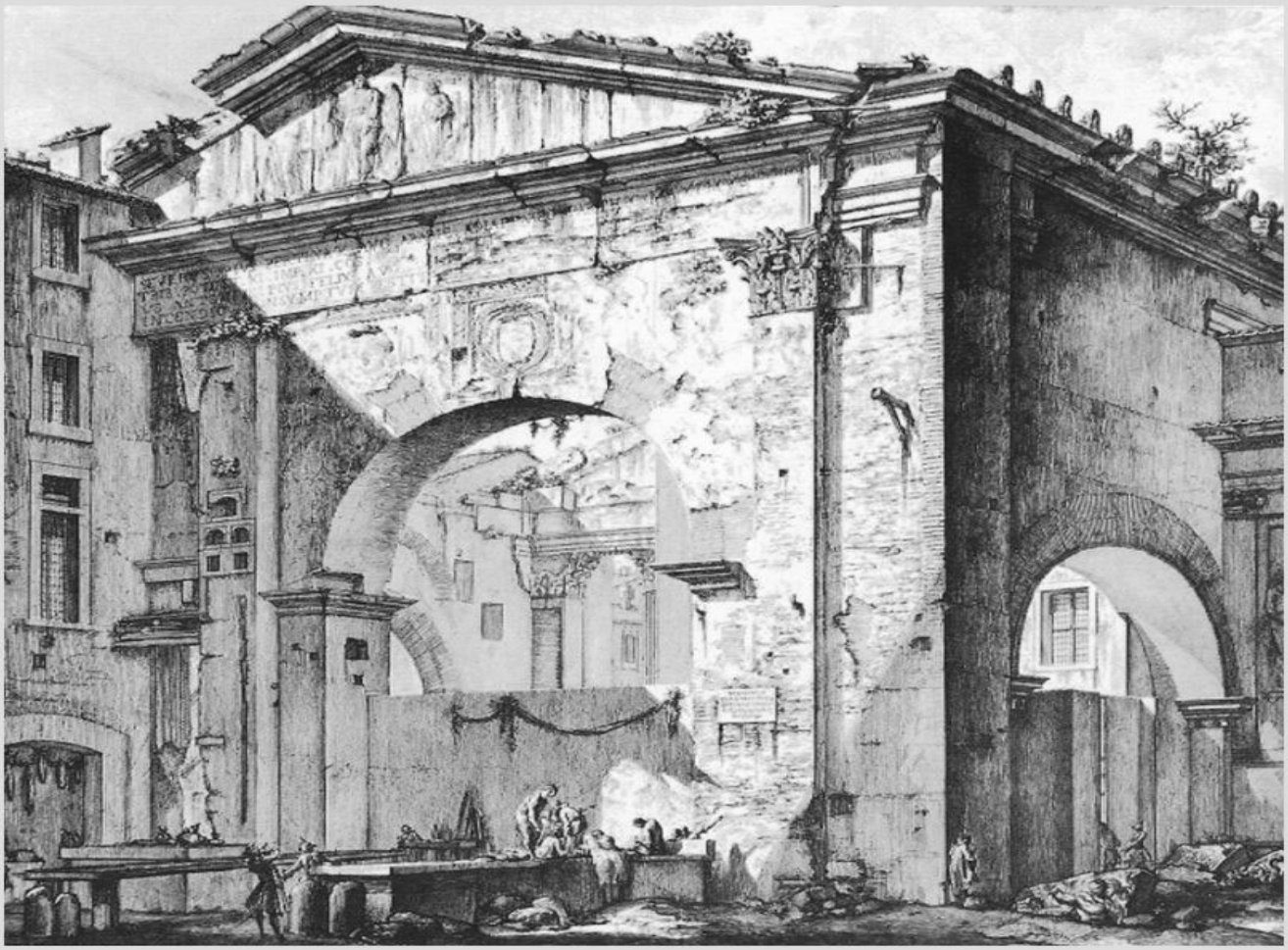

THE INSTITUTES OF ROMAN LAW

GAIUS

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The Institutes of Roman Law, Gaius
Jazzybee Verlag Jürgen Beck
86450 Altenmünster, Loschberg 9
Deutschland

ISBN: 9783849654108

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PREFACE

The death of the author of this Commentary and Translation has taken from us one who in the intervals allowed him by his official duties gave himself with single-minded devotion to the acquisition and furtherance of knowledge. ‘Omnium, quos cognovi, doctissimus’ were the words in which Mr. Poste’s great erudition was commemorated by the Vice-Chancellor of the University, the distinguished head of the distinguished College of which Mr. Poste was almost the senior Fellow; and certainly no one can read this Commentary without being impressed by the writer’s philosophic spirit and extensive learning. It is especially remarkable that a scholar, who was never engaged in the teaching or practice of law, should have produced a legal textbook, which perhaps more than any other makes intelligible to English students the teaching of the great German masters of Roman jurisprudence and at the same time never fails to be interesting by reason of its own force and individuality.

In re-editing this well-known work, at the request of Mr. Poste’s executors and of the Delegates of the Clarendon Press, my endeavour has been to preserve as far as possible the character which Mr. Poste himself gave it, while making such alterations as seemed to be required at the present time. As Mr. Poste never revised his Translation and Commentary with any completeness since they were first published, their revision for this edition has been a more considerable undertaking than would otherwise have been the case. It should be noticed that the part of the Commentary relating to analytic jurisprudence has been much curtailed in the present edition. This has been done by the advice of persons engaged in the teaching of Roman

law at Oxford, who are of opinion that the insertion of so much matter bearing on the general theory of law has rendered the Commentary unnecessarily difficult to students and that the subject is one better left to independent treatises. The omission of the Preliminary Definitions on this account has made it possible to introduce into the book an Historical Introduction to Gaius, which has been written by Dr. Greenidge, who is well known for his writings on Roman constitutional history, and for his special Treatises on ‘Infamia’ and on ‘The Legal Procedure of Cicero’s Time.’

The text of Gaius adopted is that of the last edition of Krueger and Studemund, which its German proprietors have again most kindly allowed us to use. In this text the numerous lacunae are only filled up, where from passages in the Institutes or other sources the missing words may be inferred, at least with a very high degree of probability. Some other conjectural readings, more or less followed in the Translation, will be found in the Appendix. It is to be hoped that in some future edition of this book a Critical Apparatus may be supplied by a competent hand. In the meantime the student should more especially refer to the notes on the text appended to Krueger’s and Studemund’s Gaius. He may also consult with advantage the notes to the late Professor Muirhead’s edition of Gaius, though the valuable textual criticism to be found there requires revision in the light of more recent research.

In conclusion, I have to express my obligations to my old friend and pupil Mr. Ledlie, the translator of Sohm’s *Institutes,* for many helpful suggestions. Another old friend and pupil, Dr. Potts, has also rendered me valuable aid, especially in the preparation of the Index and of the Chronological Table. My friends Dr. Schuster and Dr. Greenidge have given me useful information on several points about which I have consulted them.

E. A. WHITTUCK.

Claverton Manor, Bath,

October 17, 1904
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EXPLANATION OF ABBREVIATIONS

Inst. Institutes of Justinian.

Dig. Digest or Pandects of Justinian.

Cod. Code of Justinian.

Nov. Novellae Constitutiones or Novels of Justinian.

The meaning of the numbers that follow these abbreviations will be obvious to any one who opens a volume of the Corpus Juris.

Pr. stands for principio, meaning, in the first paragraph of a title of the Institutes, or of a fragment of a title of the Digest, or of a 'lex' of a title of the Code.

The Commentaries of Gaius are referred to by numbers indicating the book and the paragraph: e.g. 2 § 5, indicates the 5th paragraph of Book 2. When the reference is to another paragraph in the same book, the book is omitted.

When Ulpian or Paulus are quoted, the works referred to are the Ulpiani Fragmenta or Excerpta ex Ulpiani Libro singulari Regularum, and the Sententiae Receptae of Paulus.

Fragm. Vat. Fragmenta Juris Romani Vaticana.

(For the Jus antejustinianum see Huschke's or Krueger's Collections of ante-Justinian legal writings.)

When Savigny, Vangerow, Keller, Bethmann-Hollweg, Ihering, Kuntze, Windscheid, Dernburg, Lenel, Sohm, Muirhead, and Roby are simply cited, the references are to Savigny, System des heutigen römischen Rechts; Vangerow, Lehrbuch der Pandekten; Keller, Der römische Civilprocess und die Actionen; Bethmann-Hollweg, Der römische Civilprozess; Ihering, Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung; Kuntze, Institutionen und Geschichte des römischen Rechts; Windscheid, Lehrbuch des Pandekten-Rechts; Dernburg,

Pandekten; Lenel, Das Edictum Perpetuum, ein Versuch zu dessen Wiederherstellung; Sohm, The Institutes—A Text-book of the History and System of Roman Private Law (translated by J. C. Ledlie), 2nd ed.; Muirhead, Historical Introduction to the Private Law of Rome, 2nd ed.; Roby, Roman Private Law in the times of Cicero and of the Antonines.

CHRONOLOGICAL TABLE

B. C 753	Traditional Date of Foundation of Rome.
578-535	Servius Tullius. Division into thirty Tribes. Military Organization of Centuries. Institution of Census.
509	Office of Consuls instituted.
494	First Secession of Plebs. Institution of Tribuni Plebis.
451-448	Law of the Twelve Tables.
449	Second Secession of Plebs—Leges Valeriae Horatiae.
445	Lex Canuleia, legalizing marriages between Patricians and Plebeians.
443	Censorship established.
366	Office of Praetor established.
326	Lex Poetelia about this time.
304	Cnaeus Flavius publishes forms of actions and calendar of dies fasti and nefasti.
300	Lex Ogulnia, admitting Plebeians to College of Pontiffs.
287	Last Secession of Plebs—
	Lex Hortensia.
	Lex Aquilia.
280	Tiberius Coruncanius (subsequently first Plebeian Pontifex Maximus), Consul.
242	First appointment of a Praetor Peregrinus about this time.
204	Lex Cincia.
198	Sextus Aelius Paetus (earliest commentator on the Twelve Tables), Consul.
170-150	Lex Aebutia probably enacted within this period.
169	Lex Voconia.
105	P. Rutilius Rufus, Consul.
95	Q. Mucius Scaevola (pontifex), Consul.
92	Sulla, Dictator.
89	End of Social War.
	Leges Corneliae.
66	C. Aquilius Gallus, Praetor.
63	Cicero, Consul.
59	Julius Caesar, Consul.
51	Servius Sulpicius, Consul.
49	Accession of Julius Caesar to supreme power.
	Lex Rubria.
45	Lex Julia municipalis.

44	Assassination of Caesar.
40	Lex Falcidia.
27	Caesar Octavianus receives title of Augustus (first Constitution of the Principate).
23	Second and final Constitution of the Principate.
27-14	A D. Principate of Augustus.
	M. Antistius Labeo.
	C. Ateius Capito.
18	Lex Julia de adulteriis et de maritandis ordinibus.
A.D.	
4	Lex Aelia Sentia.
6	Lex Julia de vicesima hereditatium
9	Lex Papia Poppaea.
14-37	Tiberius, Emp.
	Masurius Sabinus.
	Proculus.
19	Date to which Lex Junia (Norbana) is generally ascribed.
30	C. Cassius Longinus, Consul.
37-41	Caligula, Emp.
41-54	Claudius, Emp.—
	Lex Claudia.
	S. C. Claudianum.
46	S. C. Vellaeanum or Velleianum.
54-68	Nero, Emp.—
	S. C. Neronianum.
62	S. C. Trebellianum.
68	Galba, Emp.
	Vitellius, Emp.
68-79	Vespasian, Emp.
70	S. C. Pegasianum.
79-81	Titus, Emp
81-96	Domitian, Emp.
96-98	Nerva, Emp.
98-117	Trajan, Emp.
117-138	Hadrian, Emp.
	Edictum Perpetuum of Salvius Julianus.
138-161	Antoninus Pius, Emp.
	First and part of second book of Gaius probably written at this time.
161-180	M. Aurelius Antoninus, Emp.
	Institutes of Gaius probably completed under this Emperor.
178	S. C. Orfitianum.
180-193	Commodus, Emp.

193 Pertinax and Julianus successively Emperors.
193-211 Septimius Severus, Emp.
204 Papinian, praefectus praetorio.
211-217 Caracalla, Emp —
Papinian killed.
Edict of Caracalla—extending citizenship.
217-218 Macrinus, Emp.
218-222 Elagabalus, Emp.
222-235 Severus Alexander, Emp.
222 Ulpian, praefectus praetorio.
228 Ulpian killed.
235-238 Maximinus, Emp.
238 Gordianus I and II, Emp.
238-244 Gordianus III, Emp.
244-249 Philippus, Emp.
249-251 Decius, Emp.
251-253 Trebonianus Gallus, Emp.
253 Aemilianus, Emp.
253-260 Valerian and Gallienus, joint Emperors.
260-268 Gallienus, sole Emperor.
268-270 Claudius II, Emp.
270-275 Aurelian, Emp.
275-276 Tacitus, Emp.
276 Florianus, Emp.
276-282 Probus, Emp.
282-283 Carus, Emp.
283-284 Carinus and Numerianus, joint Emperors.
285 Carinus, sole Emperor.
285-286 Diocletian, sole Emperor.
286-305 Diocletian and Maximian, joint Emperors
305-306 Constantius I and Galerius, joint Emperors.
306 Constantius I, Galerius, and Constantine the Great, joint Emperors.
307-311 Galerius, Constantine the Great, and Licinius, joint Emperors.
311-323 Constantine the Great and Licinius, joint Emperors.
323-337 Constantine the Great, sole Emperor.
330 Constantinople, the seat of government.
337-340 Constantius II, Constantine II, and Constans I, joint Emperors.
340-350 Constantius II and Constans I, joint Emperors.
350-361 Constantius II, sole Emperor.
361-363 Julian, Emperor.
363-364 Jovian, Emperor.
364 Valentinian I and Valens, joint Emperors. They divided the

Empire into the Western and Eastern.

WESTERN EMPIRE.

A. D.	
364-367	Valentinian I, Emp.
367-375	Valentinian I and Gratian, Emp.
375-383	Gratian and Valentinian II, Emp.
383-392	Valentinian II, sole Emperor.
392-395	Theodosius I, Emperor of East and West.
395-423	Honorius, Emp.
423-425	Theodosius II, Emperor of East and West.
425-455	Valentinian III, Emp.
426	Law of Citations.
439	Codex Theodosianus.
455	Petronius Maximus, Emp.
	Sack of Rome by the Vandals.
455-456	Avitus, Emp.
457-461	Majorian, Emp.
461-467	Government practically in hands of the barbarian Ricimer.
467-472	Anthemius, Emp.
472	Olybrius, Emp.
472-475	Julius Nepos, Emp.
475-476	Romulus Augustulus, Emp.
	End of Western Empire.
500	Lex Romana Burgundionum.
506	Lex Romana Visigothorum, or Breviarium Alarici, containing Epitome of Gaius.
511-515	Edictum Theodorici (Lex Romana Ostrogothorum).

EASTERN EMPIRE.

A. D.	
364-378	Valens, Emp.
378-392	Theodosius I, Emp.
395-408	Arcadius, Emp.
408-423	Theodosius II, Emp.
425-450	Theodosius II, Emp.
450-457	Marcian, Emp.
457-474	Leo I, Emp.
474	Leo II, Emp.
474-491	Zeno, Emp.
491-518	Anastasius I, Emp.
518-527	Justin, Emp.
527-565	Justinian, Emp.
	Tribonian.
528	Code ordered.
529	Code published.
530	Digest ordered.
533	Digest and Institutes published.
534	Revised edition of Code published.

HISTORICAL INTRODUCTION

In order to justify the character of this introductory essay it is necessary to say a few words about the intention with which it is written. The reader must regard it mainly in the light of an introduction to the Institutes of Gaius, not in the light of a disinterested sketch of the history of Roman Law. Had it been intended to have the latter character, both some of its omissions and some of its inclusions would be wholly unjustifiable. The most signal of the omissions is the neglect to give an adequate treatment to the stage of Roman Law which yields to no other in importance—the stage at which it passes from the religious to the secular sphere, from Fas to Jus. One of the chief questions which is, or should be, agitating students of Roman Law at the present day, is that of the period at which this transition was effected. For, if it is true that Roman Law retained its priestly character and its religious sanctions to a late period of the Republic [Ref. 002], then the traditional history of the Twelve Tables is an improbability, and the account given by Cicero and other writers of the legislation and procedure of the Monarchy and early Republic is an anachronism. The student of Gaius, however, is not very intimately concerned with this far-reaching historical question; and I have been content to state my general adherence to the traditional view without attempting to justify it by evidence.

Amongst subjects included in this sketch, which have little direct bearing on the history of Roman Law, I may mention the descriptions of the structure of the different Comitia at Rome and the account of the manner in which the powers of the Princeps were conferred. From the point

of view of the general history of the civil and criminal law in a State it is not of much importance to determine the particular mode in which a legislative assembly is constituted, or the precise manner in which a sovereign (whether nominal or real) is invested with his authority. But these historical questions do to some extent underlie subjects which are treated by Gaius; and, as it was not found convenient to deal with them at any great length in the commentary, a place had to be found for them in this introduction.

§ 1.: *The Unification and Extension of Roman Law.*

The history of Roman Law begins for us with the traditions that have been preserved concerning the Roman Monarchy. The existence of a Monarchy such as that described for us by annalists like Livy and Dionysius, implies the existence of a consolidated State, with a central legislative and executive power and a tolerably uniform system of law. In the Monarchy, however, and even in the early Republic it seems that the system of law was not marked by perfect uniformity, since the two classes of Patricians and Plebeians, which made up the Roman State, appear to have been distinguished, not only by the possession of different political privileges, but also by the possession of different systems of customary law [Ref. 003]. It is even possible that a further divergence of practice may have existed in the most primitive society, or societies, out of which the City and Monarchy of Rome developed—that a considerable amount of autonomy in legal relations may have existed in the Clans (Gentes) and Villages (Vici), out of which the earliest Rome was formed. The history of Roman law, from its beginning to its close, would thus be marked by a process of gradually increasing unification. First the customs of the Clans were merged in the customs of a State; but this State consisted of two classes, Patricians and Plebeians; and each of these classes seems to have had

a customary law of its own. Then an attempt was made to create a uniform system; and this uniformity was probably secured by making patrician law approximate as closely as possible to plebeian—the law of the few to the law of the many. A further advance was made when Rome had become the mistress of Italy. Italian customs were made ultimately to conform to those of the leading State, and the free cities of Italy became the municipalities of Rome. Lastly, Rome had created an Empire. For a very long period she adopted the wise and cautious policy of recognizing, as far as possible, the local and tribal law of the cities and peoples under her control. The recognition of this local or tribal law was not, however, merely a symptom of the favourite Roman principle of non-interference. It was also a sign that the privileges of Romans and Italians were not possessed by provincials; for the conferment of Roman citizenship, or even of Latin rights, necessarily carried with it the use of the forms of Roman Private Law [Ref. 004]. Hence, when a time came at which Rome was willing to raise States or individuals in the Provinces to a level with her own citizens, the law of Rome came to take the place of the territorial or tribal law of these political units. The process of a thorough imperial unification by means of a common system of Roman Private Law had begun.

§ 2.: *The Epochs in this process of Unification and Extension.*

The dates of the three epochs which we have touched on can only be vaguely indicated. We have no knowledge of the year, or even of the century, when the smaller political units, out of which Rome was formed, became so thoroughly marshalled under the rule of a common government that the customs of the Clans were made to conform to the principles laid down and enforced by a single superior authority. For the second epoch—the period, that is, at which an attempt was made to secure a uniform

system of law which would be binding equally on Patricians and Plebeians—tradition does supply a date, one, however, that has more than once been doubted by modern writers on Roman History and Law [Ref. 005]. This traditional date is comprised in the years 451-448 b.c., years which the Romans believed to mark the creation of the Decemviral Commission and the publication of the Law of the Twelve Tables. The third tendency—that of the unification of Rome with Italy,—although it had begun to be felt in isolated cases from a very early period of Roman History, may be said to have received its final impulse at the close of the great war for Italian freedom, generally known as the Social war, in 89 b. c. The last epoch—that of imperial unification—may be said to have been ushered in by the accession of Caesar to supreme power in 49 b. c. It had not been closed even by the time of Gaius, about the middle of the second century a. d.; for, even at that late period the Eastern part of the Empire still abode by Eastern forms of law [Ref. 006]. It may even be questioned whether the Edict of Caracalla, which is believed to have extended Roman citizenship to all the free inhabitants of that portion of the world that was ruled by Rome, between the years 212 and 217 a d., really eliminated all the local varieties of customary law. Local customs tend to die hard, and it was never in the spirit of the Roman Empire to suppress them. The legal unity of the Empire was always more strongly marked in the matter of Procedure than in the matter of Substantive Law. The processes of the Courts were the same for every Province at a time when the greatest varieties of customary law were recognized by these courts.

§ 3.: *Stages of Roman Legal History—The Clan and the Family—Evolution of individual rights.*

We may now attempt to treat in greater detail the stages of Roman Legal History which we have outlined. The earliest stage—that marked by the independent or almost

independent life of the Clan or Gens—is one for which, by the nature of the case, no definite historical evidence exists. The reality of such a life is merely an inference drawn from the characteristics of the Gens as it appears before us in the historical period. These characteristics seem to prove that the Gens is not a really primitive institution, but a late and advanced stage in the social development of the Latin races; but, on the other hand, they may show that it was in many respects a more primitive unit than the State; that is, that it exercised rights and duties which were ultimately exercised by the State. No political society worthy of the name can deal with Clans as the subjects of rights; it can deal only with Families or Individuals. Hence, if the Roman Gens ever lived a strong corporate life, the authority of the Roman State must in those days have been weak.

The organization of the Gens was based on the patriarchal idea in its extreme form: that is, on the conception that relationship is only binding when it can be traced through the male line. And this is the fact which seems to prove that the Gens marks a late and mature stage in the development of Latin societies; for the patriarchal idea is not one that is readily grasped by the mind of primitive man. Yet, late as the Gens is when considered in reference to the prehistoric development of the Latin race, it perhaps possessed, before the very dawn of history, a unity and power of its own, of which but pale reflections survive in the historical period. In historical times the only test of unity was the common name borne by the Gentiles [Ref. 007]; the chief signs of corporate action were their guardianship of the insane and their reversionary right of guardianship over women and children [Ref. 008] — powers which the Gentiles must have [xiii] exercised by delegating their authority to a personal representative. The further right which they possessed in later times, of succeeding to intestate inheritances in the last resort [Ref. 009], was perhaps a right possessed by individual members

of the corporation rather than by the corporation itself. But a corporate activity far greater than this has been suspected for earlier times. There is indirect evidence that all Private Land (Ager Privatus) was at one time owned by the Gentes, not by families or individuals [Ref. 010], and the view that the primitive Roman Senate was in some way representative of the Gentes is in accordance with the belief of Roman antiquity [Ref. 011]. The fact that the primitive Roman State was in many ways conditioned by its clan organization seems to be certain. As the State grew stronger, it substituted the Family for the Clan. Between the two there is only a difference of degree. The Family (Familia) is the aggregate of the members of a household under a common head, the Paterfamilias; whereas the Gens is the aggregate of all individuals who bear a common name and who, therefore, if their ancestry could be traced in the male line through all its stages, would be found to be the descendants of some ultimate common ancestor. But the Familia is a far smaller, and therefore a far less powerful, unit than the Gens. It cannot so effectively dominate the State or impede its activities [Ref. 012]. Again, the heads of families are many in number; the heads of the Gentes (who must have existed at the time when the Gens was the important unit) were necessarily few. The State which deals with families deals with a multitude of individuals, not with an oligarchy representing the interests of a number of corporations. The conception of individual rights, in their modern sense, was, it is true, never fully recognized in Roman Private Law. It was impeded by the Patria Potestas—the life-long power of the father over the son. But much was ultimately done to lessen the rigour of this patriarchal rule; and the principles of Roman Law were finally extended to races which knew nothing of the Patria Potestas. This law ultimately gave the most perfect expression hitherto witnessed by the world of rights which were both universal and individual. The existence of the Empire gave Rome the power, possessed in as high a

degree by no other State, of dealing with the individual on universal lines, because she was not hampered by the barriers between man and man thrown up by separate national institutions.

§ 4.: *Early Religious Law* (*Fas*)—*The Leges Regiae*—*The Secularization of Law.*

A process, which runs parallel with that which we have just described, is the process by which Roman Law came to be secularized; the process, that is, by which human were gradually substituted for divine sanctions. The customary law of a primitive society is either identical with, or developed from, some form of belief which implies the omnipresence of the gods and their detailed interest and activity in human affairs. In primitive Rome the pleading (actio) of the litigant in a civil suit is a religious chant, every word and cadence of which must be learnt from the priest; the wager (sacramentum), by which the process is stated, is a gift to a temple, and is probably conceived as an atonement for the involuntary perjury of the man who loses his case [Ref. 013]; the penalties of the criminal law are means of expiating the anger of the gods, the severest form of atonement being the sacrifice of the sinner on the altar of the deity whom he has offended [Ref. 014]. Rome in the historical period still preserves many traces of these beliefs of her infancy. They are found in the respect for the Auspices, in the conservatism which maintained the cumbrous forms of the old pleadings (actiones) and the custody of these forms by the Pontifical College; in the varied methods by which crime or sin is punished, some offences being reserved wholly for the secular courts, others being visited by the judgments of the Pontifical College, others again being subject to the milder chastisement of the Censor before he performs the religious rite of Purification (Lustratio). But the belief of the Romans themselves was that, in the very earliest stages of

their recorded or imagined history, the primitive epoch of complete subservience to religious forms, if it ever existed, had been already passed, and that even in the time of the Kings something approaching a clear line could be drawn between the functions of Religious Law (Fas) and those of Secular Law (Jus). At the close of the history of the Republic there could be shown, in contradistinction to the great secular code of the Twelve Tables, a collection of religious ordinances, believed to be even more ancient than this code, and known as the Laws of the Kings (Leges Regiae) [Ref. 015]. These laws are not represented as having formed a code, but merely a compilation. They were believed to be regal ordinances, issued by different Kings, which had been collected in the early days of the Republic by a Pontiff named Papirius [Ref. 016]. It was held that they had been publicly exhibited in Rome, and were restored, like the Twelve Tables, after the burning of Rome by the Gauls (390 b. c) [Ref. 017]. At the end of the Republic the compilation was edited, perhaps to some extent revised, by a scholar named Granius Flaccus, who is believed to have been a contemporary of Caesar [Ref. 018]; but there is no reason for supposing that Flaccus introduced any essential alteration in the tenor of the ordinances. These ordinances, in the form in which they have been preserved to us, bear the strongest internal marks of their genuineness. Some of the provisions which they contain are quite prehistoric and could never have been valid at any period of the history of the Republic. Others deal with purely religious observances, which may belong to any date, but may be as early as the city of Rome itself. The Royal Laws, in fact, contain a series of ordinances, dealing with social, moral and religious life, such as may have been issued over a long period of time by the College of Pontiffs. It is not likely that all of these rules really go back to the epoch of the Kings; but many of them must do so, for they reflect an extremely primitive stage of culture and religious belief. In fact, one of the most surprising features of the

Royal Laws is their lack of significance for the ordinary current of Roman life, as it was lived in the historical period. Where they are not a dead letter, they refer only to slight and exceptional contingencies, to the bare outline of the political life of the State and to the faintly defined structure of its hierarchical organization; whereas the Law of the Twelve Tables is a great living force, which pervades the whole of Roman business life. The Royal Laws reflect on the whole the rule of Fas; the Twelve Tables almost entirely the rule of Jus. A comparison of the former compilation with the latter code, in regard to their respective influences, exhibits more effectively than any other evidence could do the triumph of secular over religious law even in the early period of the Republic.

§ 5.: *Jus—Its different forms as exhibited in Procedure.*

The counterpart to the rule of Fas is the rule of Jus. Jus seems originally to have meant 'That which is fitting' [Ref. 019], and the word never necessarily conveys the implication, contained in the word Law, that the thing it describes is the result of enactment by a Sovereign. It conveys rather the idea of valid custom, to which any citizen can appeal, and which is recognized, and can be enforced by, a human authority. Jus is a nugatory thing, a vain abstraction, until it can be realized; it is a thing recognized only in practice; and so indissolubly were the ideas of Right and Satisfaction connected with one another in the minds of the Romans that they used the same word 'Jus' for Right and for Court [Ref. 020]. This association of ideas gives us the clue to the fact that the only possible method of distinguishing between the different kinds of Jus is by appealing to Procedure. In early societies, where there is no science of Jurisprudence, the only way in which the distinctions between different kinds of law—public and private, civil and criminal—can be exhibited, is by pointing

to the fact that different kinds of mechanism have been created for satisfying different kinds of claims. Thus the characteristics of private law are those of a civil suit. Here the action can be brought only by the injured party or his representative, the satisfaction recovered belongs to the injured party, the Court which gives the satisfaction is composed of some arbitrator or judge (arbiter or judex) chosen by the consent of the parties, but approved by the judicial magistrate who represents the State. Criminal Law may similarly be defined in terms of Criminal Procedure. Here the wrong done is regarded as inflicted, not merely on the individual injured, but through him on the State. The State, therefore, will not depend on the initiative of the injured individual to undertake the prosecution. It can either be taken up by any citizen, or is regarded as the peculiar duty of a magistrate. The magistrate is often both prosecutor and judge. The defendant has no voice in the selection of the Court. The Court consisted, in the earlier procedure at Rome which never became wholly extinct during the Republic, of a magistrate representing the State, or of the State itself in the form of the Sovereign Assembly of the People; at a later period, of a select body of Judices with a President (Quaesitor), both Judges and President being created by statute. The satisfaction recovered from the defendant in such a trial, if it takes the form of a fine, belongs not to the aggrieved individual but to the State; if it assumes the form of punishment which is not pecuniary, such punishment is inflicted by the State. The third class of occasions on which the State intervenes to correct a wrong or to chasten an individual, is that governed by the rules of Administrative Law [Ref. 021]. The procedure springing from this Law has analogies both to civil and to criminal jurisdiction. Administrative jurisdiction has as its object either the enforcement of a personal service to the State on an individual, or the exaction of a debt which he owes to the State. The obligation to service is generally enforced by a fine imposed by the magistrate. But whether what is

demanded by the State takes the form of personal service or a pecuniary debt, the characteristic of Administrative jurisdiction at an early period of Roman History is that the magistrate who represents the State has a double character. He is not only prosecutor or plaintiff but also judge. This principle, however, was eventually modified. If the fine imposed exceeded a certain limit, an appeal to the People was allowed [Ref. 022]; and, later still, the penalty might be sought either by a magistrate or a common informer before a civil court [Ref. 023]. When a debt to the State was the object of dispute, the custom may eventually have been established that the magistrate should not himself judge, but should appoint for this purpose a panel of those assessors of debts or damages who were known as Recuperatores [Ref. 024].

The question as to what particular cases shall fall under each of these three heads of Civil, Criminal and Administrative Law is one that is answered differently by different political societies; and Rome herself gave different replies to this question at various periods of her history. But we know of no period in the life of Rome when the distinction between these three types of Law and Procedure was not clearly grasped, and expressed by the higher judicial authorities, who were at Rome in a very real sense the makers of law.

§ 6.: *The ultimate sources of Jus—The Monarchy and the Early Republic.*

The problem of the ultimate source and sanction of Jus was not one that troubled the Roman to any appreciable degree at any period of history. He was content to regard it as the product of Custom assisted by Interpretation. At a later period he supplemented it by acts of Legislation; but, even when he did so, he was much less concerned with the words of the enactment than with the manner in which these words were interpreted. Scarcely any people has had

less of a gift, or natural inclination for, scientific legislation or the formation of a Code. The Roman's dependence on authority and skilled interpretation was, therefore, great; and this authority and power of interpretation are believed to have been represented, in the earliest times, by the King and the College of Pontifices. Justice could only be obtained by a litigant who knew the formularies of action, precise verbal accuracy in which was necessary for the successful conduct of a suit [Ref. 025]. But this knowledge could be obtained only from the King and his Pontiffs. The King, too, must have given the ruling in law which determined what form of action should be employed [Ref. 026]. Even at this early period the private Judex or Arbiter may often have been used for the final settlement of a suit [Ref. 027]; but the King must have assisted in his appointment; and his judgment must have been conditioned by the preceding form of action which the King and the Pontiffs had thought appropriate to the suit.

The change from Monarchy to Republic could have made little difference in the manner in which the law was revealed to the Roman litigant, except in so far as this change may have increased the power of the College of Pontiffs. The annual tenure of the consulship, and the fact that each occupant of this office was hampered by a colleague, prevented the new magistracy, which was supposed to give the forms of Jus, from exercising over its skilled advisers the authority which had been once wielded by the King; and the patrician aristocracy, each member of which might be a consul or a pontiff, must now have attained a solidarity which it had never known before. The tendency of this aristocracy was to close up its ranks and to assert a monopoly, not only of office, but of knowledge of the forms of law.

§ 7.: *Patricians and Plebeians.*

Had Rome been a homogeneous community, there would perhaps have been no agitation for the revelation of the principles of law which underlay the forms of procedure, and there would therefore have been no tendency towards an early codification. But Rome was composed of two communes, not of one. There was a Plebs within the Populus; and this Plebs possessed a solidarity which gave it the means of lifting up its voice in a demand, not for power, but for the protection of legal rights, and for the knowledge which was essential to that protection. The origin of the Plebs is wholly unknown. The favourite assertion of modern writers, that the Plebeians were a class which had emerged from a condition of clientship to the Patricians, does very little to solve the problem of the origin of the former class, except in so far as it suggests that some of the Plebeians were inhabitants of conquered cities that had been deported to Rome, and that others were voluntary sojourners from distant cities who were protected by the government and the patrician clans. But it seems impossible that causes such as these could have led to the creation of a mass of men that appears in early Roman history as forming the bulk of the community; and it is possible that further evidence (archaeological and ethnological) may show that the distinction between Patricians and Plebeians is one based on race, and that the existence of the Patricians as a governing class is the result of the conquest of a native race by bands of immigrant wanderers [Ref. 028]. Throughout Roman law there is a curious persistence of dual forms for the attainment of the same end which may be a survival of two distinct systems of customary law possessed by different peoples, the conquerors and the conquered. Thus we have the Sponsio side by side with the Nexum, marriage by Confarreatio side by side with marriage by Usus or Coemptio, the testament in the Comitia Calata side by side with the testament ‘per aes et libram.’ The procedure ‘by the copper and the scales,’ in the manifold forms which it assumes, seems to

be especially a characteristic of the popular law of the commons. The exclusion of the Plebeians from the magistracy and the priesthood, and the denial to them of the right of Conubium with Patricians, may also point in the direction of a fundamental racial distinction between the two classes. But the disabilities consequent on this racial distinction, if we suppose it to have existed, were by no means limited to the domain of public rights. They pervaded the whole of Roman life to such an extent that there is considerable justification for the view that the early condition of the Plebeian was very like that of the client. In the first place, the Patricians maintained that they alone formed Gentes, and the condition of being a member of a Gens, or Gentilis, was that the man who made the claim should be able to point to a perfectly free ancestry [Ref. 029]. In this claim of the Patricians we therefore have the implication that the ancestors of the Plebeians were not free. In all respects but this, the Plebeians formed Clans just like the Patricians. A group of Plebeians who bore a common name formed a Stirps, but this Stirps was supposed to be a mere offshoot of some patrician Gens on which it was held to be dependent. It possessed no independent rights of its own. A group of Plebeians who could trace their ancestry back to a common head were called Agnati; but these Agnati had not the rights of inheritance, or perhaps the other family rights, possessed by the Gentiles. The rights of plebeian Agnati were recognized by the Twelve Tables; but this was perhaps the first recognition that they gained. In the second place, of the two rights which were subsequently considered as forming the minimum conditions of citizenship, the Jus Conubii was, we know, not possessed at all by Plebeians, and it is probable that they possessed the Jus Commercii in a very imperfect form. We cannot, it is true, point to a time when no Plebeian could conclude a contract, or bring an action, unless, like a client, he acted through a patron. But it is probable that in early times he had a very limited