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THE EVOLUTION

OF THE

CIVIL LAW

BY

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# Analytical Table of Contents

## Part One: The Roman Law

### A

**Its Value and Place in the Legal Curriculum**

1. Syllabus ............................................. Lecture Page 2
2. Text ................................................. I 3

### B

**Stages in Its Evolution**

#### I

**Jus Quiritium**

1. **Substantive Law.**
   a. Syllabus ......................................... 12
   b. Text ............................................. II 13
2. **Adjective Law.**
   a. Syllabus ......................................... 18
   b. Text ............................................. III 19
3. **The Comitia Curiatia.** (Syllabus) ................... IV 22

#### II

**Jus Civile**

1. **General Survey.**
   a. Syllabus ......................................... 24
   b. Text ............................................. V 25
2. **The Twelve Tables.**
   a. Syllabus ......................................... 28
   b. Origin and History .............................. VI 29
   c. Character and Place ............................. VII 33
   d. Conjectural Text ................................ VIII 35
3. **Progress of Jus Publicum.**
   (Syllabus) ........................................... IX 44
4. **Legal Fictions.**
   (Syllabus) ........................................... X 46
5. **Legislation**
   (Syllabus) ........................................... XI 48
6. **Legislation, Continued, (Lex Aquilia)**
   (Syllabus) ........................................... XII 50

#### III

**Jus Gentium**

1. **General Survey**
   a. Syllabus ......................................... 52
   b. Text ............................................. XIII 53

**The Formulary Procedure**

a. Syllabus ......................................... 56
b. Text ............................................. XIV 57
### 3. Extent of Influence
   - Syllabus
   - Text

### IV
#### Jus Naturale

1. General Survey
   - Syllabus
   - Text

2. Institutes of Gaius (Syllabus)

3. Imperium and Procedure Extra ordinem
   - Syllabus
   - Text

4. The Libellary Procedure
   - Syllabus
   - Text

### V
#### Age of Codification

1. The Beginnings
   - Syllabus
   - Text

2. The Corpus Juris Civilis
   - Syllabus
   - Text

### C
#### Crystallization

#### I
##### Institutes of Justinian

1. Persons (Syllabus)
2. Property (Nature)
3. Property (Acquisition)
4. Property (Testamenta)
5. Property (Succession)
6. Obligations (Nature)
7. Obligations (Classes)

### II
#### Codex etc.

#### III
##### Adjective Law.

1. Criminal Procedure (Syllabus)
2. Actiones (Syllabus)
3. Probatio (Nature) Syllabus
4. " (Production) "
LANDMARKS OF ROMAN LAW.

XII Tables 451 B.C.

Edictum Perpetuum 242 B.C.

Institutes of Gaius ca 150 A.D.

Theodosian Code 438 A.D.

Corpus Juris 534 A.D.
THE EVOLUTION OF THE CIVIL LAW
SYLLABUS OF LECTURE I.

WORLD LEGAL SYSTEMS:

- **Roman**
  - A source of
  - A key to International Law.
  - A model and object lesson of legal development.
  - An introduction to the world's best juridical thought.
  - Consequently, the initial study.

- **Mohammedan**
  - Drew extensively from Roman Law
  - In force in Muslim countries

- **Anglo-American**
  - Profoundly influenced by Roman Law
  - In force in
    - British Empire (mostly)
    - United States
    - Liberia

The other world systems (see below)
LECTURE I.

THE VALUE AND PLACE OF ROMAN LAW IN THE TECHNICAL CURRICULUM.

There have been many national systems of law which have grown and declined with the nations that produced them, never extending beyond. But there have been only three world legal systems, i.e., those which have been adopted by other than the originating nations and countries. In order of time these are (I) the Roman, (II) the Mohammedan and (III) the Anglo-American. Of these the first is not only the oldest; it is also to a considerable extent a source of the others as well as of some which cannot be called world systems.

II

The Arabian conquerors who succeeded in spreading the law as well as the faith of Islam over a large portion of the globe came in contact with the Roman law of the eastern empire and were compelled to borrow from it because their own system was too crude and primitive to meet the new conditions which their conquests produced. The amount of real Roman law which has found its way into the Muslim system is rather surprising to those who have not specially investigated the subject.

"What the Mohammedan conquerors insisted upon in all cases," observes Amos, "was either tribute or conversion, and both the one and the other meant plenary and ostentatious submission. But it meant no more. There were no attempts to organize and administer the conquered countries like those of the Romans and English in respect of their successively annexed dominions. It will shortly be seen that the Koran only professed to legislate broadly on a few characteristic practices and institutions interesting to the natives of Arabia. There was neither in the Koran nor elsewhere, during the first few caliphates, any attempt to interfere with the complex details of civil life in the richly civilized communities brought under Arab sway. There were neither the leisure for this, nor the requisite intellectual capacity, nor the sort of men needed for the task.

1 See Bryce, The Roman and the British Empires, (1914), 79.
2 Roman Civil Law (1883), 408-9, 415.

"It is a mistake to call the Koran either the theological compendium or the corpus legis of Islam. It is neither the one nor the other. Those who turn over the pages of the Hedaya, or Khalil's 'Code Musulman' of which M. Seignette has recently published a French translation in Algiers, will easily see how little help the Koran is to the Mohammedan legislist and how few of Khalil's two thousand clauses can be traced to the supposed Book of the Law. ** It is not a code of law, nor yet a theological system; but it is something better than these. It is the broken utterance of a human heart wholly incapable of disguise; and the heart was that of a man who has influenced the world as only One other has ever moved it." Lane-Poole, Studies in a Mosque, (2nd. ed. 1893) 167, 168.
It was only when in Bagdad, in the cities of Spain, and in Cairo, there was repose and opportunity for study and reflection, that medicine, mathematics, logic, and the fine arts, were studied and made to flit with a meteoric radiance across the midnight of Western thought. If Aristotle supplied the Arabians with their logic, it was Basil, Leo and their Greek commentators who supplied them with their law. The question only was how to weave these Greek and Roman ideas, which were at the root of the national habits, were the basis of a long established system of academic learning, and were expressed in treatises of the highest and widest celebrity, into the language of the Koran, and to amalgamate the institutions familiar to the Greek world with those which had become characteristic of the Mohammedan rule.

This task has been achieved not without success, and the result is a system which, if not quite homogeneous, is yet practically uniform for all Mohammedan populations in the world. **

Out of these sources of Mohammedan law it has been seen how much and how little the Koran contributes expressly. It has also been seen (excluding from consideration the direct pontifical legislation of the Ottoman Sultans) how complex and exact a structure of law has been erected on the original foundations and yet that tradition and learned treatises or opinions have been the only recognized instruments of legal reform. When it is found, then, that it was in countries in which schools of Roman law, text books of Roman law, Roman law courts, and magistrates and officials imbued with Roman law from their early college days existed, that all this elaborate system of rules and ideas grew up,—reproducing, with a curious mixture of sameness and variation, the essential principles of the latest phase of Roman law,—the conclusion is irresistible that the system is nothing else than Roman law itself very slightly transformed. Indeed, if, as Emanuel Deutsch said and seemed to establish, the Mohammedan religion is nothing but Hebraism adapted to an Arabian soil, it seems also true that Mohammedan law is nothing but the Roman law of the Eastern Empire adapted to the political conditions of the Arab dominions."

III

The relation of the Roman Law to the third of these world systems is a subject which will be treated in detail later on. Suffice it here to say that those who have given most study to the question are substantially agreed that the Anglo-American law is profoundly indebted to the Roman.

Even, however, if its contributions thereto were less extensive than they are the Roman Law would still claim our attention as the mother of other legal systems which have profoundly influenced the civilized world. For no one denies to the modern Civil Law lineal descent from the Roman, and the former governs most of continental Europe. 1

1. "A written jurisprudence, identical through five-sixths of its tenor, regulates at the present moment a community monarchical, and in some parts deeply feudalized, like Austria, and a community dependent for its existence on commerce like Holland—a society so near the pinnacle of civilization as France, and one as primitive and as little cultivated as that of Sicily and Southern Italy." Maine, Village Communities, 358, 359.
all of the western hemisphere south of the Rio Grande and the Mexican gulf coast line, considerable portions of Asia and Africa and even parts of Anglo-American territory—that stronghold of the Common Law.

The Canon Law—that other daughter of the Roman—was once the common heritage of all Christian countries. Notwithstanding the shock of the Reformation it still survives in England, as regards the affairs of the established Church, while but recently (1908) the Canon Law was extended to full operation over the Roman Church in America. Generally in Catholic countries it supplies the rules for important subjects, like matrimonial causes, which are elsewhere dealt with by the civil courts and Chief Justice White has pointed out, how many "fundamental and humane maxims" of the Roman law have been "preserved for mankind by the canon law."

IV

Still another system claims, if not direct descent, at least close relationship with the Roman. Austin long ago pointed out the indebtedness to the latter of International Law.

"Nor" he says "has the influence of the Roman Law been limited to the positive law of the modern European nations. For the technical language of this all-reaching system has deeply tinctured the language of the international law or morality which those nations affect to observe. By drawing, then, largely for examples on the Roman or Civili Law, an expositor of General Jurisprudence (whilst illustrating his appropriate subject) might present an idea of a system which is a key to the international morality, the diplomacy, and to much of the positive law, of modern civilized communities."

Sir Henry Maine is even more pronounced on this point.

"We cannot possibly" he declares "overstate the value of Roman Jurisprudence as a key to International Law, and particularly to its important departments. Knowledge of the system and knowledge of the history of the system are equally essential to the comprehension of the Public Law of Nations. It is true that inadequate views of the relation in which Roman law stands to the International scheme are not confined to Englishmen. Many contemporary publicists, writing in languages other than ours, have neglected to place themselves at the point of view from which the originators of Public Law regarded it; and to this omission we must attribute much of the arbitrary assertion and of the fallacious reasoning with which the modern literature of the Law of Nations is unfortunately rife. If International Law be not studied historically—if we fail to comprehend, first, the influence of certain theories of the Roman jurists; on the mind of Hugo Grotius and, next the influence of the great

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4 Coffin v. United States, 156 U. S. 455, 39 Law ed. 491.
5 Jurisprudence (1832) 1, sec. 378.
6 Village Communities, (1890) 351-3.
book of Grotius on International Jurisprudence,—we lose at once all chance of comprehending that body of rules which alone protects the European commonwealth from permanent monarchy; we blind ourselves to the principles by conforming to which it coheres, we can understand neither its strength nor its weakness, nor can we separate those arrangements which can safely be modified from those which cannot be touched without shaking the whole fabric to pieces. The authors of recent international treatises have brought into such light prominence the true principles of their subject, or for those principles have substituted assumptions so untenable as to render it a matter of no surprise that a particular school of politicians should stigmatize International Law as a haphazard collection of arbitrary rules resting on a fanciful basis and fortified by a wordy rhetoric. Englishmen, however,—and the critics alluded to are mostly Englishmen—will always be more signally at fault than the rest of the world in attempting to gain a clear view of the Law of Nations. They are met at every point by a vein of thought and illustration which their education renders strange to them; many of the technicalities delude them by consonance with familiar expressions, while to the meaning of others they have two most sufficient guides in the Latin etymology and the usage of the equivalent term in the non-legal literature of Rome."

V

Thus far the discussion has been limited to the claims of Roman Law as a source of other systems. But its cultural or study value is by no means thus limited. Indeed there are some, well qualified to speak, who consider such claims among the least of its merits. An eminent American teacher\(^7\) of Roman Law has observed:

"A careful study of Roman legal history will be of great service to the English or American student who desires to comprehend his own legal history. I lay little stress on the point that we may thus recognize what has been borrowed; I desire chiefly to insist upon the point that we may thus better appreciate the true character of English legal history as an independent development. Furnished with a knowledge of the Roman law and of its development, the English investigator will more accurately gauge by comparison the excellencies and the defects of the English law. He may not find that the Roman law is more scientific—a statement which I take to mean that its broader generalizations are thought to be more correct—but he will certainly find that the Roman law is more artistic. The sense of relation, of proportion, of harmony, which the Greeks possessed and which they utilized in shaping matter into forms of beauty, the Romans possessed also, but the material in which they wrought was the whole social life of man. There was profound self-knowledge in the saying of the Roman jurist that jurisprudence was the art of life. It has long been the hope of some of the greatest modern jurists, both in English-speaking countries and in Europe, that by strictly inductive study it may be possible to discover a real instead of an imaginary natural law. The corresponding hope of the legal historians, that it will in time be possible to formulate the

\(^7\) Munroe Smith, Problems of Roman Legal History, Columbia Law Review, IV, 539, 540.
great laws that govern legal development, is not, I believe, an idle dream; and I am sure that the minute comparative study of Roman and Anglo-American legal developments will carry us further towards such a goal than any other possible comparison."

Another has epitomized as follows the results of his investigations:

"The true interest of the study of the history of Roman law lies in this, that the Romans, through their national practical intelligence, stimulated by external circumstances, and also ultimately by the philosophical theory of a 'law of nature' as they conceived it, developed a system of private law which did in fact answer to the true nature of private law, and that they were the first people who did develop such a system. If this be so, then in the history of Roman law we have an important chapter of the history of human development; the history of the growth to maturity of a conception of the utmost value to the welfare of mankind; the history of a great step onward in the growth of the human mind, yet one which has been strangely neglected in professed histories of civilization."  

The truth is that the Roman legal system is the only one in all history which has completed the full normal stages of development—infancy, maturity, and decline. Others, like the two remaining world systems mentioned above, may be on the same road but they have not yet reached even the second stage. If we are ever, as Professor Smith says, "to formulate the great laws that govern legal development" a study of the Roman law—that one system to which it has been given to finish its course—will be essential. And this may serve to explain what Sir Henry Maine meant when he said:

"It is not because our own jurisprudence and that of Rome were once alike that they ought to be studied together; it is because they will be alike. It is because all laws, however dissimilar in their infancy, tend to resemble each other in their maturity; and because we in England are slowly, and perhaps unconsciously and unwillingly, but still steadily and certainly, accustoming ourselves to the same modes of legal thought, and to the same conceptions of legal principle, to which the Roman jurisconsults had attained after centuries of accumulated experience and unrewarded cultivation."  

If we are to elevate the practice of law above the plane of a trade—if we are to strain for the bar students who shall be jurisists as well as practitioners—we cannot ignore this phase of legal study.

VI

Finally, regardless of what concrete rules and doctrines in Anglo-American law hark back to the Roman, there is no dispute among those competent to judge that the latter is the source of those fundamental legal conceptions which have most influenced the modern world.

9 Village Communities, 332 et seq.
"The Roman law" says Maine\textsuperscript{10} "is a system of rules rigorously adjusted to principles, and of cases illustrating those rules; and unless the practitioner can guide himself by the clue of principle, he will almost infallibly imagine parallels where they have no existence, and as certainly miss them when they are there. No one, in short, should read his Digest without having mastered his Institutes. When, however, the fundamental conceptions of Roman law are thoroughly realized, the rest is mastered with surprising facility—with an ease, indeed, which makes the study, to one habituated to the enormous difficulty of English law, little more than child's play. **

The Roman law is, therefore, fast becoming the \textit{lingua franca} of universal jurisprudence; and even now its study, imperfectly as the present state of English feeling will permit it to be prosecuted, may nevertheless be fairly expected to familiarize the English lawyer with the technicalities which pervade, and the jural conceptions which underlie, the legal systems of nearly all Europe and of a great part of America. If these propositions are true, it seems scarcely necessary to carry further the advocacy of the improvements in legal education which are here contended for. The idle labour which the most dexterous practitioner is compelled to bestow on the simplest questions of foreign law is the measure of the usefulness of the knowledge which would be conferred by an institutional course of Roman jurisprudence."

More apparent, tho not more real, is the utility of Roman Law as a mine of legal terminology: Here again Maine\textsuperscript{11} furnishes a suggestive passage:

"Though the decay of the technical element in our legal dialect is probably beyond help, a far greater amount of definiteness, distinctness, and consistency might assuredly be given to the popular ingredient. Legal terminology might be made a distinct department of legal education; and there is no question that, with the help of the Roman law, its improvement might be carried on almost indefinitely. The uses of the Roman jurisprudence to the student of legislative and legal expression are easily indicated. First, it serves him as a great model, not only because a rigorous consistency of usage pervades its whole texture, but because it shows, by the history of the Institutional Treatises, in what way an undergrowth of new technical language may be constantly reared to furnish the means of expression to new legal conceptions, and to supply the place of older technicalities as they fall into desuetude. Next, it is the actual source of what has been here called the popular part of our legal dialect; a host of words and phrases, of which "Obligation", "Convention", "Contract", "Consent", "Possession", and "Prescription", are only a few samples, are employed in it with as much precision as are, or were, "Estate Tail" and "Remainder" in English law. Lastly, the Roman jurisprudence throws into a definite and concise form of words a variety of legal conceptions which are necessarily realized by English lawyers, but which at present are expressed differently by different authorities, and always in vague and general language. Nor is it over-presumptuous to assert that laymen would benefit as much as lawyers by the study of this great system. The whole philosophical

\textsuperscript{10} Id., 337-8, 361.
\textsuperscript{11} Village Communities, 349, 350.
vocabulary of the country might be improved by it, and most certainly that region of thought which connects Law with other branches of speculative inquiry, would obtain new facilities for progress. Perhaps the greatest of all the advantages which would flow from the cultivation of the Roman jurisprudence would be the acquisition of a phraseology not too rigid for employment upon points of the philosophy of law, nor too lax and elastic for their lucid and accurate discussion. *** It may be confidently asserted that if the English lawyer only attached himself to the study of Roman law long enough to master the technical phraseology and to realize the leading legal conceptions of the Corpus Juris, he would approach those questions of foreign law to which our Courts have repeatedly addressed themselves with an advantage which no mere professional acumen by the exclusive practice of our own jurisprudence could ever confer on him."

VII

If the foregoing be a correct analysis of the study value of Roman Law what position should be given it in the order of studies prescribed for admission to the bar? The analysis itself answers the question. If the Roman Law is a source of fundamental juridical conceptions, as well as of specific doctrines, now found in every legal system of the civilized world,—if it is a mine of legal terminology and a model for studying legal development—it would seem that its greatest service to the modern student is to prepare and equip him for the study of his own law and that it is, therefore, chiefly valuable to him as an introduction to the latter. The time to study sources would seem to be at the beginning and not at the end of a course.

One of the most revered and experienced 12 of Roman Law teachers in America has stated as follows his conclusions as to the place which that subject should occupy in the law school curriculum:

"There are two chief faults that I would ascribe to the American law school. It is neither extensive nor intensive enough. It does not, on the one hand, lay a broad foundation in the history and theory of law, the rationale of legal institutions: nor, on the other hand, does it prepare with precision and definiteness the student with the technique and special equipment for the practice of his profession. Harvard Law School has recently taken steps which seem to admit in a partial way the former deficiency, but in doing so it has come dangerously near to inverting the pyramid. I would place in the first, or in a preliminary year, such subjects as Roman law and the theory and history of the common law, which Harvard places in a fourth year, and would distribute the remainder of Harvard's fourth year subjects through the several years of the course. And the last year, whether that be a third or a fourth year of legal study is open to other consideration, should, so far as the great majority of students is concerned, the prospective attorneys, be devoted especially to preparing such students for the efficient practice of the profession. The mere adding of one year, either at the top or at the bottom, without reviewing and revising and

12 Dean William Carey Jones, of the University of California School of Jurisprudence, "The Problem of the Law School," Univ. of California Chronicle, XIII, 3.
readjusting the whole scheme, is vain and illusory. The addi-
tion of Harvard's fourth year can serve, properly, the purposes of only one small class, the intending
teacher of law. For the practitioner, it would usually be almost the worst thing
he could do, after he had completed his preparation for the bar, to stay on at
college attending lectures on the history and philosophy of law. Reverse the
process, however, with the proper modifications, and you will tend to produce
lawyers on the one hand with intellect broadened by a view of the history of
legal institutions, by acquaintance with the development of legal principles, and
by a comprehensive survey of the whole scope of their splendid profession, and
on the other hand with faculties refined and sharpened, by a course of gradu-
ally increased intensiveness, for the immediate and practical discharge of their duties
as attorneys."

The foregoing, so far as it relates to Roman Law is amply confirmed by my own
experience in the College of Law of the University of the Philippines. I have found
not only that, after taking Roman Law, the students are better equipped for the subjects
that follow (that would be only natural in a civil law jurisdiction) but that academic
students,—i.e., those who have taken the studies leading to the A. B. degree,—take hold of
Roman Law better than of any other subject. This I attribute to the fact that it is more
closely related to other studies in the arts course,—e.g., Roman history, Latin and classical
themes generally,—and is taught in much the same way. But the various branches of
modern law are so remote from any subject studied in the ordinary undergraduate
course, and are usually presented in such a totally different manner, that the student at
once finds himself on strange ground and considerable time is needed to adjust himself
to the situation.

I trust it may not seem out of place to mention again my own personal experience
which comes back to me vividly. I pursued the classical undergraduate course with
selectives mainly in history. When I came, however, to take up the technical study of
American law I could see no connection whatever between it and any subject which I had
pursued in the university. So different, indeed, seemed my new field of investigation
that I became convinced, and long actually believed, that my earlier studies were of no
practical value from a professional standpoint.

Now I am very sure that this unpleasant situation would have been relieved, if
not wholly prevented, by a thorough course in Roman Law following immediately upon my
undergraduate work and preceding any considerable advance into the technical field of
modern law. The gulf between these two, both externally and internally, is very wide,
but Roman Law supplies the bridge which renders passage comparatively easy. The
bridge however is of little value if it is not to be used until the passage has been
accomplished by some other method, however laborious and fatiguing. My own per-
sonal and professional experience have left me no room for doubt that, for the
academic student, at least, Roman Law should be the first subject in the technical
curriculum.
SYLLABUS OF LECTURE II.

Jus Quiritium

The law of regal period (B.C. 754-509 (ca.)

Benefits confined to quirites.
L iterally “spearmen”; for spear was symbol of citizenship.
Really but another name for patricians.

Marked by “formalism and rigidity” and by a strongly religious tone.

Fas .......
Interpreted by ....... Pontiffs
Augurs, etc.

Sources ........
Mos .... (Custom)

Mainly mos ripened into law.

Jus ....... But might include fas as declared by comitia.

Formulating agency:

Voting took place by curiae (groups of gentes).

Hence open only to members of patrician gens or clan.

Substantive Law .......

Liberi
Servi

Libertas ...

Clientes (dependents.).

Elements...

Commerciun
Conubium
Suffragium
Honorum

Classes...

Cives
Plebs

Agnatic (included all of household.)

Familia
Patria potestas (autocratic power over family.)

Confraratio.

Substance

All transactions marked by...

Mancipatio

Nexum

No clear division between crime and tort.

Land owned by gens in common.
Subject to individual ownership were things capable of manual seizure.

Hence called...

Subject to mancipatio.

res mancipii

E. g. ....... Pecunia.
Mancipia.

But separate ownership being extended from movables to land.
LECTURE II.

JUS QUIRITIUM

SUBSTANTIVE LAW.

The Roman Law passed thru five ever-expanding stages before it was ready to become the basis of the modern Civil Law. We know the former first as the \textit{jus quiritium},\textsuperscript{1} i. e. law of the \textit{quirites}\textsuperscript{2} to whom its benefits and application were restricted.

Character and sources.—This was a primitive, narrow and provincial,\textsuperscript{3} system, marked by "formalism and rigidity",\textsuperscript{4} placing ceremony above substance, having a strongly sacerdotal and religious tinge, deriving ostensible sanction from the will of the gods (\textit{fas}),\textsuperscript{5} but really resting upon custom (\textit{mos})\textsuperscript{6} and fast passing

1. The succeeding stages were: (2) \textit{Jus civile} (3) \textit{Jus Gentium} (4) \textit{Jus Naturale} (5) Age of Codification.

2. Literally spearmen, as the spear was the symbol of citizenship; but in reality the term was only another name for patricians, who alone enjoyed the rights of citizens in primitive Rome.

"The law, which the Roman people make use of, is styled the civil law of the Romans, or of the \textit{Quirites}; for the Romans are also called \textit{Quirites}; from \textit{Quirinus}." Justinian Institutes, Lib. I, tit. II (II.)

3. It was confined, of course, to the city of Rome.

4. Sohn, Roman Law (3d. ed.) sec. 11.

5. "In primitive Rome the pleading (\textit{actio}) of the litigant in a civil suit is a religious chant every word and cadence of which must be learnt from the priest; the wager (\textit{sacramentum}) by which the process is stated, is a gift to a temple, and is probably conceived as an atonement for the involuntary perjury of the man who loses his case; (See Danz, 'Das Sacramentum und die lex Papiria,' in Zeitschur. f. R. G. vi (1867), p. 339 foll.; \textit{Der sacrale Schutz}, p. 151 foll.) the penalties of the criminal law are means of expiating the anger of the gods, the severest form of atonement being the sacrifice of the criminal on the altar of the deity whom he has offended. This must have been the original meaning of the \textit{conservatio capitis}, the penalty of the \textit{leges sacratae}. See Liv. iii. 55 Festus, r. 318; Bouché-Leclercq, \textit{Les pontifes de l'ancienne Rome}, p. 196. Rome in the historical period still preserves many traces of these beliefs of her infancy. They are found in the respect for the Apsuces, in the conservatism which maintained the cumbrous forms of the old pleadings (\textit{actiones}) and the custody of these forms by the Pontifical College; in the varied methods by which crime or sin is punished, some offences being reserved wholly for the secular courts, others being visited by the judgments of the Pontifical College, others again being subject to the milder chastisement of the Censor before he performs the religious rite of Purification (\textit{Expropriatio})."

*** At the close of the history of the Republic there could be shown, in contradistinction to the great secular code of the Twelve Tables, a collection of religious ordinances, believed to be even more ancient than this code, and known as the \textit{Laws of the Kings (Leges Regiae).} The extant \textit{Leges Regiae} are to be found in Brun, \textit{Pontes Juria Romani antiqui}, I, I.)" Greenidge, Historical Introduction to Poste's \textit{Gaius} (Whittuck's ed.) XIV.

6. "It can well be believed that, in the outset, the customs in observance may have been far from uniform,—that not only those of the different races but those also of the different \textit{gentes} may at first have varied in some respects, but undergoing a gradual approximation, and in course of time, consolidating into a general \textit{jus Quiritium}." Muirhead, Roman Law, 19.
Familia. The most important, as well as the oldest, branch was the family law. The early Roman conception of the family was that of a group mainly of 'agnati' but all subject to a common pater familias. For subjection to his power and authority, known as patria potestas, and not the tie of blood, was the test of membership in the family. Hence it included not only the children of the pater familias (except those of his daughter) but all other descendants, the wives of male ones, adopted children, clients, or dependents of the household, and slaves. To all these the patria potestas extended and was, originally, almost unlimited. It included the power of life and death, the power of sale, the ownership of all property, and the right to represent the family and its members in most business transactions and litigation. Indeed for most juridical purposes the

7 "The counterpart to the rule of fuit is the rule of just. Just seems originally to have meant 'That which is fitting' and the word never necessarily conveys the implication, contained in the word Law, that the thing it describes is the result of enactment by a Sovereign. It conveys rather the idea of valid custom, to which any citizen can appeal, and which is recognized and can be enforced by a human authority. Just is a nugatory thing, a vain abstraction, until it can be realized; it is a thing recognized only in practice: and so indissolubly were the ideas of Right and Satisfaction connected with one another in the minds of the Romans that they used the same word 'just' for Right and for Court." This association of ideas gives us the clue to the fact that the only possible method of distinguishing between the different kinds of just is by appealing to Procedure." Poste's Gaius, (Whittuck's ed) pp. XV, XVI.

8 "It may be shown, I think, that the family, as held together by the Patria Potestas, is the collectivity out of which the entire law of persons has generated." Maine, Ancient Law, 152.

9 Agnati are persons related through males, that is, through their male ascendants; as a brother by the same father, such brother's son or son's son; a father's brother, his son or son's son. Persons related through female ascendants are not agnati but simply cognati. Gaius, Institutes, I 156. Cf. 111, 10.

10 "The agnati family of the civil law means the aggregate of those who belong to the same household." Sohn, Roman Law (3d ed. 1907) 449.

11 Id.

12 Mackenzie, Roman Law, 137, 138; Sohn, Roman Law, 449.

13 "So far as regards the person, the parent, when our information commences, has over his children the jus citar molestiae, the power of life and death, and a fortiori of uncontrolled corporal chastisement; he can modify their personal condition at pleasure; he can give a wife to his son; he can give his daughter in marriage; he can divorce his children of either sex; he can transfer them to another family by adoption; and he can sell them." Maine, Ancient Law, 138.

14 Id. Cf. Twelve Tables, IV, 2.

15 Maine, Ancient Law, 138. Limited in the Twelve Tables (IV, 3) to three times.

16 "It was no uncommon thing for men to have passed through every grade in the public service, to have been tribunes and praetors and consuls, to have reached an honored old age, without ever having owned or been able to own a pennyworth of property!" Hadley, Introduction to Roman Law, 120.

17 Poste's Gaius, (4th ed. Oxford, 1904) 40-43. "The father was entitled to take the whole of the son's acquisitions, and to enjoy the benefit of his contracts without being entangled in any compensating liability." Maine, Ancient Law, 141.
pater familias was the family. 18

Comparative Law. Nor, despite the dictum of Gaius, 19 was the system "peculiar to Roman citizens." For, aside from the one exception which he concedes, 20 the system seems to have been in vogue among other Aryan nations 21 and was certainly a fundamental part of Chinese jurisprudence 22 where it has been carried to great extremes. 23

18 "The reason which caused the Romans to accept and uphold the patria potestas, to maintain it with singular tenacity against the influence of other systems with which they came in contact, must have been the profound impression of family unity, the conviction that every family was, and of right ought to be, one body, with one will and one executive. The pater familias was not regarded as separate from the other members of the family, as having rights or powers against them; he was regarded as the representative of the family, as the embodiment of its interest and the organ of its activity. Even in his chastisements he was supposed to be acting for the common good. It was precisely the sound sense of the Romans and their feeling of equity that sustained the patria potestas; because they furnished the best guarantee that the potestas would be sensibly and equitably used. If it had been generally abused, it must have been soon discarded." Hadley, Introduction to Roman Law, 121.

19 Institutes, I, 55.

20 "I am aware that among the Galatians parents are vested with power over their children." This was more probably derived from the surrounding Greek law. See Maine, Ancient Law, 136, 137.

21 It is recognized, e. g. in the Cretan Code of Gortyn, Table V, which provides; "The father shall have power over the children and over the goods." See Law Quarterly Rev. II, 135. Forms of it have survived in Scandinavia and India. See Maine, Ancient Law, 153.

22 Von Müllendorf, Das Chinesische Familienrecht (Shanghai, 1904). "With a preciosity truly remarkable the Chinese people have made the family the base and the image of society." In China, as later in Rome, the paternal power was instituted not to protect the child but solely in the interest of the father." Scherzer, La Puissance Paternelle en Chine, (Paris, 1898), p. 77.

See the present author's Bibliographical Introduction to the Study of Chinese Law, The Green Bag, XXVI, 390; Transactions, Royal Asiatic Society, 1914.

23 "The members of a Chinese family are those who live as members of the same household, which includes all who enter by marriage or adoption as well as slaves and servants. But this definition, while correct, is not sufficiently comprehensive as to the meaning of mutual responsibility as intended by the Code. It has been stated that the unit of social life in China is found in the family, the village, or the clan, and that these are often convertible terms, and this is specially true as relates to the doctrine of mutual responsibility. The responsibility of the family for the act of the member is most cruelly impressed, in the crime of high treason, in another section of the Code. This offence is committed either against the state, by overthrowing the established government, or endeavouring to do so, or against the sovereign, by destroying the palace in which he resides, the temple where his family worshipped, or the tomb in which the remains of his ancestors lie buried, or in endeavouring to do so. All persons who shall be convicted of having committed these execrable crimes, or having intended to commit them, shall suffer death by a slow and painful method, whether they be principals or accessories. All the male relatives in the first degree of the persons convicted of the above-mentioned crimes, the father, grandfather, and paternal uncles, as well as their own sons and grandsons, and the sons of their uncles, without any regard being had to their place of abode, or to any natural or accidental infirmities, shall be indiscriminately beheaded. All persons who shall know others' guilt of high treason, or individuals having intent to commit such a crime, and who shall connive at the said crime, by not denouncing the authors, shall be beheaded. The responsibility of the family for a member who commits a lesser offence still follows, but of course punishment is in accordance with the degree of the offence." Jernigan, China in Law and Commerce (1905) 73, 74.
Marriage.—The basis of the family, and hence of the patria potestas was, of course, the relation of marriage which was celebrated according to the patrician conarreatio. 24 This, however, was not available to the plebs who were, consequently, without power to contract a valid marriage.

Tria Capita.—In addition to familia two other elements entered into caput (legal personality) and completed the tria capita, viz., libertas and civitas. As to the former men were liberi (free), servi (slaves) or clientes (dependents); as to the latter they were either cives (citizens and practically synonymous with patricians) or plebs. The key to nearly the first third of Roman legal history is the struggle of the latter to attain the rights of citizenship.

Only the former enjoyed the elements of civitas which included ius connubii or the right of marriage, ius commercii, the right to trade, ius suffragii, the right to vote in the assembly and ius honorum the right to hold public office. Of these privileges, the first two belong to Roman private law (ius privatum), the others to public law (ius publicum).

Obligations. “The origin of the idea of obligations arising from wrong is well known. We start with self-redress or vengeance, which is gradually regulated, and we pass by observable stages through voluntary to compulsory composition. Here the Roman sources agree with the results of comparative law. But the origin of obligations arising out of agreement is not so simple. In other systems of law it has been traced to some extent to the practice of giving hostages or guarantors for blood-money. This develops into a system of self-guarantee, and so of direct conventional liability of the principal debtor, taking sometimes the form of a self-pledge or of a conditional self-sale by the debtor. One of the questions which we must ask to-day is whether these analogies will unlock the riddle of early nexum.” 25

24 Conarreatio, another mode in which subjection to manus originates, is a sacrifice offered to Jupiter Farreus, in which they use a cake of spelt, whence the ceremony derives its name, and various other acts and things are done and made in the solemnization of this disposition with a traditional form of words, in the presence of ten witnesses; and this law is still in use, for the functions of the greater flamens, that is, the flamens of Jove, of Mars, of Quirinus, and the duties of the ritual king, can only be performed by persons born in marriage solemnized by conarreatio.” Gaius, Institutes, I, 112.

Conarreatio was a solemn religious ceremony, before ten witnesses, in which an ox was sacrificed and a cake of wheaten bread was divided by the priest between the man and woman as an emblem of the consortium vitæ, or life in common.” Mackenzie, Roman Law, 95.

“The ten witnesses apparently represented the ten curiae of which the tribe was composed, or ten gentes of which the curia was composed, or, if the decimal division continued further, the ten families of which the gens was composed.” Poste’s Gaius (Whittuck’s ed.), 69.

For there were only two transactions—*nexum*, 26 loan, and *mancipatio*, 27 sale—to which the term contract might be applied, and in these the form was placed far above the substance. There was, moreover, then or later, no clear division between crime and tort.

The property law of this early period was likewise primitive. 28 Land was still owned by the gens (an overgrown family) 29 and only objects capable of manual seizure were subject to individual ownership. These were known as *res mancipii* and were transferable by *mancipatio*. Separate ownership was, however, being gradually extended from movables to land.

26 *Nexum*. "In the presence of five witnesses the *libripes* weighs out to the borrower the corresponding amount of raw metal, and the lender at the same time declares in solemn words that the borrower is his debtor—*dare damnas est*—for the specified amount after the lapse of a specified time (twelve months). The borrower is now under an obligation to repay. He is said to be 'nexum' to his creditor—i.e. he has pledged his own person for repayment of the loan."

Sohn, Roman Law, (3d. ed.), 50

"A complete account of modern views would include the theories of Schlossmann, Huvelin Stintzing, and Kretschmar. We must confine ourselves to a very brief mention of the highly original position of the first-named. ** According to this theory there is no such thing as a simple debt in primitive Roman Law. A man may charge his property, or in the last resort his person, but not simply pledge his credit; and the charge on property involves no general personal liability.

One must admit that Schlossmann has called attention to an unduly neglected form of early debt, the fiduciary mancipation of things. But his theory of person-*nexum* is the real question here, and it is reached by an interpretation of Nucius which is at least as objectionable as Lenel's and involves, moreover, unnecessary emendations. In short, here also the refutations of Kübler and Kleineidam seem complete, and we have also to remember the difficulties involved by every theory of self-mancipation. ** **

I sum up my results as follows:
1. The new theories of two *nexum*, or of no *nexum*-loan, present unsurmountable difficulties, and are based only on one or a few more passages of Livy.
2. The theory of self-mancipation is juristically objectionable.
3. The revised theory of *nexum* leading to *n.f. has no serious objections to meet; but on the other hand, it leaves something to be desired in the matter of positive proof." Zulueta, The Recent Controversy about *Nexum*, Law Quar. Rev. XXIX, 149, 149, 153.

27 *Mancipatio* is the solemn sale *per aes et libram*. In the presence of five witnesses (*cives Romani puberes*) a skilled weighmaster (*libripes*) weighs out to the vendor a certain amount of uncoined copper (*aes, randus randusculum*) which is the purchase money, and the purchaser, with solemn words, takes possession with his hand—hence the description of the act as 'hand-grasp' of the thing as being his property."

Sohn, Roman Law, (3d. ed.) 48

28 -
29 "The Gens is the aggregate of all individuals who bear a common name and who, therefore, if their ancestry could be traced in the male line through all its stages, would be found to be the descendants of some ultimate common ancestor." Greenidge, Historical Introduction to Poste's Gaius, (Whittuck's ed.) XIII.
SYLLABUS OF LECTURE III.

Over offenses against immoralty
  Unfilial conduct.
  domestic order... etc.

Sometimes Exclusive of
  Concurrent with The
  state's

Pater familias
  had jurisdiction within
  the family...

Might impose penalties of...

Death
Slavery
Banishment
Expulsion
Imprisonment

Forum...

Power delegated to judices referees in
civil cases.
Assisted by quaestores parricidii in
capital cases.
Rex gradually
acquired general jurisdiction...
Might appoint duumviri in treason cases.
Sometimes aided by council.
Appeal to comitia curiata permitted.

Adjective Law....

Remedies
General character primitive...
Self-redress tempered by regal power
Legis actiones...
Sacramentum
Judicis postulatio
Manus injectionem
Pignoris capio

Summons
Vocatio in jure
XII Tables, I (1-3.)
LECTURE III.

JUS QUIRITIUM, CONTINUED.

Adjective Law.

Under the jus quirition there was no clear division between civil and criminal jurisdiction. And while the pater familias, or head of the family, in the exercise of the patria potestas, punished offenses against the domestic order, such as immorality and unfaithful conduct, still even at the earliest recorded period, such jurisdiction, once exclusively enjoyed, was exercised thru or concurrently with, the res or the comitia curiata, the patrician assembly. The former often delegated his jurisdiction over civil cases to judices. In capital cases he was frequently assisted by quaestores and in prosecutions for treason he might appoint duumviri. In all criminal cases an appeal lay to the comitia curiata.

The civil remedies then available were known as legis actiones. They also were crude and archaic and marked by the employment of self-redress. Among them were sacramentum, "the general form of action," which lay to enforce property rights, and in which the judgment, while in form the disposition of a wager, actually determined the litigated question; judicis postulatio, which required affirmation in formal phraseology but without the wager, and lay, probably, in complex cases of doubtful right like partition, where sacramentum would be unserviceable; manus injectionem, a seizure of

1 "The boundary * * if it existed at all, was very faintly defined." Muirhead, Roman Law, p. 60.
2 Muirhead, Roman Law, p. 68.
3 Muirhead, Roman Law sec. 15; Clark, Early Roman Law, p. 54.
4 See infra, syllabus of Lecture IV.
5 "Both parties, with a view to litis contestatio, solemnly affirm their legal claim. The plaintiff, for example, declares: 'ajo hanc rem meam case ex jure Quiritium,' etc., and the defendant answers with the same formula. Thereupon both deposit a sum by way of wager, the so-called sacramentum, which amounted, according to the matter in dispute, either to 50 or 500 asses, and which each party declares shall be forfeited, if his contention proves to be false. This wager supplied the formal basis for the judicium (i.e. the formulating of the issue) and, when once entered upon, may be presumed to have, at the same time, formally established the right to a judicium (i.e. the actio) as against the magistrate. If a man challenged another to a wager (sacramentum) in reference to some legal claim prima facie possible, he was thereby enabled not only to compel his opponent to lay a counter-wager, but also to require the magistrate to appoint a judex." Sohm, Roman Law, (3d. ed.) 230-1. Cf. Muirhead, Roman Law, sec. 34; Hunter, Roman Law, pp. 975-988; Gaius, Institutes, IV, 15 et seq.
6 Sohm, Roman Law, 244; Muirhead, Roman Law, 35; Hunter, Roman Law 678.
7 Hunter, Roman Law, pp. 1030,1031; Sohm, Roman Law, pp.245-248; Muirhead, Roman Law, sec. 36
defendant's person, which was available only for liquidated claims, being originally used to enforce *nexum*; and *pignoris capio*, an extra-judicial seizure of defendant’s property, available only in limited cases where other actions would not lie, and wherein, if defendant failed to redeem or absolve himself, the property in question was forfeited. One phase of this early procedure which lasted was the summons, known as *vocatio in jus*.

“The duty was not committed to any officers of the law; there was no writ of any sort: the party moving in the contemplated litigation had himself to do what was needed”.

“This mode of summons continued down to the golden age of literature and the classical of jurisprudence.”

“The plaintiff said, ‘Whereas you have been adjudged or condemned to pay me ten thousand sesterces, which sum you have failed to pay, therefore I arrest you as judgment debtor for ten thousand sesterces,’ and at the same time laid hands on him; and the debtor was not allowed to resist the arrest, or take proceedings (*lege agere*) in his own defence, but gave a *vindicex* (substitute) to advocate his cause, or, in default, was taken prisoner to the plaintiff’s house, and put in chains.”. Gaius, Institutes, IV, 21.

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10. “Sec. 26. *Pignoris capio* (distress) was employed in some cases by virtue of custom, in others by statute.

Sec. 27. By custom, in obligations connected with military service; for the soldier could distress upon his paymaster for his pay, called *aec militare*; for money to buy a horse, called *aec equestre*; and for money to buy barley for his horse, called *aec hordearum*.

Sec. 28. By statute as by the law of the Twelve Tables which rendered liable to distress on default of payment the buyer of a victim and the hirer of a beast of burden lent to raise money for a sacrifice to Jupiter *dappiis*. So, too, the law of the Censors gave the power of distress to the farmers of the public revenue of the Roman people (*publicant*) against those in default for taxes (*vegetilla*) due under any statute.

Sec. 29. As in all these cases the distraintor used a set form of words, the proceeding was generally considered a form of statute-process. Some, however, held otherwise, because it was performed in the absence of the praetor and generally of the debtor; whereas the other forms of statute-process could only be enacted in the presence of the praetor and the adversary; besides, it could take place on an unlawful day *die nefastus* (2 sec. 279), that is on a day when statute-process was not allowed.”. Gaius, Institutes, IV, secs. 26-29 inc.

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SYLLABUS OF LECTURE IV.

JUS QUIRITIUM, CONCLUDED.

Nature A form of primitive popular assembly which existed among the early European nations.¹
Not originally sovereign but acting under the will of rex and senatus.

Composition "A group of gentes constituted together a curia, ten curiae formed a ‘third’ or tribus, and the three ‘thirds’—Rammes. Titenses, Luceres—formed the State."²
"The ancient writers agree that the comitia curiata included plebeians and clients as well as patricians. Not only did the lower classes attend this assembly, but they also voted in it, and constituted the majority."³
But other authorities deny this.⁴

Electoral: Chose or at least ratified the choice of rex and other magistrates by les cirnata de imperio.⁵

Functions Changes in mos or customary law.⁶
Legislative Declaration of War.⁷
Ratification of treaties.⁸
Judicial Treason and similar offenses tried by rex in presence of assembly.⁹
Heard appeals in capital cases at discretion of rex.¹⁰

Met in the comitium, adjoining the forum.
Summoned by the curiate lictor.¹¹
Presided over by rex or his successors.¹²

Form of rogatio: "I ask you, quirites, whether you will consent to, and consider it right, that T. Valerius be a son to L. Titus as rightfully and legally as if born of the father and mother of the family of the latter, and that the latter have the power of life and death over the former as father over his son. These (questions) in the form in which I have pronounced them, thus, quirites, I ask you."¹³

Voted by curiae.¹⁴

¹ Lobingier, The People's Law, ch. I; Botsford, Roman Assemblies, ch. IX.
² Sohm, Roman Law, pp. 34, 35.
³ Botsford, Roman Assemblies, 24, 25. Cf. 32
⁴ Id. 25, et seq.,
⁵ Id.
⁶ Id. 178-182.
⁷ Id. 175-7
⁸ Id. 174-5.
⁹ Id. 182.
¹⁰ Id. : Greenidge, Legal Procedure in Cicero's Time, 8, 305.
¹¹ Botsford, Roman, Assemblies, 468.
¹² Id.
¹³ Id. 178.
¹⁴ Id. 156-7: 465-7; Sohm, Roman Law, 35
SYLLABUS OF LECTURE V.

JUS CIVILE
(Law for Citizens)

General Character
- Benefits confined to cives, who might include plebs.
- Territorially still confined to the City of Rome.

Sources
- Those of Jus Quiritium
- Lex (statute)

Formulating Agency: Comitia centuriata
- Divided into five classes, and these into centuries.

Family Law
- Coemptio, an adaptation of mancipatio, enabled plebs to contract lawful marriages with each other.
- Nexum necessary to enable creditor to seize debtor.

Obligations
- Progressive measures for relief of debtor class.

Substance
- Classes: Res mancipii, Res nec mancipii

Property
- Succession secured to plebs thru mancipatio in form of conveyance to familiae emptor (trustee).

Consuls succeed to regal jurisdiction
- Tried plebeians
- Appeal lay to comitia centuriata.
- Which also tried patricians.
LECTURE V.

JUS CIVILE.

A new stage begins with the changes attributed to Servius Tullius, traditional sixth king of Rome, (B.C. 566-522 ca.) by which military service, and therewith citizenship, was extended to all landowners, among whom were some of the plebs. All thus included were organized into a new assembly, the *comitia centuriata*, numbering five classes, enrolled according to property holdings, which gradually absorbed the functions, legislative and judicial, of the old patrician *comitia curiata*. The *jus civile*, as the Roman law then and thereafter was called, was a broader system and, though confined to the city of Rome, operated over a wider circle than previously, since it was the law for all citizens whether patricians or plebs. Again adapting *mancipatio* to a new use they effected thru it a form of conveyance in trust to a party known as *familia: emptor*, who on the grantor's death would in turn convey to his heir, thus accomplishing circuitously, the purposes of a will. By such strange makeshifts was the Roman Law started on its process of expansion!

Meanwhile the rights of the latter were being extended in other ways. Prevented from contracting a valid marriage because the patrician *confarreatio* was the only form recognized by law, the plebs by adapting to marriage the transaction of

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1 Mommsen, History of Rome, I. I chs. V-VII
2 Botsford, Roman Assemblies.

"In the exercise of the sovereign powers of the Roman community—except as regards the regulation of certain questions of gentile law—the *comitia curiata* were now superseded by the new *comitia*, the *comitia centuriata*. This fact marks the great turning-point in the development. A new community had come into existence, a *populus Romanus* consisting of patricians and *plebeians*." Sohm, Roman Law, (3d. ed.) 41.

3 See *ante* note 1, p.13.

4 "The testator having summoned, as is done in other cases of *mancipatio*, five witnesses, all Roman citizens of the age of puberty, and a holder of the balance, and having already reduced his will to writing, makes a *pro forma mancipatio* of his estate to a certain vendee, who thereupon utters these words: 'Thy family and thy money into my charge, ward, and custody I receive, and in order to validate thy will conformably to the public enactment (the Twelve Tables,) with this ingot, and'—as some continue—'with this scale of bronze, unto me be it purchased'. Then with the ingot he strikes the scale, and delivers the ingot to the testator, as by way of purchase money. Thereupon the testator, holding the tablets of his will, says as follows: 'This estate, as in these tablets and in this wax is written, I so grant, so bequeath, so declare: and do you, Quirities, so give me your attestation. These words are called the *nuncupatio*.' Gaius, Institutes, II, 104.

"The intention is to make the *familiae emptor* merely the formal owner of the estate. His actual duties consist in carrying out the testator's wishes and handing over the property to the persons named in the *tabulae testamenti*. The *familiae emptor* is neither more nor less than the executor of the testator's will.

The *familiae emptor* declared that in acquiring ownership in the family by means of the *mancipatio*, he was merely acting on behalf of (i.e. as the agent of) the testator (endo mandatelnam,) and consequently that he was, substantially, in the position of a trustee of another man's property (endo custodelam manum.)" Sohm, Roman Law, (3d. ed.) 542, 543.
mancipatio, devised a ceremony known as coemption,\(^5\) which, as its name implies, was in form a purchase, and probably a survival of a much more primitive stage.\(^6\)

In the law of obligations progressive measures were likewise taken for the relief of the debtor class\(^7\) and creditors who insisted upon resorting to the harsh remedy of seizing the debtor’s person were required to have the debt sanctioned according to the forms of nesum. Recognition was also secured for another form of marriage, known as usus, which resembled the “common law marriage,” and consisted in uninterrupted cohabitation for one year.\(^8\)

The Consuls, who succeeded to the regal power when the kingship was abolished now exercised criminal jurisdiction and from them an appeal lay to the comitia centuriata, which, tho including plebeians, might thus try patricians.\(^9\)

\(^5\) Sohn, Roman Law, (3d. ed.) 452, 453.

“In coemption the right of manus over a woman attaches to a person to whom she is conveyed by mancipatio or imaginary sale: for the man purchases the woman who comes into his power in the presence of at least five witnesses, citizens of Rome above the age of puberty, besides a balance holder.” Caius, I, 113.

\(^6\) Leist, Altarische jus gentium, 125 et seq. Cf. Howard, Matrimonial Institutions.

\(^7\) Muirhead, Roman Law, secs. 89-93.

\(^8\) “A wife (not married by confarreatio or coemption) may avoid the husband’s marital power resulting from usucapio of one year, by absenting herself from the conjugal domicil for three consecutive nights in each year.” Twelve Tables, VI, 4.

\(^9\) Hunter, Roman Law, pp. 12, 23.
**LECTURE Va**

**Nature**

"The basal *comitia* of the republic during patrician supremacy."¹

A development from the Roman military organization.²

Significance.³

**Composition**

Five classes aggregating ultimately 103 centuries.⁴

Included all citizens classified on a property basis.

Change of basis from land to money (ca. 312 B.C.) advanced many to higher classes.⁵

Later, classes and centuries became subdivisions of tribes.

**Electoral**

Chose consul and all higher elective magistrates.⁶

*Patron auctoritas* (consent of Senate) required but by Maenian plebiscite (Ca. 287) had to be given before voting while issue still uncertain.⁷

**Legislative**

*Lex de provocations* (B.C. 509) the forerunner of important legislation by this *comitia*.⁸

Declaration of war.⁹

**Appellate only.**¹⁰

*Procedure and effect.*

"In a case subject to appeal the magistrate, after a preliminary inquiry (*quaestio*), summoned the people to *contio* on the third day for a thorough examination (*quaesitio*). The trumpeter blew his horn before the door of the accused, and cited him to appear at daybreak in the place of assembly. Acting as accuser, the magistrate addressed the *contio* and produced his witnesses. Then came the witnesses for the defence, the statement of the accused, and the pleading of his counsel. These proceedings filed three *contiones* separated from one another by a day's interval. At the end of the third day's session the magistrate acquitted the accused or condemned him and fixed the penalty. In case of condemnation, the accused if dissatisfied appealed. The magistrate then put his sentence in the form of a rogation and set a date for the *comitia*, which could be held only after an interval of a trinimum undinium, unless the accused desired an earlier trial.*¹**

The penalty proposed in the rogation was not necessarily the same as at first announced; for the trial might bring to light facts to mitigate or to aggravate the sentence.

The presentation of the case to the *comitia* by the magistrate was termed the fourth accusation. If anything prevented the voting in the *comitia*, the accused was discharged, and could not be legally brought to trial again for the same offence excepting under a different form of action."¹¹

Jurisdiction gradually curtailed by appointment (sometimes by *comitia* itself) of special magistrates and commissions.¹²

**Judicial**

**Comitia Centuriata**

**Meetings.**¹³

Convoked by hornblower.

Voted by classes averaging at least one hour to each.¹⁴

Equestrian centuries at first "prerogative"—i.e. voted earliest; after the reform, lead in voting determined by lot.¹⁵
Botsford, Roman Assemblies (1909) 201.

2 Origin. "After the Romans had determined to use the centuries regularly as voting units for the decision of questions not purely military, they proceeded forthwith to extend the organization so as to include all the citizens. For this purpose the men of military age who were free from duty for the time being, or who had served the required number of campaigns—sixteen in the infantry or ten in the cavalry—or who were exempt on account of bodily infirmity or for any other reason, had to be admitted to the junior centuries, thus materially increasing their number and making them unequal with one another. In a state, too, in which great reverence was paid to age the seniors could not be ignored. They were accordingly organized in a number of centuries (84) equal to that of the juniors—an arrangement which made one senior count as much as three juniors. The mechanics who were liable to skilled service in the army were then grouped for voting purposes in two centuries, that of the smiths and that of the carpenters, based on the two guilds in which these artisans were already organized. ** In like manner the trumpeters (tubaclari) and the hornblowers (cornucioni) were grouped each in a century for voting in the comitia, also on the basis of their guild organizations. The aediles, tellers, who, as we are informed, followed the army in civilian dress and without weapons, also received a centuriate organization. ** Laws in rank of the supernumerary centuries was that of the proletarians. The government so designated those citizens who owned no land and hence were poor. They were exempt from military duty, excepting in so far as they served with arms furnished by the state. Too few in the beginning, their number gradually increased till in the time of Dionysius it exceeded all the five classes together. At some time in the early history of the comitia centuriata they were formed into a century and given one vote which was not counted with any class but was reported after all the others." Id. 205-206, 207-208.

"In this way the small initial movements made by the Servian constitution—such as, in particular, the handing over to the army the right of assenting to the declaration of an aggressive war, attained such a development that the curies were completely and for ever cast into the shade by the assembly of the centuries, and people became accustomed to regard the latter as the sovereign people." Mommsen, History of Rome (Rev. ed. 1911) I, 328.

"This change can have come only in consequence of a revolution which changed the old sacerdotal kingdom into a military monarchy, breaking up the primeval federal constitution with its three tribes of Ramnes, Tities, and Luceres, its thirty curies, its patrician houses and their clients, and raising the plebeians from their degraded position to the rank of Roman citizens. By this revolution Rome became a military power, and even when the kings were expelled, the military organization of the people created by them was retained and no doubt contributed to give Rome a superiority over her neighbours. The memory of the process which led to this great advance has been lost. ** These are indications of a reform caused by foreign influence. Yet there are not wanting traces which seem to show that the centuriate organization was an organic development of that of the curies—a theory which, however, does not exclude the possibility of foreign influence to facilitate and direct the process." Ihne, Early Rome, 135-6.

3 "In the exercise of the sovereign powers of the Roman community—except as regards the regulation of certain questions of gentile law—the comitia curiata now superseded by the new comitia, the comitia centuriata. This fact marks the great turning-point in the development. A new community had come into existence, a populus Romanus consisting of patricians and plebeians." Sohn, Roman Law (3rd ed.) 41.

4 Botsford, Roman Assemblies, Ch. IV (VI) "In the centuriate assembly each of the six tribal troops of knights had one vote, and was called, therefore, a suffragium. As the term concursus did not previously apply to these groups, it was for a time withheld from them in the comitia the six divisions being known simply as the sex suffragia. Afterward as new voting groups were added to the equites they came to be called centuries, and thence the term extended to the old. The centuriate organization of the comitia did not demand the creation of suffragia seniorum, to correspond with the seniores seniorum of the infantry, perhaps because the six votes in the comitia centuriata adequately represented the whole number of patricians. As the equites originally provided their own horses, they held their rank for life, not merely through the period of service. After the state had undertaken to furnish money for the purchase and keeping of the horses, the eques retained his public horse, and consequently his membership in
an equestrian century, long after his retirement from active duty. The increase in the number of equestrian votes was owing to the participation of plebeians in the mounted service. From them twelve equestrian centuries were formed for the centuriate assembly, and added to the six groups already existing. This increase probably came about in the course of the fourth century, accompanying or following the enlargement of the infantry from two to four legions. Thus the total number of one hundred and ninety-three centuries could not have been reached till shortly before 269." Id. 209, 210.

5 Id. 212.

6 "The first act of the centuriate assembly according to Livy, who has certainly placed the beginning of its functions at the earliest possible date, was the election of the first two consuls. Thereafter these comitia not only continued to elect the consuls, but also naturally acquired the right to choose all elective higher magistrates, extraordinary as well as ordinary, who were entrusted temporarily or permanently with some or all of the consular power. * * * The activity of this assembly in elections expanded with the growth in the number of offices; and its importance was further enhanced by the opening of the patrician magistracies to plebeians. The validity of a centuriate elective act depended upon the subsequent curiate law, which soon became a mere form, and upon the patrum auctoritas." Id. Ch. XI (1).

7 Id. Cf. p. 331.

8 Id. 232 et seq.

9 Id. 177, 230—2, 239. "From the custom of the soldiers to participate in the settlement of questions touching their interests developed the function of declaring war. The people, however, were slow in acquiring the right. * * * Only once is mentioned a fear lest the people may not give their consent to a war. One case of rejection is recorded, and even here the centuries at a second session obediently accepted the consul's proposition. The control of diplomacy and of the revenues by the senate and magistrates assured these powers the practical decision of questions of war and peace to such an extent that ratification by the assembly could ordinarily be counted on as certain; and its influence decreased with the expansion of the empire. Meantime, however, the idea of popular sovereignty, which was expressing itself in other spheres of government, effectually demanded, if only in form, some concession to the assembly in this field as well; and accordingly in the formula of declaration 'populus' wholly takes the place of the once all-important 'senatus.' By such empty concessions the nobility rendered the people more docile. Thus to the end of the republic the centuriate assembly retained the constitutional right to decide questions of aggressive war, although in practice the magistrates nearly regained the place which they and the senate held during the century following the overthrow of kingship." Id. 230, 232.

10 Id. Ch. XI (III) "During the regal period, the well attested appellate function of the comitia was simply precarious, depending wholly on the pleasure of the king. The Romans represented the advance in liberty brought by the republic as consisting partly in the establishment of the right of appeal for every citizen thru the lex de provocacione of Valerius, a consul of the first year of the republic—according to Cicero the first law carried thru the comitia centuriata—providing that no magistrate should scourge or put to death a citizen without granting him an appeal to the people. * * * Not till after the enactment of the last Valerian statute did the people begin to enjoy in fact the privilege which had long been constitutionally theirs. The enforcement of the law, as in general of the rights of the citizens, was chiefly due to the plebeian tribunate, 'the only sure protection even of oppressed patricians', but itself a limitation on the jurisdiction of the assembly." Id. 239,—240, 242.

11 Id. 259—60, 260.

12 Id. 253 et seq.

13 "The centuriate assembly, having developed from the army, showed pronounced military features. It could not be convoked within the pomerium, for the reason that the army had to be kept outside the city; before the reform it met ordinarily in military array under its officers and with banners displayed; the usual place of gathering was the Campus Martius." Id. 263.
Each century cast a single vote, which in historical time the majority of its members decided. The voting proceeded according to classes; the equites were asked first, hence their centuries were termed prerogative (prærogatīvae), then the eighty centuries of the first class. If the votes of these two groups were unanimous, they decided the question at issue; as ninety-seven was a majority, they had one to spare from their total number. If they disagreed, the second class was called and then the third and so on to the proletarian century. But the voting ceased as soon as a majority was reached, which was often with the first class; and it rarely happened that the proletarians were called on to decide the issue.” Id. 211. Cf. Id. 469, 470.

Id. 211, 226–7.
SYLLABUS OF LECTURES VI and VII

Origin and History

Traditional account of events B.C. 462-451; criticism.
Pais and Lambert theories of Antiquity and late origin.
Authenticity Counter criticism of Girard and Greenidge.
Set up in the Forum before the rostris.
Destroyed at Gallic sack of Rome, B.C. 390.
Still formed part of Roman school boy's instruction in Cicero's youth.
Reconstruction Embodied in works of text-writers and commentators.

The Twelve Tables: Introductory

Sources

Native law mostly.
Perhaps some Greek law; cf. Laws of Gortyn.

Decemviri

Comitia centuriata.

Result of movement for intelligible statement of law.
Fas became jus.
Mos became lex.
Mainly a code of private law.

But contained some provisions relating to public law.
Courts (IX, 34)
Laws (VIII, 27; IX, 1, 2; XII, 5)
Police regulations (VII, X.)
LECTURE VI

THE TWELVE TABLES.

ORIGIN AND HISTORY.

But the most important advance during this period was the adoption of the "Twelve Tables" (B.C. 462-451).

The traditional account of their origin has been briefly stated as follows:

"Three commissioners were sent from Rome to Athens and other Greek states, for the purpose of inquiring into and collecting what was most useful in their legal systems; and we are told that Hermodorus, a learned Ephesian, then an exile at Rome, contributed valuable aid to the work. On the return of the commissioners, B.C. 452, ten magistrates, called decemvirs, were invested for a year with absolute power to carry on the government, and frame a body of laws for the republic. At first ten tables were completed and made public by the decemvirs, and two other tables were added the following year. These laws, after being approved of by the senate and solemnly confirmed in the Comitia Centuriata, were engraved on twelve tables, and fixed on the most conspicuous part of the forum." 1

Modern historians generally reject that portion of this account which ascribes the Tables, or any considerable portion of them, to Greek sources. Says the great chronicler of the Roman Empire's Decline and Fall:

"From a 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. 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." 2

On the other hand a later investigator 3 observes:

1 Mackenzie, Roman Law. (7th ed.) 6. For a more detailed account see Ihne, Early Rome Ch. XVIII; Duruy, History of Rome, I, 331-340.
2 Gibbon, IV, ch. 44. Cf. Hunter, Roman Law, 19; Muirhead. Roman Law, 65.
3 Greenidge, Historical Introduction to Poste's Galus, (Whittuck's ed.), XXI, XXII.
"The Greek influence on the Code, 4 although slight, is undeniable because it was unavoidable. It may not have been gathered, in the way affirmed by tradition, by the appointment of a commission to inspect the systems of law of different Hellenic states; but it was, at the least, an inevitable result of the prolonged influence of the civilization of Magna Graecia, 5 to which Rome had been subject from the days of her infancy—an influence which successively moulded her army, her coinage, her commerce and her literature. Again no State, however self-centred, could dream of undertaking such an enterprise as a written system of law without glancing at similar work which had already been accomplished by neighbouring cities. But, in spite of the fact that some of its outline and a few of its ideas may have been borrowed from Greek sources, the Law of the Twelve Tables is thoroughly Roman both in expression and in matter."

An interesting side light was thrown upon this question of Hellenic influence by the discovery in Crete, about a generation ago, 6 of a collection of Greek laws believed 7 to date from the period, of or immediately following that, traditionally assigned to the Twelve Tables. The Roman and Greek collections, while both dealing mainly with private law, and containing some provisions in common, are in other respects almost wholly unlike

4 Citing Paus, Storia di Roma, i, 7, p. 584. "He describes the law Table as the result of a fusion of the rude national law with the more civilized dispositions of Greek culture." Id.

5 Citing Voigt, XII Tablen, i, p. 14.

6 "In the summer of 1884 a discovery was made in Crete, which is of great importance for our knowledge both of early Doric Greek and of early law. A mill-stream at Hagioi Deka had been lately shut off, and in the bed appeared some blocks with an inscription. The occupier directed the attention of an Italian scholar—Dr. Federico Halbherr—to it, who in July laid bare and copied a part. At his request Dr. Ernest Fabricius completed the work by the beginning of November. They each compared their copy with the original before it was again covered up, and communicated their copies to one another. Dr. Halbherr's copy of the whole was edited by Professor D. Comparatelli, of Florence, in the Museo Italiano di Antichita Class., i, pp. 233 foll. (also published separately); and Dr. Fabricius published his copy in Mitthetl. d. deutschen archacol. Insttituts at Athens, ii, pp. 363 foll. Dareste gave an account of it in Bull. de Corresp. hellen., 1885, pp. 301-317; and four editions have appeared in Germany in 1885, each with a translation and notes. Two, by H. Lewy and F. Bernhoff, are slighter productions; a third, by two Bonn Professors, F. Bucheler and E. Zitelmann, contains a scholarly edition of the text by the former and thorough discussion of the law by the latter; and the last, by Joh. and Theod. Baunack, has elaborate discussions of the language. Meister has made some suggestions in Bezzanger's Beiträge, x, 139 foll. * * * * * * Hagioi Deka is near the ruins of Gortyn or Gortyna, a city mentioned by Homer, and, excepting Cnossus, at one time the most powerful town in Crete. As some other fragments of legal inscriptions have been found in the close neighbourhood of ours, it is conjectured that this was the site of the law-court, and that the laws lined the walls." Roby, The Twelve Tables of Gortyn, Law Quarterly, II, 135, 136, where a translation is set forth.

7 "On consideration of the alphabet, of the syntactical character, and of the legal expression, the date of the law is placed by Bücheler and others between the Roman XII Tables and Plato's Laws, i.e. cir. 450 to 350 B. C. Zitelmann inclines to the earlier limit. * * * This Cretan inscription lifts us at once over centuries of tradition and careless copying to a first-hand knowledge of one of the earliest European codes. The Twelve Tables of Gortyn (as we may fitly call them) by their extent and character take the lead of all legal inscriptions, either of Greece or Italy." Id. 136.
in substance as well as in arrangement," and whatever similarities exist may be accounted for from the undoubted fact that both derive from a common Aryan source rather than from any conscious borrowing by those who framed them.

In recent years the antiquity, and even the authenticity, of the Roman Twelve Tables have been questioned by the eminent continental jurists Pais,\textsuperscript{9} Italian, and Lambert,\textsuperscript{10} French. But, as Sohm observes,\textsuperscript{11} the views of these writers have been controverted by Girard\textsuperscript{12} who * * * successfully establishes the authenticity of the Tables" as well by Greenidge who maintains that

"The style and language of the XII Tables are evidence in favor of their authenticity. Their style is thoroughly rugged and archaic—short pregnant sentences, evidently intended for the comprehension of the vulgar, and suitable for transmission from mouth to mouth. framed in the imperative mood.\textsuperscript{13}

The Twelve Tables were originally set up in the Forum before the rostris\textsuperscript{14} but at the sack of Rome by the Gauls (B.C. 390) they were destroyed. This did not mean, however, the extinction of all knowledge of their provisions, for they were embodied in the works of text-writers and commentators\textsuperscript{15} and even so late as the youth of Cicero, he tells us,\textsuperscript{16} they formed part of the Roman school boy's instruction. Still this method of preservation was not exact nor always even satisfactory.

"A couple of score or so are all that can be collected of their provisions in what profess to be the ipissima verba of the Tables.\textsuperscript{17}

\textsuperscript{8} It seems a misnomer to call the Cretan collection "Twelve Tables" for it appears to contain some twenty sub-divisions "and the family and family property occupy most of it." Id. 137.

The following provisions appear to be of special interest: "16 A judge whatever it has been written he should judge according to witnesses or as denied on oath, shall so judge as has been written; and in respect of other matters he shall decide on oath in reference to the matters in contention. "17 If (a man) die, owing money or having lost a suit, if those to whomsoever it belongs will to take over the goods, to restore for him the damages and the money to whomsoever owed, they shall have the goods." Id. (universal succession)

\textsuperscript{9} Storia de Roma (Torino, 1898-9) vol. I.
\textsuperscript{10} La question de l'authenticite des XII Tables (Paris, 1902)
\textsuperscript{11} Roman Law (3d. ed.) 48, note 1.
\textsuperscript{13} The Juridical Review XVII, 100. Cf. English Historical Review., January, 1905.
\textsuperscript{14} Mackeldy, Roman Law, p. 19.
\textsuperscript{15} Muirhead, Roman Law, sec. 23.
\textsuperscript{16} De Legibus, II, 23, sec. 59.
\textsuperscript{17} Muirhead, Roman Law, p. 97.
"A few barely intelligible fragments, variously expressed by writers from four to six centuries later, and a few traditional statements, are all our real knowledge".\textsuperscript{18}

"There is unanimity as to the order and contents generally of the first three Tables, and the contents of the tenth; but as regards the others there is considerable divergence".\textsuperscript{19}


\textsuperscript{19} "The best attempt to restore the text is that by James Godefroy; (See \textit{Quatuor Fontes Juris Civilis}, Geneva, 1653, Otto's Thessaurus, t. iii. p. 1) and some additional light has been thrown on the subject in our days by the criticism and research of Haubold and Dickson. (Haubold, Institutiones Juris Roman Literariae, t. i. pp. 300-306. Dirksen, Sketch of the Efforts made for restoring the Text of the Twelve Tables. See also Ortolan's Institutes, t. i. p. 98. (Scholl, Leg. XII. Tab. reliquia. Brun, Fontes Juris Romani. antiqui, 5th ed. pp. 14-35. Voigt, Die XII. Tafeln. Gueist, Syntagma, p. xii, \textit{et seq.}) Mackenzie, Roman Law, (7th ed.) 6, 7."
LECTURE VII

THE TWELVE TABLES, CONTINUED.

CHARACTER AND PLACE.

The Twelve Tables were not, as they are sometimes called, a code; for there was no attempt to include in them the entire body of the law on any subject. Nor did their framers, on the whole, seek to effect a reform in the substance of the law. Their effort was, in the main, confined to making certain and intelligible those portions of the existing law which, because they were not so, had proved most oppressive.

And in doing so they doubtless insured a stricter observance of certain fundamental principles as e. g. this—perhaps the earliest—expression of the doctrine of due process of law: "No one shall be put to death except after formal trial and sentence." 4

So the mode of adoption marks a long step forward. For the Twelve Tables, while traditionally framed by decemvirs, were adopted and put in force by the comitia centuriata and were, accordingly, leges. Thus Rome had attained the stage of written law; mos had become lex.

"In form the laws of the tables were of remarkable brevity, terseness, and pregnancy, with something of a rythmical cadence that must have greatly facilitated their retention in the memory." 5

Hence it is not strange that, as we have seen, 6 they were made to serve the purpose of a text book.

1 Strikingly inaccurate is the sententious phrase with which Maine opens his "Ancient Law": "The most celebrated system of jurisprudence known to the word, began, as if it ends, with a Code." For, in addition to the point stated in the text, the Roman Law began long before the Twelve Tables and continued long after Justinian.

2 "It seems clear that many branches of it (the law) were dealt with in the Tables only incidentally, or with reference to some point of detail. The institutions of the family, the fundamental rules of succession, the solemnities of such formal acts as mancipation, necrum and testaments, the main features of the order of judicial procedure, and so forth—of all these a general knowledge was presumed, and the decemvirs thought it unnecessary to define them." Muirhead, Roman Law. p. 96.

3 "What they had to do was to make the law equal for all, to remove every chance of arbitrary dealing by distinct specification of penalties and precise declaration of the circumstances under which rights should be held to have arisen or been lost, and to make such amendments as were necessary to meet the complaints of the plebeians and prevent their oppression in the name of justice. Nothing of the customary law, therefore, or next to nothing, was introduced into the Tables that was already universally recognized as law, and not complained of as either unequal, indefinite, defective, or oppressive." 1d.

4 "The purpose was not so much to alter the law, as to fix, definitively and in writing, a law which should be the same for both orders." Sohm, Roman Law (3d. ed.) 54, 53.

5 Table XII, law 6.

6 Muirhead, Roman Law p. 100.

7 Ante p. 31
Livy\textsuperscript{7} calls them \textit{sous omnis publici privatique juris; corpus omnis Roman\-\textit{e juris}},

But another has said:

"The laws of the Twelve Tables were of less importance in the history of the development of Roman law than the institutions by which they were carried into execution.\textsuperscript{8}

As a whole the Twelve Tables, like the Gortyn laws, may be characterized as a compilation of private law but some of their provisions\textsuperscript{9} relate also to public law.

\textsuperscript{7} III, 34.

\textsuperscript{8} Stephen, History of the Criminal Law I, 11.

\textsuperscript{9} E.g. those pertaining to courts (IX, 34) laws (VIII, IX, 1, 2; XII, 5) and police regulations (VII, X).
LECTURE VIII

THE TWELVE TABLES, CONCLUDED.

Conjectural Text.

TABLE I

de in jus vocando.

1. Si in jus vocat, ni it, autestator; igitur cm capito.

2. Si calvitur, pedemve struit, manum endojaico.

3. Si morbus aevitasve vitium escit qui in jus vocabit jumentum dato; si nolet-arceram ne sternito.

4. Assiduo vindex assiduus esto; pro, letario quo quis volet vindex esto.

5 Rcm ubi pagunt, orato.


7. Post meridiem praesenti litem addicito.

8. Sol occasus suprema tempestas esto.


If one summon another before the magistrate, and the latter refuse to go, let the plaintiff take witnesses and arrest him.

If he attempt evasion or flight, let the plaintiff lay hands on him.

If he is prevented by sickness or old age, the plaintiff shall provide a vehicle, but he need not provide a covered carriage, unless he choose.

A freeholder (or tax payer) shall give a freeholder as surety of his appearance; one of the proletariat may give any one who may choose to be surety.

If the parties agree to settle, let then the matter be so settled.

If they do not settle, let the magistrate hear the cause before noon in the Comitium or the Forum, with both parties present.

After noon if one is in default let the magistrate decide in favor of the one who has appeared.

Let sunset end the session.

Sureties for reappearance shall be given.

1. The text here followed is that of Ortolan (following Dirksen and incorporated into Howe's Civil Law (pp. 47-59) combined with and corrected by that adopted by Hunter, (Roman Law pp.17-22)
TABLE II

de judiciis.

(Supposed to refer to stake to be deposit-
ed by each litigant).

A dangerous illness...or a day fixed for
the hearing of an alien's case...If any
of these occur to judge, arbiter or party,
let the case be postponed.

Let him who needs a witness summon
him for the third market day thereafter, by
calling aloud at his door.

Even larceny may be the subject of
compromise.

TABLE III

de rebus creditis.

For the payment of an admitted debt, or
an amount adjudged, let the debtor have
thirty days of grace.

Such time having elapsed, let the debtor
be seized by manus injectio and brought
before the magistrate.

Unless he pay or unless some one will
guarantee the debt, let the creditor take him
away and bind him with cord; or with fet-
ters not exceeding fifteen pounds in weight
or less at the discretion of the creditor.

Let him be free to live at his own expense;
if not let the creditor who keeps him bound
give him a pound of bread a day, or more
if the creditor choose.

(A rule that the debtor might be kept in
bonds for sixty days and then the amount
of the debt publicly proclaimed.)

A rule that after the third market day the
debtor might be sent or sold beyond the Ti-
ber; and the creditors might divide his body,
and that any one cutting any more or less
than his share should be deemed guiltless.

2. Cf. the judgment in Shylock v. Antonio (Merchant of Venice.)
### TABLE IV
**de patria potestate.**

1. Monsters or deformed children may be put to death.

2. Paternal power over children during their life to imprison, beat, or even kill them, even if they hold offices of state.

3. *Si pater filium ter venundnot, filius a patre liber esti.*

4. If the father sell his son thrice let the son be free.

5. Rule that a child born within ten months after death of mother's husband is presumed legitimate.

### TABLE V
**de hereditatibus et tutelis.**

1. Females (except vestal virgins) considered as under perpetual guardianship.

2. Mancipable things belonging to a woman under guardianship of her agnates are not subject to *usuacio* unless she deliver them with the authorization of her guardian.

3. *Ut i legassit super pecunia tutelave suae rei, ita jus esto.*

4. If intestate moritur, *ci suus haeres nec sit adgnatus proximus familiar habito.*

5. *Si adgnatus nec escit, gentilis familiar nancitor.*

6. If one die intestate and without *suus haeres* let his nearest agnate succeed.

7. *Si furosus est, agnatorum gentiliumque in ea pecuniaque ejus potestas esto.*

8. *Ast ci custos nec escit.*

9. *Ex ea familia......in eam familiam.*

10. If there be no agnate let the gentiles succeed.

11. (A rule that if no guardian is named by will, the agnates shall be lawful guardians.)

   Let the lunatic, if he have no curator, be in person and property under charge of his agnates, and in default of such, his gentiles.

   (Referring, perhaps, to the rule that if a freedman die intestate and without *suus haeres*, his patron succeeds).

   Debts due by or to the deceased are divided by law among the heirs according to their shares in the inheritance.

   Partition among heirs regulated by the action *familiae exsicundae.*

   A slave manumitted by will on condition of paying the heir a certain sum may, if sold by the heir, obtain his freedom by paying such sum to the vendee.
TABLE VI

de dominio et possessione

1. Quum nexum faciet mancipiumque uti lingua nuncupassit, ita jus esto.
   When one has observed the forms of *nexum* and *mancipium*, let the words used constitute the law between the parties.
   One who refuses to abide by such words penalized in double damages.

2. 

3. Usus auctoritas fundi biennium... caeterarum omnium... (annuus.)
   Let the acquisition of real estate be by possession of two years; of other property by one.
   A wife (not married by *confarreatio* or *coemptio*) may avoid the husband’s marital power, resulting from *usucapio* of one year, by absenting herself from the conjugal domicil for three consecutive nights in each year.

4.

5. Adversus hostem aeterna auctoritas.
   Against an alien a claim is perpetual.

6. Si qui in jure manum conserunt.
   If there be a contest before a magistrate by *manuum consortio* 3 as to property let the magistrate leave the actual possessor in provisional possession.
   But if there be a contest concerning personal liberty, provisional possession should be decreed in its favor.

7.

8. Tignum junctum aedibus vineaeque et conopet, nec solvito.
   Let not him whose timber has been used by another in building a house or to support vines tear it away.
   But in such case let him who used the materials belonging to another pay double for them.

9.

10. Quandoque sarpta, donec dempta crunt.
   And if such materials become detached their owner may take them.

11.

12.

3. A fictitious combat.
TABLE VII

de jure aedium et agrorum

1. Let a clear space of two and a half feet be left around each house.

2. If a man plant a hedge between his own land and his neighbor’s let him not go beyond his line; if he build a wall let him leave a foot of space; if he dig a ditch or trench let him leave a space equal in breadth to the depth of the excavation and, if a well, six feet; olives and fig trees must not be planted nearer to the line than nine feet, and other trees five feet.  

3. *Hortus...haeredium...lugurium...*  
Garden.... small estate.... grange.... Regulations concerning these subjects.

4. Between fields of neighboring proprietors let a space of five feet be reserved for turning the plough—which shall not be subject to *nsucapio*.

5. *Si iurgant....*  
If neighboring proprietors cannot agree as to boundaries, let the magistrate appoint three arbitrators.

6. A rural servitude over the property of another is eight feet in width in the direct course and sixteen feet in the bends.

7. If the way be not kept in order by neighboring proprietors one may drive his vehicle where he finds it necessary.

8. *Si aqua pluvia nocet.*  
If rain water, artificially diverted by another from its natural channel, threatens injury to one’s property, the latter may bring an action *aquae pluviae arcendae* and obtain compensation for damages so incurred.

9. When the branches of one’s tree overhang a neighboring property, let them be trimmed up to a height of fifteen feet from the ground.

10. One may enter upon his neighbor’s land and gather fruit which has fallen from his own tree.

4 Ascribed by Gaius to Solon’s Code.
5 Cf. common law right of reception.
TABLE VIII

de delictis

1. Si membrum rupit, ni cum eo pacit, talio esto.

2. Si injuriam faxit alteri viginti quinque aeres poconae suntio.

3. Ruptias...sorcito

4. Qui fruges excantasset...neve alienum sectem pedexeris.

5. Qui fruges excantasset...neve alienum sectem pedexeris.

6. Qui fruges excantasset...neve alienum sectem pedexeris.

7. Qui fruges excantasset...neve alienum sectem pedexeris.

8. Qui fruges excantasset...neve alienum sectem pedexeris.

9. Qui fruges excantasset...neve alienum sectem pedexeris.

10. Qui fridges excantasset...neve alienum sectem pedexeris.

11. Qui fruges excantasset...neve alienum sectem pedexeris.

12. Si nox furtum factum sit, si im occisit, iure caesus esto.

Capital punishment prescribed for libel. Against him who destroys the limb of another and does not compromise, let there be retaliation in kind.

For the breaking of a bone of a freeman the penalty is three hundred asses; of a slave one hundred and fifty asses.

For injury or insult to another, the penalty is twenty-five asses.

Let accidental damage done to another be repaired by him who is in fault.

If damage is done by a quadruped let its owner repair the damage or surrender the animal.

An action lies against one who lets his flock feed in another’s field.

He who by enchantment blasts the crops of another or draws them from one field to another...(penalty).

Penalty of death for nocturnal trespass and theft of crops, if committed by a person of the age of puberty. If below that age to be scourged.

Wilful burning of buildings of another punished by burning to death. Negligent burning to be compensated for. One too poor to pay such damages to be punished moderately.

Penalty of twenty-five asses for each tree of another wilfully cut.

A nocturnal thief may be killed in the act.

But a thief surprised in the day-time may not be killed unless he resist with arms.

* Verses imputing crime or immorality.
A thief taken *in flagrante delicto* should be scourged and delivered over in bondage to the owner of the stolen property. If he is a slave he should be scourged and cast from the Tarpeian rock. If under the age of puberty he should be scourged and made to pay the damage.

(Describes the ceremony of searching for stolen property with no clothing but a linen cloth around the loins and with a platter in the hand.)

If one institute an action for a secret theft .... (let there be double damages.)

(A provision for prescription *acquirendi causa*)

Rate of interest limited to one per cent per month, with quadruple penalty for usury.

A double penalty for breach of faith by a depositary,

A right of action given to any one to remove unfaithful guardians; and double penalty against guardians who appropriate the property of their wards.

If a patron defraud his client let him be devoted to the gods.

If a witness to an act or *mancipatio* refuse to testify let him be infamous, incapable of testifying himself, and unworthy of having testimony given on his behalf.

A false witness shall be hurled from the Tarpeian rock.

One who slays another accidentally shall provide a ram to be sacrificed in his stead.

Incantations and poisonings punished by death.

Seditious assemblies at night, in the city, punished by death.

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7 Aristophanes' 'Clouds' contains an allusion to a similar ceremony indicating its existence among the Athenians.

Members of collegia empowered to make rules for their government, provided they be not contrary to law.  

**TABLE IX**  
de jure publico  

1. Special legislation for individuals prohibited.  
   The comitia centuriata alone have the right to render judgments concerning a citizen's caput.  

2. A judex or arbiter who receives a bribe shall be punished with death.  

3. Appointment of quaestores parricidii, and provision for appeal to the comitia in criminal cases.  

4. Penalty of death for one who stirs up an enemy against the Roman people or delivers a citizen to the enemy.  

5. No one shall be put to death except after formal trial and sentence.  

**TABLE X**  
de jure sacro  

1. Hominem mortuum in urbe non sepelito, neve urito.  

2. Hoc plus ne facito... Rogum ascia ne polito.  

3.  

4. Muliers genas ne radunto; neve lessum funeris ergo habento.  

5. Homini mortuo ne ossa legito, quo post funus faciat.  

6.  

9 "An important aspect of the Public Law of the Twelve Tables is the guarantee of the right of free association, provided that it have no illegal intent. While nocturnal gatherings (cortus nocturni) are prohibited, the formation of gilds (collegia) is encouraged." Greenidge, Historical Introduction to Poste's Gaius, xxiv.  

10 (Due process of law.)
7. *Qui coronam parit ipse, pecuniave ejus, virtutis ergo duitor ci.*

If one by himself, his slaves or his horses have gained a crown, let the honor be accorded to him (at his funeral).

No person shall have more than one funeral, nor more than one bier.

Add no gold; but if the teeth of the dead are fastened with gold; it may be buried or burned with the remains.

No funeral pyre or sepulchre shall be placed within sixty feet of another's property without his permission.

Property in a tomb not to be acquired by mere *usucapio*, or prescription.

**TABLE XI**

**Supplementary**

Patricians shall not intermarry with plebeians.

**TABLE XII**

**Supplementary**

*Pignoris capio* lies for the price of a beast sold as a sacrifice, or employed to earn money therefor.

If a slave commit a theft or other tort... master to be held in noxal action.

If one possess in bad faith, let the magistrate in the cause appoint three arbiters and on their decision let such possessor be condemned in double the fruits.

A thing which is the subject of litigation, shall not under a penalty of twice its value be dedicated to sacred uses.

Laws enacted by the people repeal prior inconsistent ones. 11

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11 Greenidge calls this "the most typical and important utterance of the Tables which shows how little the Decemvirs regarded their own work as final, how little they were affected by the Greek idea of the unalterability of a Code—of a Code forming a perpetual background of a Constitution—in fact, by the idea of a fixed or written Constitution at all. It is an utterance that expresses the belief that law is essentially a matter of growth." Historical Introduction to Poste's Gaius, xxiv.
SYLLABUS OF LECTURE IX

The plebeian assembly; perhaps a continuation of concilium plebis. 1
Recognized and exalted, if not created, by leges Valeriac et Honoratiae (Roman Magna Charta) B. C. 449.

Formulating Agency:
Comitia tributa

Elected inferior magistrates, e.g. Quaestores, Aediles.
Appellate jurisdiction from magistrates confirmed.
Acquired a certain control over Senate.
Auctoritas patrum not required after lex Hortensia (B. C. 287.)

Progress of Jus Publicum

Honores opened to plebs

1. Quaestorship
Duties at first judicial but later financial.
Opened to plebs B. C. 421.
In 410 three out of four quaestores were plebs. Extension to plebs proposed B. C. 445. Authorized by lex Licinia (B. C. 367.)
First plebeian consul B. C. 366. Established B. C. 443.

2. Consulship
Enrollment and assessment of citizens.
Nomination of Senators etc.
First plebeian censor B. C. 351.
Duties, Custody of public property and money.
One censor required to be plebeian by leges Publiciae B. C. 339.
Superintendence of public morals.

3. Censorship
An offshoot of the consulship.
Duties mainly judicial.
First appointed B. C. 367.

4. Praetorship
First opened to plebs B. C. 337.
A sort of building inspectorship.
Opened to plebs B. C. 304.

5. Aedileship
Guardians of national religion.
Custodians of fas and later of jus.
First opened to plebs by lex Ogulnia B. C. 300.

6. Pontifical College
Originally 3 pontiffs; later 7 and 9.
First plebeian pontifex maximus (Tiberius Coruncanus) B. C. 253

1. Muirhead Roman Law, sec. 17.
2. Howe's Civil Law (2nd Ed.) p. 73.
LECTURE IX

PROGRESS OF JUS PUBLICUM

THE PLEBS AND THE ROMAN OFFICES.

The later Roman law\(^1\) distinguished sharply between \textit{jus privatum}, pertaining to the rights and duties of individuals \textit{inter se}, and \textit{jus publicum}, relating to the organization and administration of the state. The present work is concerned almost entirely with the former but in order to follow its development it is necessary to consider, in some degree, the latter and especially the law relating to officials which had an important, indirect influence upon \textit{jus privatum}.

In the earliest period all offices,\(^2\) like all other privileges, were confined to the patrician class. The key to the early history of republican Rome is the struggle of the plebs which finally resulted in overthrowing this monopoly of privilege. And nowhere is that struggle, in its successive stages, more graphically marked than in the slow but steady admission of the plebs to \textit{honores} or offices.

The Quaestorship. The first breach in the wall of patrician exclusiveness was the opening of the quaestorship. “The quaestors” observes Reich\(^3\) “originally two, since 421 B.C. four, since 267 or 241 eight, and later on even twenty (under Sulla) and forty (under Caesar)—were at first assistant judges in criminal cases but in historic times chiefly officials of the Exchequer, who guarded the bullion and money of the state, collected the taxes and other sums due it for leases, tribute, etc. They were also the constant assistants of generals in the field and of provincial governors.”

The original quaestors were, of course patricians. But “as early as 421 plebeians had been allowed to reach the lowest rung in the ladder of office, the Quaestorship; they thus received the power, as urban Quaestors, to prosecute all who were accused of capital offences, to administer the public treasure, and keep charge over certain of the public documents; or, as military quaestors, to manage the finances of the army and direct the commissariat.”\(^4\)

By 410 B. C. the plebs had succeeded in dominating the quaestorship, three out of the four incumbents of the office being of their order.

The Consulate. But the great plebeian objective was, naturally, the consulate, successor of the kingship and repository of regal power. And “the consuls were not a whit less powerful than these [kings] had been. For they had the same \textit{imperium}, conferred in the same way; and in virtue of it they might make and enforce what decrees

\(^1\) \textit{Hi sunt positiones, publicum et privatum. Publicum quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privata.} Justinian’s Digesta, I, I, 11.

\(^2\) This, of course, refers to offices recognized by law. “But we may well ask if it is likely that the plebeians who, as we have just seen, formed a separate community for themselves, had before that time no sort of organization of their own and no officers to regulate their affairs? It seems highly probable that the plebeians were not without such special plebeian magistrates, and if so, it seems most natural that these magistrates were no other than those tribunes and aediles whom they chose as their legal patrons.” Thuc, Early Rome, 143, 144.

\(^3\) General History of the Western Nations, 11, 56, 57.

\(^4\) Ferrero, Greatness and Decline of Rome, (Am. ed. 1909) 1, 11.
they pleased, with little chance of impeachment on demitting office, so long as they were responsible only to the comitia of the centuries and had done nothing to impair the privileges or offend the prejudices of those by whom they had really been elected.”

“In the place of a king for life” says another eminent authority “two annual chief magistrates were appointed under the name of ‘praetors,’ which name was afterwards changed into that of ‘consuls.’ To these annual magistrates the power of the kingly office was transferred undiminished, as were also the insignia of the kings. The change seemed slight; yet it was most important. For by the limitation of the office to a short period of time, the Romans secured the personal responsibility of their chief magistrates, which is the most essential part of republican government. During his term of office a magistrate could not have been subject to a criminal prosecution and punishment without derogating from the majesty of the state, as represented by him, and without danger to the safety of the republic itself. But his term of office being over, the consul became a private citizen, and was amenable to the laws. * * *

“The second modification in the office of chief magistrate was its partition among two colleagues, equal in every respect in rank and power. This measure, which necessarily impaired to some extent the unity and vigour of the executive, was adopted as a precaution against the abuse of authority. Not satisfied with the limitation of the office to a short annual period, the Romans desired a guarantee for their liberty even during that period, and they expected to find it in the control which one consul might exercise over the other. Each of them was entrusted consequently with the right of ‘intercession.’ i.e. he could place his veto on any official act of his colleague.”

“The two consuls” * * declares Reich “were the highest regular dignitaries in republican Rome. The year was designated by their names. Each of them might appoint a dictator. They submitted bills to the assembly; issued edicts; convoked and presided over the Senate, whose consulta they carried out. Before the institution of the praetura the consuls were the judges; after that time they could still administer jurisdiction on non-contentious points of law—e.g. manumission of slaves, adoption or emancipation of house sons, and even in criminal matters they not infrequently had jurisdiction. Religious functions were also amongst their duties—such as the arrangement of sacrifices, expiation of the divine wrath manifested in prodigia, etc. Their military functions were paramount.”

An attempt to open this powerful office to the plebs was made soon after the enactment of the Twelve Tables, and, while not successful it resulted in some concessions. The lex Canulcia of B.C. 445, the same which extended the right of connubium to the plebs, provided for military tribunes with consular powers and elected by the comitia centuriata.

“The question naturally occurs,” remarks Mommsen, “what interest the aristocracy could have—now that it was under the necessity of abandoning its exclusive possession of the supreme magistracy and of yielding in the matter—in
refusing to the plebeians the title, and conceding to them the consulate, under this singular form? But, in the first place, there were associated with the holding of the supreme magistracy various honorary rights, partly personal, partly hereditary. ** Of greater political importance, however, than the refusal of the *ius imaginum* and of the honour of a triumph was the circumstance, that the exclusion of the plebeians, sitting in the senate, from debate necessarily ceased in respect to those of their number who, as designated or former consuls, ranked among the senators whose opinion had to be asked before the rest; so far it was certainly of great importance for the nobility to admit the plebeian only to a consular office, and not to the consulate itself.”

But the struggle of the plebs for full admission continued and, over a half century later, eventuated in the famous Licinian Rogations or demands which included *inter alia* the following:

“First, to abolish the consular tribunate; secondly, to lay it down as a rule that at least one of the consuls should be a plebeian; thirdly, to open up to the plebeians admission to one of the three great colleges of priests—that of the custodiers of oracles, whose number was to be increased to ten.”

After a long struggle—it is said of eleven years—the senate at length gave its consent and they passed in the year 387 A.U.C. (367 B.C.)

With the election of the first non-patrician consul—the choice fell on one of the authors of this reform, the late tribune of the people, Lucius Sextius Lateranus—the clan-aristocracy ceased both in fact and in law, to be numbered among the political institutions of Rome.”

**The Censorship.** Another important office to which the plebs were meanwhile turning their attention was the censorship.

“The two censors were established in 443 (435, Mommsen) B.C. They had mainly two functions: (a) taking the census together with the taxation of the citizens and the appointment of Senators; (b) the moral control of the citizens. They had no *imperium*. Being irresponsible they could not act unless both were agreed on a measure; and if one of them was prevented from acting, either by death or any other cause, the other had to abstain from all censorial activity. The census was taken every fifth year, sometimes every fourth. Every citizen *sui juris* ** was obliged to declare on oath what property he owned. On the census thus taken taxation was based. Census taking was terminated by a religious ceremony called the *lustrum* after which the censors ceased to be officials. ** The censors were the financial executive of the Senate.

Regarding the moral coercion practiced by the censors, it is sufficient to say that in case of private or public immorality, excess or lawlessness of any kind, the censors could affix a *nota* to the name of a citizen on the lists of the census, and thereby materially damage his reputation (*exsimiation*) or remove him from a higher to a lower voting class (*tribus).*

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10 History of Rome (Rev. ed. 1911) I, 380, 381.
11 Id. 382.
12 Reich, General History of Western Nations (1908) II, 50 *et seq.*
In 351 B.C. both censorships were thrown open to the plebs and by the _leges publiliae_ of 339 one censor was required to be a plebeian.\(^1\)

**The Praetura.** But the office which was to exercise the most extensive influence upon the development of Roman law was the _praetura_. This was an offshoot of the consulate. Indeed, as we have seen, the consul was at first called praetor.

"Under the pretext that the nobility were exclusively cognizant of law, the administration of justice was detached from the consulate when the latter had to be thrown open to the plebeians; and for this purpose there was nominated a special third consul, or, as he was commonly called, a praetor."\(^1\)

"The two praetors, altho occasionally the generals of Roman armies, were chiefly judicial magistrates, especially for civil but also for criminal cases. Their number was subsequently increased, first to four (227 B.C.) then to six (197 B.C.) and finally, under Caesar, to sixteen. Since the time of Sulla they became, after the expiration of their year of office, governors of provinces under the title of _propraetores_. Previously provinces had been governed by praetors proper."\(^1\)

The office was opened to the plebs in 337 B.C. and we shall soon see how important it became.

**The Aedileship.** When the plebeian tribunate was recognized and vested with consular power by the _lex Canuleia_ there were attached thereto as assistants of the tribunes two aediles with minor judicial functions and acting also as custodians of certain state archives and buildings.\(^1\) Later when the consulate was opened to the plebs the patriciate sought to reserve some of its prerogative for themselves by creating a similar office of their own.

"The supervision of the market and the judicial police duties connected with it, as well as the celebration of the city-festival, were assigned to two newly nominated aediles, who-by way of distinction from the plebeian aediles-were named from their standing jurisdiction "aediles of the judgment seat" (_aediles curules)._"\(^1\)

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2. "It was to no purpose that once more a patrician augur detected secret flaws, hidden from the eyes of the uninitiated, in the election of a plebeian dictator (427), and that the patrician censor did not, up to the close of our present period (474), permit his colleague to present the solemn sacrifice with which the census closed; such chicanery served merely to show the ill humour of patricianism." Id. 384.
3. Id. 383.
4. Reich, General History of the Western Nations, (1908; II, 52.
6. "That the plebeian aediles were formed after the model of the patrician quaestors in the same way as the plebeian tribunes after the model of the patrician consuls, is evident both as regards their criminal functions (in which the distinction between the two magistracies seems to have lain in their tendencies only, not in their powers) and as regards their charge of the archives. The temple of Ceres was to the aediles what the temple of Saturn was to the quaestors, and from the former they derived their name. Significant in this respect is the enactment of the law of 305 (Liv. iii, 55), that the decrees of the senate should be delivered over to the aediles there." Id. 354, 355 note.
7. Id. 383.
But this device was but briefly effective. Plebs were soon allowed to hold the curule aedileship alternately with patricians and in 304 B.C. it was opened completely to the plebs.

**The Pontifical College.** This was the last of the patrician strongholds to which the plebs were admitted. The *pontifices* (bridge builders) observes Mommsen,

"Derived their name from their function, as sacred as it was politically important, of conducting the building and demolition of the bridge over the Tiber. They were the Roman engineers, who understood the mystery of measures and numbers; whence there devolved upon them also the duty of managing the calendar of the state, of proclaiming to the people the time of new and full moon and the days of festivals, and of seeing that every religious and every judicial act took place on the right day. As they had thus an especial supervision of all religious observances, it was to them in case of need—on occasion of marriage, testament, and *adrogatio*—that the preliminary question was addressed, whether the business proposed did not in any respect offend against divine law; and it was they who fixed and promulgated the general exoteric precepts of ritual, which were known under the name of the 'royal laws.' Thus they acquired (although not probably to the full extent till after the abolition of the monarchy) the general oversight of Roman worship and of whatever was connected with it—and what was there that was not so connected? They themselves described the sum of their knowledge as 'the science of things divine and human.' In fact the rudiments of spiritual and temporal jurisprudence as well as of historical recording proceeded from this college. For all writing of history was associated with the calendar and the book of annals, and, as from the organization of the Roman courts of law no tradition could originate in these courts themselves, it was necessary that the knowledge of legal principles and procedure should be traditionally preserved in the college of the pontifices, which alone was competent to give an opinion respecting court-days and questions of religious law."  

"The pontifices who were wont to be consulted by the people regarding court-days and on all questions of difficulty and of legal observance relating to the worship of the gods, delivered also, when asked, counsel and opinions on other points of law, and thus developed in the bosom of their college that tradition which formed the basis of Roman private law, more especially the *formulae* of action proper for each particular case. A table of *formulae* which embraced all these actions, along with a calendar which specified the court-days, was published to the people about 450 (A.U.C.) by Appius Claudius or by his

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18 From *pons* (bridge) and *facio* (to make) "*Pons* originally signified not 'bridge' but 'way' generally, and *pontifex* therefore meant 'constructor of ways.'" Mommsen, History of Rome (Rev. ed. 1911) I, 219 note.

19 "The nucleus of the so-called *leges regiae* was a probably not much more recent [than the Twelve Tables]. These were certain precepts chiefly of a ritual nature, which rested upon traditional usage, and were probably promulgated to the general public under the form of royal enactments by the college of pontifices, which was entitled not to legislate but to point out the law." Id. II, 112.

20 Id. I, 219, 220.
clerk, Gnaeus Flavius. This attempt, however, to give formal shape to a science that as yet hardly recognized itself, stood for a long time completely isolated."²¹

In these ancient and sacred offices the patricians intrenched to the end.

"Indeed," says the writer²² last quoted, "several of these, which were destitute of political importance, were never interfered with, such as their exclusive eligibility to the offices of the three supreme flamines and that of rex sacrorum as well as to the membership of the colleges of Salii. On the other hand the two colleges of pontifices and of augurs, with which a considerable influence over the courts and the comitia were associated, were too important to remain in the exclusive possession of the patricians. The Ogulnian law of 454 (A.U.C.) accordingly threw these also open to plebeians, by increasing the number both of the pontifices and of the augurs from six to nine, and equally distributing the stalls in the two colleges between patricians and plebeians."

The first plebeian to hold the office of pontiff was Publius Sempronius Sophus and the first pontifex maximus from the plebs was Tiberius Coruncanius. Both of these men had been consuls and it is significant that the latter was especially famous for his juridical learning.²³ He reached his high position in 253 B.C.; but long before that the struggle of the plebs for an equal share in the privileges of citizenship had, from a legal standpoint, attained its goal. Says Mommsen:²⁴

"The two hundred years' strife was brought at length to a close by the law of the dictator Q. Hortensius (465, 468 A.U.C.) which was occasioned by a dangerous popular insurrection, and which declared that the decrees of the plebs should stand on an absolute footing of equality—instead of their earlier conditional equivalence—with those of the whole community. * * *

"The struggle between the Roman clans and commons was thus substantially at an end. While the nobility still preserved out of its comprehensive privileges the de facto possession of one of the consulships and one of the censorship, it was excluded by law from the tribunate, the plebeian aediles, the second consulship and censorship, and from participation in the votes of the plebs which were legally equivalent to votes of the whole body of burgesses. As a righteous retribution for its perverse and stubborn resistance, the patriciate had seen its former privileges converted into so many disabilities."

²¹ Id. II, 113.
²² Id. I, 384, 385.
²³ Howe, Civil Law (2nd ed.) 73. Mommsen, however, says: "the story, that the first plebeian pontifex Publius Sempronius Sophus (consul 450), and the first pontifex maximus Tiberius Coruncanius (consul 474), were indebted for these priestly honours to their knowledge of law, is probably rather a conjecture of posterity than a statement of tradition." History of Rome (Rev. ed. 1911) II, 113.
²⁴ Id. I, 385.
SYLLABUS OF LECTURE X

PROGRESS OF JUS CIVILE.

Factors of legal development

Legal Fictions

- Equity

Legislation

"Any assumption which conceals or affects to conceal the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified."[1]

In Rome partly a result of interpretatio[2] by the College of Pontiffs.

Employed by the Praetors.

"In their task of ameliorating the law the praetors proceeded as unobtrusively as possible, by tacit rather than by open legislation, and rather by innovations in the adjective code, to use Bentham's expression, or code of procedure, than in the substantive code. The introduction of the formulary system, giving them authority to create new actions, had virtually invested them with much legislative power. The new actions introduced by the praetor were called actiones utiles."[3]

"If a person confessed before the magistrate that his opponent in the action was the owner, he was divested of his ownership, provided that at the moment of the confessio he was still owner. This suggested a general method for transferring ownership."[4]

Medium for introducing new (Vindicatio in libertatem, juristic acts e.g. in patrem, in potestatem.

Emancipatio.

"The father might sell his son, by a purely imaginary sale, thrice repeated, into the bondage of another who would manumit the son after each sale by means of in jure cessio."[5]

Datio in adoptionem.

Nature. "In the emancipatio a declaration was made that the thing was sold for one sesterce, and the alienee having paid his sesterce, ownership passed to him in virtue of the Twelve Tables. So far then as emancipatio took the form of a 'emancipatio nummo uno,' it had passed from a genuine to a purely fictitious sale (imaginaria venditio)."[6]

Gifts.

Instances

Fiduciary

causa

Trust agreements

Pactum conventum

Pledge

LEGAL FICTIONS

In jure cessio.

Fictitious emancipatio (sestertio nummo uno)
NOTES TO PRECEDING.

1 "These instrumentalities (agencies by which Law is brought into harmony with society) seem to me to be three in number, Legal Fictions, Equity, and Legislation. Their historical order is that in which I have placed them. Sometimes two of them will be seen operating together, and there are legal systems which have escaped the influence of one or the other of them. But I know of no instance in which the order of appearance has been changed or inverted." Maine, Ancient Law, 25.

2 Id.

3 Sohm, Roman Law, sec. 12; Wilson, The State, pp. 143-5.


5 Sohm, Roman Law, p. 58.

6 Id. p. 60.

7 Id. p. 61.
SYLLABUS OF LECTURE XI

PROGRESS OF JUS CIVILE, CONTINUED.

"Scanty during the republic but became very voluminous under the empire."¹

Lex Canuleia

Enacted B. C. 445.

Extended to plebs elements of civitas...{ Suffragium
{ Commercium
{ Connubium

Lex Hortensia

Enacted B. C. 287.

Made plebiscita binding on whole people and hence equivalent to leges.²

A contract depending on use of certain words; hence "verbal."

"The creditor asks the debtor: spondeas mihi centum dare?
The debtor answers: spondeo. This form of sponsio was
regarded as specifically Roman (i.e. as being juris civilis)
and could only be employed, therefore, among Roman
citizens.³

"The eldest known descendant of the primitive nescum."⁴
Validated a class of agreements previously unenforceable.

By it obligations might be......{Originated
\Novated (transformed).

Enforceable by action next mentioned.

Legis actio

un apr condici

Lex Aebutia

Enacted B. C. 2nd century.

Helped to abolish legis actions⁷

Legislation.

Slipulatio
(or sponsio)

Sun (Lex Siita, B. C. 244 ca.)
or

Thing (Lex Calpurnia B. C. 234 ca).

Included cases not covered judicis postulatio.

Judex not appointed at first appearance of parties.

¹ Maine, Ancient Law, p. 40.
² Gaius, Institutes, I, 1.
³ Muirhead Roman Law, sec. 39; Encyc. Brit. xx. 694-5; Sohm, Roman Law, sec. 8.
⁴ Sohm, Roman Law, p. 401.
⁵ Maine, Ancient Law, p. 316.
⁶ Muirhead, Roman Law, secs. 40, 41; Sohm, Roman Law, pp. 444-6; Hunter, Roman Law, p. 37.
⁷ Gaius, Institutes, IV, 30.

"After the legis actions were abolished as modes of proceeding in civil suits their forms still survived in the ceremonies of adoption, the manumission of a slave, the emancipation of a son, and conveyance by in jure cession." Poste's Gaius, (Whittuck's ed.), 474.
SYLLABUS OF LECTURE XII

LEGISLATION, CONTINUED.

In general ...

- A plebiscitum, proposed by the tribune Aquilius.
- Probable date 467 A. U. C. (287 B. C.)
- Purpose to provide compensation for injuries to property
- Nucleus of the Roman law of damages.
- Supplemented but did not repeal damage provisions of XII Tables (VIII)

Fundamental provisions

- "Si quis scrutum scribunt alienum alienamque quadrupedemque pecudem iniuria occiderit, quanti ea res in eo anno plurimi fuerit, tantum aed quo re dare damnas est." (Cap. I)
- "Ceterarum rerum praeter hominem et pecudem occisos si quis alteri damnum facit, quod usserit friget, ruperit iniuria, quanta ea res fuerit in diebus triginta proximis, tantum aed domino dare damnas est." (Cap. III)

Acts of commission not merely omission.

Lex Aquilia...

Essentials of liability

- Culpa:
  - Generally levissima culpa sufficient:
    - Servants
    - Soldiers
    - Gamesters
    - Contributory negligence
  - Want of conduct observed by bonus pater familias.

Damnum (loss to owner).

Legis actio Aquilae...

Parties:

- Actor
  - Bonae fidei possessor
  - Possessor of jus in re aliena

- Reus:
  - Any party responsible for damnum

Measure of damage

- At first value of thing damaged.
- Later, difference between its actual and normal value.

Extension

- By actiones
  - Utiles.
  - In factum.
- "praetor

Finally incorporated into Justinian's Digest.
SYLLABUS OF LECTURE XIII

That part of Roman private law which coincided with that of other nations as regards fundamental conceptions. Not the "law of nations" but the law for aliens.

General character:
Cf. English "law merchant" (now in force in Philippines)
Arose from growing influx of, and trade with, foreigners.
Benefits available to all civil beings, whether citizens or not.

Sources
- Treaties.
- Legal systems of surrounding nations.
- Conquered territory.
- Rome.

(Urbanus: Heard cases between citizens
Provincial (ultimately 14).

Praetor
- First appointed about 242 B.C.
- Function to hear cases involving foreigners, and to relieve praeceptor urbanus
- Needed to know and apply foreign law

Comitia Tributa.
- Announcement by praetor on taking office of relief he would grant in given cases during his term.
- Usually included editum of predecessor with slight additions.
- Probably originated by some praetor who had experienced recurring applications for similar relief.

Edictum Perpetuum
- Contents: Edict proper.
- Appendix of actions.
- Posted in album, or white board tablet in forum.
- Marked by increasing reliance upon aequitas or natural justice; hence the period of "equity."
- Used by Roman law students as elementary text book.

Jus Gentium
- Formulating agencies

Plebiscita or leges.
LECTURE XIII

JUS GENTIUM.¹

Various factors led the Roman law into its third stage, but foremost among them was the growing influx of, and trade with, foreigners,² which necessitated the application of legal principles to and by others than Roman citizens. The process was much the same as that which led to the formation of the English law merchant,³ and the result was the infusion of new principles into the Roman private law so that the portion thereof which coincided with the law of other nations became known as jus gentium.⁴ It meant originally, not the “law of nations”, with which it has sometimes been confused, but the “law for aliens.”⁵ And as the new principles permeated the entire law of Rome the jus gentium ceased to be merely an exotic appendage thereof and produced an advanced stage of the whole whose benefits, no longer confined to citizens, were available to all civil beings.

The Praetor. The instrument thru which this was brought about was the praetorship, the one judicial office at Rome. Originally an offshoot of the consulship, and designed to relieve it of judicial functions when opened to the plebs, the praetor’s importance increased with the growing volume of litigation.⁶ At first there was but one praetor and he at Rome. Then praetores were appointed for the provinces, eventually fourteen in number. Finally about 242 (B. C.) a praetor peregrinus was appointed to hear cases where either party was a foreigner, the other then being known as praetor urbanus.⁷ Naturally the new praetor could neither refuse to apply pertinent rules of his own law nor ignore those of other legal systems, in contemplation of which the parties had contracted.

One custom of the praetor was to issue, upon taking office, a brief announcement (edictum) of the sort of relief he would grant during his term.⁸ It usually included the edictum of his predecessor, with slight additions, and was posted

¹ Known also as Jus Honorum and Praetorian Law.
"In its infancy the jus gentium was jus honorarium: having undergone a period of probation and attained to manhood—it was tested more particularly in its application to foreign trade—it took its place definitively as part of the civil law of Rome.” Sohm, Roman Law, p. 259. But see Hunter, Roman Law, pp. 34-36.
² Sohm, Roman Law, (3d. ed.) sec. 13; Muirhead, Roman Law, sec. 42.
⁴ Sohm, Roman Law, sec. 14.
⁵ Id. p. 259; Howe Civil Law, (2nd. ed.) Lecture VI; Hadley, Roman Law, pp. 90 et seq.
⁶ Muirhead, Roman Law, sec. 43; Sohm, Roman Law (3d. ed.) sec. 15.
⁷ Muirhead, Roman Law, sec. 43; Sohm, Roman Law sec. 15.
⁸ The custom probably originated with some early praetor who had experienced recurring applications for similar relief or for that which he could not grant and who saw in the edictum a means of avoiding annoyance.
on the *album* or bulletin board of the Roman *forum.* The accumulated edicts, known as the *editum perpetuum,* thus became a repository of Roman legal precedents, not unlike the reports of Anglo-American law; and as the former was marked by increasing reliance upon *aequitas* or natural justice, and was used as an elementary text book by law students, the result was a decidedly progressive influence upon the Roman Law.

9 Sohm, Roman Law, (3d. ed) sec. 15: Muirhead, Roman sec. 49.
10 Maine, Ancient Law, Ch. III.
11 Cicero, *De Legibus.*
SYLLABUS OF LECTURE XIV

History and Character

Introduced thru the praetor peregrinus.
Partly evolved from legis actio per conditionem.
Placed on equality with Legis Actiones by lex Aebutia (B. C. 150 C. A.)
Made exclusive by Lex Julia.
Abandoned under the later emperors (C. A. 294 A. D.)

In jure (before praetor)
In judicio (before judex)

Argument of questions of law.

Prætor's instructions to ..........
Index or Recuperatores (If either party were peregrinus).
Cf. modern instructions to juries. Imitated in Scotch law.

Began in Praetor's imperium.

Proceedings in jure

Litis .......... Contestatio per ..........
Formula. 6

Demonstratio

Intentio

Statement of subject matter.
Set forth facts which entitled actor to relief independent of jus civile.

Condition of judgment

Condemnation

Direction to render judgment.
Always pecuniary. But might be modified to suit circumstances.

Adjudicatio:--Direction to transfer.

A plea of defense on grounds of equity or public policy (Cf. modern demurrer).

Exceptio

Kinds (Peremptoria.
Dilatoria.

Proceedings, Hearing.
in judicio . . . . (Sentencia . . . .) (Condemnatoria.
Arbitrium (might be in nature of fine.).

Execution

Controlled by magistrate
Issued against

Person. Property.
LECTURE XIV

JUS GENTIUM, CONTINUED.

THE FORMULARY PROCEDURE.

Another important contribution of the praetor was the formulary procedure. This was, indeed, partly evolved from the old *legis actio per conditionem*, but in time it became something very different tho it was placed on an equality with the *legis actiones* by the *lex Aebutia* of the second century B.C.¹ Under the formulary procedure a lawsuit included two stages,² the first before the praetor himself (*in iure*) and the second (*in iudicio*) before an official termed *judex*³ but, who resembled the modern referee more than a judge.

**Formula.** The praetor’s function was to draft the formula, an instrument serving, in part, the purpose of both pleadings and instructions,⁴ and which embodied the issue of fact which the *judex* was to decide.⁵ The composition of the formula is thus described by Gaius ⁶:

“Sec. 39. The formula is composed of the *Demonstratio*, the *Intentio*, the *Adjudicatio*, the *Condemnation*.

Sec. 40. The principal function of the part of the formula called *Demonstratio* is to indicate the subject-matter of dispute, (the cause of action, the title of the plaintiff’s right, the origin of his claim), as in the following example: ‘Whereas Aulus Agerius sold a slave to Numerius Negidius,’ or, ‘Whereas Aulus Agerius deposited a slave in the hands of Numerius Negidius.’

Sec. 41. The *Intentio* is that part of the formula which expresses the claim of the plaintiff, thus: ‘If it be proved that Numerius Negidius ought to convey ten thousand sesterces to Aulus Agerius;’ or thus: ‘Whatever it be proved that Numerius Negidius ought to convey or render to Aulus Agerius;’ or thus: ‘If it be proved that the slave in question belongs to Aulus Agerius by the law of the Quirites’.

Sec. 42. The *Adjudicatio* is that part of the formula which empowers the *judex* to transfer the ownership of a thing to one of the litigants, and occurs in actions for partitioning an inheritance between co-heirs, for dividing common property between co-partners, and for determining boundaries between neighboring landholders. In these the praetor says: ‘The portion of the property that ought to be transferred to Titius, do thou, *judex*, by thy award transfer to him!’

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¹ Muirhead, Roman Law, sec. 44.
² Sohm, Roman Law, sec. 47.
³ Or *recovery* if either party were *peregrinus*.
⁴ There is a similar practice in the modern Scotch law. See Scottish Jurist, XXXIII, 287.
⁶ Institutes, IV, 39-44.
Sec. 43. The Condemnation is that part of the formula which empowers the judex to condemn or absolve the defendant, thus: 'Do thou, judex, condemn Numerius Negidius to pay to Aulus Agerius ten thousand sesterces; if it be not proved, declare him to be absolved;' or thus: 'Do thou judex condemn Numerius Negidius to pay to Aulus Agerius a sum not exceeding ten thousand sesterces; if the case be not proved, declare him to be absolved;' or thus: 'Do thou, judex, condemn Numerius Negidius to pay to Aulus Agerius,' et cetera, without inserting any maximum limit as, e. g., of not more than ten thousand sesterces.

Sec. 44. These parts are not concurrent, but where some are present others are absent. Sometimes the Intentio is found alone, as in the prejudicial formula to decide whether a man is a freedman, or to ascertain the amount of a dower, or to settle other preliminary inquiries. But the Demonstratio, Adjudicatio, and Condemnation are never found alone, for the Demonstratio is inoperative without an Intentio and Condemnation, and the Condemnation and Adjudicatio are inoperative without a Demonstratio or an Intentio."

In order intelligently to draft a formula the praetor needed to hear the parties and the first stage consisted in listening to their contentions and hearing arguments upon questions of law; for such questions were invariably settled in the formula itself and were never left to the judex (who was a layman) so that the formula also became a repository of judicial precedent. After drafting the formula the praetor sent it to the judex for his guidance and the second stage of the trial took place when the parties appeared before the latter and he heard their evidence on the questions thus referred to him. According to the way he found thereon he proceeded to dictate the sententia which was indicated, for either outcome, in the formula. The judex could not, however, issue the execution, which was under the praetor's control and was against the defendant's person or property, successively.  

9. Id pp. 302–305.
SYLLABUS OF LECTURE XV

JUS GENTIUM, CONCLUDED.

Marriage between cives and peregrinae recognized.... { Wife given dowry at dissolution. Acusatio adulterii available to husband.

Familia

Followed status of mother. Exempt from patria potestas. But entitled to support.

Children....

Stipulatio enlarged.... { Form relaxed. Scope extended.

Literal (book entries)

New forms of contract introduced...

Real (requiring delivery) ....

Consensual (resting on consent alone)


Obligations...

Assignee recognized as owner and suitor.

Law of pledge developed by adopting from Greek law. (Hypotheca: simple pledge with right of sale on default. Antichresis: giving right to fruits and profits.

Rule of general average adopted from Rhodian sea law.

Bonitaria (praetorian) Supplemented "quiritaria" ownership recognized. Enforced by actio publiciana.

Creation of servitudes permitted by simple agreement (quasi traditio servitutis).

Property....

Land tenure by emphyteusis recognized.

(Fidei commissa (testamentary trusts) introduced.

Awarding of bonorum (Secundum tabulas possessio (decedent's property) to one not technically an heir. Contra Ab intestato.

Succession

Mancipatory will of jus civile becomes unitateral, and the familiae emptor a mere witness.
LECTURE XV
JUS GENTIUM, CONCLUDED.
EXTENT OF INFLUENCE

The extent of this foreign influence and of the broadening effect of contact with outsiders was wide and far reaching.¹ In the family law it brought recognition to marriages between ives and peregrinae (foreign women), subjected the unfaithful wife to a charge of adultery in such a marriage but authorized the return of dowry at its dissolution, gave children thereof the status of their mother so as to exempt them from the patria potestas but still entitled them to support.² In the law of obligations³ the contract of stipulatio was enlarged—its form relaxed and its scope extended—and entirely new forms introduced. Besides the literal contracts, consisting of book entries, there were the real, requiring delivery, and including mutuum, (loan for consumption) commodatum (gratuitous loan for use) depositum (storage) and pignus (pledge); and the consensual, resting on consent alone and comprising emptio venditio (sale) locatio conductio (hiring) societas (partnership) and mandatum (agency). As directly illustrating the borrowing process then in vogue the law of pledge may be instanced. The pignus above mentioned was defective because, being a real contract, it applied only to movables.⁴ It was now supplemented by two contracts borrowed from the Greek law⁵ and applicable to immovables, viz., hypotheca (simple pledge with right of sale on default) and authichrosis, which gave also the right to fruits and income. So from the Rhodian sea law the Romans adopted, and transmitted to modern nations, the important doctrine of general average.⁶ A glimpse of liberal tendencies likewise appears in the recognition of the assignee of a contract as the real party in interest and the one entitled to sue.⁷ In the law of property "bonitary"⁸ or praetorian ownership supplemented the "quiritary" of the older law and a special proceeding (actio publiciana)

¹ Sohm, Roman Law, sec. 16.
² Muirhead, Roman Law, p. 237.
³ Muirhead, Roman Law, sec. 53; Howe, Civil Law (2nd ed.) p. 80 et seq.
⁴ Sohm, Roman Law, pp. 374, 375.
⁵ Id. pp. 375-378.
⁶ Howe, Civil Law (2nd ed.) pp. 87, 88.
⁷ Sohm, Roman Law, pp. 442, 443.
⁸ "Sec. 40. We must next observe that for aliens there is only one ownership and only one owner at the same time of a thing, and so it was in ancient times with the people of Rome, for a man had either quiritary dominion or none at all. They afterwards decomposed dominion so that one person might have quiritary ownership of an object of which another person had bonitary ownership.

Sec. 4. For if a mancipable thing is neither mancipated nor surrendered before a magistrate but simply delivered to a person, the bonitary ownership passes to the alienee, but the quiritary ownership remains in the alienor until the alienee acquires it by us ucapio; for as soon as us ucapio is completed, plenary dominion, that is, the union of bonitary and quiritary ownership, vests in the alienee just as if he had acquired the thing by mancipatio or surrender before a magistrate." Gaius, Institutes, II, 40, 41.
was provided for its enforcement. The creation of servitudes by simple agreement (quasi traditio servititis) was authorized, and land tenure by emphyteusis recognized. Now also fidei commissa (testamentary trusts) were introduced and honorum possessio (of a decedent) began to be awarded to other than technical heirs. Finally the mancipatory will of the jus civile was transformed into an unilateral instrument, the familiae empor becoming a mere witness.

10 Muirhead, Roman Law, sec. 69.
11 Id. sec. 70. Cf. Maine, Ancient Law, 299, 302, 303.
12 Sohm, Roman Law, pp. 572-574.
SYLLABUS OF LECTURE XVI

Character

"The law which nature has taught all living things so as to be common to men and beasts."

Benefits available to all human beings per se.

Source

Doctrines of the philosophers, especially the Stoics.

Tiberius Coruncinus, first plebeian Pontifex Maximus and interpreter of law to the people.
P. M. Scaevola, 133 B. C.
Servius Sulpicius, b. 106 B. C.

The schools of Jurisconsults

Proculian, or Pegasian (Labeo, founder).
Sabinian, or Cassian.
(Capito, founder).

Jus Naturale:

Formulating Agency:

The five great Jurists (Ca. 2nd Cent., A. D.)

Paulus.
Ulpian.
Modestinus.
Papinian.
Gaius.

Opinions of licensed jurists given force of law by Augustus.

Hadrian's rescript allowed discretion where responsa conflicted

Responsa prudentium

The Valentinian Law of Citations. (426 A. D.)

Claims of blood recognized:

Emancipated children allowed to share in succession.
Collateral kindred of females recognized.

Mother given preferred right of succession to children and vice versa.

Duty of faithfulness to engagements emphasized.
Equitable apportionment of gain and loss.
Intent given preference over form.

Examples of influence
LECTURE XVI

JUS NATURALE.

THE FLOWERING OF ROMAN JURISPRUDENCE.

For the source of the leading doctrines of its fourth stage Roman Law is indebted to the Greek philosophers and especially to the Stoics. There had, indeed, been a succession of eminent Roman jurists commencing with Tiberius Coruncanius, the first plebeian pontifex maximus, (B. C. 253) and interpreter of law to the people, and including such distinguished names as P. M. Scaevola (B. C. 133) and Servius Sulpicius (b. 106 B. C.) But during the period now reached, the last century of the republic, philosophical study was much in vogue at Rome and its conceptions of a law of nature were borrowed by the Roman jurists who strove, in some degree successfully, to make their law one whose benefits were available to all human beings per se and even, as defined by one of them (Ulpian),

"The law which nature has taught all living things, so as to be common to men and beasts."

The jurists were divided into two schools, the Proculians or Pegasiens who looked to Labeo as their founder, and the Sabinians or Cassians founded by Capito.

"If we now inquire whether this divergence of schools was based on any difference of principle, the answer is, No: on none, at least, that modern commentators have succeeded in discovering: it was merely a difference on a multitude of isolated points of detail. We are told indeed that the founders were men of dissimilar characters and intellectual positions: that Labeo was characterized by boldness of logic and a spirit of innovation; while Capito rested on tradition and authority, and inclined to conservatism, Dig. 1, 2, 47; but it is altogether impossible to trace their opposing tendencies in the writings of their successors: and we must suppose that the intellectual impulse given by Labeo was

1 "The alliance of the lawyers with the Stoic philosophers lasted through many centuries. Some of the earliest names in the series of renowned jurisconsults are associated with Stoicism and ultimately we have in the golden age of Roman jurisprudence, fixed by general consent as the era of the Antonine Caesars, the most famous disciples to whom that philosophy has given a rule of life. The long diffusion of these doctrines among the members of a particular profession was sure to affect the art which they practiced and influenced", Maine, Ancient Law, 55, 56.

2 "As society developed and the inevitable division and function of labor came, the jurist proper made his appearance,—a man of high position and learning, such as Cicero delighted to describe, delivering his carefully prepared opinions on points of controversy, and attended by his young disciples who noted his decisions on their tablets, and treasured them up as horn books of the law. Such a jurist was Tiberius Coruncanius, who flourished in the third century before the Christian era, and who is mentioned in the Pandects as the first who may be said to have made a profession of jurisprudence. It is interesting to notice that he was the first plebeian who ever attained the great office of Pontifex Maximus, and his undertaking to teach the mysteries of the law was a very important step of progress toward popular enlightenment upon such questions." Howe, Civil Law, 73.
communicated to the followers of both schools of jurisprudence. But though, as we have stated, no difference of principle was involved, each school was accustomed to follow its leader or teachers (praecptores) with much servility; and it is quite an exception to find, on a certain question, Cassius, a member of the Sabinian school, following the opinion of Labeo; while Proculus, who gave his name to Labeo's school, preferred the opinion of Otilus, the teacher of Capito, 3 sec. 140; Gaius too, who was a Sabinian, sometimes inclines to the opinion of the rival school.3

The second century of our era witnessed the rise of a brilliant group known as the "five great jurists"—Paulus, Ulpian, Modestinus, Papinian4 and Gaius—who, though of non-Italian blood, soon attained a position of commanding authority at Rome. Eventually, by the Valentinian law of Citations (A.D. 426) they were given a specific rank and a certain weight was assigned to each.5 Under Augustus the opinions of certain licensed jurists were given the force of law and the responsa prudentium, as these opinions were called, occupied a place in Roman jurisprudence not unlike the judicial decision of the modern law.6

Such were the factors which tended to shape the Roman Law into a jus naturale. As results we find claims of blood taking preference over merely artificial relationships. Emancipated children allowed to share in the succession, the collateral kindred of female-recognized, and the mother given the preferred right to succeed over the children.7 In the law of obligations the duty of faithful performance rather than of literal observance was emphasized, an equitable apportionment of loss and gain sought, and in general revers ing the thought of the primitive law, intent was given preference over form.8

3 Poste's Gaius (Whittuck's ed.) 12 "Cf. 3, sec. 98. Controversies between the two schools are referred to by Gaius in the following passages of his Institutes: 1, 196; 2, 15, 37, 79, 123, 195, 200, 226-222, 231, 244; 3, 87, 98, 103, 141, 167-8, 177-8; 4, 73-9, 114, 170." Id.
4 Juridical Review, V, 297.
5 Muirhead, Roman Law, sec. 78.
6 Id. sec. 59. "Books of Responses bearing the names of leading jurisconsults obtained an authority at least equal to that of our reported cases and constantly modified, extended, limited or practically overruled the provisions of the Decemviral law. * * * The Responses of the early lawyer were not, however, published, in the modern sense, by their author. They were recorded and edited by his pupils and were not therefore, in all probability, arranged according to any scheme of classification." Maine, Ancient Law, 34, 35.

A rescript of Hadrian allowed election where responsa were conflicting.

7 Muirhead, Roman Law, pp. 281 et seq.
8 Id.
SYLLABUS OF LECTURE XVII

JUS NATURALE, CONTINUED,

INSTITUTES OF GAIUS.

"A course of elementary lectures by a professor of no marked distinction it appears to have grown steadily in reputation." 1

Written in second century A.D.; product of an age of literary activity. 2

"From the way in which it is mentioned by Justinian we may infer that for 351 years the elite of the youth of Rome were initiated in the mysteries of jurisprudence by the manual of Gaius much as English law students have for many years commenced their labors under the auspices of Blackstone." 3

Yet not a satisfactory text book for the modern student; valuable now chiefly as a source and for purposes of comparison.

Because the basis of arrangement too not of substance of Justinian's Institutes.

Text disappeared in Middle Ages.

Rediscovered by Niebuhr 1816.

"Niebuhr noticed in the library of the Cathedral Chapter at Verona a manuscript in which certain compositions of Saint Jerome had been written over some prior writings, which in certain places had themselves been superposed on some still earlier inscription. In communication with Savigny, Niebuhr came to the conclusion that the lowest or earliest inscription was an elementary treatise on Roman Law by Gaius, a treatise hitherto only known, or principally known, to Roman lawyers by a barbarous epitome of its contents inserted in the Code of Alaric II, King of the Visigoths (sec. 1, 22. Comm.) The palimpsest or rewritten manuscript originally contained 129 folios, three of which are now lost. One folio belonging to the Fourth Book (sec. 139-sec. 144), having been detached by some accident from its fellows, had been published by Maffei in his Historia Theologica, A.D. 1740, and republished by Haubold in the very year in which Niebuhr discovered the rest of the codex.

Each page of the MS. generally contains twenty-four lines, each line thirty-nine letters; but sometimes as many as forty-five. On sixty pages, or about a fourth of the whole, the codex is doubly palimpsest. I.e. there are three inscriptions on the parchment. About a tenth of the whole is lost or completely illegible, but part of this may be restored from Justinian's Institutes, or from other sources; accordingly, of the whole Institutions about one-thirteenth is wanting, one half of which belongs to the Fourth Book.

From the style of the handwriting the MS. is judged to be older than Justinian or the sixth century after Christ; but probably did not precede that monarch by a long interval.

In a year after Niebuhr's discovery the whole text of Gaius had been copied out by Gosechen and Hollweg, who had been sent to Verona for that purpose by the Prussian Royal Academy of Sciences, and in 1820 the first edition was published. In 1874 Studemund published an apograph or facsimile volume, the fruits of a new examination of the Veronese MS. and in 1877 Studemund, with the assistance of Krueger, published a revised text of Gaius founded on the apograph." 5

1 Buckland, Roman Law, i.
2 Greenidge's Introduction to Poste's Gaius, li.
3 Id.
4 Buckland, Roman Law, 3.
5 Greenidge, Introduction to Poste's Gaius, iii, liii
INSTITUTES OF GAIUS, CONTINUED.

De Personis (Lib. I)

Sui juris

Servi

Filiae familiæ

De Nuptiis

Usus.

Personae in manu

De adoptionibus.

Farreo.

Coemption

Subjecti

In tutela

In curatone.

De emancipione (116-123)

Res sacræ; dedicated to the gods above.

Res religiosae; dedicated to the gods below.

Disjunct juris

Publicae

De manus

Privatae

Corporales

Incorporales

Mancipii: transferable only by mancipatio.

Nec mancipii:

Traditio

Usucapio

Occupatio

Accretion

Humani juris

Alienation

Capacity

Testamenta

Bonorum possessio (II, 119; III, 23-37).

Succession

Sui heredes.

Order

Ignati

Cognati

Of freedmen

Lib. III.

Obligationes

Ex contractu

Real

Verbal

Literal

Consensual

Furtum

Rapina

Damnun

Injuria

Ex delicto

In rem

personam

Compensatio (set off)

Perpetua

Temporalis

Exceptiones (IV, 115-130)

Præscriptio

Classes

6 "His subject does not in the least resemble the Law of Persons as conceived by Austin, of Bentham's Special Codes. Dr. Moyle has shewn that Savigny's conception of it as the Law of the Family is quite inadmissible. It is in fact hardly possible to mark it off as a branch of the law, having as its subject-matter any set of rights and duties. That is not the writer's point of view: he is merely giving an account of the principal differences of Status which the student will meet." Buckland, Roman Law, 13, 14.
SYLLABUS OF LECTURE XVIII

Character

\{ \begin{align*}
\text{Generally in jure only} & \quad \{ \text{E.g.} \\
\text{Originally applied to disputes which} & \quad \{ \text{Public Property.} \\
\text{might involve public order.} & \quad \{ \text{Restitution of children or} \\
\text{Originally administrative} & \quad \{ \text{relatives.} \\
& \quad \{ \text{Neighborhood quarrels,} \\
& \quad \{ \text{etc.} \\
\end{align*} \}
\}

A direction to the parties to act or refrain from acting in
a particular way (Cf. injunction).
Might be followed by ordinary procedure.

Interdictum

\{ \begin{align*}
\text{Restitutorium} & \quad \{ \text{Unde ri (deprivation.)} \\
\text{to restore} & \quad \{ \text{Quod ri aut clam} \\
\text{Simplicia} & \quad \{ \text{(damage).} \\
\text{to produce} & \quad \{ \text{Uli possidetis (immovables).} \\
\text{Prohibitorium} & \quad \{ \text{Trubi (moveables).} \\
\text{Classes.} & \quad \{ \text{neither}
\text{Duplicita} & \quad \{ \text{party plaintiff} \}
\{ \text{neither}
\end{align*} \}
\}
\}

Remedies

\{ \begin{align*}
\text{Restitutio in} & \quad \{ \text{Minorum on account of dolus (fraud).} \\
\text{integram} & \quad \{ \text{Majorum on account of dolus,} \\
\text{Stipulatio} & \quad \{ \text{metus (intimidation).} \\
\text{praetoria:} & \quad \{ \text{error,} \\
\text{Requirement of security against damage to another.} & \quad \{ \text{absentia,} \\
\text{Missio in} & \quad \{ \text{First step: Complaint addressed to magistrate.} \\
\text{possessionem:} & \quad \{ \text{Evocatio or summons.} \\
\text{A form of execution against judgment and absconding} & \quad \{ \text{Causa cognitio (investigation).} \\
\text{debtors, etc.} & \quad \{ \text{Decretum (Judgment).} \\
\end{align*} \}
\}
\}
\}
\}

IMPERIUM 
AND 
PROCEDURE 
EXTRA 
ORDINEM
LECTURE XVIII

JUS NATURALE, CONTINUED.

IMPERIUM AND PROCEDURE EXTRA ORDINEM.

Progress under the Jus Naturale was not confined to the substantive law. For in this period the procedure extra ordinem came into vogue and new remedies for emergencies were provided which might be granted by the praetor in jure without the fatal delays attending a reference to the judex. ¹ Such was the interdictum, ² undoubtedly parent of the injunction of English law, of which it has been said:

"The characteristic of the procedure by interdict was this,—that in it the praetor reversed the ordinary course of things, and, instead of waiting for an inquiry into the facts alleged by a complainer, provisionally assumed them to be true, and pronounced an order upon the respondent which he was bound either to obey or show to be unjustified." ³

Such also was the restitutio integrum, ⁴ progenitor of the modern equitable rescission for fraud or mistake; the stipulatio praetorio, ⁵ resembling the present day bond to keep the peace; and the missio in possessionem, ⁶ or attachment against judgment and absconding debtors. To obtain these also a simpler, and more rational procedure was permitted, beginning with a complaint addressed to the praetor, followed by the evocatio or summons (instead of the brawl-producing vocatio in jus) the causae cognitio or investigation and finally by the decretum. ⁷

¹ Sohm, Roman Law, (3d. ed.) sec. 56 (1) ; Hunter, Roman Law, pp. 1012, et seq.; Muirhead, Roman Law, sec. 72 (cf. sec. 38).
² Gaius, Institutes, IV, 141 ; Sohm, sec. 56 (11) ; Howe, Civil Law, pp. 350 351 ; Mackenzie, Roman Law, pt. V. ch. IV ; Mackeldy, Roman Law, secs. 255-264 ; Hunter, pp. 357. et seq., 379, et seq. Cf. the interdicto of the Spanish law, Ley de Enjuiciamiento Civil, Arts. 1613-1667.
³ Muirhead, Roman Law, p. 346.
⁴ Sohm, Roman Law, sec. 56 (III) ; Muirhead, Roman Law, 7, p. 350.
⁵ Muirhead, Roman Law, pp. 348, 349.
⁶ Id. pp. 349, 350
⁷ Id.
SYLLABUS OF LECTURE XIX

Consolidation of Praetorian Edicts

<table>
<thead>
<tr>
<th>Consolidation of Praetorian Edicts</th>
<th>Effected by Salvius Julianus under order of Emperor Hadrian before A. D. 129.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Ratified by <em>Senatus Consultum</em> and extended to provinces.</td>
</tr>
<tr>
<td></td>
<td>Further changes possible only thru Emperor.</td>
</tr>
</tbody>
</table>

Praetor's office continued to lose its importance from reign of Diocletian (A. D. 284 to 306)

<table>
<thead>
<tr>
<th>In Rome and Constantinople functions gradually absorbed by <em>praefectus urbi</em>.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provincial governors instructed to hear causes wherever practicable.</td>
</tr>
<tr>
<td><em>Judex pedaneus or delegatus</em> appointed to act in lieu of Magistrate.</td>
</tr>
<tr>
<td>Rescript addressed by Emperor to <em>judex</em> contained provisional decision.</td>
</tr>
</tbody>
</table>

THE LIBELLIARY PROCEDURE

Formulary procedure gradually disused and finally abandoned.

A. D. 294 reference to *judex* forbidden unless required by pressure of business.

*Actio ex interdicto* expanded.

<table>
<thead>
<tr>
<th>Proceedings initiated by <em>libellus conventionis</em></th>
<th>Brief statement of action.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Formal undertaking to prosecute cause to judgment.</td>
</tr>
</tbody>
</table>

*Interlocutio* (order of service on respondent).

*Libellus contradictionis* (Answer)

Dilatory pleas heard; e.g., lack of jurisdiction.

Amendment of pleadings permitted.

Execution might be

<table>
<thead>
<tr>
<th>Specific.</th>
<th>Pecuniary: realized from sale of sufficient property.</th>
</tr>
</thead>
</table>

Appeals to Emperor.
LECTURE XIX

JUS NATURALE, CONCLUDED.

THE LIBELLARY PROCEDURE.

Increasing resort to this extraordinary procedure was doubtless one of the factors which led ultimately to the abandonment of the slower and more cumbrous formulary system. Another factor was the growing power of the emperor, which was inconsistent with the independence theretofore enjoyed by the praetor and eventually brought about the consolidation and cessation of the praetorian edicts and the abolition of the praetorship. Under the new system proceedings were instituted by the libellus (whence libel, bill) conventionis and hence the procedure was known as libellary. Next came the inerlocutio (order for service on respondent) and then the libellus contradictionis or answer. Dilatory pleas (e. g. challenging jurisdiction) were entertained and amendment of pleadings permitted. These proceedings all took place before a judex pedaneus or delegatus who acted under the authority of a rescript (containing, somewhat like the formula, a provisional decision) issued by the emperor, and appeals lay to the latter.

Such was Roman procedure as crystallized in its final stage and before it was taken over by the ecclesiastical courts and preserved and passed on by them to the English chancellors and eventually to American tribunals inheriting their jurisdiction.

Meanwhile the territorial scope of the Roman Law’s operation had expanded from the limits of a small inland city to the confines of the civilized world. But this contrast was no greater than the change, in character and substance, which the Roman law had undergone during the long period commencing with jus quiritium and ending with jus naturale.

1. Sohm, Roman Law, sec. 17; Muirhead, Roman Law, sec. 58.
2. Langdell, Equity Pleading, p. 1 et seq.


SYLLABUS OF LECTURE XX

THE AGE OF CODIFICATION.

Nature: A reduction of the entire body of the law to certain, simple, statutory form, logically arranged. ¹

Cicero's ideal. Codification planned by Julius Caesar.

Practical steps

"Codification began with praetor's edict."

Hadrian's 129 A. D.
Gregorian, ca. 300 A. D.
Early collections of Imperial Rescripts - - -
Hermogenian, ca. 363 A. D.
Used in preparing Alaric's Breviary

506.

The Valentinian Law of Citations, 426.

Commission of 9 appointed, 429 (abortive).
New Commission of 16 appointed, 435.
Both Commissions under presidency of Antiochus, a former consul.
Code published, 438.
Consisted of 16 books, divided into titles.
Arranged on traditional plan of praetor's edict.
Included one book on crimes and one on religion.
Subject of numerous commentaries.
400 of its 3400 enactments appear in Alaric's Breviary.

Codex Theodosianus

Novellae constitutiones

Imperial edicts issued after Codex.
30 of 101 known extracts reproduced in Breviary.

Foregoing formed basis of Justinian's Corpus Juris Civilis.

¹ Hepburn, Historical Development of Code Pleading, 1–6.
LECTURE XX

THE AGE OF CODIFICATION.

PRELIMINARY STEPS.

In its thousand or more years of evolution the Roman law, like the Anglo-American of to-day, now found itself in a chaotic state as regards form and expression. The crude and primitive Twelve Tables, long obsolete and partly lost, had been followed successively, as we have seen, by leges and plebiscita. by the edictum perpetuum, by responsa prudentium and the commentaries of great jurists; but neither any one nor all of these together contained the whole body of the law. To reduce it to systematic and accessible form was the one remaining need. Cicero\(^1\) had dreamed of a system of universal law but the more practical Caesar\(^2\) had actually planned a comprehensive scheme of codification which, had he lived, might have anticipated that of Justinian or even of Napoleon. It has been said\(^3\) that “codification began with the praetor’s edict.” In the sense that the edictum perpetuum afforded a crude basis for the codemakers this is true. Hadrian’s rescript (A. D. 129) for the consolidation of the edicts may therefore be regarded as a step toward codification and more advanced were the rescripts\(^4\) of Gregorian (ca. 330) and Hermgenian (ca. 363). The Valentinian Law of Citations (426) was another link in the chain. But the first practical effort at real codification was made under the Emperor Theodosian. After the appointment in 429 of a commission of nine, which proved abortive, a new commission of sixteen was appointed. Both commissions were under the presidency of Antiochus, a former consul, and a compilation, since known as the Codex Theodosianus, or Theodosian Code, was published in 438. It consisted of sixteen books, divided into titles, including one book on crimes and one on religion, and was arranged on the traditional plan of the praetor’s edict.\(^5\) A supplement to the Code (Novellae) containing imperial edicts, was published later\(^6\) and numerous commentaries appeared. Indeed Theodosian’s was the only Roman Code known in the west for centuries and when Alaric the Visigoth issued his famous Breviarium for his Roman subjects he drew largely from the former, four hundred of its thirty four hundred enactments reappearing in the Breviary which also reproduced thirty of the one hundred and four known extracts from the Novellae.

1  "Non est alia lex Romae, alia Athenis, alia nunce, et alia posthaec, sed apud omnes gentes, et omni tempore una lex et sempiterna et immortalis, continebit" De Republica.

2  Plutarch’s Life of Caesar, 58.

3  Wilson, The State, sec. 279.

4  Muirhead, Roman Law, sec. 79; Hunter, Roman Law, pp. 85, 86; Sohm, Roman Law, sec. 21; Mackenzie, Roman Law, sec. 22-23.

5  Muirhead, Roman Law, sec. 80; Hunter, Roman Law, pp. 86, 87.

6  Muirhead, Roman Law, p. 369; Sohm, Roman Law p. 125; Hunter, Roman Law, p. 87.
SYLLABUS OF LECTURE XXI

THE AGE OF CODIFICATION, CONTINUED.

Preliminary announcement by Emperor Justinian at Constantinople, Feb. 13, 528.

Under presidency of Tribonian.

Framed by Commission of 16: 4 Law professors; 11 lawyers.

Appointed Dec. 530.

An introduction to the work.

An elementary text book for use in law schools of Berytus.

Constantinople.

Mainly work of Theophilus and Dorotheus, respectively.

profs respectively in the two first named schools.

Institutes


Divided into four books. Based on works of


Completed and published, November 21, 533

"The soul of the Corpus."

Collated from the works of 39 authors.

Aggregate number of extracts over 9,000.

Digest or

Pandects

Commission worked in three sections, each on a different group.


About one-third taken from Ulpian.

Formed much the largest fraction of Corpus Juris Civilis.

Divided into 50 books and subdivided into 7 parts.

Arranged on model of edictum perpetuum and XII Tables.

Issued December 30, 533.

Parts...

Contained more public and criminal law than the Digest.

Divided into 12 books.

Orationes: Proposals to Senate.

Edicta: Laws proclaimed without ratification.

Sources Constitutions: Documents issuing from emperor.

Mandata: Instructions to subordinate officials.

Decreta: Decisions on legal points.

Rescripta: Answers to queries of citizens or officers.

Epistolae (letters)

Codex

Published November, 534.

Novels (Novellae Constitutions)

A supplement to the Corpus Juris.

Containing later enactments, added down to 567.

Mostly in Greek or Greek and Latin.

Relate mainly to public and ecclesiastical affairs.

But some deal with private, especially intestate succession.

Legend of rediscovery at Amalfi in 1147.
LECTURE XXI

THE AGE OF CODIFICATION, CONTINUED.

THE CORPUS JURIS CIVILIS.

But the centre of imperial power had shifted to the east and less than a century of experience with Theodosian's work was sufficient to show the need of something better. So on Feb. 13, 528, at Constantinople, the Emperor Justinian made his preliminary announcement of a far more comprehensive scheme of codification than had yet appeared. But the emperor took practically no part in preparing the famous work which bears his name. That task was accomplished by a commission appointed in December 530 and numbering (like the second of Theodosian's) sixteen, including Tribonian, the president, four law professors and eleven practitioners. The scheme included four distinct books, viz.:

(I) Institutes. This was designed both as an introduction to the entire work and as an elementary textbook for use in the Roman law schools like those of Constantinople, Berytus and Rome. Hence it was mainly the work of Theophilus and Dorotheus, professors respectively in the two first named schools. It was based upon the commentaries of Gaius, Ulpian and Marcianus, was divided into four books, treating respectively of Persons, Property, Obligations and Actions and was completed and published Nov. 21, 533.

(II) Digest or Pandects. This was intended to be the most practical, as it was most extensive, portion of the scheme. It covered substantially the entire body of Roman private law and hence has been called "the soul of the corpus," its purpose being "to extract the spirit of jurisprudence from the decisions and conjectures, the questions and disputes of the Roman civilians." In preparing it the commission worked in three sections, one engaged on subjects of jus civile, the second on those of jus gentium and the third on miscellaneous branches. They collated from thirty-nine authors, material comprising over nine thousand extracts of which about one third were from Ulpian. It was arranged, it is said on the model of the Twelve Tables and the editio perpetua. and was divided into fifty books and subdivided into seven parts. The

1 While more commonly known in the Anglo-Saxon world as the Corpus Juris Civilis, the work is also called, especially in Continental Europe, the Pandects which name, however, is likewise applied to the second of the four books. On their history and general character see Muirhead, Roman Law, pp. 376-80 (XX Ency. Brit. 712 et seq.); Hadley, Roman Law, Lecture I; Mackenzie, Roman Law, pt. I, Ch. II; Gibbon, Decline and Fall of the Roman Empire, Vol. IV.

2 See Muirhead, Roman Law, pp. 382-383; Solm, Roman Law, (3d. ed.) p. 126. English translations of the Institutes have been made by Cooper and Sanders, the latter having also been edited by Hammond.

3 Muirhead, Roman Law, pp. 383-385; Solm, Roman Law, pp. 126-128.

4 Hadley, Introduction to Roman Law, 11.

5 Gibbon, Decline and Fall of the Roman Empire, V., 283 et seq.

6 Roby, Introduction to the Study of Justinian's Digest (1886) 29.

7 Hammond, Introduction to Sandars' Justinian, pp. xxii-xxv.
authors inform us that they "have not adopted this division by chance and without reason, but upon consideration of the nature and mystery of those numbers, and so making an arrangement appropriate to them."

(III. Codex. This contained more public and criminal law than the Digest and its leading sources were the constitutiones or documents issuing from the emperor, such as edicts, rescripts and decrees. It was divided into twelve books and published in November, 534.

(IV) Novels (Novellae Constitutiones). As with Theodosian's Code these formed a supplement containing enactments after the other parts had been published and as late as 565. They relate mainly to public and ecclesiastical affairs but some deal with private law and especially intestate succession. They are written mostly in Greek, alone or with Latin.

Such was the work with which Justinian crowned his own reign and the twelve centuries of Roman legal evolution. But its influence has not only furnished the model for all subsequent codes; it has supplied the name and, let us hope, the inspiration also for the most comprehensive exposition yet undertaken of the Anglo-American law.


This probably suggested both the arrangement and the name of the famous mediaeval Spanish code "Las Siete Partidas" which, like the Digest, discourses at length, in its "Septenario", on the importance of this number.

"The mystic meaning of the number seven is not of importance to us here and now; and it may be sufficient to say that the first part included four books, and treated generally of the history of jurisdiction of tribunals, of appearance therein, and exceptions or defences; the second part was entitled, de judicis, and concerned judgments, and contained seven books, the third part, de rebus, contained eight books, the fourth part, umbilicum concerned hypothec, edicta, rules as to certain actions, and matters concerning marriage and tutorship, and contained eight books; the fifth part contained nine books, de testamentis; the sixth part treated of various matters of succession, servitude, injunction, and also of certain obligations, and included eight books, while the seventh part, in six books, contained the subject of obligations, ex contractibus and ex delicto, and treated also of crimes, appeals, and interpretation." Howe, Studies in the Civil Law, 17.

12. The Novellae also find a counterpart in the so-called "Manchu Code" (Ta Ch'ing Lü Li) of China.

"This was promulgated in the year 1647 of the western chronology, under the Emperor Shun Chih, the first of the late Manchu or Ch'ing Dynasty. It may well be called the Chinese Corpus Juris, for it includes the original text (Lü) corresponding to the first three parts of Justinian's Pandects and the supplemental laws (Li) answering to the Novellae of Justinian. The former (Lü) were translated into English and published in London in 1810 by Sir George Thomas Staunton, an attache of the first British diplomatic mission to China (1793) * * * * Staunton's work was soon utilized by other western scholars. A French translation of it by Felix Renouard de Sainte Croix was published in 1812 and later a Spanish translation, probably from the latter, was rendered. A copy of this is now in the government law library of Manila." Lohinger. A Bibliographical Introduction to the Study of Chinese Law, 113, 114.

13. "This book we owe to great Justinian's hand Framed by Tribonian's toil at his command. As art's best wonders grace Alcides' shield, So the best Jurists' thoughts these pages yield: Thence Europe, Asia, and each Libyan horde Learn to obey the world's Imperial Lord."

Translation of Greek epigram said to have been inscribed in Amalfi copy of Pandects. As to the legend (now generally discredited) of their loss and rediscovery at Amalfi, see Irving, Introduction to the Civil Law, pp. 78-84.
SYLLABUS OF LECTURE XXII

INSTITUTES OF JUSTINIAN.

Liberti 1

Liberti (manumitted) 2

Liberti 1 (free born)

Mother alone free at child's birth.

Origin

Captivity.

Self-sale.

Conviction.

Servi 1

Birth (of slave mother) 3

Protection: "Sed hoc tempore nihilominibus, qui sub imperio nostro sunt.
licet, sine causa legibus cognita, in servos suos sapientia moneant."

Servi are now cities.

Omnes libertos, nullo nec etatis manumissi, nec dominii manumissoros, nec in manumissionis modo discernere habere, nesciunt; dedit unusque libitum, civitatis Romanae d omnibus, multa modis additis per quos possit libertas servis cum civitate Romana, quae sola est in praestant, praestari." 4

Civitas

Extended to all lineage descendents in male line. 5

LIBER I:

PERSONS

(Tria capita)

Patria potestas. 6

Matrimonium... 7

Legitimatio

Adoption 12

By authority of magistrate

Termination 13

Death of parent.

Emancipation.

Manus (wife)

Testamentary

Judicial

Kinds

Testator (general).

Authority (succession for property, etc.)

Tutores 11

Curatores 18 (guardians of property of)

Adolescentes (under 25).

Furiosi (madmen).

Prodigii (spendthrifts).

In loco parentis

Excuses.

Supervision. 17

Security.

Acquittal.

Removal.

1 Tit. IV.
2 Tit. V (1).
3 Tit. VI, VII.
4 Tit. III (2—5); Sohn, Roman Law, sec. 32.
5 Paribus sequitur materem.
6 Tit. VIII (2).
7 Tit. V (3); Sohn, sec. 33.
8 Sohn, Sec. 34.
9 Tit. IX (3).
10 Id. (1).
11 Tit. X.
12 Tit. XI.
13 Tit. XII.
14 Tit. XIV—XXII.
15 Tit. XIX.
16 Tit. XXIII—XXIV.
17 Tit XXV.
18 Tit. XXVI.
19 Tit. XVI; Sohn, sec. 35.
SYLLABUS OF LECTURE XXIII

INSTITUTES OF JUSTINIAN, CONTINUED.

Definition: Whatever is capable of being the subject of a right.

As to ownership...

| In nostro patrimonio | Bona. |
| (individual) .... | Pecunia. |

Extra patrimonium nostrum.

| Res communes | Air. |
| Running water. | Fisheries. |
| Sea and shore. | Moorage, Wharfage, etc. |

Res publicae (public buildings)

| Unappropriated. |
| Sanctæ (consecrated buildings and grounds). |
| Sacrae (city walls). |

Res nullius

Tangible: (e.g., land, gold)

Res corporales

Kinds: {Mobiles, Immobiles.}

As to character....

| Res incorporeales |
| (intangible rights in general: Servitutes) |

| Praedial (de immobilibus) |
| Rusticas |

Urbanas

Support. Party walls. Water. Light and air

Usus fructus (right to use)

Distinct from res. Alienable

Personal

| Less extensive |
| (Capitis diminutio) |

Termination...

| Usus | Disuse |
| Surrender to owner. |
| Consolidatio |
| Destruction |

1 Tit. I, 1-5; Sohm, Roman Law, p. 230 et seq.
2 Tit. I, 6.
3 Id. 7-10
4 Tit. II.
5 Tit. III; Sohm, sec, 63.
6 Tit. IV: Tit. I, 36-38.
7 Tit. V;
SYLLABUS OF LECTURE XXIV

INSTITUTES OF JUSTINIAN, CONTINUED.

Limitations

Wife's dowry inalienable.

Pupilli can not alienate without tutor's consent. ¹

Personally.

By filii familiarum.

" servi.

" procuratores.

Means ² . . .

Animales ferae naturae, ³

War booty ⁴

Treasure trove ⁵

Occipatio . . .

Requisites

| Good faith.
| Alienable property.

Excludes.

| Free persons.
| Sacred things.
| Fugitive slaves.

Usucapio ⁶

(prescription)

Mobiles, 3 yrs.

Period

| 10 years parties present.
| 20 years parties absent.

Immobiles

Modes . . .

Increase of animals.

Accretion . . .

| Avulsion.
| Alluvion.

Accessio ⁷ . . .

Transformation.

| Confusio (liquids).
| Commixto (solids).
| Adjunctio.

Improving another's property.

Traditio ⁸ (delivery)

Donatio ⁹ . . .

| Mortis causa (nearly like legacy).
| Inter vivos . . .
| Ordinary.
| Propter nuptias.

¹ Tit. VIII.
² Tit. IX.
³ Tit. I, 12-16, inc.
⁴ Id. 17.
⁵ Id. 18, 39, 47.
⁶ Tit. VI; Sohm, Roman Law, pp. 336-341.
⁷ Tit. I: 19-35 inc.
⁸ Id. 40-43 inc.; Sohm, Roman Law, pp. 330-332.
⁹ Tit. I, 44.

Cont’d.—"Treasure trove is gold or silver hidden in the ground, the owner being unknown. Such treasure naturally belongs to the finder; but the laws or customs of any country may ordain otherwise. The Roman law on this subject varied at different periods. By Hadrian's constitution, which is referred to in the Institutes, when treasure was found by any one on his own ground it became his property; but if it was accidentally discovered by a person on the ground of another, one-half belonged to the finder and the other half to the landowner. This rule is adopted in the modern French Code. In Britain and some other countries treasure-trove belongs to the crown or its grantees." Mackenzie, Roman Law (7th ed.) 175.
SYLLABUS OF LECTURE XXIV

INSTITUTES OF JUSTINIAN, CONTINUED.

Rome's gift to the world. 1
Immaterial on what.
But required to be in presence of 7 witnesses.

Written... 2
Had to subscribe.

Implicates permitted 4
Competent: all those with testamenti facio

Codicils (Supplements to wills not requiring formalities of originals). 5
Incompetent.

Nuncupata: declared orally before 7 witnesses 6
Military: Soldiers in service could make wills by merely declaring intention. 7

Testamentary capacity: Incompetent. 8
Those in another's power (captive).
Children.
Lunatics (except during lucid intervals).
Prodigals.
Deaf and dumb from birth (except soldiers).
Blind.
Children must be expressly instituted as heirs or disinherited. 9
Inapplicable to Mothers.

Remedy... 10
Maternal grandfathers.
Soldiers.

Action de inoficioso testamento. 11
Lineal heirs.
Brothers and sisters.
Those totally disinherited.

Other requisites
Number unlimited. 13
Conditions permitted.
Might be strangers.
Might be slaves.
Substitution allowed 14
Vulgar.

Institution
Extranei (might decline).

Heirs 12...

Classes. 15
Those in testator's power at death.

Adoption of child.
Revocation 20.
Later testament.

Debts.

Direct and imperative gifts by testator.
Might be deemed (revoked). 17
Might be transferred.
Limited to three fourths. 18
Fidei commisa: precatory gifts thru the heir. 19

Legata 16
Necessary.
Liabilities
Maine, Ancient Law, Ch. VI; Sohm, Roman Law, pp. 574 et seq.: Muirhead, Roman Law see. 87.

Tit. X. 12.

Id. 3-11.

Id. 14.

Tit. XXV.

Tit. X. 14.

Tit. XI

Tit. XII

Tit. XIII, s.

Id. 6, 7.

Tit. XVIII.

Tit. XIV.

Id. 4.

Tit. XVI

Tit. XIX; Sohm 113

Tit. XX; Sohm, pp. 593 et seq.

Tit. XXI


Tit. XX, 3, 25; XXIII, XXIV; Sohm pp. 597 et seq.: Muirhead, Roman Law, Sec. 70.

Tit. XVII.
SYLLABUS OF LECTURE XXVI

INSTITUTES OF JUSTINIAN, CONTINUED.

Occurs in Testament of Testamentary heir.

Valid.

Unrevoke.

(Child of dis-inherited on failure of heir.

Grandchild be-gotten but un-born.

Emancipated.

Includes

Those in deceased’s power at his death

Excludes

Those adopted by another.

Unbegotten.

1. Sui heredes

Shares per stirpes (by the group) and not per capita.

Unaccepted portions of inheritance accrue to co-heir.

Accepted portion of deceased heir accrues to his heirs.

2. Agnati

Those related thru males.

Take according to proximity, nearest first.

Mothers given full right to succeed their children and vice versa.

Those related thru females only.

Includes

Adopted children.

Children of uncertain father.

INTESTATE SUCCESSION
(Lib. III. Tit. I-IX.)

Order of honorum 3. Cognati

posessio.

3. Great grand par-ents, etc.

2. Grand parents.

1. Parents.

Ascending

Grades or de-grees

1. Children.

2. Grand children.

3. Great grand children, etc.

Descending

2 Brothers and sisters.

3. Nephews and nieces.

Uncles or aunts.

4. Grand nephews and nieces.

First cousins.

Great uncles and aunts.

Collateral

4. Vir aut uxor (husband or wife). 12
5. The state (fiscus): Si nemo sit, ad quem bonorum possessio pertinere possit, aut sit quidem, sed jus suum omniserit, populo bona deferuntur.  

Succession of slaves and freedmen qualified by rights of patron.

1 Tit. I, Preamble: Muirhead, Roman Law, sec. 87; French Civil Code, Lib. III, Tit. I; Spanish Civil Code, Lib. III, Tit. III, Chs. 3. 4.
2 Tit. IX.
3 Tit. I.
4 Id. 6.
5 Tit. IV, 4.
6 Tit. II.
7 Lib. I, Tit. XV, I.
8 Lib. III, Tit. II, 5-7.
9 Tit. III.
10 Tit. V; Solun, Roman Law, pp. 559 et seq.
11 Tit. VI.
12 Tit. IX, 6.
13 Ulpian, Reg. XXVIII, 7.
14 Tit. VI, 10; Tit. VII.
SYLLABUS OF LECTURE XXVII

INSTITUTES OF JUSTINIAN, CONTINUED

Nature: "Obligatio est vinculum juris quo necessitate astringimur aliquam solvendum esse."

Principals

[Joint, Several]

Parties: Fide jussores (sureties)

Might be added in every obligation before or after.
Each liable for whole debt and heir bound,
But all solvent fide jussores must share liability.
And each could recover from principal debtor.

Slaves: Rights accrue to master.

Children: Usufruct accrues to pater familias.

Classes: 4

Obligationes

(Ex Contractu)
Those of jus gentium)

Real

Mutuum: Enforced by condiction.
Comodatum: Enforced by actio commodati.

Forms
Depositum
Enforced by actio depositi
Imposed liability for fraud only.
Pignus
Ordinary diligence alone required
Enforced by actio pignoratitia.

Manual delivery
Being weighed, measured or numbered.

Meeting of minds necessary

Ancient words no longer required

Might be conditional unless condition impossible.
Heirs bound.

Joint parties permitted, but performance as to one sufficient.
Slave might stipulate, but benefits accrued to master.

Judicial proceeding from office of iudex.
Practorian: proceeding from office of praetor.
Common: proceeding from office of either.
Conventional: proceeding from agreement.

Classes: 13
Verbal (con'd.)

Subject matter non-existent.
Object unlawful.
Attempt to bind or benefit stranger: how evaded.

Invalid (14)

Those in other party's power:
Incapable parties
Dumb.
Insane.
Infants.

Condictio (when certain)

Enforced by Actio ex stipulatu (when uncertain)

Literal. 10

Emptio venditio. 18
May be conditional.
Void if subject matter incapable of sale.

Held to care of diligentis-simus pater familias.

Conductor
Right passes to heir
Had actio conducti.

Locatio conductio 19

Locator: Had actio locati.

Share of gains and losses equal unless otherwise provided.

Societas 20

Ex personis [Death of socius.
(Publicatio (confiscation) of partner goods

Solutio. ... Ex rebus ... Purpose accomplished.
Honorum cessio

Ex voluntate: retirement of socius.
Ex actione (suit by socius).

Requisites.
Must be gratuitous, 22
Must not be contra bonos mores

Might take effect at a fixed time or conditionally

Mandatum 21

Kinds. For benefit of mandator only.
" " mandator and mandatarius.
" " " " " and mandator.

Not obliged to accept.
But after acceptance must execute mandatum within its limits.

Extinction. Revocation.
(Death of either party.
1. Tit. XIII, Preamble; Sohm, Roman Law, sec. 73; Mackeldy, Roman Law, sec. 288, et seq.
2. Tit. XXVIII; Sohm, sec. 74.
3. Tit. XX.
4. Id. 1, 2.
5. See Lecture XV.
6. Tit. XIV; Sohm, sec. 79.
7. Tit. XV; Sohm, sec. 80.
8. Tit. XV, 1-3.
9. Tit. XIX, 5, 23.
10. Tit. XV, 2-6
11. Tit. XVI.
12. Tit. XVII.
13. Tit. XVIII.
14. Tit. XIX.
15. Id. 19.
16. Tit. XXI; Sohm, sec. 81.
17. Tit. XXII; Sohm, sec. 82.
18. Tit. XXIV.
19. Tit. XXV.
20. Tit. XXVI.
21. Tit. XXVII.
22. Id. 13.
Syllabus of Lecture XXVIII

INSTITUTES OF JUSTINIAN, CONCLUDED.

Quasi ex contractu 1

Instances

Management of another's affairs without mandatum.

Expenditures for the other party's benefit by

Tutor.

Joint owner.

Cohérit.

Money paid by mistake, generally recoverable.

But not gifts for religious purposes.

Nature

The appropriation of mobiles against the will of the rightful possessor.

Wrongful intent necessary; hence could not be committed by a child.

Furtum 2

Classes

Manifestum: thief "caught with the goods."

Penalty, quadruple value.

Nec manifestum: penalty double value.

Conscriptum: goods found in another's house.

Oblatum: stolen goods left with innocent.

Remedies

To recover penalty, actio furti. Ordinary.

Nec manifesti

Vindicatio (against possessor).

Condictio ("thief" or heir).

Rapina 6

Nature

Taking mobiles from rightful possessor by force.

Wrongful intent not always essential.

Within one year property and triple value awarded.

After one year value only.

Remedy; actio vi bonorum raptorum.

Wrongful damage to res corporales.

Damnum 8

Legis actio Aquiliane 9: direct if damage caused by defendant's body.

Utilis if otherwise caused.

Remedies

Crimen capitale against wrongdoer if death resulted.

Any willful violation of another's rights not included in foregoing.

Injuria 10

Kinds

Atra (grave)

Committed in a public place.

Injured one.

Pater familias.

Master.

Parties.

Rents.

Actual wrongdoer.

Instigator.

Penalty (damages).

Extinction (abandonment).

Wrongful judicial decisions.

Quasi ex delicto 13

Injuries caused by objects.

Nautae.

Ejected from room.

Furtum by servants of

Caupones.

Stabularii.

Discharge 14

Performance.

Acceptatio 15

Agreement.

Noratio 16

Mutual consent.
1 Lib. III, Tit. XXVII. Cf. French Civil Code, Lib. IV, ch. I; Spanish Civil Code, Lib. IV, Tit. XVI, cap. II.
2 Lib IV, Tit. I; Sohm, Roman Law, pp. 432, 433.
3 Might include persons, Tit. 1, 9.
4 Tit. I, 1. 6-18,
5 Id. 18.
6 Tit. II; Sohm, p. 434.
7 Tit. II, 1.
8 Tit. III; Sohm, pp. 434-6.
9 See syllabus of Lecture XII.
10 Tit. IV; Sohm, pp. 437, 438
11 Id. 7.
12 Id. 12.
13 Tit. V; Sohm, sec. 86; French Civil Code, Lib. IV, ch. II.
14 Lib. III, Tit. XXIX.
15 Id. 1, 2.
16 Id. 3; Sohm, sec. 87.
SYLLABUS OF LECTURE XXIX

Character of Provincial and arbitrary in substance.

Roman Crime: Capital in classification.

At first consisted of separate laws: Osterwald c. 160 B.C.

As a system, began with creation of Magna Carta: 1215.

Julian legislation: 494.

Caesar's emperors: Special Favours provided for.

Osterwald
<table>
<thead>
<tr>
<th>Extraordinaria</th>
<th>Penalty not fixed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prosecuted by injured party.</td>
<td></td>
</tr>
<tr>
<td>Generally punished by dux.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Furtum (larceny)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Also delicta.</td>
</tr>
<tr>
<td>Vi bonarum rap- torum (robbery)</td>
</tr>
<tr>
<td>Stellionatus (fraudulent contracts)</td>
</tr>
<tr>
<td>Falsum (forgery)</td>
</tr>
<tr>
<td>Incendium (arson)</td>
</tr>
<tr>
<td>Forcible ouster.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Prius (Death)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Forms</td>
</tr>
<tr>
<td>Decapitation</td>
</tr>
<tr>
<td>Burning</td>
</tr>
<tr>
<td>Crucifixion</td>
</tr>
<tr>
<td>Could not be imposed by comitia tributa; hence disused toward close of republic.</td>
</tr>
<tr>
<td>Libertas.</td>
</tr>
<tr>
<td>Civitas.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Poenae (Loss of)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reclatio</td>
</tr>
<tr>
<td>Deportatio (more severe)</td>
</tr>
<tr>
<td>Flogging</td>
</tr>
<tr>
<td>Imprisonment (temporary)</td>
</tr>
<tr>
<td>Flines.</td>
</tr>
<tr>
<td>Loss of rank.</td>
</tr>
<tr>
<td>Suspension.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Non-Capital</th>
</tr>
</thead>
<tbody>
<tr>
<td>Death</td>
</tr>
<tr>
<td>Abolitio (pardon)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Extinction of liability 5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prescription</td>
</tr>
<tr>
<td>None in early law.</td>
</tr>
<tr>
<td>Ordinary crimes 20 yrs.</td>
</tr>
</tbody>
</table>

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4 Id. pt. VI, Ch. IV; Hunter, pp. 1064-5.
5 Mackenzie, pp. 420-421.
SYLLABUS OF LECTURE XXX

Criminal Procedure

Forum 1 . . . . Quaestiones (commissions) appointed for special cases as early as 413 B.C.

Quaestiones perpetuae 2 .

To try particular classes of offenses.
Presided over and supervised by . . . . Index quaestionis 3 (B.C. 81, et seq.)
Accuser acted without counsel.

Decision rendered by consilium: (judices) 4 . . . .

Originally drawn from senators only.
After B.C. 123 from equites, and later from other classes.
Names inscribed on album judicum.
Selection for particular trial made by parties . . . . accused. accuser.

Postulatio . . . .
Informal complaint.
Included . . . . Nomen.
Crinis delatio.

Citation (warrant).
Interrogatio of accused: to narrow issues.
Inscription (formal charge) with
Subscriptio of accuser.
Setting of trial (generally for tenth day following).
Selection of judices.

Prosecution 5 .

Accused not necessarily present (trial after death of one accused of larcenae majestatis.

Default . . . . Of accused resulted in acquittal.
Of accused resulted in sentence late in day
Torture of witnesses permitted. 6

Decision . . . . absolvit, condemnavit, non liquet.
Ampliatio (new trial) ordered.
That permitted in Comperendinatio
(two staged trial divided at verdict)
Introduced about B.C. 111.

Imposition of penalty.
Appeal to emperor. 7

1 Mackenzie, Roman Law, pt. VI, Ch. I; Hunter, Roman Law, pp. 55-58; Int. to Sandars Justinian, pp. 60-62.
2 Maine, Ancient Law, pp. 31 et seq. Cf. proceeding syllabus.
3 Abbott, Roman Political Institutions, sec. 96.
4 Hunter, pp. 44-47.
5 Id. 58-60; Mackenzie, pt. VI. Ch. II.
6 Hunter, p. 1060.
7 Book of Acts, Ch. XXV, 7-27; XXVI, 32.
SYLLABUS OF LECTURE XXXI

DEFINITION: Jus persequendi judicio quod sibi debetur (right of seeking in court what is due us).

Civiles (arising under jus civile).

Arose under jus gentium.

Actiones utilis (adaptations of actiones civiles).

Classes ....

Actiones in factum

Purely praetorian.

Actio de dolo
Actio negotiorum gestorum.
Actio hypothecaria.
Actio de pecunia constituta.

Special forms ....

Actio vi honororum rapaciorum.
Actio de superficie.

Perpetuae: not barred by lapse of time.

As to origin 2

honora
tia (Praetor-ian) ..

Called also

Needed to be brought within a fixed period.

Under jus
civile excep
tional

History

Praetorian penal actions not entertained after annum utilis ..............

Originaly praetor's year of office. 4

Included only judicial days

Under emperors (424 A. D.) all actions limited.

Ordinary to 30 years

Exceptional to 40 years.

To enforce impersonal rights

Real

Family

Status

In rem ...

Actio publiciana (recovery by equitable owner 7)

Actio Serviana (hypothecaria): to foreclose pignus hypothecae.

Interdictum Salvianum: to recover possession.

Actio Pauliana to rescind fraudulent conveyance.

Instances

Ex contractu...

Stricti juris 

Liability fixed.

E.g. actio ex stipulatu (actio empli) 8

Bonae fidei

Liability unliquidated.

More discretion allowed judge 9.

In personalam

As to time of commencement 3

temporales ...
Compensatory (rei persequendae causa comparatae).

Penal (poenae persequendae Private comparatae)

Mixed: to recover res and penalty.

1. Justinian's Institutes, Lib. IV, tit. VI.
3. Sohm, Roman Law, sec. 54.
SYLLABUS OF LECTURE XXXII

(Consisted usually of facts, not opinions.\textsuperscript{1}

But signatures were provable by comparison of handwriting.\textsuperscript{2}

\textit{Testis unus testis nullius.}\

\textit{Quantum} Two witnesses required to prove any fact.\textsuperscript{3}

In certain cases more (e.g. 5 (or 3 with document) to prove free birth.)\textsuperscript{4}

\textit{Pondus} \textit{Testimonia ponderanda sunt non numeranda.}\textsuperscript{5}

(weight) Where evidence was equally balanced, doubt given to defendant.\textsuperscript{6}

\textit{Ei incumbit probatio qui dicit, non qui negat.}\textsuperscript{7}

As to a particular point rested upon him who failed if no proof were offered.\textsuperscript{8}

\textit{Onus probarit}\textsuperscript{9} Actor required to prove allegations of demonstration; reus those of excepatio.

\textit{Praesumptiones juris et de jure} (conclusive)\

\textit{Praesumptiones facti} (inferences from facts proved.)

\textit{Regularity of legal proceedings.}\textsuperscript{11}

\textit{Bona fides.}\textsuperscript{12}

Innocence of accused.\textsuperscript{13}

Title to mobiles in possessor.\textsuperscript{14}

Payment, from debtor's possession of credit instrument.\textsuperscript{15}

\textit{Debtor non praesumitur donare.}\textsuperscript{16}

Survivorship.\textsuperscript{17}

\textit{Facts presumed}\textsuperscript{10}

\textit{Praesumptiones juris} (rebuttable)

\textit{In jure} (rendered reference to judex unnecessary.)

\textit{Facts admitted (Confessions).}\textsuperscript{18}

\textit{During interrogations.}

Must be pertinent and relevant. (E.g. to prove that Titius is freeborn, evidence is inadmissible that his daughter is free for she would be so if her mother were)\textsuperscript{19}

\textit{Copies of documents excluded} (unless originals lost etc.)\textsuperscript{20}

\textit{Contra scriptum testimonium non scriptum testimonium non fertur}\textsuperscript{21}

Hearsay generally applied to self serving excluded.\textsuperscript{22}

\textit{Ancient facts}\textsuperscript{23}

\textit{Dying declarations.}\textsuperscript{24}
2 Id. p. 1059.
3 Id. 1056-7; Mackenzie, Roman Law p. 382; Digest, Lib. XXIII, Tit. V, 11; Code, Lib. IV, Tit. XX, 9, 1.
4 Code, Lib. IV, Tit. XX, 15, 1.
5 Mackenzie, 382. For considerations in weighing testimony, see Hunter p. 1057, Dig., Lib. XXII, Tit. V, 32.
6 Id. p. 372; Dig., Lib. L Tit. XVII, 125; Heineccius, Pandects, Lib. XXII, Tit. V, sec. 144.
7 Dig. Lib. XXII, Tit. III, 2; Hunter, p. 1057; Grueber, Lox Aquilis, p. 257.
8 Hunter, p. 1057.
9 Id.
10 Dig. Lib. XXII, Tit. III, 5, 1; Hunter, 1053-5; Mackenzie, p. 385.
11 Hunter, p. 1059.
12 Grueber Lox Aquilis, p. 263 n.
14 Mackenzie, p. 385.
15 Id.
16 Id.
17 Id.; French (Napoleonic) Civil Code, Arts. 720, 722; California Code C. P. Sec. 43; Philippine Code C. P. Sec. 334 (37).
18 Hunter, pp. 1093-5; Mackeldy v. 383.
19 Hunter, p. 1053; Code, Lib. IV, Tit. XIX, 10.
20 Hunter, p. 1054; Dig., Lib. XXII, Tit. IV, 2.
21 Code, Lib. IV, Tit. XXI, 1, 6, 7.
22 Id. Tit. XX, 1; Mackenzie, p. 381.
23 Hunter, p. 1055.
24 Id.; Dig., Lib. XXII, Tit. III, 28.
25 Mascalus, De. Probatione, concl. 1080.
SYLLABUS OF LECTURE XXXIII

When public, regarded as the most satisfactory form of evidence.

Proof
1. By attesting witnesses
2. Comparison of handwriting

Documents
Inspection
Accuser could not inspect defendant's documents.
Debtor could inspect creditor's books but not vice versa.
Generally each party required to prove his case without the other's help.
Witnesses required to produce documents unless self-disserving.
Argentarii (money-dealers) required to produce books.

Production
In criminal cases must be 20.
Age "civil" above age of puberty.

Disinterestedness, Their near relatives excluding Tand dependents, Their advocates.

Qualifications
Convicts.
Gladiators.
Prostitutes.
Adultresses.

Disqualified
Slaves, unless affected themselves.
Pupilli.
Lunatics.
Heretics and pagans.
But Jews competent where neither party was orthodox.

Witnesses
Aged.
Infirm.
Bishops (testimony taken by an officer)
Magistrates.
Those absent in public service.
Soldiers.

Exempt
Required by summons issued by by judge.
But not for more than fifteen days.
Witness's travelling expenses paid by party calling him.
Depositions of absent witnesses taken by procuratores.
Examination

(Jusjurandum in judicio (oath) \{
  Required after Constantine.
  Ceremony; touching the book.

Nemo tenetur seipsum accusare. \(^{11}\) 
Cross-examination practiced. \(^{12}\) 
Leading questions not favored. \(^{13}\) 

In civil cases allowed of slaves only.

Quaestio \(^{14}\) (under torture) \{ 
In criminal cases allowed of any defendant where other evidence was insufficient.

1 Mackenzie, Roman Law, p. 381.
2 Hunter, Roman Law, p. 1059; Code, Lib. IV, Tit. XXI, 20; Novellae, XI. IX, II, 1.
3 Hunter, p. 1059; Code, Lib. II, Tit. 1, 2.
4 Hunter, p. 1059; Code, Lib. II, Tit. 1, 5, 8.
5 Hunter, p. 1059; Code, Lib. IV, Tit. XX, 7.
6 Hunter, p. 1059; Code, Lib. IV, Tit. XXI, 22.
7 Hunter, p. 1059; Digest, Lib. II, Tit. XIII, 4, 9, 3.
8 Hunter, Roman Law, pp. 1055-7; Mackenzie, Roman Law, p. 382-3.
9 Hunter, Roman Law, p. 1060.
10 Id.
13 Hunter, Roman Law, p. 1060.
14 Id.; Mackeldy, Roman Law, p. 385, note.