

PICKERING & LEGARE



To M. Niebuhr  
Privy Counsellor of His Prussian  
Majesty, &c. &c. &c.

REMARKS

from his most obedient  
& humble servant

ON

The Author

THE STUDY OF THE CIVIL LAW.

FROM THE AMERICAN JURIST, NO. III., JULY, 1829.

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BOSTON:

FREEMAN & BOLLES, 81, COURT STREET.

1829.

10,456

## REMARKS, &c.

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1. *An Historical Essay on the Laws and the Government of Rome; Designed as an Introduction to the Study of the Civil Law.* 8vo. pp. 298. Cambridge, [Eng.] 1827.
2. *Précis Historique du Droit Romain, depuis Romulus jusqu'à nos jours, &c.*; or, *An Historical Summary of the Roman Law, from Romulus to our own time.* By Mr. DUPIN, Advocate in the Royal Court at Paris. 18mo. pp. x. and 106. 4th edition. Paris. 1822.

THE civil law, or, to adopt the language of Sir William Jones, 'the decisions of the old Roman lawyers, collected and arranged in the sixth century by the order of Justinian, have been for ages, and in some degree still are, in bad odor among Englishmen;' which, he adds, 'is an honest prejudice, and flows from a laudable source; but a prejudice most certainly it is, and, like all others, may be carried to a culpable excess.' (a) This hostility to the Roman law is generally ascribed by historians and lawyers to the spirit of liberty, which has been so conspicuous in the English nation, and to their detestation of the arbitrary maxims of a code, whose fundamental principle was, that 'the will of the prince had the force of law.' Blackstone is of opinion, that the *common law*, however compounded, or from whatever fountains derived, having subsisted immemorially in the kingdom and survived the rude shock of the Norman conquest, had become endeared to the nation; but being only handed down by tradition, and not committed to writing, 'was not so heartily relished by the *foreign clergy*, who came over in shoals during the reign of the Conqueror and his two sons, and were utter strangers to our constitution as well as our language.' The accidental discovery of Justinian's Pandects at Amalfi, he adds, had nearly completed the ruin of the common law; for this circumstance brought the civil law into vogue all over the west of Europe, and that law became 'the favorite of the *popish clergy*, who borrowed the method and many of the maxims of the canon law from this original.' (b) The Norman kings, too, according to Sir John Fortescue, found the constitutional maxims of the

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(a) Law of Bailments, p. 12.

(b) 1 Black. Com. 17.

civil law so congenial to their notions of sovereignty, that they exerted themselves to introduce that law into the government of England; (a) but this was so odious to our 'sturdy' English ancestors, that, according to John of Salisbury, 'they burned and tore all such books of civil and canon law as fell into their hands.' (b)

But, although the monkish *clergy*, devoted as they were to the will of a foreign primate, (Theobald, a Norman abbot, made archbishop of Canterbury,) received the civil law with eagerness, yet the *laity*, who were more interested to preserve the old constitution, and had already severely felt the effect of many Norman innovations, continued wedded to the use of the common law; and, in coincidence with this feeling, even one of the kings, Stephen, forbade by proclamation 'the study of the laws then newly imported from Italy,' which the primate above named had attempted to make a part of the studies at Oxford. This proclamation of king Stephen, we are told by historians, was treated by the monks as a piece of impiety; and, though it might prevent the introduction of the civil law process into the English courts of justice, yet did not hinder the clergy from reading and teaching it in their own schools and monasteries. The nation thus became divided into two parties; the ecclesiastics, of whom many were foreigners, applied themselves to the civil and canon laws; while the laity, both nobles and commoners, adhered with equal pertinacity to the old common law; both of them, as Blackstone observes, 'reciprocally jealous of what they were unacquainted with, and neither of them, perhaps, allowing the opposite system the real merit which is abundantly to be found in each.' (c)

The same jealousy of the Roman law prevailed above a century after the period last mentioned; when, in the reign of Richard II., the nobility, with a sturdiness surpassing even that of their sturdy ancestors, declared, (as Blackstone remarks) with a kind of prophetic spirit, that 'the realm of England hath never been unto this hour, neither by the consent of our lord the king and the lords of parliament *shall it ever be, ruled or governed by the civil law.*' (d)

Indeed, so much of this hostile spirit has remained in the land of our ancestors, that even so lately as the reign of the

(a) Fortescue De Laud. Leg. Angl. c. 33, 34.

(b) See Jones on Bailments, p. 13. (c) 1 Black. Com. 19. (d) Ibid.

last king, in the ever-memorable attack made upon his lord chief justice Mansfield by the unsparing pen of Junius, which seared as it went, a partiality for the civil law was prominently set out as one of the severest reproaches against that distinguished judge: 'In contempt or ignorance of the common law of England,' says Junius, in the spirit of an old English baron, and with that severity and boldness which felt no awe in assailing either the highest law officer or the sovereign who appointed him, 'you have made it your study to introduce into the court where you preside maxims of jurisprudence unknown to Englishmen; *the Roman code*, the law of nations, and the opinion of foreign civilians are your perpetual theme; but who ever heard you mention Magna Charta or the Bill of Rights with approbation or respect? By such treacherous arts the noble simplicity and free spirit of our Saxon laws were first corrupted. The Roman conquest was not complete until Norman lawyers had introduced their laws and reduced slavery to a system. This one leading principle directs your interpretation of the laws.' (a)

Exceptions, indeed, there have been to this state of feeling even during the period just mentioned. In that well written work called *Eunomus*, which we are inclined to think is not so much read at the present day as it deserves to be in the course of our legal studies, it is candidly admitted, though in cautious terms, that the civil law, 'in due subordination, deserves on many accounts to be studied by the professors of our own. The law of England often borrows the rules of the civil law in the construction of wills and trusts; the latter was the offspring of the civil law, and both are treated by it with great precision and exactness. Our law, too, has perhaps borrowed, at least agrees with the civil law in many other particulars.' (b) These remarks, in our judgment, need not have been made in so guarded language; we think it may be said, without such qualifications, that a great part of what we familiarly denominate 'common law' is 'borrowed' from the Roman code. It is true, indeed, that certain fundamental principles are recognised alike in all codes—as well in the *Institutes of Menu* as of *Justinian*. But when we find in the common law the same body of principles regulating the merely conventional rights of property, similar rules of evidence, and

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(a) Lett. 41.

(b) *Eunomus*, Dialog. 1. § 18.

even matters of practice, handed down to us in the language of the Roman law, we cannot hesitate in pronouncing the former to be derived from the latter. In proof of this, it would be sufficient to refer to that 'best of our juridical classics,' Bracton, whose work follows the civil law so closely, that some writers without much examination have discarded it from among the common law authorities. Yet, as Sir William Jones remarks, though Bracton had been a civilian, he was 'a great common lawyer, and never, I believe, adopted the rules and expressions of the Romans, except when they coincided with the laws of England in his time.' (a) It is true, indeed, that in the well known case of *Stowell v. Lord Zouch*, in Plowden's Reports, (b) it is said, by counsel, that 'Bracton and Glanvil are not authors *in our law*;' and the counsel adds, in respect to the former, in language which now excites a smile, that he cited Bracton 'as an ornament to discourse where he agrees with the law,' and 'for consonancy and order where he agrees with better authorities;'—a character of him which that profound juridical antiquary, Selden, pronounces to be founded in gross error, notwithstanding some great men have adopted it. (c) Lord Hale, too, says of Bracton's work, 'The book itself in the beginning seems to borrow its *method* from the civil law; but the greatest part of the *substance* is either from the course of proceedings in the law, known to the author, or of resolutions and decisions in the Court of King's Bench and Common Bench, and before justices itinerant.' (d) This authority fully supports the character given of Bracton by Sir William Jones, and justifies the remarks of Mr. Reeves, that 'Bracton was deservedly looked up to as the first source of legal knowledge, even so low down as the days of Lord Coke, who seems to have made this author his guide in all his inquiries into the foundation of our law;' (e) a very extraordinary guide for Lord Coke to select, if, as the counsel in Plowden contended, Bracton was not to be cited as an authority in our law, but only 'as an ornament to discourse.'

To the proofs of the affinity of the Roman law and our own we might, after the example of some distinguished writers, add even the much boasted *trial by jury*. This mode of trial has been shown, with a high degree of evidence as we think,

(a) Jones on Bailments, 75.

(b) Plowd. 357.

(c) Dissertat. ad. Fletam, c. 1. (d) Hale's Hist. Com. Law, ch. 7, p. 150.

(e) 2 Reeves' Hist. Eng. Law, 89.

by that very learned antiquary, Dr. Pettingal, to be substantially derived from the Romans, who also had themselves received it from the Greeks. (a) Such a mass of evidence is to be found on this subject by those who will take the pains to examine the question, that Sir William Jones, whose scholarship and legal knowledge eminently qualified him to judge in the case, and who had arrived at the same conclusion with the author here cited, expresses himself in the following strong terms: 'I have always been of opinion with the learned antiquary, Dr. Pettingal, that they [the judges at Athens] might with propriety be called *jurymen*; and that the Athenian juries differed from ours in very few particulars.' (b) As this, however, is a different view of the origin of juries from that which has been handed down in our elementary books, we here subjoin an extract from Dr. Pettingal's preface; intending to recur to this subject on some future occasion:

'This kind of judicial process was first introduced into the *Athenian* polity by Solon; and thence copied into the Roman republic, as probable means of procuring just judgment and *protecting the lower people from the oppression or arbitrary decisions of their superiors*. When the Romans were settled in Britain, as a province, they carried with them their *Jura* and *Instituta*, their *Laws* and *Customs*; which was a practice essential to all *colonies*; hence the Britons, and other countries, of Germany and Gaul, learned from them the *Roman* laws and customs; and upon the irruption of the Northern nations into the Southern kingdoms of Europe, the laws and institutions of the Romans remained when the power that introduced them was withdrawn. And Montesquieu tells us, that under the first race of kings in France, about the fifth century, the Romans that remained, and the Burgundians, their new masters, lived together under the same Roman laws and police, and particularly the same forms of judicature. *Esprit des Lois*, liv. xxx. ch. 11. How reasonable then is it to conclude, that in the Roman courts of judicature, continued among the Burgundians, the form of a *jury* remained in the same state it was used at Rome. It is certain, Montesquieu speaking of those times mentions the *Paires* or *Hommes de Fief*, homagers or peers, which in the same chapter he calls *juges*, judges or jurymen. So that we hence see how at that time the *Hommes de Fief*, or Men of the Fief, were called *Peers*, and those peers

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(a) Pettingal's Inquiry into the Use and Practice of Juries among the Greeks and Romans. 1769.

(b) Jones's Speeches of Isæus, Prefatory Disc. p. 25.

were *judges*, or jury-men. These were the same as are called in the Laws of the Confessor *Pers de la Tenure*, the Peers of the Tenure, or Homagers, out of whom the jury of Peers were chose, to try a matter in dispute between the lord and his tenant, or any other point of controversy in the manor. So likewise in all other parts of Europe, where the Roman colonies had been, the Goths succeeding them continued to make use of the same laws and institutions which they found to be established there by the first conquerors.'

The learned author justly adds,  
 'This is a much more natural way of accounting for the origin of a jury in Europe than having recourse to the fabulous story of Woden and his savage Scythian companions, as the first introducers of so humane and beneficent an institution.'

Feeling the force of the facts above stated, and of the occasional examinations of original authorities which we have been able to make, we cannot but entertain a strong conviction that a very large portion of our common law, perhaps nearly all, except the law of real estate, is derived from that very Roman law, which has for ages been the subject of so much jealousy in England, and to which English lawyers have been so reluctant in acknowledging their obligations. And, under this conviction, we have sometimes been quite as much amused by the vehemence of a certain class of professional authors who have exhausted their lilliputian artillery in trying to batter down the venerable fabric of the common law, which they have supposed, and very honestly we have no doubt, to be wholly of barbarous origin and therefore of little worth, as we have at other times by the equally conspicuous enthusiasm of their adversaries, who with about the same justice have poured out their idolatry to their supposed native English law, with what the caustic Gibbon too harshly calls 'that blind and partial reverence which the lawyers of every country delight to bestow on their municipal institutions.'<sup>(a)</sup>

But the prejudices which once existed against the civil law are fast wearing away in England. In our country it can hardly be said that the effects of them are felt. We have hitherto been so much of a business nation, that we have contented ourselves with discussing and settling the rules by which the rights of property and persons were to be regulated, without having found leisure to inquire, whether those rules originated among the uncultivated natives or the civilized conquerors

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(a) Decline and Fall, ch. 44.

of our mother country. Our situation has in this respect been favorable; we can now take up the study of the civil law, as a wonderful repository of human reason, with as much impartiality as we could the Institutes of Menu or of Confucius, if they were equally useful to us in the study of our own jurisprudence.

The study of the Roman code has, within the last half century received a fresh impulse even in Europe, where we could hardly have expected that any department of it had left room for new investigations. This impulse is in a considerable degree to be ascribed to the writings of the eminent German jurist, Hugo, who, in the year 1780, was made professor of law at the university of Göttingen (where we believe he still remains) when he was only twenty-four years of age. He immediately projected a general reform in the method of study, and changed the common scholastic mode for one which was more lucid and founded upon the more solid bases of philology, history, and sound philosophy. He then composed elementary books to be used at his lectures; and commenced the publication of his *Civilistisches Magazin*, or Magazine of Civil Law, which contained interesting treatises on different topics of jurisprudence. Among other things, it is not an uninteresting fact to professional and other readers, to know, that in aid of his proposed improvement he translated into German, the celebrated 44th chapter of Gibbon's Roman History, which contains the well known historical sketch of the Roman Law; a work which some of the continental writers have, though in too strong terms we think, pronounced to be more profound than the treatises of Gravina, Heineccius, or Bach. But Hugo undoubtedly perceived the insufficiency of Gibbon's sketch for a professional reader, however well suited to a general scholar; for he afterwards wrote a history of the Roman law himself; and this, as might be expected, was soon preferred to that of Gibbon; he adopted in it, however, that writer's divisions of the subject.

The example of professor Hugo was soon followed. At the close of the last century M. de Savigny made himself known by a work upon the Law of Possession, according to the Roman code; which placed him in the first rank of jurists. He was appointed professor of law at Landshut, in 1808; and in 1810 was transferred to the University of Berlin, where he is now in the full enjoyment of the honors and rewards to which his genius and learning entitle him.

During the period now under consideration the constitution and laws of the German empire were much shaken by the power of France, and a portion of the German states annexed to that kingdom. The new French *Code* was, of course, to be extended to that new territory of France. This event brought that celebrated code under the notice of the German civilians, and led to much discussion and frequent comparisons of its provisions with the existing laws of the German states. Some jurists of the very first rank became desirous of making a general reform in the legislation of Germany. Among these was M. Thibaut, who was desirous of having a *civil code* applicable to all the states of the Germanic confederation; while others would have had distinct codes for each state. This difference of opinion produced a controversy. M. de Savigny wrote against the scheme of a general code; contending, that we ought not to take away from a people the laws which had been formed by their national habits and usages and modified by the spirit of successive ages; that a system of laws slowly matured by enlightened jurists, was always to be preferred to a new body of legislation, formed, as it were, at a single casting. He supported himself by the evidence of history as to the formation of the Roman law, which attained to its highest perfection in the age of Papinian, Paul, and Ulpian; a period, when there was a very small number of *positive laws*. These doctrines of Savigny met with much opposition; and his opinion, 'that our age was incapable of producing a good system of legislation,' gave great unpopularity to his views. He was, however, supported by Hugo, who declared himself against M. Thibaut. The great point of inquiry then became, whether we could promise ourselves more advantages from the establishment of a system of *positive legislation*, than from perfecting the *science of law*. Hugo and Savigny maintained the negative, and became the heads of a new school, called the *Historical School of Jurisprudence*. A journal was established, entitled *A Journal of Historical Jurisprudence*, to which Hugo, Cramer, Heise, Haubold, Hasse, and other eminent jurists contributed.

From that period to the present time, the law has been enriched with numerous distinguished works of continental writers, which have contributed to keep up the impulse originally given in the manner we have mentioned.

But, perhaps, a circumstance which above all others stimulated the civilians to new exertions in their professional inquiries,

was the brilliant discovery made at Verona, in 1816, of an ancient *palimpsest* manuscript, containing the Institutions of Gaius, covered over with a transcript of the Epistles of St. Jerome. The recovery of this work, it is well known, is due to Mr. Niebuhr, whose name is now familiar to every reader, and we might almost add, in every branch of learning.

This discovery is justly considered by the learned editors of the work itself as one of the most important that has been made since the revival of letters. In the official report, made to the Royal Academy of Berlin, on the 6th of November, 1817, one of them says—‘This manuscript gives us not only a series of principles on points of law entirely new to us and of great interest, but also some curious views of certain parts of the law already known; there is not a single page which does not impart some instruction. I may say, therefore, that of all the discoveries respecting the ancient Roman law, made since the middle ages, there is no one so important as that which I have the honor now to communicate, and for which we take pleasure in making our acknowledgments to Mr. Niebuhr.’ This great event accordingly excited the most intense interest throughout Europe; and we should give a more particular account of it on this occasion, if the limits of the present article permitted, and if some of our popular journals had not already noticed it. We shall, if necessary, recur to it hereafter.

The distinguishing characteristic of the present method of studying the civil law in the continental schools is, that it shall be *critical*. While its professors pay all respect to the authority of eminent jurists, they require that we should ascend directly to the sources of the law, and bring to our aid everything which can be furnished by history and by the study of languages and philosophy; the knowledge of the Roman law is regarded *as the foundation of all jurisprudence*, for Europeans; and, above all, this mode of study inculcates upon us, that we must, as their writers express themselves, enter into the conceptions of the jurists of a nation, which more than any other was ambitious of the perfection of its law.

The effects of the impulse thus given to the modern study of the civil law have been various, and of greater or less importance in several respects. The most important of them, perhaps, has been, that the jurists of Europe have had a more extensive correspondence with each other than has ever before

been known; they have travelled over all parts of the continent, have examined all the libraries, and discovered numerous manuscripts of great value; by collations of which they have been enabled to correct or explain the received texts of the ancient legislation, and to settle doubtful points in them as well as in the writings of the juridical commentators. Among the matters of minor importance, but yet of rational curiosity, we may mention, that the long existing perplexity of the civilians in respect to the origin of the character used in citing the Pandects, *ff*, is at length removed. The common tradition in all the elementary books of our common lawyers (who follow the civilians) has been, that this character was only a corruption of the Greek letter  $\pi$ , the initial letter of the Greek name of the Pandects, *Πανδικται*. But we now learn, by Savigny's masterly work on the history of the Roman law during the middle ages, that the manuscripts of the 12th century remove all doubts as to the true origin of this sign; it is nothing but the letter *D*, a little contracted or narrowed, and having a stroke across it in the usual manner, in order to show that it stands for an abbreviated word; but the copyists and editors have gradually changed it into the character *ff*. It is not a little remarkable, that the true explanation had already been given by several authors of the 16th century, but had been overlooked by their successors. (a)

We now proceed to give a brief account of the two works at the head of this article. The first of them is designed as an *introduction* to the study of the civil law. The author's object, as expressed in his preface, is,

'To offer a view of the principal revolutions which have taken place in the constitution and in the jurisprudence of the most celebrated people with whose history we are acquainted. The subject is in every point of view highly interesting. Indeed it may fairly be asserted that none of the numerous branches of study, which must be cultivated to obtain a knowledge of antiquity, is fraught with so much real and practical interest as that of laws and governments. It is not disputed that the manners and habits, the manufactures, the commerce of a great nation offer abundant materials for the gratification of a very natural curiosity; but still they are, in most instances, an object of curiosity only. If the importance of every study were to be computed by its utility alone, this would have but slender pretensions in comparison

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(a) Vol. iii. p. 407, as cited in the *Thémis* ou Bibliothèque du Jurisconsulte.

with that of laws and of political institutions, which may be and often are actually reproduced in our own times and even in our own country. Indeed it is a fact so well known, that it need scarcely be mentioned here, that the jurisprudence of Rome has formed the groundwork of the jurisprudence which to this day governs almost every nation of Europe. England is perhaps less indebted to it than any of the continental nations; but even the English law *owes it many and deep obligations*; and the neglect into which the study of it has fallen in this country must be imputed to motives very different from its want of connexion with our own system of jurisprudence.'

The learned and sensible author then goes on to show the great value of a knowledge of the civil law, as an aid in classical studies.

'It must be remarked,' says he, 'that there is one class of persons to whom some knowledge of the Roman jurisprudence is absolutely indispensable; those who have a desire, not only to catch the spirit, but even merely to understand the literal meaning of the Roman classics. In those writings, an acquaintance with which the unanimous consent of ages has agreed to consider as essential to a liberal education, allusion is as frequently and as familiarly made to the prætor's tribunal, or to a *vocatio in jus*, as in the works of our own popular authors we find casual mention of a grand jury or a writ of *habeas corpus*. Of course, in both instances, the author supposed his allusion to be perfectly intelligible to those who were likely to read his works; and if the lapse of time and change of language place us in a very different situation from the contemporaries of the writer, we must, if we aspire to place ourselves on anything like an equal footing with them in this respect, endeavor to overcome, as far as we are able, the obstacles which our situation puts in the way.'

We have often thought of this subject in the point of view last mentioned, as well as in its relation to jurisprudence; and we entirely concur in these opinions of our author. In proof of the justness of his remarks respecting *classical* studies, we are satisfied from our own observation, that of the commentators on the classics, taken as a body, the civilians have been the best. And, if we can transport ourselves to a period of two thousand years hence, when Burke, and Fox, and Pitt, and other English statesmen, and we may add Shakspeare, and other poets, shall have become ancient classics to our posterity,—who, we may ask, will then be able fully to comprehend them, and feel the force of many of their expressions

and allusions, unless he has some knowledge of the constitution and laws of England? The case is the same with the works of the statesmen and other writers of antiquity. If, then, a just and accurate knowledge of man is of any value to us,—and all agree that it is of the highest importance,—it is essential that we should make ourselves acquainted with the *governments and laws* of those ancient nations, whose history we would study with the expectation of deriving any advantage from them.

The work now before us is well adapted to the purposes of a general introduction to the civil law. It is not rendered forbidding by a mass of technical learning, and yet is sufficiently full to initiate both the student of law and the general scholar in this branch of knowledge. It is arranged in seven general divisions, as follows: 1. The Roman Constitution, previous to the establishment of the empire. 2. The Legislature [i. e. the legislation] of Rome, previous to the establishment of the empire. 3. The Pontifical Law. 4. The Prætorian Law. 5. The Roman Jurisconsults. 6. The Constitution of Rome under the Emperors. 7. The Imperial Jurisprudence.

Under these general divisions are discussed, in as clear and satisfactory a manner as the author's limits would allow, various interesting particulars which every well informed man, in or out of the profession ought to make himself acquainted with; as, the relative condition of the Patricians and Plebeians; the Senate, Curia, Comitia, Leges, Plebiscita; Patria potestas, Patron and Client; the Twelve Tables; the manner of enacting laws; the Priesthood; Dies fasti et nefasti; actiones legum; the Prætorian Law; the Patrician Jurisconsults; Responsa Prudentum; difference between the *causidici* and professed jurisconsults; Schools and Sects of Lawyers; Constitution of Rome under the Emperors, and improvement of the Jurisprudence; Codes of various Emperors; Justinian; Sources of the Roman Law, and comparison with the laws of England; the Institutes, Digest, Novellæ, etc. with numerous other particulars which we have not room to state.

Such is the plan of this useful and interesting work; which, though of small compass, is the result of much reading and reflection; and, among the books read by the author, we are glad to see occasional references to the eminent *German* lawyers of the present day, whose works however, we regret to add, are probably not better known in England than they are in this country.

We ought not to omit mentioning, that in the course of the work, our author takes occasion briefly to discuss some of the contested points in Roman history and jurisprudence; and his conclusions are always such as approve themselves to the judgment of practical men. On *constitutional questions*, his inclination is decidedly in favor of liberal principles, but moderated by a due regard to what is *practicable*, rather than what would be metaphysically exact in the social order.

In his opinions upon the subject of legislation, or, as he chooses to call it, *legislature*, (for which use of the word lawyers would require some authority, and which we do not find even in the capacious repository of our new American Dictionary,) we observe the same cautious and well-considered decisions as in other cases.

Among the controverted points in the juridical history of the Romans is that of the celebrated embassy, which Livy and other historians assert was sent to Athens, in order to procure materials for a body of legislation for the use of the Romans. He observes, very justly, that it is difficult to refuse credence to such authority as exists in favor of its having actually taken place; that it must have been a subject of great notoriety at the time, and not so likely, he thinks, to have been impaired by tradition as many other Roman stories were. But, as he observes, *the total silence of Cicero*, whose works abound with remarks on the Roman laws, and who had occasion frequently to mention those which were supposed to have been derived from Greece, very nearly amounts to a decided contradiction of it. He adds, in rather too strong terms we think, that this is one of those supposed historical facts, 'which modern criticism has in general rejected.' It is true that Gibbon and some other writers have boldly rejected it; but, as our author himself says in a note, there have not been wanting those who have taken up the other side of the question. And among these latter we would name one of our own time, who is himself a host in a question of this kind, and who should not have been overlooked; we mean that very high authority, Heeren, professor of History at Göttingen, who says in emphatic language, that 'the doubts, which have been raised respecting the embassy to Athens, are by no means sufficient to shake our confidence in a fact which is so positively stated.' (a)

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(a) Heeren's Handbuch der Geschichte der Staaten des Alterthums, or

Another disputed point of *constitutional* law, is the well known one relating to the *Lex Regia*; which, according to a passage of Ulpian, cited in the Digest, lib. i. tit. 4, *transferred to the emperor all the power which had formerly belonged to the people*. 'It has frequently been doubted,' as our author observes, 'whether this passage was genuine; and as it has only been transmitted to us through the medium of Justinian's compilation, many have accused that emperor of interpolating a forged authority for the purpose of giving a legal color to his own enactments. But the recent discovery of the Institutes of Gaius has completely refuted this opinion; and among the numerous obscure points of the Roman jurisprudence, which have been elucidated by that valuable work, there are not many of more importance than this. The testimony of Gaius on the subject of the *Lex Regia* leaves no room to doubt that such a law was actually passed. *Gaii Instit. Com. 1. § 5.*' p. 217. (a)

The remarks of our author upon the Imperial *rescripts* deserve notice, particularly as an incorrect notion of them has been propagated by the older common law writers, and has thence found its way into our juridical classic, Blackstone, and might mislead the student. He makes the following correction of the commonly received opinion :

'With regard to the *Rescripta* or personal decrees, which formed one of the most valuable branches of the imperial legislature, a very erroneous opinion has been advanced. They were the answers or judgments of the prince in particular cases where a disputed point of law was referred to his decision; and thus scarcely differed from the authorized *responsa prudentum*, since they were actually framed by the most eminent jurisconsults of the empire. Montesquieu, and Blackstone who has copied him, have inveighed against the impropriety of making private decisions (applicable only to few cases) serve for general rules of legislature. The fact is, *they were not considered as such*. Their authority was only that of legal precedent; and, like that of the *responsa prudentum*, could only depend on the applicability of their principles to anal-

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Manual of the History of the States of Antiquity, p. 421, edit. 1817. A translation of this valuable work has been lately made by Mr. Bancroft, of Round Hill; and we may justly take some credit to ourselves, that the first *English* translation of it has been made in America.

(a) We subjoin the passage of Gaius, from the second Leipsic edition, which is the one we have before us:—*Nec umquam dubitatum est, quin id (the emperor's decree or edict) legis vicem optineat, cum ipse Imperator per legem imperium accipiat. Gaii Institutt. Com. i. § 5.*

ogous cases. Blackstone, who was fully aware of the improvements the English law had undergone by the means of similar decisions, might certainly have better appreciated the value of this branch of the Roman jurisprudence; for certainly no English lawyer of the present day, experiencing as he continually must the practical authority of the law reports, will hesitate to confess that the *statutes* of the realm are not of more frequent use in our courts than the *rescripts* of Westminster Hall. Those of the Roman emperors were certainly not less confined in their application.' p. 223.

Among our author's criticisms, we may notice the following; which, though not of much importance, yet gives us more distinct and precise conceptions of the use and import of words frequently occurring in the works of the Roman lawyers and other writers.

The words *populus* and *plebs*, he remarks, 'though frequently confounded by translators, were in fact very distinct. The former comprehended the whole body of the free citizens; the latter was applied to such of them alone as were not of the patrician order. Every free citizen of Rome was entitled to a vote in the *Comitia*, or popular assemblies; and by the majority of votes every affair of importance connected with the administration of the state was decided.' p. 18.

We recollect that several years ago, when we felt a natural indignation at the reproaches cast upon us by certain British writers, one of the champions on our side of the controversy, in the warmth of argument, asserted that in this country we had no *plebs*; but according to the classical acceptation of this word, as above explained, the case is exactly the reverse.

Again: The customary formula, *Patres Conscripti*, is repeated in the daily exercises of our youth, even by students at the universities, without an accurate knowledge of its origin; for this can only be obtained by a knowledge of the Roman constitution, in which they are very imperfectly instructed.

'The original application of the term *patres*,' says our author, 'is doubtful. Their number is said to have been first limited to an hundred; an assertion which cannot be looked on but with great distrust, since it is supported only by an uncertain and improbable tradition. On the overthrow of the monarchical government, Brutus increased it to three hundred; and very few additions, if any, were made during the flourishing periods of the republic. It is worthy of observation, however, that the *newly enrolled* members did not assume the title of *Fathers*. Either

they were the first who had been elected for other qualifications than that of age, or the recent date of their admission did not entitle them to the distinction; but it was thenceforward customary to address the body of the Senate by the words *Patres et Conscripti*. This is one of the many forms of speech in which, for the sake of brevity, the adjunctive particle was afterwards disused.' p. 12.

Further examples of this abridged mode of speaking may be found in Ernesti's *Clavis Ciceroniana*, verb. *Conscriptus*.

We quote a remark or two of our author upon the mode of framing laws; which, though not new, deserve the attention of those persons who think the business of legislating to be a very simple one. We are perpetually told by men, who have never themselves attempted to draw an act, that our laws ought to be short and plain, so that everybody may understand them as well as lawyers; qualities, we agree, which are excellent in themselves, but no less difficult to incorporate into our laws than into a contract, a deed, a will, or any writing not of a legal character. If the subject-matter of a law or of a common contract is in itself intricate and difficult to be comprehended except by the particular class of men to whose business it relates, how is it to be expected that the language which is to describe those intricacies and difficulties can be made plain to every man in the community? But let us hear the author's remarks in relation to the characteristics of the Roman laws:

'There is one other circumstance relating to these laws [the Twelve Tables] which cannot be passed over in silence; their extreme brevity. That "admirable concision" which has often been proposed as a model, and quoted as a reproach to modern legislators, was not without its motive. It was intended to leave ample scope for dubious comment and interpretation. It will be seen hereafter, that the intention was fully accomplished. Few of the laws that have been preserved consist of more than one short sentence; so that the strict maxim alone could be conveyed in the text, while every deviation from it, to suit the emergency of particular cases, *was left entirely to the discretion of the judge*. The consequences of this laconism proved, that the convenience resulting from the brevity of laws may be more than counterbalanced by the disadvantages attendant on it.' p. 86.

The same difficulty has been experienced, during our own times, in the application of the celebrated French code; which, though perhaps the most comprehensive that was ever made, yet from its very conciseness leaves too much to construction;

and indeed, without the benefit of constructions *ab extra*, as, by usage aided by numerous supplementary enactments and endless commentaries and expositions of the civilians, even that celebrated code with all its excellencies would be wholly insufficient for regulating the complicated concerns of society; in which, as in the natural world, scarcely any two cases will be found precisely alike, and where our various legal and moral rights and duties differ from one another by delicate gradations, which are perceptible only to minds long practised in the discrimination of those rights and duties. Just as in the fine arts the skill of a painter is necessary, to distinguish in a picture the numberless shades of color, which run into each other, and whose united effect is perceived and felt by every spectator, but whose differences are discernible only by a practised eye. In France, accordingly, it is the fact, we believe, that the community at large are as much puzzled to know the exact bearing and extent of the *two thousand two hundred and eighty-one* concise and perspicuous laws of their code, as the people of Massachusetts, for example, often are to ascertain the meaning and application of the more prolix and obscure enactments of their voluminous statutes. In making comparisons, therefore, between our own and the French law, we must know not only the statutes or positive enactments of the respective countries, but how much of their law consists in usages (which must ever exist) and how much in constructions given to the positive law; all which must be looked for in the Digests and Abridgments, as we call them in our professional language, and the corresponding works called *Repertoires* of Jurisprudence by the French. We have, for example, as every lawyer knows, the valuable Abridgment of American Law by Mr. Dane, which the learned author has with vast labor been able to condense within the space of seven large octavo volumes, and which to persons out of the profession seems to be unnecessarily bulky. But, in comparison with the best Abridgments or Repertoires of France, the simplicity and conciseness of whose law is so often recommended to our imitation, Mr. Dane's work shrinks to a pigmy size. The most modern and most valuable French work of this kind, the *Repertoire de Jurisprudence*, by Mons. Merlin, is now extended to nineteen closely printed quarto volumes. The simple fact that a work of this bulk is found necessary in France, where, according to some fanciful theorists, a code was to supersede

all other law books, we may truly say speaks volumes upon this subject.

From our remarks, however, upon the subject of codes, the reader must not understand, that we should by any means object to a more methodical and systematic mode of legislation than has been practised. Method and system are as necessary in the law as in any science. Our statutes have much superfluous phraseology and are too carelessly drawn; even those of a general nature are too often made to suit a particular case, and are accordingly framed either with a studied ambiguity in order to conceal the real object, or at least without taking that large and general view which the public good requires. If, therefore, any improvement is to be made in our legislation, it should be done in the manner lately adopted in England; not by setting out *de novo*, and making at a single casting an entirely new code, or, in the cabala of Jeremy Bentham's school, by *codifying*, but by carefully revising and methodizing the existing laws; always preserving as nearly as possible, the very words of the statutes where they are now clear, and in other cases, where necessary, resorting to the language of the judicial decisions in which they are expounded. The author of the work now before us justly observes, that

'Every system of law which is accommodated to the growing exigencies of the state, and gradually increases according to the wants of the citizens, must possess a great superiority over the best of uniform codes, which are comparatively the work of a moment; inasmuch as the former must of necessity be adapted to the manners and habits of the people, among whom it is begun and from whom it receives almost daily additions.' p. 152.

The multiplication of laws, which has been a subject of frequent complaint in modern days, is undoubtedly an evil; but when we consider the innumerable and complicated relations arising from the constant changes and progress of society, particularly in a new country like our own, we shall the less wonder at the multitude of our laws. And, as to the fanciful wish of some philanthropic persons, that our laws might be made so plain as to be intelligible to every man in the community, we might as rationally attempt to abolish and sweep away all those improvements which constitute the superiority of modern society over that of past ages, but which at the same time give occasion to new laws for its due regulation. The mere necessity of terms peculiar to the different arts and

sciences and the various professions and kinds of business in common life, though by no means the greatest of all difficulties, presents an insurmountable obstacle at the very threshold of all attempts to legislate in *popular* language; for, until we can banish all the arts and sciences, we must retain the language which is appropriate to them. The divine and the physician, the merchant, the mechanic, the seaman and the farmer cannot dispense with their terms of art; and the law-makers, whose duty it is to make rules for regulating the social relations of all the different professions and callings in life, must frequently use language which will not be understood by everybody without the aid of an interpreter, any more than it would be possible for every man to make himself master of every one of those professions and callings. But we have not room to enlarge upon this topic in the present article; we therefore repress all further observations upon it, and will only add one other remark respecting the work under consideration.

One defect of this performance ought not to be overlooked; we mean a total omission to give an account of the *Agrarian* laws of the Romans, which produced so many political convulsions in their government. To general readers, as well as lawyers, who would have just notions of the Roman history and constitution, a correct view of the agrarian laws is indispensable; and we are the more surprised, that this well read and sensible author has barely mentioned them (at p. 77) without any explanation, as Mr. Niebuhr, in his celebrated Roman History, has lately given a view of them which is new to English and American readers, though it has for some time been well known to the learned of Germany. Our readers, we persuade ourselves, will pardon us, if we detain them a few moments upon this subject.

The commonly-received opinion has been, that the agrarian laws were resorted to for the purpose of making an equal division of the private property of individuals, and restricting all landholders to five hundred jugera, or about 350 acres; an opinion, which has been adopted even by such men as Machiavelli, Montesquieu, and Adam Smith. But the original object of these laws was, the distribution of the *public* lands, which had become the property of the nation either by conquest, or purchase with the public money, or otherwise. We must not, however, infer as some writers have hastily done from Mr. Niebuhr's remarks, that the agrarian laws did not

interfere at all with *private rights*; this would be only escaping from one error to fall into another, and would be irreconcilable with Cicero's severe animadversions upon the demagogues who promoted laws of that kind. The manner in which private rights were violated would require some detail, and will be explained on a future occasion. In the mean time we will inform our readers, that we understand an article on this subject is to appear in that valuable German work, the *Conversations-Lexicon*, to which we referred in our last, and the first volume of which will be published in this city before the next number of our journal. (a)

The second work at the head of our article will require but a brief notice on this occasion, as it has already been well translated and published entire in a valuable law journal, which was begun at New York in 1822, but was soon afterwards discontinued; we mean the *United States Law Journal and Civilian's Magazine*. Mr. Dupin, the author of the work before us, is well known in Europe as an eminent advocate at the Paris bar, and as the author of various works on jurisprudence. We find at the end of his present volume a list of no less than twenty-seven different publications by him, comprising forty-six volumes of different sizes, and among them twelve quartos of *Plaidoyers* and *Consultations*, answering to what we call *arguments* and *opinions*. The translation of the present little work, to which we have just alluded, was made from the edition of 1821. We have before us the *fourth* edition, 1822, which, so far as we can decide by the translation, does not differ materially from the former. The work is divided into eight short chapters, on the following subjects:—1. The Roman law under the kings; 2. The Roman law to the time of the Twelve Tables; (b) 3. From the time of the Twelve Tables to the time of Augustus; 4. From Augustus to Constantine; 5. From Constantine to Justinian; 6. The compilation of the *corpus juris*, or body of Roman law; 7. The

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(a) A concise account of these laws has also been given in the *North American Review*, vol. 16, p. 439 of the review of Niebuhr's work.

(b) At the end of this chapter we find a short paragraph which is not in the New York translation, and which is as follows; 'Several authors advise beginning a legal course of study with these laws [the Twelve Tables], which in fact indicate the origin and principles of many established regulations; but others, with whom I myself agree, think, on the contrary, that the study of them is only advantageous to those who wish to sound the depths of the science; and that to common readers we must say—procul, ô, procul este profani!'

Roman law after Justinian, and the fate of his legislation ; 8. The Roman law in the 19th century. The work is concluded by an Appendix, explaining the *abbreviations* used by the civil lawyers in citing the Roman law and the writers upon it. We need only add, that from the very limited extent of this work, which is not longer than a single lecture of a professor, the reader will not expect anything more than a mere outline of the history of the Roman law ; but it is clearly and distinctly drawn. The author, as we have observed, is a friend of liberal principles in government ; so much so, indeed, that we find, by the following notice prefixed to this edition, that his work has come under the censure of the police of France : ‘The first edition of this historical summary had the honor to be seized by the police in 1809 ; the reason of this will be easily guessed by reading the fourth chapter ;’ where, it is true, he uses a boldness of language which we should suppose would be deemed offensive by the officers of the police.

We conclude this article with a few general remarks upon the study of the civil law.

The history and constitution of Rome, as a republic, must ever be highly interesting and important to us who also live under a republican government ; for, if there is any such thing as learning wisdom by the history of other governments, it can only be when we obtain an accurate knowledge of them ; and this demands a careful and exact study of their constitutions and laws. Apart from these more general considerations, however, the utility of the civil law as an important aid in the study of our own, cannot now be questioned.

But if we extend our views beyond the confines of *municipal* law, we find the civil law to be the basis of that *international* code, which governs us and all the nations that constitute the great community of Europe. The interpretations given to that law, the reasoning of foreign nations upon it, and the instruction we have in the works of its elementary writers, all proceed from foreign statesmen and jurists, who have been taught in the schools of the civil law ; whose modes of thinking and language, particularly their technical language, will not be intelligible to us without some acquaintance with the same code. Our statesmen at home, therefore, our diplomatic agents abroad, and our practising lawyers of eminence, who are daily called to the examination of important questions more or less intimately connected with the rights and duties

of foreign nations, must make themselves in some degree acquainted with foreign laws; and for this purpose a knowledge of the civil law is indispensable.

We might add to these considerations, that in a liberal course of professional studies, general or *comparative jurisprudence* must be a constituent part; and in this point of view the Roman law is of far greater importance than that of any other nation. The remarks of Blackstone on this subject (which we fear are not so much read as many other parts of his book) deserve the serious attention of the profession :

‘The evident want of some assistance in the rudiments of legal knowledge has given birth to a practice, which, if ever it had grown to be general, must have proved of extremely pernicious consequence. I mean the custom by some so very warmly recommended, of dropping all *liberal* education, as of no use to students in the law; and placing them, in its stead, at the desk of some skilful attorney, in order to initiate them early in all the depths of practice and render them more dexterous in the mechanical part of business. . . . Making, therefore, due allowance for one or two shining exceptions, experience may teach us to foretell that a lawyer thus educated to the bar, in subservience to attorneys and solicitors, will find he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know; if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him; *ita lex scripta est* is the utmost his knowledge will arrive at; he must never aspire to form, and seldom to comprehend any arguments drawn *à priori* from the spirit of the laws and the natural foundations of justice.’ (a)

The example of lawyers in other nations, one would think, needs but to be known, to stimulate us to the liberal course of study here recommended. They think it useful to study the laws of other nations besides their own. We accordingly find that the admirable Commentaries of Blackstone have been already translated into French and German; and we have now before us an excellent French Law Journal, in which there are many discussions on points of English law as compared with the civil law. We have also before us a learned history of the English law, in German, written by a professor at Berlin; (b) and there are doubtless many other works of a

(a) 1 Black. Com. 31, 32.

(b) The title of this learned work is, *Englische Reichs und Rechtsgeschichte*, etc. By Dr. Geo. Phillips. 2 vols. 8vo. Berlin, 1827.

similar description which have not yet come to our knowledge.

While, then, we are endeavoring to advance the *science* of law in our own country, particularly by means of law schools and lectures on the *common* law, we ought at the same time to take care that the *civil* law should not be wholly neglected. We have just had an illustrious example of professional liberality in the donation made by our learned countryman, Dr. Dane, to the University of Cambridge, for the advancement of *American* law. And we earnestly hope, that some benefactor of equal liberality will soon be found, who will devote a portion of the well-earned fruits of an honorable life to a chair for the civil law in that ever-cherished institution. This would complete the department of jurisprudence in our university law school, and at once give it the preference over every other.

Need we fortify the argument in favor of this interesting and useful study by examples of its fruits? Both England and our own country, happily, can furnish them. Great as the talents of Lord Mansfield were, he owes no inconsiderable part of his professional reputation to the constant use which he made of the civil law, particularly in the application of it to contracts of a mercantile nature. And who, we may ask, has not read with delight and wonder the finished work of Sir William Jones above cited; which, however, as every student of the civil law knows, and as he himself admits, is nothing more than a summary of principles drawn directly from the writers in that law; principles, which, though new at that period in England, had been settled for centuries on the continent of Europe. And, as that inimitable writer observes,— ‘in questions of *rational* law, no cause can be assigned, why we should not shorten our own labor by resorting occasionally to the wisdom of ancient jurists, many of whom were the most ingenious and sagacious of men. What is good sense in one age must be good sense, all circumstances remaining, in another; and pure, unsophisticated reason is the same in Italy and in England, in the mind of a Papinian and of a Blackstone.’ (a)

In our own country too we can exhibit honorable examples of high professional distinction, which has been in some degree at least obtained by this study. Among our advocates we may

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(a) Law of Bailments, 14.

mention that eminent jurist of the Philadelphia bar, who has enriched our law with his able Dissertation on the Jurisdiction of the United States' Courts; and among our judges every man will point to the illustrious chancellor of New York, whose opinions from the bench, and whose lectures from the university chair are alike imbued with the wisdom of the Roman law, skilfully adapted and applied by the native energy of his discriminating mind to the interpretation and improvement of our own.

With this strong conviction of the high value of the Civil Law—its great utility in our legal studies and its essential importance in the administering of our own, particularly the equity, mercantile, and testamentary law of the several states, and the equity, admiralty, and international law as administered in the courts of the United States—we cannot but earnestly hope soon to see the proper rank assigned to this branch of jurisprudence both in our law schools and among our practisers at the bar.

The following list of Roman Jurists is extracted from the work first named at the head of this article.

*List of the Principal Roman Jurisconsults, with the number of times they are quoted in the Digest, and the number of Fragments, (commonly called Laws) there inserted, which are taken from their works.*

*I. Jurisconsults anterior to the Age of Cicero.*

No.	No. of times quoted in the Digest.	No. of Fragments of the Digest, extracted from their works.
1 P. or C. Papyrius . . . . .	2	“
2 Appius Claudius (Decemvir) . . . . .	2	“
3 App. Claudius Centumanus } Cæcus . . . . . }	3	“
4 Cn. Flavius . . . . .	2	“
5 P. Sempronius Longus Sophus . . . . .	1	“
6 Tiberius Coruncanius . . . . .	2	“
7 Q. Mutius . . . . .	1	“
8 Sext. Ælius Pætus Catus . . . . .	6	“
9 P. Attilius . . . . .	1	“
10 P. Scipio Nasica . . . . .	1	“
11 M. Cato . . . . .	5	“
12 P. Mucius Scævola . . . . .	4	“
13 M. Manilius . . . . .	3	“

No.		No. of times quoted in the Digest.	No. of Fragments of the Digest, extract- ed from their works.
14	M. Brutus . . . . .	7	"
15	C. Livius Drusus . . . . .	1	"

## II. *Jurisconsults of the latter period of the Republic.*

16	Cicero . . . . .	7	"
17	P. Rutilius . . . . .	5	"
18	Q. Ælius Tubero . . . . .	1	"
19	Q. Mucius Scævola (Pontiff) . . . . .	50	4
20	C. Aquilius Gallus . . . . .	16	"
21	S. Sulpicius Rufus . . . . .	93	"
22	Q. Cornelius Maximus . . . . .	2	"
23	Antistius Labeo (the father) . . . . .	1	"
24	Granius Flaccus . . . . .	1	"
25	Ælius Gallus . . . . .	2	1

## III. *In the time of J. Cæsar and of Augustus.*

26	A. Offilius . . . . .	73	"
27	A. Cascellius . . . . .	16	"
28	Trebatius Testa . . . . .	96	"
29	Q. Ælius Tubero, pupil of Offilius . . . . .	17	"
30	Cinna . . . . .	3	"
31	Alfenus Varus . . . . .	19	54
32	Aufidius Namusa . . . . .	6	"
33	C. Ateius Pacuvius . . . . .	1	"
34	P. Gellius . . . . .	1	"
35	Antistius Labeo (the son) . . . . .	541	63
36	Ateius Capito . . . . .	7	"
37	Blæsus . . . . .	1	"
38	Vitellius . . . . .	1	"

## IV. *From Tiberius to Vespasian.*

39	Massurius Sabinus . . . . .	220	"
40	Cocc. Nerva (the father) . . . . .	34	"
41	C. Cassius Longinus . . . . .	160	"
42	Sempronius Proculus . . . . .	136	37
43	Falcinius (Priscus) . . . . .	16	"
44	Fabius Mela . . . . .	39	"
45	Cartilius . . . . .	2	"
46	Cocc. Nerva (the son) . . . . .	15	"
47	Attilicinus . . . . .	27	"

## V. *From Vespasian to Hadrian.*

48	Cælius Sabinus . . . . .	18	"
49	Pegasus . . . . .	28	"

No.		No. of times quoted in the Digest.	No. of Fragments of the Digest, extract- ed from their works.
50	Juven. Celsus (the father)	5	"
51	Priscus Javolenus . . . . .	11	206
52	Aristo . . . . .	81	"
53	Neratius Priscus . . . . .	128	64
54	Arrianus . . . . .	6	"
55	Plautius . . . . .	4	"
56	Minutius Natalis . . . . .	3	"
57	Urseius Ferox . . . . .	4	"
58	Varius Lucullus . . . . .	1	"
59	Fufidius . . . . .	3	"
60	Servilius . . . . .	1	"

### VI. Hadrian and Antoninus Pius

61	Lucius Celsus (the younger) . . . . .	173	142
62	Salvius Julian . . . . .	778	457
63	Aburnius Valens . . . . .	4	20
64	Lælius Felix . . . . .	2	"
65	Vindius Verus . . . . .	4	"
66	S. Cæcilius Africanus . . . . .	3	131
67	Volus. Mæcianus . . . . .	18	44
68	Ulp. Marcellus . . . . .	256	158
69	Val. Severus . . . . .	4	"
70	Ter. Clemens . . . . .	1	35
71	Publicius . . . . .	3	"
72	Pactumeius Clemens . . . . .	1	"
73	Campanus . . . . .	2	"
74	Octavenus . . . . .	23	"
75	Vivianus . . . . .	23	"
76	S. Pedius . . . . .	60	"
77	Tuscius Fuscianus . . . . .	1	"

### VII. M. Aurelius and Commodus.

78	Caius or Gaius . . . . .	4	536
79	S. Pomponius . . . . .	409	588
80	Q. Cervidius Scævola . . . . .	63	307
81	J. Mauricianus . . . . .	6	4
82	Papyrius Justus . . . . .	"	16
83	Papyrius Fronto . . . . .	4	"
84	Claudius Saturninus . . . . .	"	1
85	Tarruntenus Paternus . . . . .	1	2

### VIII. From Severus to the Gordians.

86	Callistratus . . . . .	"	101
87	Æm. Papinian . . . . .	153	596

No.		No. of times quoted in the Digest.	No. of Fragments of the Digest, extract- ed from their works.
88	Arrius Menander	5	6
89	Tertullian	3	5
90	Jul. Paulus	45	2087
91	Dom. Ulpian	20	2461
92	Venul. Saturninus	4	71
93	Messius	1	"
94	Ælius Marcianus	6	282
95	Cl. Triphoninus	21	79
96	Lic. Rufinus	1	17
97	Æm. Macer	"	62
98	Heren. Modestinus	2	345
99	Florentinus	"	42

*IX. From the Gordians to Justinian.*

100	Hermogenianus	"	107
101	Aurelius Arcadius Charisius	"	6
102	Julius or Gallus Aquila	"	2

*X. Uncertain.*

103	Puteolanus	1	"
104	Paconius	1	"
105	Furius Antianus	"	3
106	Rutilius Maximus	"	1
107	Antæus	1	"







Hugh Sydney Legaré

THE  
ORIGIN, HISTORY, AND INFLUENCE  
OF  
ROMAN LEGISLATION.

- ART. I.—1. *Lehrbuch eines civilistischen Coursus*, vom Geheimen Justiz-Rath Ritter HUGO, in Göttingen, Dritter Band, welcher die Geschichte des Römischen Rechts bis auf Justinian enthält. Elfte, sehr veränderte Auflage. Berlin: 1835.
2. *Corpus Juris Civilis*, ad fidem Manuscriptorum aliorumque subsidiorum criticorum recensuit, commentario perpetuo instruxit EDUARDUS SCHRADER, Jctus. In operis societatem accesserunt, THEOPH. LUCAS FRIDER. TAFEL, Philolog. GUALTH. FRIDER. CLOSSIUS, Jctus. Post hujus discessum, CHRISTOPH. JOH. C. MAIER, Jctus. Tomus Primus, Institutionum Libri iv. Berolini: MDCCCXXXII.
3. *Gaii Institutionum Commentarii Quatuor*, cura AUGUSTI GUIL. HEFFTER. Bonnæ: MDCCCXXX.
4. *Commentaries on the conflict of Laws, Foreign and Domestic, in regard to Contracts, Rights, and Remedies, and especially in regard to Marriages, Divorces, Wills, Successions, and Judgments.* By JOSEPH STORY, LL. D., Dane Professor of Law in Harvard University. Boston: 1834.
5. *Institutionum Juris Romani Privati Historico-Dogmaticarum Lineamenta*, observationibus maximè litterariis distincta in usum prælectionum denuo adumbravit et Legum Duodecim Tabularum nec non Edicti Prætoris atque Ædilitiæ sententias

integras, etc., adjecit. D. CHRIST. GOTTLIEB HAUBOLD, antecessor, Lipsiensis. Post mortem auctoris edidit atque additamentis auxit D. CAROLUS EDUARDUS OTTO, Professor Lipsiensis. Lipsiæ : CIOIOCCCXXVI.

MR. HALLAM, in his "History of the Middle Ages,"\* speaking of the civil law and its earlier professors in modern times, remarks, that he "should earn little gratitude for his obscure diligence, were he to dwell on the forgotten teachers of a science that is likely soon to be forgotten." As we do not affect to have done more ourselves than glance over the pages of the *Corpus Juris Civilis Glossatum*, and know (we confess it with shame) little more of those restorers of Roman jurisprudence than may be learned from Gravina or Terrasson, it is not for us to take up the glove for Azzo and Accursius, or to censure very severely the historian who omits their names in a general view of the progress of society. Yet Accursius has found in the first of elementary writers of the old school † a champion, whose zeal is equalled only by his prowess, and one does not very readily conceive how the history of the human mind, in the middle ages, can be written without reference to a branch of study, which, in its double form of civil and canon law, did, during that period, more than all others put together, to shape and control the opinions of mankind. But when that writer goes on to speak of the schools of the sixteenth century, and even of the great Cujacius himself, as of those "whose names, or at least whose writings, are rapidly passing to the gulf that absorbed their predecessors" — and still more, when he gravely assures his reader, that "the stream of literature, which has so remarkably altered its channel within the last century, (he is writing some twenty years ago,) has left no region more deserted than that of the Civil Law," he must pardon us for doubting whether he is the best of all possible pilots in that stream, or has explored with any pains the particular channel, of which he speaks with such flippant, and, as it happens, erring dogmatism. We trust we are not insensible to the real claims of the author of the "Constitutional History of England," to the grateful consideration of statesmen, as well as of scholars. That work, although far, in our judgment, from being perfectly satisfactory, is still a respectable one, and has, to a certain extent, filled a void in a most important department of knowledge. But the "History of the

\* Chap. IX. P. II.

† Heinecc. Hist. Jur., § ccccxvii. He quotes and confirms the elaborate panegyric of Gravina de Ortù et Progr. Jur. Civ. § CLV.

Middle Ages" is a compilation, as superficial as it is ambitious. That it should have attained to a certain degree of popularity and reputation, is, in the present condition of English literature, unfortunately not to be wondered at. What does, however, we confess, seem to us a little surprising, is the extent of the ignorance — if extent can be predicated of such a negation — discovered in this positive announcement of the end, actual or imminent, of all study of the civil law, by a contemporary of Hugo and Savigny, of Niebuhr and Eichhorn, of Dirksen, Schrader, Göschen, and a host of other names, scarcely less shining than these.

Our very rubric, if we stopped there, were itself a refutation. We could, for this reason, scarcely resist the tempting facility of extending it much farther. We had, for instance, at first added to it the other six volumes that make up the complete *Civilistischer Coursus* of Hugo, together with the new edition of the *Jus Civile Anti-Justinianicum*, including (what had been omitted by Schultingius) the whole Theodosian code, published at Berlin in 1815, by a society of Jurisconsults, with a preface and index, by that learned professor, and republished after the discovery of Gaius, with additions and improvements, in 1822-3. Haubold's *Lincamenta*, one of the works placed at the head of this article, would have supplied us with materials for the same purpose, *usque ad nauseam*. The scheme of that work is to present, in a systematic form, the outlines of a course of lectures, or of a comprehensive treatise upon the elements and the progress of the civil law, with references, under each particular head of doctrine, or history, to the writers by whom it has been most ably treated, as well as to the whole body of collateral and subsidiary literature. (*Apparatus Litterarius*.) The extent of reading, thus displayed, is prodigious — the volumes of "forgotten teachers," still studied by a learned Jurisconsult, are innumerable — and in a science condemned by Mr. Hallam to such speedy oblivion, it is quite inconceivable what a monstrous brood of this vain wisdom and false, and what is worse, (if he is right,) most perishable philosophy, has been brought forth, of late, as if in spite of his prediction, by an incessantly teeming press.

The truth is, that at no former period was there ever more ardor and activity displayed in the study of the civil law on the continent of Europe, than at this very time.\* A revival in it took place some forty or fifty years ago, † when a new and heal-

\* Cooper. *Lettres sur la Chancellerie d'Angleterre*, &c. p. 480. (Ed. Bruxelles, 1830.)

† Eichhorn, *Deutsche Staats and Rechts Geschichte*, Einleitung, p. 27.

thier taste for the antique, in art and literature, began to be diffused. It was just then that Hugo first rose into reputation as a professor. The editor of this posthumous edition of Haubold's outlines,\* in his preface, speaks of it as a return of the age of Cujas. It is even more than that. The great jurisconsults of the present day, to equal zeal add more knowledge, that is, more exact and available knowledge, a penetration more refined and distinguishing, and above all, views of the constitution of society, and of the principles, the spirit, and the influence of legislation, incomparably more profound, comprehensive, and practical. Criticism awoke about the middle of the seventeenth century, yet Bentley was long without a rival — and Niebuhr considers the sagacity of Perizonius, as thrown away upon an age entirely unworthy of it.† The example and the lessons of Heyne and Voss, have filled Germany with philologists, who have carried into every department of thought and knowledge, but especially those with which historical criticism has any connexion, the spirit and the habits of enlightened, searching, and philosophical inquiry. Some of these writers are really great men. Many of their opinions — conjectural at best — may, in the progress of science, be qualified or refuted, but their general views are characterized by too much comprehensiveness and wisdom, are too agreeable to the analogies of society and human nature in all ages, to pass away with the fashions of a day.

At the head of these (*absit invidia*) stands Niebuhr, who, we acknowledge, is, with us, an object of most profound homage. We have studied his work, as he asks that it shall be studied, and as he professes to have written it, conscientiously, and with perfect freedom from all prejudice; and the result is, that even in the rare cases in which we do not share his conviction, we feel the force of his reasoning, and admire the depth and soberness of his views. To call him the first of philologists, is to do him but very inadequate justice. No such mind was ever produced by a mere scholastic education. Uniting the qualities of Bentley to those of Montesquieu — when Montesquieu is not sacrificing his wisdom to his wit — but, with the additional advantages which both would have derived from the unspeakably instructive experience of the last sixty years, his pages challenge, and will reward, the meditation of the philosophic publi-

\* Professor Otto of Leipsic.

† *Römische Geschichte*, Vorrede, VIII. (Edit. 1833.)

cist. We ascribe to him the honor of having brought about a revolution—for it is nothing less—in the history of public law. He was, we believe, the first to lay his hand upon that key of the Past—the effect of races upon the revolutions of society, and the character of governments—of which Thierry has since made so striking an application in his History of the Norman Conquest, and his Letters on the History of France. It is not for his *doubts*, as some seem to think, but for his *discoveries*, that he is entitled to the thanks and admiration of the learned—not for what he has done to discredit the magnificent romance of Livy, (for the barren scepticism of Beaufort was equal to that,) but for what only such a combination as has scarcely ever been seen in any single individual, of immense erudition, unwearied industry, and incessant vigilance of research, with matchless critical sagacity, could have enabled him to accomplish, towards explaining what was obscure, reconciling what was contradictory, completing what was defective, and correcting—often out of his own mouth—what was mistaken, or misstated, in Dionysius of Halicarnassus. His examination of this writer, for the most part the only witness we have to vouch for the antiquities of Rome, is a master piece of its kind, and rivals the highest acumen and address of the bar. He sees intuitively when his author tells the truth, as sometimes happens, without knowing it, or knows the truth without telling it. He has an infallible instinct, in divining what is half revealed in a corrupt text, or in making an intelligible and consistent whole out of fragments separately dark, or not apparently related to one another. His conjectural emendations and reasonings *à priori*, always cautious, are rendered sure by his habitually patient and comprehensive inductions, and the immense command of analogy and illustration with which his various knowledge supplies him. Enabled by such means to anticipate what the truth ought to be, he detects it in the most blundering or perverted statement, turns to account every casual and distant hint, and attaches to words uttered in one sense by the writer, a meaning entirely different from his own, yet more probable in itself, and serving, perhaps, to clear up parts of his narrative, otherwise incongruous or unintelligible. It is not, we repeat it, the negative but the positive part of his work that entitles it to its great reputation. It is a mighty creation, or if we may borrow a thought from an old writer, it is more, it is raising the dead. Niebuhr, himself, compares the task of the philologist in this restoration, or anamorphosis of the history of the past, to that of the

naturalist gathering and putting together the fossil bones of a lost species of animal.\* It is thus that he has rebuilt, with fragments picked up here and there where they lay scattered about, as by a tempest, over the whole surface of ancient literature, the sacerdotal and patrician City of the Kings, in its old Cyclopean strength and massiveness, and the awful forms of Tuscan mystery and superstition. It is thus that you are made to see the Eternal City, already with her triple crown — not mystical — of *gentes* — three privileged tribes of various origin, greater and lesser — incorporated successively into one people, and constituting, in legal contemplation before the legislation of Servius Tullius, the *whole* people — while the noble *plebs*, the city of Ancus Martius, the people of the Aventine, never equalled by any other but the Commons of England, excluded from the rights of citizenship, is, for centuries together, fighting its way, like the Saxons under their Norman lords, into the pale of the constitution, and a full participation in its benefits. Never was more laborious and patient learning tasked to supply materials for the conceptions of genius, and the conclusions of philosophy, and never were such materials wrought by the hand of genius and philosophy, into a more solid and stately fabric.

If Niebuhr had done nothing but rebuild the ancient city, and reveal, for the first time, to the light of history — of that history of the life and forms of a community which may so long precede, as he well remarks, all knowledge of individuals — the “buried majesty” of Rome, he had rendered an immense service. The Kings lived with honor in the traditions of the republic; each of them was the personification of some commanding or venerable attribute; war, religion, legislation, conquest, heroic virtues, sometimes heroic crimes, were ascribed to them in the popular legends. Servius Tullius, especially, identified with a revolution so favorable to the classes lying under political disabilities, as to produce, by its very excess, a reaction, followed by two centuries of perpetual struggle and contention to overcome it — made a great figure in their Romancero.† To write the history of this period, was to explain that of the following, as on the contrary, the history of the following period confirms, by conformity, Niebuhr’s views of this. His theory accounts for the

\* R. G. B. III. 135.

† See the almost demagogical harangue put into his mouth by Dionysius, I. IV. c. 8.

phenomena, and is the only one that will do so. For two centuries and a half the people lived under the influence and the discipline of a patriarchal and limited monarchy, or Archonship—the national character was formed, the great outlines of the constitution were traced, the spirit of the laws, and, no doubt, most of their particular provisions, as they were afterwards recorded in the XII Tables, were developed and settled—in short, the future destinies of Rome may be said to have been already decided at the expulsion of the Tarquins. The Kings had governed strenuously; they had waged many and successful wars; and their grandeur is still attested by works unrivalled even by those of the Cæsars.\* Nothing could be more justly the subject of regret, than the absence of all clear historical light (and satisfactory, though but conjectural) on so interesting and critical a period of Roman annals. The childhood and youth of the heroic city, like those of Mahomet, were hidden from our view, and lost to the purposes of instruction, and nothing but what was fabulous and distorted, was known of her, until she sprang forth from behind this veil of myths, full-grown and ready armed for the fulfilment of her great mission, the conquest, the civilization, and ultimately, the *conversion* of the world. By his account of the three different races which formed this people, and especially of the connexion with Tuscany—of the corporate existence, and exclusive privileges of the *gentes*, under a senate made up of their chiefs, and a president elected for life (the King)—of the somewhat undefined, but certainly intimate and controlling relation of the patron to his clients, retainers of the patricians to be carefully distinguished from the plebs—of the peculiar characteristics of that plebs, the whole infantry of the legion, led by the Sicinii and the Iciliii, men as noble as the Claudii or the Quinctii, who denied them through constitutional disabilities, the fruits of their valor—of the *nexi*, the *ager publicus*, the usury laws, and the influence, so inconceivably important, of the Augur and the Pontiff, the auspices and the calendar,† we have problem after problem of Roman history and legislation, solved in the most natural and satisfactory manner.‡ Freed from the shallow and delusive common places

\* Dionys. III. 67.

† See the speech of App. Claudius against opening the consulship to the Plebs, on the single ground that they had no auspices. Liv. VI. 41.

‡ The coincidence of our own opinions on the subject of Niebuhr's services with those of such a writer as Schlosser, not a little confirms our conviction of their justness. See his admirable *Geschichte der Alten Welt*, Th. II. abth. I. C. 2. pp. 253, and especially 284, note f. (edit. Frankfort, 1828.)

of monarchy and republic, of aristocracy and democracy, of positive legislation, and governments arbitrarily adopted — ideas and language of what was called the philosophy of the 18th century, indiscriminately and absurdly applied to the institutions of all others—we now see the mixed constitution of Rome rationally, that is to say, historically accounted for. We see it, like that of England, under circumstances strikingly similar, developing itself through perpetual (though not as in the case of England bloody) conflicts, and successive compromises, between different, yet kindred, *nations*,\* inhabiting the same territory, without being members of the same commonwealth — the minority in possession of the state continually yielding something to their determined, persevering, multiplying, and yet singularly patient and moderate adversaries, until they are melted into one body politic and one people. These struggles were a discipline that fashioned both parties to stern virtues, and an excitement that stimulated them to heroic exertion. They were struggles for law and justice — for constitutional privilege on the one side, and for natural rights on the other. In such a school, the great legislators and conquerors of the world might well be trained, and Dionysius of Halicarnassus has not failed to embellish his account of contests so fruitful of good, with discussions of public law, in orations imputed to the great names of those times, profound and elaborate enough to satisfy a Greek, a philosopher, and a rhetorician of the age of Augustus.

It is not, therefore, to be wondered at, that Hugo, among the advantages which he mentions as calculated to animate the zeal of the civilian in the present times, should give a decided prominence to Niebuhr's history.† But the other helps to a more accurate knowledge of the Roman law than it was possible to acquire a century ago, are neither few nor inconsiderable. Niebuhr himself seems to regard it as a sort of special providence for the success of philology in this age, that just as a new spirit of inquiry had been awakened, the discovery of Cicero's republic, and of the real Gaius, should have occurred to excite and to aid it in its enterprises. But here, as in so many other analogous cases, it is difficult to say whether this discovery stands

\* Τὰ ἕθνη is the very expression of Dionysius, X. 60. Speaking of the prohibition of mixed marriages in the two last Tables of the Decemvirs.

† P. 55. Yet Hugo seems to us, more than once in the course of this work, to "hint a fault, and without sneering, teach the rest to sneer," when he speaks of Niebuhr's ideas as more approved by juriconsults than by historians. p. 56.

in the relation of cause or effect to the zeal which it furnishes so opportunely with a powerful instrument. It is now very well settled, that the Florentine copy of the Pandects had nothing to do with the revival of the study of the Roman law, however effective it was in promoting its progress; but on the contrary, nothing seems to us more probable, than that the revival of that study was the means of bringing to light, and preserving this solitary and precious manuscript. It is not at all surprising that a new school of philology, pronouncing the knowledge of Antiquity still in its infancy,\* examining de novo all the evidence in relation to it, collating more carefully than ever the manuscripts of classical authors, and publishing editions of them so emended as almost entirely to supersede the old,† should have found such a collaborator as Mai, or that Mai should not have sought in vain among the improvements of modern chemistry, for means to disinter (so to express it) from the Palimpsest the precious remains of ancient genius. Cicero's Republic is by no means the only conquest of the kind which the learned world owes to the celebrated librarian of the Vatican. His palimpsests of Ulpian and other writers are frequently quoted by Hugo, in the course of this work; but a still more important accession, in the opinion of that writer, to the resources of the philologist, are the Turin leaves of the Theodosian code, published by Peyron some fifteen or sixteen years ago. Without referring to other discoveries mentioned by the same author, (pp. 21, 23,) it is sufficient to add, that what with new readings of old books and the acquisition of new ones, and what with a deeper study and more critical examination of those long in the possession of civilians, an entirely new aspect has been given to the study of the Roman law. Hugo quotes a letter from a friend, (p. 75,) in which, congratulating the present generation upon the change, he declares, that he had taken his degree of Doctor, before he knew who Gaius or Ulpian was—writers now familiar to all his hearers; and Hugo confesses as much of himself, in regard to Ulpian and Theophilus. Our own experience, fortunately for us, is not quite so extensive, and yet it is difficult to imagine a greater contrast than that which presents itself to us, in comparing this *Lehr-Buch* of a Göttingen lecturer, with what we remember was the *course* of professor of the Civil Law in the Uni-

\* Boeckh. Staats Haushaltung der Athener.

† Bekkers.

versity of Edinburgh, just twenty years ago. One who was initiated into this study, as we happened to be, under the old plan of the 18th century, with Heineccius for a guide, will find himself in the schools of the present day, in almost another world — new doctrines,\* new history, new methods, new textbooks, and, above all, new views and a new spirit.

In the preface to the first volume of this Course — the *Lehr-Buch* of a Juridical Encyclopedia — Hugo carries his reminiscences back to 1782. He made his *début*, however, as an author in 1789, by translating into German, Gibbon's 44th chapter, in which that great master has contrived to condense into a few pages, a comprehensive, and to the general reader, satisfactory account of the history, the principles, and even the spirit of the Roman law † The year afterwards he put forth a publication, which he treats as the germ of the work at the head of this paper, and which has been since gradually expanding, through eleven successive editions, into its present form. Its title, when given to the world in 1790, was "a *Lehr-Buch*" of the history of the law up to our time, and contained only 170 or 180 pages. It is now a goodly tome, indexes and all included, of upward of 1200. We have read, with a melancholy interest, the remarks which, in the preface just referred to, the author makes in reference to his past successes and his present situation. His lecture-room, a few years ago too small to contain his pupils, was in 1833-4 comparatively deserted. His books, once bought up as soon as they were published, are, it seems, no longer very much in demand. For the decay of his popularity as a professor, he confesses, with a touching simplicity, that the infirmities of age may, in some measure, account. But in publishing, as he informs us, his *fortieth Lehr-Buch*, and as he has chosen to declare, his last, he is at a loss to imagine why many more should not be called for by the reading public, who cannot, like his pupils, be affected by the dulness of his hearing or the dimness of his sight. In what he has said of Göttingen's no longer giving the *tone* in legal studies, and the preference elsewhere manifested for the system of "Outlines," (such as Haubold's,) over that of *Lehr* books, he has revealed to us at least one very powerful cause of the change. We have found another in the style of this work

\* Hugo gives a list of them, p. 57, note.

† Gibbon is one of the very few historical writers of the 18th century, who have stood before the criticism of the 19th. Niebuhr acknowledges "the Decline and Fall" as auch für den Philologen ein herrliches Meister-Werk. — Vorrede to R. G. IX.

itself. It is thoroughly detestable — as bad as bad can be in a didactic, and especially an elementary work — involved, obscure, parenthetical, “cycle and epicycle, orb in orb.” There are sentences on important and difficult points, requiring the utmost possible precision and clearness, which run down a whole page, winding their almost invisible course through capes and shoals of qualifications, exceptions, *obiter dicta*, and so forth, that are absolutely distracting, to a foreigner at least. Some of these vices are, perhaps, inherent in the very nature of a *Lehr-buch*, which is something between a book and a brief, meant to serve for a text to lecture from in universities; but we suspect that this most profound of jurisconsults is not the most eloquent, and that since nothing more of novelty is to be expected from one whose doctrines have been so fully given to the world, students naturally seek those by whom they may hope to find new ideas broached, or old ones embellished. Besides, the veteran professor must not forget that the lessons which he has successfully taught, are become the arms of rivals in the hands of his pupils, and that the maxim of Napoleon, that it is given to no general to make war prosperously beyond a certain number of years, is only a recognition of the inexorable law of succession and equality among the generations of men.

Solve senescentem maturè sanus equum, ne  
Peccet ad extremum ridendus.

He has lived, too, through a period which, more than any that ever preceded it, has been, as we have seen, one of progress in his particular pursuit. That he has greatly contributed to promote that progress—that he has been, in some sort, the harbinger of a new era—that the great men whose more recent glory has eclipsed his own, were many of them brought up at his feet, and all of them enlightened by his wisdom — is a distinction which cannot be denied, and ought to satisfy him.

As we confine ourselves, in this paper, as much as possible, to the history and character of Roman legislation, and the study of the civil law, we will say little of the first and second volumes of Hugo's “*Cursus*,” one of which, as we have already had occasion to observe, is only a sketch of a juridical Encyclopedia. The other is much more interesting, being a *Lehr-Buch of natural law*, in which an attempt is made to produce something, in that kind, that shall not be liable to the objections made, by Bacon and Leibnitz, to the old way of treating this subject. In this work he has embodied certain principles of po-

litical philosophy which all will admit to be bold, and some may pronounce paradoxical. The great dogma, for example, of the *historical school*, that in the matter of government, "whatever is, is right," for the time being, and nothing so for all times; that positive institutions are merely provisional; and that every people has, *ipso facto*, precisely those which are best adapted to its character and condition.\* We recognise in these doctrines a great fundamental truth, without a distinct perception of which, history becomes a riddle, and government impossible; but it is easily pushed to extravagance, and we are not sure that Hugo and his school have not given to it too much the color of a dark and licentious fatalism. His idea, too, of the boundaries between the *jus publicum* and the *jus privatum*, savors far too strongly of the despotism of Dorian legislation for our tastes. We are for making private property as exclusively as possible an affair of *meum* and *tuum*, and in the spirit of our own constitution, would lean in all imaginable circumstances, in favor of maintaining its sanctity inviolate, against the pretended claims of state necessity, or the indefeasible sovereign power of society.

We have frequently, in the course of the preceding remarks, had occasion to mention the discovery of the *real Gaius* as an event of the highest importance to the study of the civil law. We owe this accession to our literary treasures to the same great man, whose work on the early history of Rome had already done so much for philology, Niebuhr. It was fitting that he who had made the best use of the old materials, should have the honor of making by far the most precious addition to them. This *palimpsest*, (the darkest and most perplexed of any,) was found by him at Verona, in 1816, and deciphered, says Hugo, by Göschen, and Bethmann Holweg, with admirable success, in 1817. The existence of some such manuscript, at no very remote period, had long been suspected. Bynkershoek, in his treatise *de Rebus Mancipi*,† after quoting the passage of Gaius preserved by Boëthius, in which *mancipatio* is defined, treats as erroneous the common impression that that fragment, together with another, *de in Jure Cessione*, (neither of which was to be found in the Gothic abridgment,) existed only in Boëthius, and goes on to state that he had recently read a treatise by Cynus, in which those very fragments are cited, on the authority of P. J. de Ravani, as having been copied out of Gaius by him. Schuldingius, to whom Bynker-

\* Civ. Curs. I, pp. 313—15.

† Opuscul. Varia, 107.

shoeck pointed out this curious passage, made very light of the allegation of the aforesaid Ravani, but Byukershoeck himself saw no reason for doubting it, and Heineccius subsequently assented to that opinion, and asserts \* or intimates the probability that a complete copy of Gaius was extant in the 14th century, when Ravani flourished. Be that as it may, no search was at that time instituted, and it is only within the last twelve years that civilians have enjoyed the light shed from this source on many dark or doubtful points, especially in the history of the law so imperfectly written by Pomponius.† As to Gaius himself, every thing had conspired to awaken the liveliest curiosity in regard to him. Just a century before Justinian undertook his compilation, (A. D. 426,) Theodosius the younger, and Valentinian, in order to correct, in some measure, the confusion arising out of a vast multiplicity of laws, and to introduce into the administration of justice, then in a deplorable condition, the science of a more fortunate era, addressed to the "Senate of the city of Rome" an Imperial *Constitution*, by which it was ordained that the judges should be bound by the opinions of five illustrious juriseconsults of an earlier age, Papinian, Paullus, GAIUS, Ulpian, and Modestinus; that if there were any difference in their opinions, those of a majority should prevail; and that in case of equality of voices, that should be ruled to be law which Papinian should have pronounced to be so.‡ We shall say nothing here of the other names honored by this singular *constitution*, a more suitable opportunity for doing so may hereafter present itself; but the *Gaius* thus distinguished was no other than he whose Institutes, or as they are described in the work itself, "*Institutionum Commentarii*," are named in our rubric, and have been the subject of our previous remarks. This, however, though an extraordinary, was by no means a solitary distinction. Throughout the institutes of Justinian, Gaius is often referred to, and the epithet of "*noster*," which always accompanies his name, and which led some to think him a contemporary of Justinian, is now clearly proved to express merely the very free use made of this work, in that of Tribonian, Theophilus, and Dorotheus. The commissioners of Justinian are found to have largely adopted the language together with the arrangement of Gaius; but this fact was not known, for they had taken no pains to distinguish what they had borrowed from him, from what they had added of their own,

\* *Histor. Jur.* § CCCXIV.

† *D. l. I. Tit. II.*

‡ *Cod. Theodosian: l. I. Tit. IV.* *Se Responsis Prudentum.*

nor indeed had they given us any reason at all to imagine the extent of their obligations to him. Another compilation, however, made a few years before, (A. D. 506) in quite a different quarter, purported to contain—along with copious extracts from Ulpian, and five books of the *Sententiæ Receptæ* of Paullus, with abridgments of the Gregorian, Hermogenian, and Theodosian codes, &c. &c.—an epitome in two books of the Institutes of Gaius. This is the “Gothic Gaius,” as contradistinguished from the real Gaius discovered at Verona. The epithet of Gothic belongs to this collection as made under the auspices of Alaric II. king of the Visigoths, at that time established in Gallia Narbonensis, the very year before his defeat by Clovis. It was the policy of the Teutonic barbarians to govern their *Roman* subjects by the Roman law.\* This personal, instead of a territorial jurisdiction, was a novelty in the history of nations; it served at once to mitigate the severities of conquest, and to hasten the union of the races under a new civilization; and nowhere were the effects of this policy more striking than in the south of France, where the foundation of the titular kingdom of Arles, in the 9th century, the early formation of the provençal dialect, and the existence up to the time of the Revolution, of a *pays de droit écrit*, attest, in the most unequivocal manner, the influence of Roman legislation, and the Latin language. This compilation of Alaric was sometimes called the *Breviarium Alaricianum*, and sometimes bore the more pompous title of *Lex Romana*, with or without the addition of *Visigothorum*. We owe to it, it is probable, the present mutilated condition of the Theodosian code, which ceased to be copied in its integrity, because this abridgment, especially after the legislation of Justinian, answered practically the same purpose. But to confine our observations to what relates to our particular subject—Gaius is deformed in it, as Oiselius expresses it, to suit the tastes or the wants of a barbarous period. The epitome in two books contains some twenty or thirty pages octavo in the Berlin edition, (omitting the notes,) and deviates so entirely from the language of the author, that it would be impossible for him to recognise in it any resemblance or approach to his own work. Yet, imperfect as it was in itself, this breviary had its mission, a high and important one, and it was fulfilled. Of this, however, we shall have more to say when we come, (as we trust we shall,) on

\* Among the texts to be found in the *Corpus Juris Germanici Antiqui*, to that effect, one of the most striking is in the laws of Lothaire I. (XXXVII.) at page 1224 of that collection.

some future occasion, to speak of what M. de Savigny has done for the history of the civil law in the middle ages.

The discovery of Gaius, we have said, is highly important with a view to the history of Roman jurisprudence. It is an excellent remark of Hugo's, \* that in a system of law, half of what is scientific, as contradistinguished from what is immediately practical and so quite mechanical, belongs to its history, and can be learned only through it. It is, however, just this part of jurisprudence, which alone reveals its true spirit, without which the most important statutes are scarcely intelligible, and the greatest causes are but imperfectly argued, that is uniformly neglected in what they publish, by those best fitted to do justice to it, leading advocates and learned judges, the sages and oracles of the profession. It is so with our own common law; it was so in quite as remarkable a degree with the civil law. We have already adverted to the meagre outline of Pomponius embodied in the Digest. There were few other fragments that might aid in supplying what was defective in that. The volume before us has added greatly to our stock of information in this particular. It is an exposition—occasionally, though not often, with a retrospective glance at what the law had been—of the elements of the law as it then stood. It is the work of one of the most illustrious of the Roman Jurisconsults in the palmy day of the science, the age of the Antonines, just bordering on that of the Severi. Gaius was a contemporary of Q. Cervidius Scævola, the master of Papinian. His work, besides, has been adopted by Justinian as the basis of his own Institutes. The difference, therefore, between the original text and the text thus adapted to the purposes of education in the sixth century, is all *history*. Now it happens that this difference is very wide. Justinian was a mighty innovator—we admit, in one sense, a great reformer—but at any rate a mighty innovator. Those changes extend to every part of the whole body of jurisprudence—to its most important provisions, its most pervading principles, its most characteristic features, its genius, its maxims, and its policy. And this leads us to remark what struck us the most forcibly in reading Gaius, title by title, with the Institutes of Justinian. You see in the former, the Roman law in its highest *theoretical* perfection; you see it in the symmetry of an exact science and a rigid logic, pursuing its principles without limitation and without reserve, to all their legitimate consequences. Gaius speaks repeatedly of what he

\* Introduction.

calls *elegantia* or *inelegantia juris*; that is to say, of what is or is not agreeable to the perfect harmony of its doctrines, and the strict logical filiation of its reasonings. A stipulation to give *post mortem meam*, or *cum morieris*, is void, because it is *inelegans* that a stipulation should begin only with the heir.\* Another instance will be still more illustrative. By a *senatus-consultum* which Claudius, at the instigation of his freedman Pallas, caused to be passed, a free woman cohabiting with a slave, against his master's express prohibition thrice solemnly pronounced, was herself reduced to bondage; yet she might, by a special agreement with the master, retain her own liberty at the expense of that of her offspring, who were to be born slaves. But the Emperor Hadrian, says Gaius, †—*iniquitate rei et inelegantia juris motus*—restored the rule of the *jus gentium* upon the subject, and ordained that the children should inherit the *status* of the mother. Now Justinian would undoubtedly have gone at least as far as Hadrian, as he in fact abolished the *senatus consultum* of Claudius, not without denouncing it as unworthy of the spirit of the age; but he would have been quite satisfied with the former of the two reasons, the *iniquitas rei*, to the correction of which he scrupled not, on every occasion, to sacrifice the mere symmetry of the law. ‡ This we take to be the true character of his legislation. His reforms are a perpetual sacrifice of law to equity, of science to policy or feeling, of *jus civile* to *jus gentium*, of the privileges of the citizen to the rights of man, of the pride and the prejudices of Rome to the genius of humanity consecrated by the religion of Christ. There are those who seem to imagine that the civil law has existed as a science only since Justinian published it in the form of a code. The very reverse is the fact: the civil law lost so many of its peculiarities by his unsparing reforms, that it may be said, more properly, to have ceased to exist at that time; to have been completely transmuted into the law of nature, and the universal equity of cultivated nations, to which it had been, for a long time, gradually approximating. It is this extraordinary change that is brought before us, in a sudden and striking contrast, by collating the text of Gaius with that of Justinian,—the Institutes of the Roman law, strictly so called, and the

\* P. 154, 155.

† P. 22.

‡ A passage very much in point and highly illustrative of the *subtilitas*, as Justinian himself calls it, of the *jurisprudencia media*, contrasted with his own views of the law, is to be found, Institut. l. III. t. 2. § 3. *De legitima agnatorum successione*. He applauds the Prætor for his humane purposes, but thinks that the *bon. possessio unde cognati* had not gone far enough.

Institutes of that law, purged of almost all that was Roman, that is since become, in the hands of Domat and Pothier, of Voet and Vinnius, the "written reason" of Christendom. "*Populus itaque Romanus,*" says Gaius, "*partim suo proprio, partim communi omnium hominum jure utitur;*" even so, but the proper has been merged in the common, just as the text of Gaius is in that of Tribonian, to the exclusion of *res mancipi, actiones legis*, and distinctions between classes of legacies, and freedmen.

This view of the subject is so important in reference both to the history of the civil law, and to the philosophy of jurisprudence in general, and has especially such a bearing on the question, whether the former is likely "soon to be forgotten," that we shall be excused for pursuing it somewhat farther.

D'Aguesseau, in a panegyric of unrivalled beauty, upon this body of jurisprudence, as it was then studied and practised in France, uses the following language:

"These rules, it is true, have almost all of them their foundation in natural law; but who, by a single effort of sublime speculation, could go up to the origin of so many streams that are now so far removed from their fountain? Who could descend from that fountain, as if by degrees, and follow step by step the almost infinite divisions of all the branches that flow from it, to become, as it were, the inventor and creator of a system of law?"

"Such efforts transcend the ordinary limits of human exertion. But, fortunately, other men have made them for us; a single book which science opens at once to the judge, develops to him, without any difficulty, the first principles and the remotest consequences of the law of nature.

"The work of that people, whom heaven seems to have formed to govern men, every thing in it breathes that high wisdom, that deep sense, and to sum up all in one word, the gift of that spirit of legislation which was the peculiar and distinguishing characteristic of the masters of the world. As if the mighty destinies of Rome were not yet fulfilled, she reigns throughout the whole earth, by her reason, after having ceased to reign by her authority. It might, indeed, be affirmed, that justice has fully developed her mysteries only to the Roman lawyer. Legislators rather than juriconsults, mere individuals in the shades of private life, have had the merit, by the superiority of their intelligence, to give laws to all posterity. Laws of a jurisdiction not less extensive than durable, all nations, even now, refer to them, as to an oracle, and receive from them responses

of eternal truth. It is, for them, but small praise, to have interpreted the XII. Tables, or the Edict of the Prætor, they are the surest interpreters, even of *our* laws; they lend, so to express it, their wisdom to our usages, their reason to our customs, and by the principles which they furnish us, they serve us as a guide, even when we walk in ways which were unknown to them." (XIII. Mercuriale.)

We have before us a striking example of the truth thus eloquently expressed, and it is with unaffected pleasure that we turn from the virtuous and learned D'Aguesseau, to do homage to one who has done honor to his country. Mr. Justice Story has, in a series of valuable publications, not only enriched the library, but enlarged the horizon of the American lawyer. He has most fully verified, by his success, an opinion we have long cherished, as to the superiority of the civilians and those nurtured in their conversation, as elementary writers, over the lawyers trained for practice in England. It is with surprise we find a different opinion expressed by Mr. Cooper.\* It will not be denied that some English text writers, and indeed, most of them, discover a thorough acquaintance with the subjects they treat, considered as mere matters of business—that they carefully collect all the decided cases, and critically distinguish the circumstances that ought to affect their authority as law, or their effect as precedents in point—nor have we any doubt at all, but that so far as these cases go, those compilers are as safe guides as can be followed by counsellors or their clients.† But there arise sometimes—and it is generally in things touching the highest interests, public or private, and most calculated to excite the minds of men, that there do arise—questions in which the file affords no precedent, and the judge is compelled to make one by the help of analogy, and by reasoning from principles. Now, it is in such cases that an English text book hardly ever affords the least assistance to an inquirer. They never think of the *elegantia juris* of Gaius, of a scientific distribution of their subject, of genus or species, class or category; the principle of a rule is seldom stated as a theorem, and when a new case calls for its application, the most trifling difference in accidental circumstances, gives rise to embarrassing doubt. In short, there is a total absence of all philosophical analysis, and systematic exposition. Fearne's book is generally considered

\* Lettres sur la Chancellerie d'Angleterie.

† See the remarkable case mentioned. Ibid.

as one of the most lucid and satisfactory treatises in the library of an English lawyer—yet look at the summing up of his prolix discussion of the rule in Shelley's case—what does he at last make the foundation of that most startling, and yet best settled of all the canons of English succession—to the Jews a stumbling block, and to the Greeks foolishness? Does he agree with Mr. Justice Blackstone in his “celebrated” argument in Perrin and Blake, which Lord Thurlow thought proved nothing but Blackstone's ignorance of the whole subject? does he agree with Lord Thurlow himself? or does he subscribe to Mr. Hargrave's rather obscure opinion? Is it a rule of feudal descent, or is it merely a canon of interpretation? So as to a remainder itself, where has he shown why the law so inexorably required the vesting of a remainder, at the death of the tenant for life, &c. &c. We might push this much farther—but *his non erat locus*—we forbear.

There can not be, in our judgment, a greater contrast than that which exists between such treatises, and those of Pothier. What Cicero says, in an often quoted passage, of the superiority of Servius Sulpicius to all his predecessors in his exposition of the doctrines of the Civil Law, is precisely applicable here. But any one who wants an exemplification of our ideas upon the subject, has only to compare Maddock's Chancery with Mr. Justice Story's excellent Commentaries on Equity, the best text book, by far, ever yet published on that subject.

But it is not only in scientific method and arrangement, that the civilians, of the last two centuries especially, excel as elementary writers. They have drawn their materials from a longer and infinitely more diversified experience, than the English lawyers. The insular position of England, and the peculiarity of her institutions, have hitherto separated her, as it were, from the family of nations, and shut her out from the *disputatio fori* (if we may borrow a phrase from the civilians) of modern international jurisprudence. She has been literally a law to herself—

Penitus toto divisos orbe Britannos.\*

So much the better, undoubtedly, for her own admirable pub-

\* What light is to be derived from English books on such subjects as are treated of by Struvius Corp. Jur., Germanici? Take the case of two states, separated by a river; where are their relative rights in the use of it, discussed by English lawyers?

lic law — but this circumstance accounts for chasms in her legal system, such as that which Mr. Justice Story has just filled up by his excellent book at the head of this article. Is it not passing strange — or rather would it not be so, but for the circumstance just alluded to, of her isolated position, political and physical — that it has been reserved for an American jurist, at this time of day, to discuss for the first time in the vernacular, in a manner worthy of such a subject, the principles which govern nations in so important and delicate a matter, as a conflict of laws? In his able and ample exposition of the subject, the help which he has derived from Westminster Hall has been comparatively little; the Ecclesiastical and Scotch courts have contributed more — but, after all, his principal reliance has been upon the civilians, not forgetting some admirable discussions from the courts of Louisiana\* — and both this work and the previous one upon Bailments, are fruits of his intercourse with them, and most conclusive evidence that they are not “forgotten teachers of a science that is likely” either soon or late “to be forgotten.”

But Mr. Hallam seems to imagine that these fountains of ever living waters will be abandoned, because men have in these later times hewn out to themselves broken cisterns that will hold no water. “The *new* legal systems, (we quote another sentence from the same paragraph,) which the moral and political revolutions of the age have produced, and are likely to diffuse, will leave little influence” to them. That is to say, the French Code, and other systems formed or projected in imitation of it, are to supersede for ever the *Corpus Juris Civilis*. It is really melancholy to hear a man of so much ability and information, uttering an error as vulgar as any recorded by Tom Browne. It certainly is not our present purpose to discuss, at large, the exploded folly of Codification; it will be time enough to attack when any body shall be found to defend it, under any other circumstances than those, which rendered such, or indeed any means of producing unity of legislation and judicature in France, desirable. But, even in France, no body imagined before the formation of the Code, and certainly no body pretends since, that the collecting of a few principles, in such an abridgment, is to dispense with the most profound, comprehensive, diversified, and universally applicable body of juridical

\* The case of Saul and his creditors is one of the best reasoned we ever met with.

reason and natural equity, that the world has ever known. None that have looked into the "*Discours et Exposé des motifs*" of Bonaparte's commissioners, need be told, that they are rivals of Justinian, at least in one qualification of a professed reformer, unbounded self-complacency, and that, like Tribonian and his associates, they glorify their master and themselves without scruple, and without stint. They represent all France, from the banks of the Rhine and the Meuse to those of the Var and the Rhône, as in an ecstasy of wonder at the work of sagacity and patience,\* which their pregnant wits were bringing forth — a *patience*, he it remembered by the way, displayed in preparing their *projet* within four months, and a *sagacity* which determined them to use the labors of others instead of their own, in doing so. Yet even these luminaries of this privileged age, admit that their Code is, at best, but a germ, round which a body of unwritten law is yet to be formed by practice, usage, and interpretation. As to dispensing with the study of the Civil Law, they earnestly deprecate the very idea of it, and no where, not even in the passage quoted just now from d'Aguesseau, is there to be found a more studied and ample panegyric upon its wisdom and equity, than fell from the lips of more than one of them. "In this *projet*, (says the orator of the *Tribunat* Garry, referring to the Title *de l'usufruit, de l'usage et de l'habitation*,) as in all those which will be successively presented for your approbation, you will remark with satisfaction the religious care with which all those who have been concerned in the *reduction* of the Code, have consulted the legislation of that people, who, after having subjugated the whole earth by force of arms, govern it still by the superiority and the profoundness of their reason. I shall be permitted, here, to advert to an error disseminated already by ignorance, and which nothing but indolence could accredit, namely, that it will be hereafter sufficient for those who are destined to the study of the law, to know the *Code Civil*. We cannot too often repeat, that, after the example of our greatest magistrates, and our most celebrated juriconsults, they must study the law in its purest source, the Roman laws. It is only by profound and incessant meditation upon that immortal monument of wisdom and equity, that *they* can be formed, who aspire to the honorable occupation of enlightening their fellow citizens upon their interests, or of pro-

\* See the tumid vauntings of the *tribune* Duveyrier, 18 Pluviose, sur le projet de loi titre X. relatif au contrat de mariage, Tome III.

nouncing judgment upon their controversies.\* Another, (and he is one of the most distinguished of the counsellors of state,) M. Bigot-Préameneu when he comes to the Corps Législatif, (*Législature*, hardly describes such an assembly,) with Title II. B. III. of the Code, “on the various modes of acquiring property, and on contracts, and conventional obligations in general,” dwells still more at large upon the merits of that vast body of doctrine, as he expresses it, which will render the legislation of Rome immortal. To have foreseen, he continues, by far the greatest number of those covenants and agreements, to which the condition of man in society gives rise; to have weighed all the grounds of decision between interests the most opposite and the most complicated; to have dispersed most of the clouds in which equity is too often found involved; to have gathered in one collection all that is most sublime and most holy in morals and philosophy; such are the results achieved in that immense and precious depository, which will never cease to deserve the respect of mankind, which will contribute to the civilization of the whole globe, and which all cultivated nations rejoice to acknowledge as *written reason*. After adding that all further progress in legislation, except what may be implied in a better order and method, seems out of the question, and after some just remarks upon the defects of the Justinian Collection, in this respect, which are of course corrected in the projet presented by him, he proceeds to add, emphatically, that it is no part of their purpose, in digesting, according to a more lucid arrangement, the principles involved in the *titre*, to supersede the study of the Roman law on the subject of contracts. It will no longer, he observes, have in France the authority of municipal legislation; but it will exercise the commanding influence which reason confers in all nations. “Reason is their common law.”† The provisions of the Code, in relation to contracts, would be very much misunderstood if they were regarded in any other light than as elementary rules of equity, of which all the ramifications are to be found in the Roman laws. It is *there* that the full development of the science of the just and the unjust is to be sought; from that source *they* must draw who would wish to make any progress in the French Code, or who shall be charged with the preservation and the execution of the laws deposited in it.

\* Discours, &c. T. III. p. 93.

† Even this aphorism is borrowed from the Civilians, who teach, *ratio naturalis lex quadam tacita*.

Such acknowledgments as these, frankly made by the authors of this extravagantly vaunted collection, ought, one should think, to have obviated, not merely such an error — scarcely excusable in any point of view — as that pointed out in Mr. Hallam's work, but many other opinions in regard to that Code, and to the virtues of written, or more properly, positive law in general, just as false, but far more mischievous and troublesome to society. They saw the great fundamental truth thus expressly enunciated by one of them, "*Les codes des peuples se font avec le temps ; mais proprement on ne les fait pas.*" Subsequent experience has fully justified these anticipations. Mr. Cooper mentions in his *Lettres sur la chancellerie d'Angleterre*,\* that the *Bulletin des Lois*, which is just as necessary to the French public as the Five Codes themselves, and which, at the time he wrote, comprehended the legislation of only thirty-five years, already contained more than a hundred volumes ; while the *Recueil de Cassation* — that is, the collection of the decrees of the *Cour de Cassation* up to 1826 — was just twenty-six goodly tomes. The same writer has furnished from a bookseller's advertisement, in the titles of two new works, a curious proof, how impossible it is for a great nation, even after passing through a revolution more unsparingly subversive than any recorded in history, and legislating literally upon the ruins of the past, to get rid of its previous laws.† But an observation from the same source, still more to our immediate purpose, is, that no one can read the *avertissement* of the 11th volume of the works of M. Dupin without at once perceiving how necessary and profitable it is, after having looked into any article in the Codes, to turn to what Pothier has written upon the same subject. The truth of this assertion is established, and the reason explained, by a fact stated by this very M. Dupin, a witness above all exception. "The works of Pothier," says he, "have not been received by us as laws, but they have obtained a similar honor ; for more than *three fourths of the Code Civil, are literally extracted from his treatises.* The truth is, the *ré-dacteurs* of that Code, convinced that they could not possibly imagine an order more perfect than that which Pothier had adopted for his various treatises, and that they could no where else find sounder principles, or more equitable decisions, had

\* P. 128 (ed. of Brussels.)

† P. 155. *Recueil général des Ordonnances, Edits, Déclarations, Lettres- Patentes, Arrêts du Conseil, Arrêts de reglements, &c., qui ne sont pas abrogés, &c. &c.*

the praiseworthy good sense, to confine themselves to an analysis of his works.”\* What a commentary is this upon the boasted “sagacity and patience” of those *réducteurs!* It only remains for us, in order to complete the view which we have endeavored to present, of the influence of Roman legislation, to mention that Pothier — worthy, as we admit him to be, of all honor and reverence — is but a commentator upon the doctrines gathered by Justinian into his heterogeneous collection — and that the great bulk of these doctrines is to be found in the Pandects, of which one third is made up of literal extracts from Ulpian, one sixth from Paulus,† and the remainder from other celebrated juriconsults from Scævola to Modestinus. It is thus demonstrated that the science which they taught, is likely to pass away when Euclid’s elements shall be forgotten, but not *till* then.

If the hero of Marengo and Austerlitz, who shivered to pieces the throne of the German Cæsars, and blotted out for ever the very name of the Roman Empire, consoled himself, in that last exile, with the assurance that his work of peace, the Code, was identified with the constitution of society, and would live when his victories should be no more than those of Timour or Alexander — what honor shall we not ascribe to those who were *really* the authors of that work, and the trophies of whose wisdom are thus preferred before all the glory of the earth?

And why should they not be preferred to the perishable grandeur which they have survived?

Strange, but striking, and impressive destiny! This body of morality and reason, rescued from beneath the ruins of the first Roman Empire, of whose civilization it was the proudest monument, and whose majestic image is impressed upon its whole face, was used as a most powerful instrument to build up the second; and the treaty of Luneville had scarcely sealed the fate of that second, when the founder of a domination, more haughty than either, adopted it as the basis of a new order of things. But a few years — scarcely more than a generation of men — are passed away, and behold! that throne, too, is mouldering, with the others, in the dust, while a combination of favorable circumstances has given a renovated youth, and seems to insure an uncontested dominion, to the immortal spirit of the Roman Law!

\* Dissertation sur la vie et les ouvrages de Pothier, par M. Dupin, (apud Cooper, Lettres, &c.)

† Hugo L. B. eines C. C. B. I. S. 116.

We have said that the Civil Law was made use of to build up the Holy Roman Empire, and in appreciating and accounting for its influence over modern society, that circumstance must not be overlooked. About 50 years after the revival of the study of it under Irnerius, it attracted the attention of the Emperor Frederic Barbarossa, whose penetration it could not escape, how profound a respect for its authority was entertained in the Italian cities, and to what profitable account it might be turned in extending the prerogatives of the crown. On a second visit to Italy, (in 1158,) he surrounded himself with professors of law, conferred upon their school the privileges of a University, and had their co-operation at Roncaglia in multiplying his *regalia*, and clothing him as far as possible in the sovereignty conferred by the real or imaginary *Lex Regia* — a new pretension in feudal Europe. From this epoch, the Emperor began to be familiarly spoken of among the doctors of Italy, as the successor of the Cæsars, and the Civil Law to be regarded as an Imperial Common Law, binding upon all Christendom, because unity of faith and allegiance, under one head, was supposed to be exacted by the Divine Founder.\* But it was long before the slavish maxims of the Byzantine Court could make their way into the tribunals of Germany. At length, however, as the progress of civilization called for a better legislation, the superiority of the Civil Law in all that relates to *meum* and *tuum*, began to be more and more felt. It was favored by the example of Charles IV., by the influence of the numerous universities founded between the middle of the 14th and the beginning of the 16th century, and by the establishment of the Imperial Chamber; so that under the reign of Maximilian I. it was fairly installed, within limits or on conditions, as it appears, not very perfectly defined, as a part of the common law of Germany.† In France the *pays de droit écrit* extended from the Mediterranean to the Loire, and in all the other kingdoms of Europe, the legislation of Rome “commanded the respect or obedience of independent nations.” This part of the subject, however, we must reserve for a future occasion. But its influence, in another sphere, was too commanding and universal to be omitted here. The compilations of the Canon Law, which began to be made as early as the middle of the 12th century, gave it more form and consistency, and the authority of the

\* Eichhorn Deutsche Staats und Rechts-Geschichte. II. Th. § 269.

† Id. III. Th. § 440.

church, and the jurisdiction of the ecclesiastical courts, cooperated in extending and perpetuating the dominion of Paullus and Papinian, of Ulpian and Gaius, over the human mind.

But whatever the authority of the Empire or the Church may have done to facilitate the diffusion of the Civil Law in modern Europe, we have said enough to show that the day must, at all events, have come, when its intrinsic excellencies would have recommended it to the respect and the acceptance of mankind. Its connexion with those institutions was essentially transitory, — her light dwelt in *them*, only until the social condition of Europe should be fully prepared, to receive it in a proper form and in its true brightness and purity, —

Sphered in a radiant cloud, for yet the sun  
Was not, she in a cloudy tabernacle  
Sojourned the while.

An old chronicler, quoted by Eichhorn, asks and answers the question, why the whole earth should be subjected to the laws of a single city.\* He ascribes to the necessity of maintaining the unity of faith, what we explain by more profane reasons; but whatever solution be given of that problem, there is another question naturally suggested by the facts brought to the view of our readers, in the preceding pages, which we beg leave ourselves to propose and to answer: Was there any thing in the original character of the Roman law, that fitted it to become thus universally applicable, or by what causes, and through what process, was it ultimately rendered so?

It is laid down as a fundamental maxim, by Montesquieu,† that laws ought to be so peculiarly adapted to the people for whom they are made, that there is but a remote chance of their being found suitable to any other.

This, like so many other of that brilliant writer's best thoughts, can be received only with qualifications and distinctions. So far as it goes to preclude all merely arbitrary legislation à la Joseph II. — all those theories, so much in vogue, and so prolific of disorder in the latter half of the 18th century, of systems of universal public law, and of the power of the lawgiver to cut

\* Otto Frising. Chron. lib. 3. Hoc jam solvendum puto, quare *unius urbis* imperio totum orbem subjici, *unius urbis legibus*, &c. Scilicet, ut his modis unitas commendaretur fidei.

† Esprit des Lois, l. i. c. 3.

out society, as if it were made of parchment or paper, into whatever shape he might judge most eligible, and to make it in that shape a living, a moving, and an effective thing — the experience of Europe, for the last sixty years, has abundantly confirmed his opinion.\* Undoubtedly if there be any thing very peculiar in the condition, the character, or the opinions of a people, its law, both public and private, must conform to it, on pain of being otherwise wholly inoperative; and this is the reason why, as we have seen, the authors of the French Code, themselves, think, and think justly, that by far the greater part of every system must grow up gradually in the shape of common or customary law. In this point of view we heartily concur with Montesquieu; but we have seen in the case of the Civil Law, that infinitely the largest and most important portion of it — that relating to *meum* and *tuum* — is suitable, not only to other countries, but to all other countries — that it is as applicable at Boston as at Paris, and has served equally to guide the legislation of Napoleon, and to enlighten the judgment of Story. This is a *fact* not to be disputed, but accounted for — a fact which will excite our curiosity the more, when we come to look at the use which Lord Mansfield made of the science of the Civilians, in his own masterly administration of justice, and to discover, as Mr. Evans has shown, that he often applies not only their doctrines, but their very words, to the action for money had and received. This example is the most striking that can possibly be imagined — for certainly if there ever were two bodies of jurisprudence apparently irreconcilable with one another, they were the old common law of Plowden and Coke, and the *Jus Civile* of Rome in earlier times.

We have thus answered the question we propounded just now, as to the original character of the Roman law. It was as far as possible from being the “written reason” it afterwards became; but to explain how it underwent so entire a revolution, is to write *its history*, and we purpose devoting the remainder of this paper to some remarks on its origin and progress down to the time of Justinian.

We will premise, however, that in what we had occasion to say in characterizing the Institutes of Gaius, we anticipated, in a few words, the results of our present inquiry. Considering that book as the mirror of the old Roman law in its highest

\* See the excellent remarks of Eichhorn D. S. u. R. G. 4. Th. p. 708, and seqq. especially as to the failure of the legislation of the 18th century in Prussia and Austria.

state of perfection, after six centuries (for so many were elapsed since the Decemvirs had promulgated their tables) of experience and cultivation, we contrasted it with the form it had assumed in the hands of Tribonian. You see at a glance, that in the interval of nearly four hundred years, between the reign of M. Aurelius and that of Justinian, some mighty revolution has occurred in the opinions of mankind, for laws are the shadow of opinions. This contrast becomes, of course, still more violent, if, laying down Gaius, you take up what remains of the Twelve Tables, and the literature that illustrates it—but of that by and by. And there *had* occurred in that interval a mighty revolution,—the mightiest of all moral revolutions. Constantine had ascended the throne, and had established Christianity in the Empire. The law which his despotism enforced, became, under him and his successors, more and more impressed with the spirit of the gospel. He had built himself a christian capital undefiled, and abandoned, as he thought, the seven-hilled city—the seat of pagan superstition—to her old gods, with their pontiffs, their flammens, and their soothsayers—though, in truth, we may just remark, *en passant*, that by thus preparing the independence of the popes, and facilitating and almost inviting the establishment of the Teutonic races in the west, he was signally contributing to hasten the formation of the christendom of modern times, of which he was, at the same time, erecting on the Bosphorus the most effectual bulwark against the approaching invasions of Islam.\* From his accession, christianity became the *jus gentium* of Europe, or the basis of its *jus gentium*, according to the definition of the civilians themselves. In the copiousness and scientific completeness of their vocabulary, they distinguished, as we have seen, in the code of every nation, what was peculiar to itself, from those principles that prevailed in the jurisprudence of the rest of the civilized world. They called the former *jus civile*, they designated the latter as *jus gentium*, which they considered as in all cases synonymous with reason and natural law.† In a

\* We do not know that these effects of the division of the empire have been even yet fully developed. To let in the German race, was quite as desirable in that condition of the world, as to keep out the Saracen or the Turk.

† The *jus naturale* of the Institutes, is a third ingredient of every law. It respects *man*, not as a reasonable being but as a mere *animal*. It is, *quod natura omnia animalia docuit*. In this sense, *jus naturale* is sometimes opposed to *jus gentium*. Thus, for instance, it is said, *bella enim orta sunt, et captivitates secuta et servitutes, quæ sunt juri naturali contraria*. Hugo has well explained this to apply to the nature of man considered only as an animal, not to man as a reasonable creature and member of society—*Lehr-Buch des Natur-Rechts, &c.*,

rude state of society, the *jus civile* covers, so to express it, nearly the whole orb of legislation; and the maxim just cited from Montesquieu is applicable to it, in all its rigor. It is local and exclusive. But in the progress of civilization, the other element — natural law, or the principles of general equity and reason — gradually occupies and illumines a larger and larger surface, until at length the differences which separate the legal systems of foreign states, almost wholly disappear. It is impossible not to perceive this tendency in the actual condition of christendom. The spirit of a religion, which we consider as the source of the highest and most refined civilization, and as a bond of union among modern nations — which, never interfering directly with the policy of any government, never fails in the long run to influence that of all — of a religion essentially catholic and comprehensive, breathing mercy, justice, equality, fraternity among men — unfavorable to all partial advantages, all exclusive privilege, all marked nationality, — clearly manifests itself in the advances of modern legislation, just as it did in that of Constantine and his successors, especially in that of Justinian. Democracy, in the high and only true sense of that much abused word, is the destiny of nations, because it is the spirit of christianity. It is written in the French code, in the article which denies to the father all power of disposing, by testament, of more than a child's portion. It is seen in the whole body of our legislation; but in nothing more than in our returning to the simplicity of the civil law, by abolishing all distinction between land and personal property, and distributing them indiscriminately among the next of kin. The 118th novel of Justinian, is substantially our law of successions, as it is that of France. It effaced the inequalities of the old Roman law; it has effaced, in the same way, those of feudal Europe: no primogeniture, no preference of one sex to the other, no distinction between *agnati* and *cognati*, none between goods moveable and goods immoveable.\*

189. For in reference to the rights and liabilities of men living in society, *jus natura* and *jus gentium* are uniformly considered as synonymous. As, for instance, Instit. II. 1, § 11: *dominium nanciscimur jure naturali, quod sicut diximus, appellatur jus gentium*. Ib. § 41: *jure gentium, id est, jure naturali*. So Cicero, de Offic. III, 5: *neque vero hoc solum natura, id est, jure gentium, sed etiam legibus populorum, &c.* It is important to bear the above distinction in mind, or we shall ascribe to the civilians opinions as to war and slavery which they certainly did not entertain. They never question the moral rectitude of either.

\* Montesquieu, l'Esprit des Loix, l. 26, c. 6, referring to these changes, seems too much disposed to sacrifice the *jus gentium* to the *jus civile*.

To show that what we have done in this country is not accidental, it is not necessary to seek authority for it in the codes of antiquity, or in those of foreign countries: there is a still more striking, and, as it were, domestic proof, that we have only developed the germs, and given scope to the tendencies of our own race. There are few subjects of more curious and instructive speculation, than a comparison of the reforms projected under the Commonwealth of England, with those accomplished, without an effort by its *scions* in a new world. Almost all that we have done to simplify and equalize, was shadowed forth to the eyes of Whitelocke and Cromwell. The same principles will one day produce the same effects in England, and, deposited in the French codes, they are not confined, on the continent, within the territories of France. They have taken root else where, and *ça-ira*.

When we speak of the influence of christianity upon the civil law, and especially of its having-had much to do with adapting it to serve, as it does, for the *jus gentium* of modern nations, we would not by any means be understood as excluding or underrating the co-operation of other causes to the same end. We have said that it had been long approximating by degrees to that consummation; in the lapse of a thousand years from the Decemvirs to Justinian, experience and science had brought forth their fruits. Thus, for instance, the Edict of the Prætor, which, like the English Chancery, built up, in a long lapse of time, a vast body of equitable jurisprudence commented by Ulpian, in the great work so freely used in the Pandects, gave a *bonorum possessio* to the next of kin, on principles almost identical with those of the 118th novel. The same observation applies to many other branches of the law: but still much was left to be done, and much was done by Justinian, and generally by the christian emperors, which may be distinctly traced up to the influence of their religious opinions — the *religio temporum meorum*\* — the *castitas temporum*,† familiarly referred to in the legislation of Tribonian. One has only to glance over the constitution of those emperors, to be convinced of this.‡ To say nothing of those which fall under the head of ecclesiastical law, such as those touching legacies to pious uses, the observance of Sunday as a festival of the church, and the functions, rights, and

\* Cod. VII. 24, De Scto. Claudiano tollendo.

† Institut. I. 22.

‡ The whole Theodosian Code bears witness to this. It is a collection of the constitutions of Christian Emperors.

conduct of the clergy, we find Constantine prohibiting the atrocious exhibitions of the amphitheatre, and the selling of children, except in cases of extreme want, and that in earliest infancy — a horrid exception made in deference to the “hardness of their hearts,” and the inveterate usage of the heathen world — infanticide — and superseded by subsequent provision for the support of both offspring and parents. We see the spirit of Christianity gradually taking possession of the seat of the family affections, blessing home with holy charities, mitigating the despotism of the father, consecrating and protecting infancy by baptism, and crowning all with the perfect emancipation of woman. In short, the boast of Eusebius, that Constantine aimed at giving sanctity to the laws, may be safely made for his successors in general, and Heineccius adds, after other writers, to sanctity, *simplicity* — thus freeing jurisprudence from the intricacy of forms and the snares of a mere technical chicanery.\*

Such was the end of the civil law — let us now turn for a moment to its beginning.

The history of the law, properly considered, is the most important part of the annals of every country. We mean not the law as it is written, but the law as it is applied and executed — not the letter, but the spirit — not the statute, but the interpretation — not the pompous and hollow Bill of Rights, but the daily practice of the courts in regard to such things as *habeas corpus*, trial by jury, and the liberty of speech and of the press. The law, in this only practical sense of the word, reveals the inward life and true character of a people. It is that very life and character, and a deputy sheriff may know more about them than a De Lolme or a Montesquieu. It is true that the history of the law, in this way of considering it, has very seldom been written; and that of the civil law, especially, as Eichhorn affirms, until the last ten years of the last century, least of all. A dry series of enactments, outlines of mere positive legislation, were recorded in chronological order, and some book of antiquities used as a succedaneum to fill up the skeleton or solve the riddles it presented. And yet the history of Roman legislation is the most interesting of all such histories, not only because it regards the most perfect and the most influential of all systems of law, but because that system is incontestibly *the* great intellectual monument of the conquerors of the world. Roman literature, properly so called, is, in comparison of Greek or our own English, absolutely mean. The very lan-

\* Hist. Juris. § CCCLXXIII.

guage, except in the matter of politics and law, where it is richer even than the Greek,\* is the poorest of all—without flexibility, variety, or copiousness. It is, indeed, impressed with the *majesty* which belongs to dominion and superiority long established and directed by a grave wisdom, and the love of order and civilization. So far, we assent to what Count Joseph de Maitre has said of it,† and we acknowledge its fitness to be the language of the Church and the State, of archives and monuments. It is, too, in *possession*—it is, emphatically, as he calls it, *le signe Européen*—the language which medals, coins, trophies, tombs, primitive annals, laws, canons, which every thing, in short, dear and venerable to the modern man speaks, and a familiar knowledge of which is quite *indispensable* to many other kinds of knowledge, that of the civil law, for example. But in every department except that of legislation, and (if they be worth adding) agriculture and satiric poetry, Roman genius was stamped with a marked inferiority; it was tame, servile, and imitative, even to plagiarism—no depth, no pathos, no originality—nothing national, spontaneous, and awakening. *The numerisque fertur Lege solutis*, is not for it—it walks forever as in the bonds of the law, and under the yoke of discipline. Their historians we consider as falling properly within our exception. Tacitus, a leading advocate, certainly does—so does Sallust, as his proemes show—even Livy, their great epic poet, (history is their true and only Epopee,) with his native, kindling, unaffected eloquence, and his matchless gift of picturesque description, is thoroughly Roman, formed, as it were, in the Forum and the Campus Martius, and glorying in the Republic as a government of laws, not men.‡ But in art and poetry, strictly so called—we do not speak of mere elegance or urbanity, wit or delicacy of sentiment—they have nothing to match with the mighty minds of other times—no Dante, no Milton, no Shakspeare, no Homer, no Pindar, no Plato, no Sophocles. None felt this truth more sensibly than the most exquisite of critics as of writers, Horace. Perhaps Lucretius and Catullus ought to be excepted, but we fully subscribe to Niebuhr's equally just and original estimate of the genius of Virgil, to whose learning, however, he does homage, and whose

\* For *populus* and *plebs*, the Greek has only *δημος*; for *lex* and *jus*, only *νομος*, &c.

† Du Pape, v. 1. 199. Let any one who doubts our general proposition only read Cicero's philosophical works.

‡ *Legum potius quam hominum imperium.* l. ii. 1.

great poem is one of his authorities for the antiquities of Italy.\* But in law and government, no less than in arms, the Romans were, as we have seen, the mighty masters of the art and of mankind. Cicero declares, that the contrast between their legislation and that of every other people, made the latter appear positively ridiculous;† and if he could say so at that early period, when his contemporary Servius Sulpitius had, for the first time, given something like a philosophic cast to jurisprudence, what pomp of eulogy would he have thought too labored for the perfect science of Paullus and Ulpian? He that wishes to know what Roman genius was, must study the *Corpus Juris Civilis*, and the remains of the great jurisconsults, with Cicero (our best guide here) and the historians; he that wishes to know what it was not, may take the whole body of literature besides, beginning with Plautus, and ending with Pliny the younger. He will see all the wisdom, if not the poetry of Virgil, in the fine lines so often quoted, closing with,

Tu regere imperio populos, Romane, memento.

If the laws of Rome were not the spontaneous growth of her own peculiar civilization, if they were not the unaided work of her own wisdom, then never was seed sown in a more congenial soil, or a loan paid with such usurious interest. But they unquestionably were so. Her philosophy and eloquence were formed by Greek sophists and pedagogues, as is evident from their character and physiognomy; her legislation, both in its origin and in its perfection, was all her own.

In the volume at the head of this article, Hugo, in tracing the history of that legislation from the earliest times to the reign of Justinian, divides the intervening space of thirteen centuries into four nearly equal periods. The first, extends from the building of the city, to the laws of the XII Tables, A. U. C. 303. From this epoch until the year of the city 650, is the second. The third, brings us down to the reign of Severus Alexander—A. U. C. 1000—and the last closes all with the legislation of Justinian, A. U. C. 1300. It is scarcely fanciful to liken them to the four analogous periods of human life, and to call them the infancy, the youth, the manhood, and the old age of the Roman Law. The history of each of these periods is considered in three different

\* R. G., v. i., pp. 207. 529. 580.

† He confines his panegyric principally to the XII Tables, *De Orator*, I. 44, a well known passage, *Prætant omnes licet, &c.* Including Solon's, *Incredibile est quam sit omne jus civile, præter hoc nostrum, inconditum ac pene ridiculum.*

aspects. Two of them, the original sources or acts of legislation, (*Quellen*,) and the development given to them in treatises, etc., (*Bearbeitung*,) constitute its *external* history. The third, is the state of the law itself, with its maxims, principles, and spirit, at the close of each period; and this is its *internal* history. The order pursued, is that of the Institutes of Justinian, borrowed from those of Gaius, beginning with *Persons*, then proceeding to *Things*, and concluding with *Obligations and Actions*. We can easily imagine that a course of lectures *fully* developing all the matters treated of here, would leave very little to be considered by a student of the Roman Law; but the reader of this *Lehr-Buch*, if he wishes to understand the true spirit of that legislation, must come prepared with the knowledge of what Niebuhr, Creuzer, and others, have done, to illustrate the antiquities of Rome.

We shall address our observations, in the first place, to the legislation of the first five centuries of the city, including the first and a considerable portion of the second of the periods above mentioned.

But it will be necessary to premise a few words concerning the source of all that legislation, the primitive constitution of Rome.

That constitution, like those of the other two great branches of the Indo-Germanic race — the Teutonic and the Greek — was founded on the sovereignty of the tribe, or the nation, with this difference, that in Italy the principle of a hereditary chief seems to have been unknown. He was elected for life, by a community made up of a confederacy of clans\* or *gentes*, and united, as in the old patriarchal state, the functions of judge, general, and pontiff. His title was king; but his power, which was in theory excessively limited, varied with the measure of his abilities or popularity. Thus, the elder Tarquin contrived (as may happen in the best regulated commonwealths) to secure the election of a creature of his own to succeed him; and the second made himself, by means familiar to the history of usurpation, a downright *tyrannus*, according to the most approved models of ancient Greece or modern Italy. The king was surrounded — as in all the other states of those early times — with a council of chieftains, called a senate, originally no doubt the heads of the clans or *gentes*, who received this, with other badges of a

\* We use the word *clans* for want of a better. Gibbon translates *gens* "lineage;" but that word suggests no precise idea of corporate unity. *Gens* was a collection of *families*.

conceded superiority, according to the established usages, and from the common consent of the clan. Originally, the Roman people consisted of but one tribe—the Ramnenses. By the treaty with the Sabines, under Tatius, they admitted another—the Titienses—and these two constituted the *majores gentes*. Subsequent events, probably some war, made the addition of a third necessary—the Luceres—but this, until the time of the XII Tables, was considered as inferior to the other two, denied certain privileges, and called the *minores gentes*. These three tribes, thus united, composed the whole people, (*populus*), which was divided into thirty *curiæ*, ten to each tribe, and these *curiæ* again were subdivided each into a hundred *gentes*, clans, or lineages, comprehending under them families more or less numerous, subject to the authority of their several *patres familias*—not fathers simply, but fathers emancipated from the power of their own. The king, when at the head of the army in the field, had an absolute command; the authority of a senate of three hundred chiefs of *gentes* or clans, was of course very great, in a patriarchal state of society; but the sovereign legislative as well as judicial power, in the last resort, resided in the general assembly of the *curiæ* or wards, called the *comitia curiata*, to which none could be admitted but as a member of a *gens* or *lineage*. By continual wars, however, in which the Romans, according to their original and constant policy, made great accessions to their population, there formed itself, it is believed, under Ancus Martius, a distinct community, excluded of course from the privileges of the *gentes*, and standing towards them in precisely the same relation as the *nobles of terra-firma*, under the constitution of Venice, to the patricians of the city. This community constituted the *plebs*—whom we do not call *plebeians*, because the present acceptation of that word suggests false ideas of the composition of the Roman commons, shut out by this *Serratura del consiglio*. They were, many of them, rich and noble—all of them a robust yeomanry—and not, as has been thought, an ignorant, depraved, and rapacious rabble, led by ambitious and jacobinical adventurers.

In the nature of things, the numbers of the three tribes would, in the lapse of ages, have dwindled into a miserable oligarchy, had it not been for three institutions of very great political importance at Rome. These were, adoptions, the emancipation of slaves, and the relation of patron and client. By the first, a childless parent was enabled to perpetuate his family; and it was the haughty, perhaps the singular boast of the Claudii, that no

such mixture had ever contaminated their blood. By the second, the freedman assumed the name and enjoyed the privileges of the *gens* or lineage of his benefactor; and the third, although left by Niebuhr still clouded with some obscurity, certainly clothed the chief to whom fealty was due in attributes and secured to him rights, strikingly analogous to those of the feudal lord. Hugo is of opinion that the importance of the second of those institutions has not even yet been sufficiently appreciated; and we may fairly set down the distinction between the clients of the chiefs of *gentes* and the independent and high-minded *plebs* to whom they were constantly opposed, and by whom they were cordially detested, as one of the discoveries of Niebuhr. That the emancipation of the slave should make him at once a citizen, (especially where the plebeian was excluded,) might strike us as a singular exception from that pride of privilege and that bigotry of race which were the peculiar characteristics of the ancient world. But besides that Rome has always been celebrated for her comparative liberality in this respect, there were two considerations that predisposed the patrician master to admit into the bosom of the state, the servant whose conduct in the family had deserved his esteem or his gratitude. The first was that, in those early times, his bondmen were generally of the same race with himself — the Sabine, the Latin, the Tuscan captive — brave men, placed at his mercy by the chances of war, to which he was himself subject, and accustomed to eat at his table and labour by his side in his rural occupations — very different from the dissolute and barbarous rabble who were let loose, in later times, by thousands, upon the city, and whose manumission was restrained, or whose rights as freedmen were limited, by the legislation of Augustus\* and Tiberius.† The other, and doubtless the stronger motive, was to preserve the political importance of the *gens* or clan. This motive became every day more active in proportion to the rapid increase of the *plebs*, who were, at the end of two centuries, numerous enough to demand and obtain admittance into the state. This was effected, if we are to believe the traditions, by Servius Tullius; and it was effected by that very measure which has generally been regarded as a clever contrivance to cheat the poorer classes out of their relative influence in society. The truth is, as we have said, that he destroyed the aristocracy as such — or what is the same thing, he changed

\* By the Lex Ælia Sentia, A. U. C. 757, and the Lex Fusia Caninia, A. U. C. 761, both repealed by Justinian.

† By the Lex Junia Norbana, A. U. C. 772.

entirely its principle. The distinction of race and clan was abolished — the *Curia*, except for some religious or what we should call ecclesiastical purposes, were superseded, and gradually sank into a sham meeting of thirty lictors — the *plebs* had a voice in the legislature — and wealth, in whatever hands it might be found, gave, in the *comitia centuriata*, more weight to its possessor just in the ratio of his contributions to support the state.\* Practically, it is true, the change was not a complete revolution. The patricians, now associated with the leaders of the *plebs*, being by far the most opulent part of the community, and having a command of all the means necessary to continue so, maintained their ascendancy, with the exception of some rare intervals, to the very last. Sallust declares, in the seventh century, that he selects the Jugurthine War for a subject, because (among other reasons) then, for the *first* time, resistance was made to the insolent domination of the aristocracy;† in spite of the seven elections of Marius, the consulship was considered as defiled by a *novus homo* when Arpinum was again honored in the person of Cicero; and the nobility, patrician and plebeian, entirely engrossed the direction of public affairs, until Cæsar — himself one of the proudest of them — smote them with the edge of his victorious sword at Pharsalia, and prepared for their shattered bands a yet darker day and more irreparable doom at Philippi.

After the expulsion of the Tarquins — as in England, after that of the Stuarts — the aristocracy, who were really the government, became more haughty and exclusive than ever, but, at the same time, more simple in life, more severe in morals, and more stern in discipline. The power of the kings, and the insignia of royalty, descended scarcely diminished, though divided, upon the consuls; and the patricians, as a class, gained as much as their temporary chiefs lost, by this rapid rotation in office. The *plebs*, now the democracy, was decidedly less favored than it had been under the monarchy, and very naturally inclined to restore it in the person of Sp. Cassius. At length, however, they secured the election of their tribunes by the *comitia tributa*; and it was not long before the resolves of that assembly were declared to be, as much as those of the *comitia centuriata*, the supreme law. In the former, the people met and voted *per capita*, and not in classes

\* Yet the influence which the patricians derived from the votes of their clients, in the centuries, is shown by the first Publilian rogation, and explained by Niebuhr. The *plebs* were husbandmen, attending the *comitia* only at intervals: the freedmen, &c., were always in town.

† *Bellum Jugurthinum*, C. 5.

arranged according to property : they were convened by a plebeian magistrate, who had the *initiative* and presided over them ; and they were not at the mercy of the augur and his birds, for the time or the duration of their meetings. Armed with the veto of their tribunes for defence, and with the vote of their assembly for attack, and constituting an immense majority of the whole nation, it might have been supposed that they would soon have taken undisputed possession of the republic. But, as we have seen, this was very far from being the case. It is beside our present purpose to explain this singular phenomenon, which would be, indeed, to write the history of Rome ; but we cannot do justice to our subject, without touching upon two of the causes which most powerfully contributed to maintain, for four centuries together, a mixed government, and to insure to it a more extended dominion and a more permanent influence over the destinies of the world, than any other people ever exercised.

The first of these causes, was the constitution and the authority of the senate, now made up of all the *notabilités*, plebeian\* as well as patrician, who had held curule offices. It is generally supposed that this august body had, until the age of Tiberius, no legislative power ; but whatever may have been the *theory* of the constitution, it was most certainly otherwise in practice. But even had its attributes as a legislature in all ordinary cases† been less clearly defined, the immense variety and importance of its functions, as the supreme executive council, could not fail to give it a controlling influence over the affairs of the commonwealth, and make it, in effect, the sovereign power. No one can look at the working of our own federal government, or at that of the French monarchy in the hands of Louis Philippe, without perceiving, that if the legislative body have no means of changing the ministry — as the house of commons always has had — in other words, if that body do not to a certain extent participate in the exercise of the executive power, it must and will be controlled by it, and become subordinate to it. Now, the Roman Senate was a permanent and independent ministry, with every thing in its constitution and its composition to clothe it in the most imposing authority, and vested with all the powers best fitted to enslave to its will the ambitious and leading spirits of the commonwealth. It had power to declare war and conclude

\* The majority of the illustrious historical names of the later times of Rome, are of plebeian race, though of noble families — Decii, Domitii, Catos, &c.

† Dionys. l. II. 14, and cf. Hugo, p. 410.

peace, to raise armies, to judge of the necessity of proclaiming a dictator, to levy taxes, to take charge of and lease the public lands, to farm out the revenues, to give up to the soldiers or to withhold from them the booty taken by their armies in war. In later times it exercised, though under the nominal control of the people, the superintendence of religion and its ceremonies, the distribution of the governments of the provinces and of the command of armies, the keeping and appropriation of the public moneys. It exercised jurisdiction over all Italy, it had the administration of all foreign affairs, the receiving and sending of ambassadors, the conferring of the title of king upon meritorious allies. It determined the time of holding assemblies of the people and prepared the business to be discussed and disposed of there. It could grant or refuse the triumph to the victorious general, and could, by means of the terrible *dent operam — ne quid*, etc., (their suspension of habeas corpus,) clothe the consuls, prætors, and tribunes, with absolute power.\* Added to all this, and more by far than any single prerogative, the judicial power was, until the time of the Gracchi, vested exclusively in them. The *selecti iudices*, answering to our juries, were drawn from their order. The importance of this union of the executive with the judicial power need not be dwelt upon; but it is worth mentioning, that Tacitus expressly declares it to have been the great issue between Marius and Sylla.†

But another source of influence for the patricians and check upon the power of the democracy, is to be found in the fact, that among a people of all others most governed by their religion, (such as it was,) and by the love of order and law, that class were the hereditary priests and jurists of the Republic, until the fifth century of its history. They were its Ulema, a power behind the throne, greater than the throne itself.

The legislation and history of Rome, are altogether unintelligible, without a distinct apprehension of the causes, the extent, and the consequences of this extraordinary influence. Whatever is most characteristic in the old law, is intimately connected with it. The very definition of jurisprudence in the beginning of the Institutes bears testimony to its importance.‡ All nations are governed more by manners and opinions than by laws, and the Romans above all other nations. But their manners and opinions were formed and directed by this *caste* of lawyer-

\* Schlosser.

† Tac. Ann. I. XII, 61.

‡ Jurisprudentia est divinarum et humanarum rerum scientia, &amp;c.

Priests, an institution quite oriental, transmitted to them through Tuscany, at once by inheritance and by education. The Greek writers of Roman history, without being at all aware of the cause, are unanimous in their views of the fact, and of its incalculable effects upon the whole system of the life, the legislation, and the government of the "People-King." In every part of their annals, from the earliest struggles of the *plebs*, in the freshness and vigor of youthful health and enthusiasm, under their immortal tribunes, down to periods of degeneracy and servitude, the same spirit is every where visible. Religion, law, subordination, or all these names in one, *discipline*, civil and military, at home and abroad—"this was their sorcery." Created to teach the law to all coming time, they regarded it with instinctive awe, approached its oracles as those of their Gods, and yielded to it a devoted, yet magnanimous and enlightened obedience. Hence it was, that revolution after revolution occurred; that the assemblies of the Curiae were superseded by those of the Centuries, and these in turn overshadowed by those of the Tribes; that the veto of a single tribune, clothed himself in no armor but that of religion,\* could bring on universal anarchy by preventing all elections, and leaving every office vacant; that repeated secessions of the plebs to the mountain appropriately called *sacred*, or to the Janiculum, took place; that for centuries together the story of Roman politics, omitting the wars altogether, is, in the hands of Livy, and even of Dionysius, by far the most thrilling and sublime of historical romances, and yet that in the midst of so many elements of disorder and violence, not one drop of blood was shed in civil war, and the glorious commonwealth,

Rising in clouded majesty, at length  
Apparent Queen, unveiled her peerless light.

When we come to speak of the union of races out of which the Roman people sprang, we shall have a better opportunity of developing the influence of this most striking of all their characteristics; but we may add here a single illustration of it. It is the use made, in their domestic contentions, by the old consuls, of the *σπαρτωρικος ἑρκος*, the oath which bound the soldiers to obey the generals, and to follow and defend the eagles of Rome. Cincinnatus opposed it with success, to the veto of the tribune,†

\* He was inviolable, *sacrosanctus*.

† Dionysius, X. 18.

and one of the weakest of those adventurers, who disgraced the purple of the Cæsars, could still speak of it, as “the holy and august mystery of the Roman Empire.”\* To attach all the importance that is due to the effect of such ideas, we are to remember that the whole character of the state, and the very organization of the classes and centuries were purely military.

We proceed, now, to make some remarks upon the legislation more strictly so called, of the same period.

The laws of the XII Tables are recommended to our most profound attention, or rather, as things stand, to our special curiosity, by the exalted, if not extravagant, encomiums passed upon their wisdom and morality, by the very first writers of the best period of Roman literature, — Cicero, Livy, and Tacitus. But they have, in our eyes, an attraction more powerful, if possible, than the respect which they commanded in subsequent times — it is their connexion with the preceding. We regard them, as we have already observed, as evidence of what the law was under the government of the kings, and from the very foundation of the city. They were evidently what Lord Coke pronounces Magna Carta to be, simply declaratory.† The idea and the tradition, that they were fashioned upon the model of Solon’s, are refuted—so far as we now have any means of judging—by the fact that there is no resemblance at all, but on the contrary, almost a perfect opposition between them in all the most characteristic features of legislation—in the “Rights of Persons” as well as the “Rights of Things.” Even Dionysius of Halicarnassus, Greek as he is, does not pretend to more than an engrafting of some foreign laws upon the established customs of Rome.‡ He expressly ascribes too, and we have no doubt at all, ascribes with truth, to Romulus, that is to say, to immemorial usage, some of the most important principles of the law—the *patria potestas*, for example, and the *conventio in manum* of the wife—of both which he speaks in terms of unqualified admiration. No one can read the second book of his Antiquities without clearly perceiving that, when he records these elements of the domestic life of Rome, he expects to excite in his reader the incredulous surprise which he has himself felt in regard to them. But we do not stand in need of evidence like this. Believing, as we do, that no such thing as a code of laws arbitrari-

\* Herodian, l. vi. 7, sub fin. *ὅς (ὄρκος) ἐστὶ τῆς Ῥωμαίων ἀρχῆς σέμνον μυστήριον.*

† Montesquieu’s views on this whole subject of the Decemviral legislation are excessively unphilosophical and unsound. *Esp. des Lois*, l. vi. 11.

‡ *Ἐκ τῶν πατρῶν ἐθῶν*, says he. l. x. 55.

ly, adopted for a country, a code, we mean; that has lived through a single generation, or, indeed, has lived at all, is to be found in the (profane) history of mankind — that Locke's constitution for Carolina, and Citizen Sièyes' litter of constitutions for the "Republic One and Indivisible," are types of them all — we should, *à priori*, venture to reject all such stories as false or exaggerated. The thing has never happened elsewhere — it is not in the nature of man that it should happen anywhere — therefore, it did not happen there. But the argument, strong as it would be in the general, is irresistible in its particular application to Roman manners and legislation. If ever there was a people that adhered to establishments; that revered the past, and used it, at once, to awe and to protect the present; that had faith in the wisdom of their ancestors, and none at all in the pretensions of political quacks of all sorts — it was they. Their fundamental maxim, as Hugo remarks after Appian, was *melior est conditio prohibentis*. Their constitution was one net-work of checks and counter checks. A reformer was not exactly required to propose his bill with a cord round his neck, as Zaleucus ordered it, but unless things were clearly ripe for its adoption, he might not think of carrying it without a struggle, that would shake the Forum and the Campus Martius — perhaps the state. In reading Cicero, one is fatigued with the citing of precedents from the purer days of the republic, and with the perpetual recurrence of such phrases as *more majorum — veteri consuetudine institutoque majorum*. In this respect, also, as in so many other points of Roman history, we are irresistibly reminded of England and the English race. Niebuhr, indeed, goes so far as to say, that the Romans never abolished any thing — that their institutions were all suffered to live out their time, and were only laid aside or disused, when there was no longer any vitality or strength in them.\* Perhaps our readers will see, when we come to speak of the influence of Tuscan manners and religion on the character and destinies of Rome, how it was that the state was thus, as it were, consecrated — that it was regarded with a sort of Jewish reverence, and that it was deemed sacrilege to touch, were it but by accident, the ark of the covenant, with unhallowed hands. This aversion to all merely speculative innovation, is perfectly reconcilable with their constant readiness to adopt improvements, tried by experience, or imperatively called for by the circumstances of the times, which

\* R. G. I. p. 2, 3.

was equally a distinguishing characteristic of Rome. No people ever knew better how to follow Time, the mighty reformer, or that a froward retention of customs, as Bacon profoundly remarks, is itself a sort of innovation. Accordingly this trait of their national character has not escaped the observation of Niebuhr, and there are few passages in his work more vigorously and earnestly written, than that in which he contrasts their docile wisdom, with the bigotry that resists all progress, and, as it were, murders improvement in the womb.\*

The same writer has shown, indeed, that the occasion of adopting the XII Tables, was a much more extraordinary one than has been commonly imagined. He makes it out very clearly to have been a *political revolution*, and that the aim and the issue of the struggle, which led to the appointing of the Decemvirs, was not merely to restrain what was arbitrary in the judicature of the consuls, or to reduce their customs to a written code, but to bring about a perfect equality among the different classes of society.† According to his masterly exposition of the history of that period, as well as from the tenor of Livy's narrative, it is very manifest to us that the patricians, whose numbers had been fearfully reduced by pestilence some years before these events, never afterwards recovered their ground; that, on the contrary, the spirits of the plebs were raised, and their way to the consulship, which they attained through a series of triumphs in the course of the century, made clear and comparatively smooth. But even this does not alter the case. The probability is, that the reforms ascribed to Servius Tullius — such as the abolition of the *nexus* — which had been defeated, or neglected in practice, were at least as extensive as these. Nay, he actually did effect a most fundamental revolution in the state. He converted an aristocracy into a timarchy, as Solon and Cleisthenes did, and considering the tradition of his relation to the elder Tarquin, and of the Corinthian extraction and connexions of the latter, it is not improbable, from this perfect coincidence in so remarkable a point, that Greek ideas may have had some effect in suggesting the form of classes and centuries. Yet, we do not hear of any other change in the law at that time; and still less, of a new and an imported code.‡ Admitting, therefore, as we do, that

\* Ib. II. p. 509.

† With some few *exceptions*, they effected this.

‡ See the speech of Servius Tullius, Dionys. IV. p. 10, which is a programme of all future reforms — public lands — debtor and creditor, &c. The expression for the Nexi is well chosen, *μηδὲνα δαμειζεν ἐπὶ σώμασιν ελευθεροῖς*. The historian makes him refer to the legislation of foreigners — with a view — not to the *οισιαρχία* of Solon — but to his classification of citizens according to taxable property.

the laws of the XII Tables were a *magna carta*—a treaty between parties in arms against one another—a compromise between real powers, and so a constitution, in the only proper sense of the word—still it does not follow, as we have seen in *that* memorable case, that there was any material alteration of the laws, beyond the particular abuses that provoked the struggle, and were redressed by it. The revolution of 1688 in England, and our own revolution, are additional examples of the same kind. In short, we consider the XII Tables as a statute declaratory of the old common law of Rome, and say of it, as Livy says of the supposed obligations of Numa to the philosophy of Pythagoras, that they were due not to foreign wisdom, but to the stern and rude discipline of the old Sabines.\* The legislation of Rome was, we repeat it, entirely peculiar and indigenious—as much so as the organization and the discipline of the Legion. Certainly in that age when Athens was in all her glory, under the administration of Pericles—only thirteen years before the Peloponnesian War, and in the midst of a constant intercourse between Greece and her numerous colonies in Italy—no one can doubt, as Niebuhr insists, that they had every means of learning what was the legislation of her renowned lawgivers. But there is nothing but the loosest tradition to show that they turned those means to any practical account, while all internal evidence is against it. To us one fact alone is decisive of the whole question. It is the very one adduced by that great man to show that the laws of the two last of the XII Tables, savage and strange as they appear to us, could not have struck the Romans in the same way, because they were never repealed. Not only so, but they were, for centuries together, the object not merely of reverential obedience, but of studied panegyric. Now we go farther: we affirm that this fact is conclusive to show that those provisions were such as the people had been accustomed to from time immemorial; more especially, if we consider the laws themselves, as we have just remarked, in the light of a compromise extorted by the body of the plebs, from a decayed and enfeebled, though not dispirited, oligarchy. Montesquieu long ago observed of the laws limiting the rate of interest, that the Decemvirs—the haughtiest of aristocrats—never wrote any such law. He was, without knowing how, right to a certain extent. They wrote it only on compulsion. The day—the *ineluctabile tempus*—was come, when it must be written. It was already passed into law in men's minds,

\* *Disciplina tetrica et tristi veterum Sabinorum*, l. 1, c. 18.

and it took its place naturally by the side of the immemorial usages and maxims recorded with it, on those tables of brass or ivory. But it is utterly inconceivable that the XII Tables should have been, in the main, more than a declaratory act, when we consider that the overthrow of those odious tyrants, and the popular vengeance justly exercised upon them, had no effect whatever in suspending the execution or impairing the authority of their laws. The abolition, some years after, and not without a vehement struggle, by the Canuleian *rogation*, of the clause prohibiting marriages between patricians and plebeians, is an exception that proves the rule. We cannot doubt but that such marriages were unlawful from the beginning, as inconsistent with the first principles and whole economy of the Roman constitution, in its primitive state.\*

Whether we consider the XII Tables, as showing what the law had been from the beginning of the first, or what it continued to be, with no very important changes, until towards the end of the second period of its history, according to the distribution of Hugo—whether we look upon them, with Tacitus, as the last act of equitable legislation, or with Livy, as the source of all the subsequent jurisprudence public and private of Rome—we must equally regret that this precious monument is come down to us a mere fragment. Thirty-five precepts, contained in not many more lines, are all the remains of it that learned industry has been able to glean from the whole field of ancient literature. To these must be added the substance of some others, preserved by writers who had occasion to refer to them. This is, indeed, miserably unsatisfactory for the curiosity naturally inspired by a relic of such capital importance. Yet there is enough left of it or about it, to reveal the spirit of the ancient law of Rome, and to show how remarkably contrasted it is with the body of jurisprudence collected by Justinian. We see the rude forms of process, and the cruel modes of execution. We see the despotic authority of the father over the son, who stands to him in the relation of a chattel, of which he has the most absolute disposal, and which does not cease to be his, until he has alienated it three several times. We find libels punished with death, and the *lex talionis* enforced for a broken limb. That most terrible of all the scourges of the poor plebeian, the power of the

\* See the speech of the consuls, Liv. l. 4, c. 2. Niebuhr, R. G. I. 419. Canuleius, in his harangue, declares that it was an innovation of the Decemvirs. Livy follows Dionysius l. x, c. 60.

creditor over his insolvent debtor is maintained in its utmost rigor. The latter is still allowed (and it seems to be the only form of contract yet in use) to mortgage his life, his liberty, his children, to the lender; and if the Equi and Volsci, in their eternal inroads, lay waste his little farm, or he is compelled, by being enrolled to resist those enemies, to leave his ground untilled, or his crop to perish for want of tendance, so that he is unable to meet his engagements, he is loaded with chains, dragged to the market place to see, perchance, if others will have more mercy for him than his remorseless *master*, and in case charity or friendship do not enable him to satisfy the demand, may be put to death, or sold beyond the Tiber. The case of many creditors having liens upon the same bankrupt body occurs, and provision is made for an equitable distribution of the assets, except that a clumsy dissection is excused beforehand by the law, with an indulgence for unintentional, because unprofitable inequality, which would have ravished Shylock into ecstasy.\*

The most tender, and the most important of the domestic relations, is regulated in the same stern spirit of absolute dominion in the father of the family. The husband acquires his wife like any other property, by purchase in market-overt, (*coemptio*), or by a statute of limitations, (*usu*), after a possession of one year, not interrupted for three nights together at any one time. There is still another form, consecrated by religion, and having mystic reference, says Creuzer, † to agrarian hieroglyphs of a remote antiquity. This was marriage by *confarreatio*, or the eating of the salt rice-cake from the hands of the pontiff, in the presence of witnesses. The nuptials of the patricians, as a caste of priests, were originally celebrated in this way. The plebeian, and, generally, most usual rite, was the *coemptio*. The legal effects, however, of the three forms were the same, (*conventio in manum*;) the wife became the husband's property, and inherited of him only as one of his children. Woman was condemned by this old law to perpetual incapacity; as a daughter, she was the slave of the paternal, as a wife, of the marital authority; and the death of the father or the husband, only subjected her to the tutelage of a kinsman. This tutelage, which is at best one of the

\* As to this celebrated *questio vexata*, Hugo concurs with Bynkershoek, that the language is metaphorical, and wonders that there should be a doubt in any mind. Niebuhr, on the contrary, is equally positive that the literal sense is the proper one, R. G. ii. 670; so Gibbon thinks, or seems to think. We humbly concur with the latter.

† Symbolik, B. ii, 100. We follow Gibbon in interpreting *far*, rice.

less understood points of jurisprudence, was of course mitigated by the progress of civilization, and the influence of the sex, and ceased entirely during the fourth period of our history. To be, in the eye of the law, the bond-slave of her husband, the sister of her son, is a theory so paradoxical and shocking, that nothing but evil and disorder might be anticipated from it; yet Dionysius of Halicarnassus is enraptured with its effects in practice, and they were unquestionably good. In a corrupt age, when Augustus endeavored by the severe provisions of the Julian laws, and the *lex Papia-Poppæa*, to restore purity of morals, and to bring marriages again into fashion, it is amusing to read the sage lamentations of the libertine Horace, himself a bachelor, over the sanctity of the marriage bed, and the fruitful chastity of those happy times, so entirely obsolete in his own.\* That in spite of all that the law could do, nature asserted for the sex the influence that belongs to it in civilized society, is clear, from the traditions adopted and adorned by the genius of Livy. 'The question of the wise old Spanish monarch, *quien es ella*, would not have been asked in vain among those stern warriors, for from the rape of the Sabines to Theodora's conquest of Justinian, woman seems to have been at the bottom of almost all the memorable events of Roman story. Lucretia, Virginia, Veturia, Fabia the wife of Licinius, who became at her instigation the first plebeian consul, are illustrious examples of this; and whatever may be the changes of manners and opinions, as Hume has well remarked, all nations with one accord, point for the ideal of a virtuous matron, to the daughter of Scipio and the mother of the Gracchi. The extraordinary, and Montesquieu thinks incredible, fact, that it was not until upwards of five centuries were elapsed, that a divorce was heard of at Rome, is evidence either of signal purity of manners, or that the laws were wonderfully accommodated to the manners, such as they were.

The Roman seemed to think nothing his own (except acquisitions *jure belli*) but what he might call, in biblical phrase, "his money." He bought his wife, he bought his child by adoption—his property in his own son could be lost only by repeated sales; his last will, which he was authorized by the XII Tables to make, was in the shape of a transfer, *inter vivos*, and for a valuable consideration to a nominal purchaser, like the conveyance to a use for that purpose before the statute 32 Henry VIII. This reveals one of the most important traits of the Roman character,

\* Od. iii. 6. 24. Epod.

its avarice—or it may be only an overweening sense of commutative justice. They exacted inexorably a *quid pro quo*, and held no sale complete until the price was received. But to acquire the property of a Roman—to hold, as they termed it, not by natural law, but *ex jure Quiritium*—the transfer was required to be made with the solemnities of a regular *mancipatio*, in all cases where the thing was important enough to be classed with *res mancipi*. Since the real Gaius has been opened to us, compared with Ulpian and Mai's palimpsests, we are better informed what this description comprehends, and as to the several conveyances which alone were effectual to divest the Roman of his privileged proprietorship. The chief of these, was the *mancipatio*, just mentioned, a symbolical sale, in the presence of at least five witnesses, all Roman citizens, and representing, it may be, the five tax-paying classes, under the authority of a pontiff or some other public officer, whose presence gave solemnity to the act, and whose business it was to weigh the copper (there was as yet no coin) paid as the price, (*per aes et libram*.) This sale, however, though it were regular in every particular, of course transferred no property, unless there were, in the purchaser, a capacity to take, and that capacity none but a *Roman citizen* could have, or the few foreigners who were favored with the rights of denizens, (*Commercium*.) It is our purpose in alluding to these principles of this ancient law, only to show how strictly it was then entitled to be called *jus civile*, and how very far removed it was from the catholic and comprehensive system which has served for the basis of modern jurisprudence. We here see, that the very *property* of a Roman was peculiar and exclusive, and we shall be still more struck with its privileged character, if we consider what Niebuhr has brought to view, as to the solemn ceremonies with which the soil of the *ager Romanus* was laid out and limited by the augurs.\* It was all holy ground, and a trespass upon it was sacrilege.

Other heads of the XII Tables regard inheritance *ab intestato*, and the appointment of tutors. None could be heir to a Roman but his *agnati*, (including his wife *in manu* and his daughter,) and no inheritance could be transmitted through females. If there were no *agnati*, or persons of the same family tracing their consanguinity through the male line, the estate descended to the *gentiles*, or members of the *clan* or lineage. The tutorship was a burthen, or a privilege, that accompanied the right of inherit-

\* R. G. ii. 695. Anhang.

ance, and that inheritance, once accepted by him that was free to refuse, and in other cases, whether accepted or not, bound the heir, with or without his assent, to all the liabilities of the deceased — a stern doctrine, subsequently modified in practice and by legislation.

Penal jurisprudence was never a very important part of the Roman Law. Several causes conspired to produce this effect, but certainly one of the most important was the domestic jurisdiction of the father of the family. Thus we find, in the XII Tables, that theft is made in some cases a matter of private action, as it continued ever after. But the few provisions in regard to the punishment of crimes that are to be found among these fragments, are in the true spirit of Roman discipline, typified, as Dionysius remarks with complacency, in the lictor always at the consul's beck, ready armed with the rod and the axe, to inflict summarily the two punishments most familiar to the old law. But these laws prohibited the taking of the life of a Roman except by the sentence of the people met in the great assembly of the Centuries, and his person was in a later age made inviolable by the Portian and Sempronian laws.\* Sternness and even cruelty in the execution of penal laws, and in enforcing civil and military discipline, continued through all periods to characterize these masters of mankind. For a breach of that discipline, whole legions were sometimes scourged and decapitated,† and he that has seen with the light of history Rubens' master-pieces, — especially the "Elevation of the Cross," and the "Breaking of the Legs," at Antwerp — has come away with his imagination impressed forever with ideas equally just and frightful of the muscular and mighty strength, the colossal proportions, and the barbarous hard heartedness of Roman domination — especially as contrasted with the meek type of Christian civilization on the Cross.

But amid provisions like these, the voice, at once, of political wisdom and of everlasting justice speaks in the interdiction of all *privilegia*, or bills of attainder and *ex post facto* laws — of all laws, in short, made for a particular case. The fidelity of the client is encouraged by the curse pronounced upon the unjust patron (*sacer esto!*). The Libripens, or attesting witness, who refuses to give testimony before the Judge, is declared for ever infamous and incompetent (*improbus et intestabilis*).‡ In a ques-

\* There is something hideous in the very title of the Lex Portia, *pro tergo civium lata*. A. U. C. 452.

† Dionysius XX. 7.

‡ The words are a *formula* and untranslatable. See Calvin's Lexicon.

tion involving the liberty of one of the parties, the presumption is in favor of it. It is from such precepts that we ought, in fairness, to judge of the opinions, as we have seen, passed upon the legislation of the XII Tables by Tacitus and Cicero. There were doubtless many things in them calculated to excite the ridicule (if philosophy *ever* ridicules what has been venerated by a past age) of a more refined era; as we may learn from a well known passage in Aulus Gellius.\* Of this sort are the sumptuary precepts, relating to the burying of the dead, which are still extant, and one of which permits the body of the deceased to be burnt or interred, even with the gold that had been used to bind his teeth together.

Such were the XII Tables; but the character of this early jurisprudence is, of course, very imperfectly learned from the mere letter of the law. The important question how it was interpreted and enforced remains to be answered.

In the first period, the Kings, and afterwards the Consuls, exercised the functions of judges, with an appeal, in capital cases, to the people; but a form of judicature, extremely analogous to our trial by jury, was, in process of time, established at Rome. After the office of Prætor was instituted, (A. U. C. 387,) the functions of the magistrate became more and more separated from those of the judge of the facts. This admirable system of a single judge, charged under an undivided responsibility with maintaining the uniformity of the rule, while the application of it to the circumstances of the case was left, under his instruction, to the sound discretion of others, is, no doubt, one of the causes of the gradual improvement and great superiority of the Roman law. Of the edict of the Prætor, properly so called, it is not yet time to speak; but as our observations apply to the first, and a great part of the second period of Hugo's division, we could not avoid this allusion to the *selecti judices*.† We have already mentioned, that they were drawn from the senatorian order, until the rogation of C. Gracchus (A. U. C. 630) transferred the judicial power to the Knights.

The XII tables, although they contained many provisions on what would be called among us points of practice, still left, in

\* Aul. Gell. 20. 1.

† On this, as indeed most other subjects of Roman legislation, Beaufort may be consulted with profit. République Romaine, l. v. c. 2., or Noodt (on whom he relies,) de Jurisdict. The latter thinks the division between the magistrate, (king or consul,) and the judge, with the *formula*, existed before the XII tables. Ib. l. I. c. 6.

the main, much to be done by the courts themselves, in building up a system of procedure and *pleadings*. Accordingly, it has been generally thought that the patricians, combining, as we have seen, the priest and the lawyer, and transmitting their knowledge, as an occult science, to their successors in their caste, contrived, by way of indemnity to their own order, on losing the exclusive legislative power, (in which the *plebs* were now allowed to share,) what were called *Legis actiones*. This subject is, for the first time, placed in a clear light by Gaius, who treats of it at considerable length in the 4th book of his Institutes, (p. 190, seqq.) Unfortunately there are several chasms in the MS., which render even his account of it less perfect than could be wished. It is not necessary to our purpose, to enter into any detailed analysis of the different species of these *actiones legis*, but simply to mention, that Gaius suggests as one reason why they may have been called so, that, like our indictments upon penal statutes, they were required to conform, with the strictest exactness, to the very *words* of the law. For example, the XII tables gave a remedy, in general terms, against a trespasser, for cutting down *the trees* of another. It was understood as *nomen generalissimum*, and yet in an action for such an injury to a vineyard, the allegation being for *vites*, instead of *arbores*, it was held bad. The result was, that in process of time these forms of pleadings all fell into such odium, that by the Æbutian and the two Julian laws, they were entirely abolished, and *formulae*, of a more convenient kind, substituted for them. It is easy to perceive what an immense control an entire monopoly of this precious science of special pleading (and it extended to matters of voluntary jurisdiction, as well) must have given to the patricians over all the business of the people. But their advantages did not stop there. There were from the time of Numa, in the Roman calendar, a great number of *dies nefasti*, or *dies non*, as we believe they are called for shortness in our courts. These were known to the pontiffs only, and to add to the embarrassments of the uninitiated, that calendar was itself so imperfect as to require frequent intercalations to make the civil year agree with the course of the sun. The Tuscans, from whom the Romans had learned all the little astronomy they possessed, had taught them results without explaining the reasons, and the pupils were, of course, liable to commit blunders, in the application of their rules. But besides errors of that sort, Niebuhr scruples not to impeach their integrity, and to impute to their intrigues a still greater confusion

in the "times," already sufficiently "out of joint." A more fearful disorder in a well-regulated society can scarcely be imagined — the case was still harder with the *plebs*, the majority of whom were honest farmers, coming to town only on market days, and not having much time to spare. To be without an almanac under such circumstances were bad enough; what must it have been to have a false one?\*

The Patricians, it is true, gave the information and advice needed by the ignorant in such matters, *gratis*. They thought themselves abundantly compensated in the influence conferred upon them by their black art. But their "forensic royalty," as Heineccius calls it, was not to last long. A fellow of the name of Cn. Flavius, a scrivener, son or grandson of a freedman, had been employed by the renowned Appius Claudius, the Blind, as a clerk or secretary. This gave him an opportunity, of which he availed himself, to copy all the *forms* together with the *fasti*, and to publish them for the benefit of mankind. The people were so grateful to him for the unexpected service, that he was created *Edile*. This is the *Jus Flavianum*.

It is an ungracious thing to spoil a good story; and yet there is, it appears to us, a great deal of force in Hugo's objections to this. (p. 450.) But this strictness in pleadings, so strikingly analogous to that of our old common law, *may* possibly have proceeded from similar causes. Besides the influence ascribed to the subtlety of Norman clerks, and to the school logic introduced by those celebrated churchmen, Lanfranc and Anselm, it is certain that jury trial does call for precision of statement and simplicity in the issue. Now, the Romans, as we have seen, had a sort of jury trial, of uncertain origin, it is true; but the presumption is, as Noodt supposes, that it was almost as old as their law itself. If that *was* the case, Montesquieu may, on the whole, be right in his manner of accounting for this strictness of forms in the early judicature of the republic. In treating the question under what governments and in what cases, judges ought to conform most strictly to the letter of the law, he remarks, that in monarchies, judges are like arbitrators: they deliberate together, they communicate their ideas to one another, they conciliate and compromise. At Rome and in the Greek cities, in conformity, as he affirms, (though we do not exactly perceive it,) with the spirit of republicanism, every judge gave his own opi-

\* Put the case of a title by prescription, or by the statute, as it is called: it would manifestly depend in some measure on the pontiff's intercalation. R. G. I. 289.

nion categorically — “I acquit,” “I condemn,” “I am not convinced.” “It is because the people judged, or was supposed to judge. Now the people are no jurisconsults; all these temperaments and modifications of arbitrators are not for them; it is necessary to present to them a single object, a fact, a single fact, &c.” He then goes on to remark, that the Romans, after the example of the Greeks, introduced forms of actions, and required that every cause should be carried on in the appropriate form. It was necessary to ascertain and *fix* the issue, in order that the people should have it steadily in view; otherwise, in the course of a prolonged inquiry, the state of the question would be continually changing, and great confusion would ensue. The Prætors invented, in later times, more accommodating forms, and more, as he supposes, in the spirit of monarchy.

There is undoubtedly — making the usual allowance for some radically false notions of Montesquieu — a good deal of force in this observation; and we will just add here, that the idea is strikingly illustrated by the difference between the two sects of jurisconsults, of which it is our purpose, if our space admit of it, to say something more. Labeo, the republican, adhered, with his followers, to the rigid logic of the law — Capito, the creature and the tool of an insidious despotism, always favored equity, and dealt in temperaments and modifications.\*

But the Romans did not, as Montesquieu supposes, imitate the Greeks in this respect. If they were not led to it by motives growing out of their situation, as he aims to show they were, they followed those masters in whose school their intellectual character was mainly formed and that superstitious adherence to forms learned, with every other sort of superstition. We alluded just now to the effect of Norman manners and character in England, and mentioned the subtlety of a scholastic clergy as sharpening the acumen of the special pleader, and infecting the common law with the spirit of chicane. The mixture of races in that island, was attended with consequences of the greatest importance, not in this respect alone, but in many others which it would be easy

\* Lest we should not have another opportunity, we adduce as an illustration the following from Gaius, himself one of the Sabiniani or Cassiani. Suppose a son delivered up *ex noxali causa*, i. e. for any damages done another's property, for which his father would otherwise be liable, must he be emancipated three times, as in other cases, or only once? Three times; because the law makes no exception, say the Proculiani — once, say Cassius and Sabinus. — Gai. Inst. p. §18. This tendency began with Augustus, and prevailed, as we have seen, ever after.

to point out.\* But the sluggish, though firm, enduring, and robust Anglo-Saxon, did not gain more by a union with the subtle, crafty, rapacious, and adventurous Norman, than did the city of Romulus and Tatius — the Latin and the Sabine of the Palatine and the Capitol — from the superior civilization of that mysterious, unfathomable Tuscany — darker, says Niebuhr, than Egypt — which we know only by ruins, or through Rome.

We have the casual testimony of antiquity to the fact that the Roman people was composed of the Etrurian or Tuscan, Latin, and Sabine or Sabellian races.† This city grew up on the confines of three considerable confederacies, under the names just mentioned, varying, according to times and circumstances, in relative strength and importance, and still more in character and institutions. The Latin element, although judging from language, the basis of the whole, was, with a view to moral effects, the least prominent; and we need only add, that there is every reason to believe that that tract of country, for so many centuries laid waste by *malaria*, and now so desolate, was, in these remote times, extremely populous and flourishing — much more so than under the dominion of Rome. But it is the union of the fierce, rude, and warlike mountaineers of Samnitic origin, with the Tuscan lucumon, or patrician priest, that we are to seek for a solution of the great problem of Roman civilization.

The whole constitution of society among the Samnites and Sabines reposed, as it did in Tuscany, upon aristocracy and religion; but their aristocracy was not, as in Tuscany, surrounded with multitudes of slaves; and their religion, instead of depending on the memory and traditions of a patrician caste, was recorded in written precepts.‡ The country was in the highest state of cultivation; flourishing fields or rich pastures were seen upon the very tops of their mountains; and numerous villages, instead of cities, were the abode of an immense rural population. The aristocracy were not oppressive, because their lives were innocent and their manners simple; with few or scarcely any slaves, they tilled their own grounds and fed their own flocks. Marriages were early contracted and publicly solemnized, and their wives, chaste, industrious, and above all, obedient, were helps meet for them in their rustic labors, or in their quiet household. Above all, they were devoted to agriculture

\* We believe Herder was the first to make this important remark. See *Philosophie der Geschichte*, &c., IV., 161.

† Florus, l. III. 18.

‡ Schlosser, 2 Th. 1 abth. 270.

practically and theoretically, as the priesthood of the *Fratres Arvales*, derived to Rome from thence, sufficiently shows. Creuzer thinks, that woman had a hard lot there, as well as in the primitive Latium.

This element of the Roman character is illustrated in some of the most remarkable passages of the early history of the Republic, and was more and more developed during the Italian wars, when Rome, under Papirius Cursor and his successors, began to conquer without being corrupted. The Sabines were the warrior caste of the new state; they were soon united in it, as in the east, to a caste of priests.

That Rome borrowed from Tuscany some of the external pomp and bravery of her costume and ceremonial, has often been repeated. The toga prætexta, the golden crown, the sceptre with the eagle, the curule chair, the axes and fasces of the lictors, ensigns of power that passed from the kings to the consuls, and even the triumph itself, was derived from them. But the inward influences from the same source were not so generally perceived, or not sufficiently appreciated. Nobody saw them so distinctly as to affirm, before Niebuhr, that the phenomena could be explained on no other hypothesis than that Rome had derived her Tuscan forms of all sorts from a Tuscan prince, and was at one time the great and splendid capital of a powerful Tuscan state.\* The great philologist repeats this opinion in the latest edition of his work, with the utmost emphasis and deliberation, at the same time that he indirectly retracts some of the views on this subject when he was much younger, which he admits were false or exaggerated. The Roman writers whom we possess, are not blind to the fact, that the Tuscans had taught their ancestors much; but they thought it was merely teaching. They did not know, (with some casual and unimportant exceptions,) that by an actual mixture of races, it was become *nature*, and that the warlike spirit and frugal manners of the conquerors of the Samnites, were not more surely descended to them from those very Samnites with the blood of their mothers in the Legend of the Rape, than their deep reverence for the mysteries of soothsaying, the influence of the augur and the pontiff, with their occult science, the scrupulous attachment to forms, the very shape of a caste, (so important to the preservation of traditional principles,) which the patricians had given to their *gentes*, their reluctance to make a change, struggling with their readiness to receive admitted improvements; in short, the oriental color that so deeply

\* R. G. i. 402.

tinges the early Roman character, and left its impress upon it long after the warlike Sabine propensities had, by extinction of families and other causes, obtained the mastery in their conduct; that these traits so *very* peculiar and distinguishing, we say, were also the voice of blood, and the testimony of a common origin. It was recorded, because it could not be dissembled, that the opulent youth of the city were educated by Tuscan masters, in all the wisdom of those Egyptians, and the *Libri Rituales* were there to show how many Roman practices of the highest importance in their eyes, were borrowed from them; but these very facts, the evidence of an intimate and hereditary connexion, were regarded as proof only of a comparatively slight and superficial intercourse.

The *libri rituales*, as described by Festus, speak for themselves. They remind us of the Mosaic ritual: "they teach the rites with which cities are to be founded, and altars and temples dedicated; the holiness of the walls of towns; the law relating to their gates; how tribes, wards, (*curiæ*,) centuries, are to be distributed; armies organized and *arrayed*; and other the like things relating to peace and war." We call the attention of our readers to the comprehensiveness and importance of all this—it goes to the very bottom of the whole body of public law, civil and military. We see the same influence, as we have already had occasion to remark, extending itself over the very soil of the Roman territory, and making, in the technical language of their augury, one vast temple of it. It was consecrated by the auspices; it could become the property only of one who had the auspices, that is, a patrician or *Roman*, properly so called: once set apart and conveyed away, it was irrevocably alienated, so that sales of the domain were guaranteed by religion, and it was sacrilegious to establish a second colony on the place dedicated to a first. Auspices could be taken no where else but on some spot which *they* had rendered sacred. The city, by its original inauguration, was also a temple—its gates and walls were holy; its *pomœrium* was unchangeable, until higher auspices had superseded those under which it was at first marked out. Every spot of ground might become, by the different uses to which it was applied—sacred, (*sacer*,) holy, (*sanctus*,) religious, (*religiosus*.) To the assembly of the *Curia*, the presence of the augurs was, of course, indispensable; that of the *Centuries* could not be held, unless the augurs and two pontiffs assisted at it,\* as it was dis-

\* Niebuhr, R. G. ii. 253.

solved instantly, at their bidding, on the occurrence of any sinister omen, were it but the flight of an obscene bird, (*si bubo volasset.*) The first *agrimensor*, says Niebuhr,\* was an augur, accompanied by Tuscan priests or their scholars. From the foundation of the city, the sacredness of property was shadowed forth in the worship of the god Terminus, and that of contracts protected by an apotheosis of Faith. In short, the worthy Roman lived, moved, and had his being, as the Greek writers observe, in religion—a religion, too, as peculiar as every thing else in his situation.

There is a noted passage of Dionysius, wherein he makes this remark.† He is charmed to find in the (primitive) worship of Rome, none of those prodigious, and humanly speaking, obscene and abominable things, which disgusted the Greek philosopher in the mythology of his fathers—no corybantes with their clashing cymbals and frantic convulsions,‡—no howlings for the loss of Proserpine—no mutilations of Cœlum or Saturn. The priests, also, were a sort of magistracy, not drawn by lot, but elected by the Curia, two to each, men fifty years old and upwards, distinguished for high birth and exemplary lives. The Romans, says Creuzer, embraced and long retained the primitive Pelasgic religion, that once prevailed generally in Italy—the worship of those old gods, still carried round in the Circensian pomps. These, with the augurs, extispices, &c., were long ago forgotten in Greece. There, he continues, instead of primeval faith and reverence, there had sprung up out of the mythology of Homer and Hesiod the splendors of a sensual anthropomorphism. In Etruria and Rome, the poetical element was always subordinate to the mystical; for bards and artists never exercised the same control over a religion established by the state, and superintended by ancient and serious priests. They looked beyond Olympus, into the depths of the heavens and the earth. The pious and worthy fathers of the calm and thoughtful Latium, did not suffer themselves to be transported by the gay fancies of the Greek *αἰδοίαι*, beyond the homely circle of the religion of their fathers. The pious old Roman adored and served his god for one hundred and seventy years together, without an image.§ Even after idols stood in the sacred niches, the worship of the High Vesta savored of that primitive simplicity. Ever after he was satisfi-

\* Niebuhr, R. G. II. 703. 19.

† L. ii. c. 19.

‡ Creuzer, Symbolik. ii. 980, remarks that the Sallii are an oriental institution.

§ Plutarch in Numa, 8. p. 65, 6. Heyne doubts, but see the learned note of Creuzer, Symbolik. ii. 993, and what Posidonius, (*ibi. laudat.*) says of the excellent character of old Rome.

ed, in her still holy house, with the bright flame of the pure fire, without an image. And when in the earthquake, the mysterious influence of dark powers made itself felt, the Romans still adored and believed without examining, and prayed to no ascertained or known God.\* Had he never gone astray after false and foreign gods, had he not ambitiously given to its exterior the polished air and forms of Greece, there might have sprung up out of this old, mysterious, nature-exploring, serious, and moral religion — as a great writer observes† — from the deep roots of this nationality founded on religion — an art, a tragic muse, that would have diffused their peculiar spirit and worth over other times and people, instead of the imperfect and imitative efforts on a foreign soil, which we must now rather deplore than admire.

Thus predisposed by original complexion, as well as by religious discipline and opinions, to mysticism, the Latin fathers of Rome were prepared to receive the deepest impressions from the admixture of the Tuscan race, with its singular civilization, impressed with an oriental character. Religion was the life of that civilization; but not in the form of a natural sentiment merely, or an easy and obedient faith—It was become a regular science, though still a mysterious one — its priesthood was a political privilege — in short, it was the very basis of the whole constitution of society. Unfortunately the language of Tuscany was so entirely peculiar, that even in an age which has found a key for the hieroglyphics of Egypt, it is almost given up in despair. But the most remarkable social phenomenon by far — with the exception of Rome — which the history of ancient Italy presents, (for so the existence of Tuscany is,) could not pass away without leaving many traces behind it. The genius of the people seems to have been inclined to melancholy and superstition. The volcanic nature about them, produced all monstrous, all prodigious things; they looked with anxious curiosity into the signs of the future—they sought and studied them, especially, in lightning and thunder, in the bowels of animals, and in the flight, the feeding, and the voices of birds. They had digested systematically what Creuzer calls a “sacred ornithology” — and it was in their schools only that the augurs and aruspices of Rome could be taught their science. Tuscany thus became as renowned as Egypt for her superstitions, and a father of the church describes her as the great mother and nurse of them.‡

\* Aul. Gell. ii. 28. credere quam scire, as Tacitus, (de Morib. Germ.) has it.

† We refer with pleasure to the admirable remarks of *M. le Baron* (as we hear) A. W. von Schlegel. *Dramatische Kunst und Litteratur*, ii. 21.

‡ Arnobius apud Creuzer, *Symb.* ii. 954.

But, in reducing the primitive religion of Italy to a system, she corrupted its simplicity. A ritual abounding in forms, and precise in enforcing them, altered the genius of the people. Their worship, and indeed their whole life, became full of gorgeous pomps and mummeries, and the word ceremony, derived from Cære, one of their cities, will attest, to the latest times, their taste for what was formal, studied, stately, and mysterious.

The union then of the elements, which we have thus attempted to develop, formed the character of the Roman people, and the body of maxims, doctrines, and opinions, that constitutes their law, public and private. It is thus, for instance, that the Tuscan love of symbols, and punctilious observance of forms, are impressed, as we have seen, upon the ancient practice of her tribunals and modes of conveyancing.\*

We trust that this view of the subject will not have been uninteresting or uninteresting to the philosophical reader, to whom such studies may be new. But we must hasten to a conclusion, after adding a few words by way of recapitulation, an ideal portraiture of the *Pater Romanus*, or full Roman citizen, under the old law. It is thus that Niebuhr correctly translates the phrase in the lines of Virgil :

Dum domus Æneæ, Capitoll immobile saxum  
Accolet imperiumque Pater Romanus habebit.†

The Roman legislator, according to Dionysius of Halicarnassus, built the state upon the family, or more philosophically speaking, the state grew up of itself out of the family, and *father of a family* is synonymous with him who enjoyed, without any diminution, all the *jura Quiritium*. Patricians, *patres*, were the whole *ca-te* of those entitled to such rights, each, when *sui juris*, or not in the power of any other, being a *pater familias*.

This image of patriarchal authority was preserved with care, and only enlarged, as we have said, in the constitution of the state itself. The law, in its turn, clothed the Roman fathers, at home, with her own majesty. Seated upon his domestic throne, or tribunal, he exercises without appeal, and beyond even the veto of the tribune, a despotic authority in his family. He has power of life and death over his wife, his child, his slave, his debtor—they are his money, as we have seen. Three terrible words of the law sum up his *imperium*, in these four relations, *po-*

\* See the picturesque description in Gibbon's 44th chap., and what we have said of the *actiones legis*.

† The text is to be found, Æneid, ix. 448, 9., and the commentary, R. G. 344, n.

*testas, manus, mancipium.* It is not by way of implying any restraint upon his dominion, that the XII Tables expressly authorize or enjoin the making ~~way with~~ deformed infants. No office, no virtue, no power in the state, no glory in arms, releases his son from this natural, and unless his master will it otherwise, eternal allegiance. He may marry a wife, by permission, but he shall not be capable of holding property to maintain her; he may beget children, but they shall be bondmen born of his own lord. As for the slave, he may be cut up to feed the fish in his ponds, and both he and the child, if they commit any trespass, may be abandoned to the arbitrary discretion of the injured party, in order to release their *owner* from liability. The fate of the poor debtor we have just read, in that *horrendum carmen*, as it was well called. This relation (as money has been at the bottom of most revolutions) gave rise to unceasing contests between the ruling *caste* and the *plebs*. The patricians obstinately, and, for centuries together, successfully maintained the principle and the practice of the *nexum*. The house of our *Pater Romanus* is not only his own castle, it is the dungeon of enslaved debtors toiling under the lash. Livy's words are quoted by Niebuhr, whose commentary is powerfully written, and presents a frightful picture of oppression. The eloquent Roman informs us, that men "adjudged according to their 'bond' to slavery, were seen daily, by troops, dragged from the forum to their *ergastula*; that the houses of the nobles were filled with debtors in chains, and that wherever a patrician dwelt, *there* was a private prison."\*

Towards the foreigner, he is altogether without sympathy. Stranger and enemy are the same, in his old language. With the consciousness or the instincts of his high destinies, he considers every means consecrated by such an end as the aggrandizement of Rome; and wo to those who stand in the way of it. He pleads, when made prisoner in battle, and released to procure a peace, that he may be sent back to certain torture or servitude — if he have saved an army under his command, by an unauthorized treaty, he begs to atone for his officiousness with his life — he puts his son to death, if he gain a victory at the expense of discipline — how shall he feel for enemies, created, predestined to become his slaves? Accordingly, he destroys without compunction — ravages whole tracts of country, sacks and burns cities, fills his camp with plunder, and sells (where it is not

\* T. Liv. vi. 36. *Gregatim* quotidie de foro addictos duci, &c. Niebuhr's manner of treating the subject of the *nexi*, is in the last degree masterly. R. G. I. 600.

more politic to spare and colonize) into bondage, to traffickers who follow his bloody footsteps like vultures, all — man, woman, and child — whom the sword has not cut off. The bravest and finest of his captives shall one day be reserved for the nameless horrors of the amphitheatre, the only pastime that really interests him — a pastime fit for a horde of cannibals, such as a demon of hell might invent for the amusement of fiends.

Our Pater Romanus, however, does not always oppress the poor and the weak; he sometimes, nay, frequently, serves them, from motives of policy especially. His own clients and retainers are under his guardian care, of course; it is the condition and the reward of their fealty. But he emancipates his slaves readily, and so makes him one of his own *gens* or lineage, bearing a patrician name, and entitled to all the privileges of a citizen. He sits in the forum, upon a sort of throne, or walks up and down among the people, glad to give legal advice gratis to whoever will ask for it. Even his most destructive conquests are made in the spirit of civilization, and directed to perpetual possession, regular administration, and unity of government — and hence his admirable colonial system — by which subjugated nations are adopted as his subjects, rather than extirpated as enemies; and his laws and his language are diffused over the whole earth.

Every thing inspires him with ideas of superiority; and his self-esteem is immense, but calm, enlightened, and majestic. He is a fatalist; but his fatalism too, as always happens, is self-conceit in disguise. He never dreams of being vanquished in the end, though he frequently is at the beginning of a war, and bears it with perfect composure. He has no faith in impulses; he works by system, and relies on general laws in every thing — in war especially, — he has “organized victory,” as they said of Carnot, and is deliberately brave by calculation. If he will deliver up his own consuls to an enemy, stripped and pinioned for a sacrifice, what will he not do with *their* great men? He will expose them in his cruel triumph to the “rabble’s curse” and scoffs, and then murder them; he will make the title of king a jest; they shall be his vassals; one of them shall put a liberty-cap upon his shorn head, and glory in being his freedman; another he will scourge and crucify like a bond-slave.

In private life, he is grave and austere, simple, sober, industrious, patient of toil, hardship, and pain. His conjugal love is none of the most rapturous, and his marriage is therefore of the

kind called "good," not "delicious,"\*—yet he is perfectly satisfied with it—for this whole period of five centuries passes away without a single change of wives. Yet he would almost as willingly adopt a child as have one of his own, and does not like too many of them on any terms. He looks with contempt on all arts, trades, and professions, which he abandons to his freedmen, reserving to himself war and agriculture alone; but he is very frugal, and decidedly avaricious†—though as yet his avarice takes the shape rather of parsimony than rapacity; but the day is coming when he shall be as insatiable as the grave, and *alieni appetens sui profusus* will be the device of his degenerate order. He is deeply religious, in his own way, controlled even in the weightiest matters by the most grovelling superstition—faithful to oaths and to promises *made in proper form*, and profoundly impressed with reverence for the law, which he is seldom persuaded to break, although he is apt to evade it by fraudulent interpretation. So, if ever he violates the faith of treaties, it is by sophistry and not by force; special pleading is the great instrument of his policy; and he thinks the gods satisfied, if men are only argued out of their rights with decent plausibility.‡ His whole history shows that his courage is equalled by his conduct, and his strength by his cunning.

In politics, he is strenuously conservative; he adheres to established institutions as long as they will hold together and work well; but he is not a bigot, and abandons them as soon as he perceives that the time is really come; neither does he scruple to adopt from his enemies weapons and methods which experience has shown him to be better than his own. One thing is most remarkable in his history: he *never* seeks a treaty, nor even comes to terms, with a foreigner successful in arms, and still threatening war or resistance—he *always* does so with his plebeian brethren, who drive him from post to post until he fairly opens the door of the city to them all. He loves power by the instinct of his nature, and for its own sake—not for the pomps and vanities that surround it—this simplicity distinguishes him from the kings of the barbarians.

Long protected by an appeal to the people, his person is at length rendered inviolable by the Portian and Sempronian laws. But it is not himself only that is sacred: he consecrates the

\* La Rochefoucault.

† See Cato de R. R., and his Life, in Plutarch. The old censor, in point of good husbandry, was a Roman Franklin.

‡ See the whole case of the Caudine Forks, and especially the words put into the mouth of the Consul Posthumius by Livy, l. IX. c. 9—though they were right in the main question.—See Vattel.

state; he consecrates the city with its walls and gates; he consecrates the territory around it. Every thing about him is sanctified to his use, and his very property is not like other peoples'; he holds it *ex jure Quiritium*. Thus descended, thus constituted, thus disciplined, with such a character, and under such laws, he has from God the grandest mission that was ever confided to merely human hands. He is trained up for centuries in civil broils and border warfare, that he may learn to conquer the world, and in disputes about rights that he may know how to give it laws. The day is coming, when those laws, converted as it were to Christianity, shall breathe a higher, a purer, and a holier spirit; and when the cross, which is now the instrument of his most terrific despotism, shall be the earnest of a new order of triumphs in Constantine, and the symbol of the most perfect civilization that has ever blessed mankind — a civilization founded upon peace on earth, good will to men, and equality before the law.

We have thus accomplished one of the objects we proposed to ourselves when we began this paper. We have brought into immediate contrast the Roman Law as it originally stood, with the same law as it has been transmitted to us in the collection of Justinian — the *jus civile* of the XII Tables, and the period immediately after that, with the *jus gentium* of Paullus and Ulpian, and still more of Domat and D'Aguesseau—in a word, the code fashioned by the Tuscan priest, with the same code remodelled by Christian potentates. It has been our purpose, as more suitable to such a work as this, to speak rather of the *spirit* of the law, than of the law itself.

But, in consequence of the inordinate length of this article, we are constrained to omit — perhaps to reserve for a future occasion — all that we proposed saying of the progress of Roman jurisprudence towards that consummation, from the time it first became matter of public instruction and scientific cultivation, up to the reign and the labors of Justinian. That investigation would have comprehended some of the most interesting and difficult questions in the history of the law — as the *Lex Æbutia*, and the origin of the Edict of the Prætor, in its most extensive application — both of them unfortunately still problematical — the *responsa prudentum* — and the origin and difference of the *Sects*, with the characters of Labeo and Capito — of Nerva and Sabinus — the legislation of the republic against bribery, extortion, and peculation, and the Cornelian laws — the legislation of Augustus in the *Leges Juliae* and *Papia-Poppæa* —

Salvius Julianus and the Perpetual Edict — some notice of the great lights of the third period, or the Augustan age of the law, the five jurisconsults of the Theodosian constitution, who have been well characterized as “the last thinkers of antiquity;” and finally of the merits of Justinian and his commissioners, who certainly improved *the spirit*, and as certainly hurt its forms by a most slovenly compilation.

We will only add, with regard to Mr. Schrader’s new edition of the *Corpus Juris Civilis*, that we have found great convenience in the use of his Institutes, and heartily bid him God-speed for the yet unpublished part of the work.

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