

## JUSTINIAN'S REDACTION.

*"For him there are no dry husks of doctrine; each is the vital development of a living germ. There is no single bud or fruit of it but has an ancestry of thousands of years; no topmost twig that does not green with the sap drawn from the dark burrows underground; no fibre torn away from it but has been twisted and strained by historic wheels. For him, the Roman law, that masterpiece of national growth, is no sealed book, . . . but is a reservoir of doctrine, drawn from the watershed of a world's civilization."\**

For to-day's student of law, what worth has the half-dozen years' activity of a few Greek-speakers by the Bosphorus nearly fourteen centuries ago?

Chancellor Kent says: "With most of the European nations, and in the new states of Spanish America, and in one of the United States, it (Roman law) constitutes the principal basis of their unwritten or common law. It exerts a very considerable influence on our own municipal law, and particularly on those branches of it which are of equity and admiralty jurisdiction, or fall within the cognizance of the surrogate or consistorial courts . . . It is now taught and obeyed not only in France, Spain, Germany, Holland, and Scotland, but in the islands of the Indian Ocean, and on the banks of the Mississippi and St. Lawrence. So true, it seems, are the words of d'Aguesseau, that 'the grand destinies of Rome are not yet accomplished; she reigns throughout the world by her reason, after having ceased to reign by her authority.'"

And of the honored jurists whose names are carved on the stones of the Law Building of the University of Pennsylvania another may be cited as viewing the matter from a different standpoint. The Hon. Joseph P. Bradley, late Associate Justice of the Supreme Court of the United States, in a letter to the present writer, said: "Your plan of instituting a course of study of the Roman law in the original

\*From the President's address, delivered before the New York State Bar Association at Albany, on January 15, 1901, by Hon. Francis Miles Finch, formerly Judge of the New York Court of Appeals, and Dean of the Faculty of Law in Cornell University.

texts is an excellent one, and ought to be particularly acceptable and useful to those who intend to study law as a profession; for there is no better groundwork for that study than a knowledge, at least in outline, of the Civil Law. Alexander Hamilton always required of his students that they should commence their studies by reading Justinian's Institutes."<sup>1</sup>

What more unscientific than to magnify or to belittle the achievements of any people in any science without first carefully examining its literature upon that science? Yet, in

<sup>1</sup> Justice Bradley also suggested certain texts for reading. His suggestions may have a general interest: "As to selections for reading and study, it seems to me the following portions of the Digest would be interesting, or such portions of them as could be read in addition to your own selections.

"1. The origin of the law as given by Gaius and Pomponius in ff. 1, 2, tit. ii, lib. 1. This reading would admit of, and, indeed, require, two or three lectures explanatory and illustrative of the text. As your selections provide for an insight into the law of persons and contracts, I would suggest further:

"2. The Aquilian Law, which provided a remedy for injuries to person or property, at least so far as the chapters of the Edictum copied in Dig., lib. ix, tit. 2, ff. 2, 27, and the exposition of it in the Institutes, lib. iv, tit. 1, 2, 4, 5.

"3. Injury to reputation: Dig., lib. 47, tit. 10, ff. 1 (Ulpian).

"4. The Edict respecting Infamia: Dig., lib. iii, tit. 2, ff. 1.

"5. The Rhodian Law: De lege Rhodia de Jactu: Dig., lib. xiv, tit. 11, ff. 1, 2. This is the foundation of our maritime law. . . . An additional selection for reading of much interest would be the Falcidian Law, by which a testator could only deprive his heirs, by will, of three-fourths of his property. One-fourth was beyond his control, The law is explained in Institutes, Book II, tit. 22, and is given *in hæc verba* in Dig., lib. xxxv, tit. 2, in an extract from Paulus. The right of the heirs is still further extended by the civil laws of modern nations; thus, by the Code Napoléon, of France, a person may dispose, by gift or will, of only half his estate, if he have a lawful child; of only one-third, if he have two children; and only one-fourth, if he have three or more children. In Louisiana such power of disposal cannot exceed two-thirds, if there be one child; one-half, if there be two; one-third, if there be three or more. These have taken their origin in the Roman Falcidian law, and it seems to me that it would be a good thing to introduce the principle into our laws, and prevent adventureses from marrying old men and getting all their property away from their children. It is this consideration which makes me think the Falcidian Law a good one to read."

violation of so trite a truism, now from critics, now from eulogists—yes, even among men versed in the common law, deriving so much from the civil law—misconceptions are sometimes met regarding the sources of Roman law, and, in particular, respecting the *Corpus Juris Civilis*. Hence it may be not amiss to present a very brief outline<sup>2</sup> of the Justinianean redaction of the Roman law between the years 528 and 534.

Said Justice Bradley:<sup>3</sup> "So many erroneous notions prevail with regard to the body of the Civil Law that a few lectures on that subject would be very useful. It is almost universally regarded as a code; but is no more like what, in modern times, is meant by a code than the New Testament is. It consists of four parts . . . the Digest of the Common Law of Rome; the Revised Statutes (under the name of *Codex*); Supplemental and Amendatory Statutes under the name of *Novellæ Constitutiones*;<sup>4</sup> and the Summary Institutes, as a grammar or outline of the law for the use of students."

Roman law, prolific parent of codes, itself never had a code, in the sense in which we use the term. The Law of the Twelve Tables, though compiled in the main from the unwritten law of Rome,<sup>5</sup> and enacted by the people, the only legislature, constitutionally speaking, of Republican Rome, was by no means exhaustive, was designed to equalize

<sup>2</sup> The courtesy of Professor Paul Krueger, of Bonn, who with Mommsen edited the *Corpus*, allows the use of material from his *Quellengeschichte*. Especially valuable for the early period are Cuq's *Institutions juridiques des romains*, and Joers: *Roemische Rechtswissenschaft*.

<sup>3</sup> In a letter, dated November 4, 1891.

<sup>4</sup> The Novels fall outside the limits of this article. They were never officially collected, though now published as the last volume of the *Corpus*. Most of them were issued in 535-540, and almost all were written in Greek.

<sup>5</sup> Anent the originality of the Twelve Tables, Professor Paul Krueger writes, under date of November 9, 1900: "Ihre Anfrage hinsichtlich des Festhaltens an meinen Ansichten ueber die Originalitaet des Roemischen Rechts kann ich nur dahin beantworten, dass soweit ich darauf in der Quellengeschichte eingegangen bin, wie S. 1, 13, usw., ich keinen Anlass habe meine Auffassung aufzugeben." Cf. Voigt, "Die Zwölf Tafeln" and Cuq, "Institutions juridiques des romains" pp. 123-142.

the rights of patricians and plebeians, and left untouched those customs that were peculiar to either body. The later statutes<sup>6</sup> passed by the people of the Roman Republic strike one as singularly few, if compared with the actual development of law during that period.

This development was occasioned, first, by the Interpretation<sup>7</sup> of the College of the Pontiffs, who occupied a singular position, blending with their oversight of the *cultus* very important functions in connection with acts now recognized as juristic, but then considered at least quasi-sacred, such as adoption, marriage, testament. The pontiffs assigned yearly one of their number to meet citizens who desired information upon points of law, legal forms and transactions. They held in their secret archives the reports of such decisions and counsel. By the clandestine publication of material from their archives their influence was affected; largely, too, by the growing consciousness of the secular nature of matters early considered to be *divini iuris*.

Before the existence of a special science of law, certain families (patrician, and whose members often were themselves pontiffs) treated the law as a hereditary province,<sup>8</sup> holding themselves accessible to free consultation by their fellow-citizens, handing down their knowledge from father to son, and sometimes admitting other young men to their consultations and discussions.<sup>9</sup> In this way proceeded the development of law by interpretation, and the Civil Law as a technical term included the Twelve Tables, and the later statutes enacted by the people, *plus* the interpretation, first of the pontiffs, and, second, of the jurisconsults.

As antithetical to this Civil Law arose the Honorary

<sup>6</sup> Collected in Bruns, *Fontes Iuris Romani*. The more important also in Girard, "Textes de droit romain."

<sup>7</sup> *Omnium tamen harum et interpretandi scientia et actiones apud collegium pontificum erant, ex quibus constituebatur quis quoquo anno praeesset priuatis. Pomponius, Encheiridion, Dig. 1, 2, 2, 6.* On the activity of the Pontiffs, see Joers, *Roemische Rechtswissenschaft*.

<sup>8</sup> *Est enim sine dubio domus iurisconsulti totius oraculum ciuiatis. Cic., De leg. 1, 3, 10.*

<sup>9</sup> *Alteros enim respondententes audire sat erat, ut ii qui docerent nullum sibi ad eam rem tempus ipsi seponerent sed eodem tempore et discitentibus satisfacerent et consulentibus. Cic., Or. 41, 142.*

Law,<sup>10</sup> from the rules laid down in his yearly Edict by the prætor, affecting only such cases as would come before jurors under his control.<sup>11</sup> While the prætor was strictly not over, but under, the law, yet as minister of justice he was possessed of great power—almost a keeper of the people's conscience—and subjected only to the *norm publica utilitas*.<sup>12</sup> Actually, the people intrusted him with extraordinary quasi-legislative functions. This Edict was redacted and published in final form by Julian, under Hadrian.<sup>13</sup>

Meanwhile, with the subversion of the republic, the people lost the legislative function, which went over, first, to the Senate, and then to the Emperor,<sup>14</sup> the latter legislating

<sup>10</sup> Eodem tempore et magistratus iura reddebant et ut scirent ciues quod ius de quaque re quisque diciturus esset seque præmuniret edicta proponabant: quae edicta prætorum ius honorarium constituerunt. *Pompon.*, Dig. I, 2, 2, 10.

<sup>11</sup> Iurisdictio est etiam iudicis dandi licentia. *Ulp.*, Dig. 2, 1, 3.

<sup>12</sup> Ius prætorium est quod prætores introduxerunt adiuuandi, uel supplendi, uel corrigendi iuris ciuilibus gratia, *propter utilitatem publicam*. *Papin.*, Dig. I, 1, 7, 1. Cf. the *Senatusconsultum* conferring *imperium* on Vespasian, C. I. L. vi. 930, line 17; *Utique quaecumque ex usu rei publicae . . . esse censebit*.

<sup>13</sup> The Edict stated how the Prætor would conduct his office. It contains, therefore, nothing under the jurisdiction of other magistrates: so mortuary trusts are excluded. It contains only such rules as the Prætor's office had to do with, as having named or authorized the appointment of the iudex; therefore it excludes rules respecting liberty and the freeing of slaves. Further, such rules as were strictly defined by statute might be omitted as superfluous. The Edict therefore contains no rules governing the Prætor in his function in iure of the *legis actio*. Aside from the appendix, containing forms, it falls into four parts, disposed broadly in processual sequence. Part I gives rules ordering and protecting procedure at law from the initial steps in litigation up to declaration of judgment. Part II details rules controlling the Prætor's function in ordinary civil procedure, his activity so far as it depended on his jurisdiction as executive officer of the law. Part III includes rules basing on the Prætor's *imperium* or authority as minister of equity, having power within his sphere to take all measures in his judgment necessary for the public welfare. Herein he was limited only by the standard, *propter utilitatem publicam*. Part IV gives rules for the carrying out of judgment. See Lenel, *Das Edictum Prætorium*.

<sup>14</sup> The main forms of the "Emperor's Will" (*Constitutiones*, or *Principum placita*) were:

(aided, of course, by the leading jurists) directly through the *Constitutio* (or Emperor's Will). Upon interpretation, too, the Emperor tried to exercise an influence, by restricting the right—so far, at least, as it should be efficacious—to those jurists who should hold his patent or diploma. The decisions (upon the law, not fact,) of these jurists should, under stipulated conditions, bind the judges.<sup>15</sup> Further, these *jurisconsults* were accessible to citizens, litigants, counsel and magistrates.

Early instruction in the law consisted, as has been said, in being permitted to listen to consultations, decisions, discussions and *dicta* of the *jurisconsults*. During the last century of the republic, an elementary instruction (independent of the required memorizing in school of the Twelve Tables) seems to have begun. Instruction in Elementary Law was not confined to law schools, but was given in the numerous schools of rhetoric.

This elementary instruction *instituere* caused a demand for elementary books. So the *Instituta*, *Institutiones*, *Elementa*, *Encheiridia*, *Manualia*=*Institutes*, *Elements*, or *Handbooks*,<sup>16</sup> came into existence. These books as well as

*Edicta*. By virtue of his *ius edicendi* the Emperor created directly and published laws by proclamation.

*Decreta*. These were decisions in cases coming before the Emperor either in the first instance or on appeal.

*Rescripta* or *Epistulae* were written answers by the Emperor to written queries on the law whether from magistrates or private parties. When addressed to a private party (from Hadrian's time on), the answer involved the reference of the questions of fact to the proper magistrate. In the two latter forms the Emperor was considered to be acting as judge rather than as legislator: hence they were slow in being recognized as sources. The Emperors were at first under the law, but from Hadrian's time the writers give them the function of legislating "in place of the people." Hence the *Constitutiones* class not under the Honorary Law, but under the Civil Law.

<sup>15</sup> *Just.*, *Inst.*, 1, 2, 8; quibus a Cæsare *ius respondendi* datum est, qui *iuris consulti* appellabantur; quorum omnium *sententiae* et *opiniones* eam auctoritatem tenent ut *iudici* recedere a responso eorum non liceat. Cf. Gaius, 1, 7., and the chief source, *Pompon.*, *Encheir.*, in *Dig.* 1, 2, 2, §§ 48, 49, from which I quote: *Primus diuus Augustus*, ut maior *iuris auctoritas* haberetur, constituit ut ex auctoritate responderent. To bind the judge, the *responsum* must be in writing and sealed.

<sup>16</sup> Such were written by Gaius, Florentine, Callistratus, Paul, Ulpian, Marcian, Pomponius.

the Rules (*Regulæ*) and Definitions (*Definitiones*), or hand-books of concise rules and definitions<sup>17</sup> for the beginner to fix in memory, endeavored to blend the Civil Law (in the technical meaning) with the Honorary Law, and to strike out a scientific arrangement of the subject matter.<sup>18</sup>

<sup>17</sup> Such were written by Neratius, Pomponius, Gaius, Scævola, Paul, Ulpian, Marcian, Modestine, Papinian.

<sup>18</sup> The order of treatment in Gaius's *Institutes* (unknown to Blackstone, being discovered in 1816) is as follows:

After an introduction dealing with the sources of law, the work distributes the subject into three main divisions: "*Omne autem ius quo utimur pertinet vel ad personas, vel ad res, vel ad actiones*" (i, 8). In the first division are treated distinctions between free and slaves, freeborn, and freedmen (in connection with which the freeing of slaves is treated), and then the power over slaves, the *patria potestas* (in connection with which impediments to marriage are noted, results of marriage with *latinæ*, *peregrinæ* and slaves, are developed, and adoption is treated); *manus* and *mancipium* come next; then the termination of the *patria potestas*, and the first book closes with guardianship.

The *jus quod ad res pertinet* includes books 2 and 3, and begins with the division of things (as objects of property). In connection with *res incorporales*, usufruct and the *prædial servitudes* are touched upon. In connection with the antithesis between *res Mancipi* and *res nec Mancipi* are treated the methods of transfer *traditio*, *mancipatio*, and in *iure cessio*, as well as the application of the last mentioned to *res incorporales*. After this follows the antithesis between ownership *ex iure quiritium*, and in *bonis*, and, in connection with the latter, *usucapio*. An awkward transition introduces certain methods of acquisition by *jus naturale*. Next are mentioned those who can legally alienate and who can legally acquire for others. Then follows the acquisition of aggregates; and first, through *hereditas*. Of this, testamentary succession and mortuary trusts (*fidei commissa*), end the second book. But a not entirely successful attempt is made to blend *bonorum possessio* (*Prætorian*, or equitable succession) with testamentary succession. Intestate succession, which begins the third book, is thus almost divorced from *bonorum possessio*, having but a few general remarks added thereon. Then follows succession to freedmen, then other universal acquisitions. Then, without show of logical sequence, are taken up obligations, which fill out the third book. Obligations are treated under contracts and delicts. Contracts are divided into those created *re, verbis, literis, consensu*. Between contracts and delicts there is slipped in a subject already treated, *viz.*, acquisition by means of others. Delicts are treated in the order: theft, robbery, property damage and *injuria* (injury to honor or reputation). The fourth book is devoted to the *jus quod ad actiones pertinet*, and gives, first, the division of actions. While treating the *ficticiæ actiones*, Gaius slips

The larger treatises chose to retain the convenience and advantages of the antithesis between the Jus Civile and the Jus Honorarium and of the traditional order rather than to attempt to rearrange the extensive material into a scientific system.

Besides the books for beginners we find Pithana, Sententiæ and Opiniones, all, in size, handbooks; but evidently designed for practitioners.<sup>19</sup> We find frequent annotated editions and abridged editions. The longer works include the Commentaries on the Edict,<sup>20</sup> often very extensive; along with these, often treated as supplements to them, Commentaries on the Civil Law.<sup>21</sup> The Responsa, or decisions of the jurisconsults,<sup>22</sup> compiled into books by themselves, or their hearers, furnish a copious literature. These give, in the main, the bare decision, with little discussion of reasons therefor. But the Quæstiones and Disputationes, or discussions of cases by the jurisconsults,<sup>23</sup> give more *in extenso* the arguments on which the decisions are based. Sometimes works of these last two classes attempted to unite the Jus Honorarium and the Jus Civile. This was attempted by the Digesta of the jurists.<sup>24</sup>

in a *résumé* of the legis actiones. Then he takes up the individual parts of the formulæ. Then plus petitio and compensatio. Afterwards he brings in, with awkward transition, the actiones adiecticiæ, and the noxal actions. Then comes the subject of representative in court or attorney, the difference between judicia legitima and those imperio continentia, time limitation of actions, and their transmission to or against a legal successor, satisfaction before judgment, exceptiones, interdicta, penalties for rash litigants, the in jus vocatio and vadium. Ulpian's Regulæ, so far as extant, follow a like order, which must go back to an original earlier than both.

<sup>19</sup> Such by Labeo, Paul, Ulpian. Similar was the Epitomæ iuris of Hermogenian.

<sup>20</sup> Such by Labeo, Vivian, Plautius, Pedius, Pomponius, Gaius, Furius, Anthianus, Callistratus, Paul, Ulpian. Also in the earlier parts of the *Digests* by Celsus, Julian, Marcellus.

<sup>21</sup> Pomponius and Gaius Libri ex Q. Mucio; Pomponius, Paul and Ulpian, Libri ex Sabino or ad Sabinum.

<sup>22</sup> Such by Sabinus, Marcellus, Scævola, Papinian, Paul, Ulpian, Gallus, Aquila, Modestine.

<sup>23</sup> Such by Celsus, Africanus, Scævola, Papinian, Paul, Callistratus, Tertullian, Marcian, Tryphoninus, Ulpian.

<sup>24</sup> Digesta by Celsus, Julian, Marcellus, Scævola; Responsa and



The appearance of the Emperor himself as legislating through his *Constitutiones* led eventually to efforts to compile the law, or rules, thus set. The earliest attempt falls in the reign of Diocletian, was made by a private person, and is called the *Codex Gregorianus* (*Codex* must not be interpreted as "code." It was simply a book in the modern shape—not *rolled*). The *Codex Hermogenianus*, also private, was prepared as a supplement to the *Gregorianus*.

Theodosius II. had the plan, that Cæsar had cherished, of compiling all the existing law, from whatever source, and he instructed a commission to carry out the plan. The committee failed,<sup>25</sup> and the emperor so modified his plan as to include only a collection of imperial *Constitutiones*. This collection constituted the *Codex Theodosianus*, which, with the two private *Codices*, forms an important source for Justinian's *Codex*.

After this hasty glance at some of the sources that contributed to Justinian's law books, let us turn to the actual legislation by which Justinian set in motion the work of redaction, and then made the completed works statutory—this between 528 and 534 A. D.

It will be remembered that it was Justinian's plan to collect in a compact form all the law, omitting obsolete provisions. First, he undertook to collect all the *Constitutiones* in a *Codex Justinianus*, designed to supplant the old *Codices* and absorb all imperial statutes that were still valid law. In 528 he appointed a committee of ten, including Tribonianus, *magister officiorum*, and Theophilus, professor of law in the Law School of Constantinople. This committee was instructed to cut out obsolete matter, omit unimportant prefaces, avoid repetitions and contradictions, and

*Quæstiones* by Scævola, Papinian and Paul; *Responsa* by Modestine, *Disputationes* by Ulpian. Paul's *Sententiæ* show the same effort. (See below, on the order of Justinian's *Digest*.)

<sup>25</sup> An interesting effort, of about this time, to do what Theodosius's commission failed to accomplish, has left a few pages called the *Vaticana Fragmenta*. The compilation must have been made between 372 and 438. Twenty-eight leaves are preserved; but the existence of 232 can be traced, and probably these were but a part of the work. Excerpts from jurists and excerpts from the *Constitutiones* are there placed side by side.

express the text clearly and concisely. In 529 this Codex was published and went into effect at once (published April 7; in effect April 16). Thereafter reference to the old Codices, and even the Novellæ, or more recent imperial statutes, was forbidden. Only such pragmatic constitutions as contained special privileges were to remain valid. Further exception was made of ordinances regarding the government expenses and the treasury, if registered with the proper officials.

Next, Justinian undertook to condense the treasures of the classic literature of the jurists into one work, which should also decide as to what was still good law. The plan probably originated with Tribonian, who was the soul of the undertaking. On the fifteenth of December, 530, he was given its direction, and the selection of the committee. Among the sixteen whom he chose were Dorotheus, professor in the Law School of Beirut, and Theophilus, who had served on the Codex Committee. The work was published on the sixteenth December, 533, to go into effect the thirtieth. As a digest of all the valid law derived from jurists' writings, it was named *Digesta* or *Pandectæ*.

In 530 Justinian also provided for the preparation of a manual for elementary instruction. This was to meet the changes within the law and replace Gaius's *Institutes*. Its compilation was given to Tribonian and the two professors of law, Theophilus and Dorotheus, representing, respectively, the two principal Law Schools<sup>26</sup> (Constantinople and

<sup>26</sup>Law schools had existed at Constantinople, Rome, Beirut, Athens, Cæsarea and Alexandria. Justinian closed the three last mentioned. In the fifth century, in order to be an advocate, one must have studied at a law school, and further, have a certificate from his professor. Justinian's constitution, "Omnem," shows the existing curriculum and substitutes a new one. Four years had been required. First-year students (*Dupondii*) studied Gaius's *Institutes* and four monographs on *res uxoria*, guardianship, testament and legacies. Second-year students (*Edictales*) took the *prima pars legum* and select titles from the parts *De judiciis* and *De rebus*. Third-year students (*Papinianistæ*) had the rest of these parts and eight books of Papinian's *Responsa*. Fourth-year students (*Lytæ*, *λύται*) studied privately Paul's *Responsa*. Justinian's curriculum covered five years and was as follows: First-year students (now called *Justiniani novi*) read Justinian's *Institutes* and the first part (*πρώτα*) of Justinian's *Digest*. In the second and third years, the

Beirut). This book, called the *Institutiones* or *Elementa*, was actually published before the Digest (*Pandects*), on November 21, 533. It was also given full authority as law.

Of the questions in law that had come down as doubtful, moot or controverted, some were settled in the redaction of the Digest; a few in the compilation of the *Institutes*. Other points were settled by independent *Constitutiones*. Such decisions were united in an independent official collection called the *Fifty Decisions* (*Quinquaginta Decisiones*).

Finally, a revision of the *Codex* (*Vetus*) Justinianus itself became necessary, in view of these changes. Tribonian, Dorotheus and three advocates were commissioned to insert the new *Constitutiones* and make the changes rendered necessary thereby, and by the other changes in the law. This revision gave the *Codex Repetitæ Prælectionis*, or Revised *Codex Justinianus*, which has come down to us. It was published December 17, 534, to go into effect the twenty-ninth. The *Codex Vetus*, or earlier edition (that of 529), together with the separate *Constitutiones* which had emanated since, was repealed, and it has not come down to us. Thus much for the legislation of Justinian.

If we examine more closely the contents of the law books thus compiled, a natural question is: What is the origin of the material and what the treatment of the excerpts?

Respecting the sources of the material of the Digest, or *Pandects*, Tribonian and his fellow-redactors were given quite precise instructions by the *Constitutio de Conceptione Digestorum*. They were to use the writings of those jurists only who had had the *jus respondendi*, or above-mentioned patent from the emperor.<sup>27</sup> As a matter of fact they did add to the list of such jurists (falling, of course, under the empire) the republican jurists, Q. Mucius (*Scævola*),

partes of the Digest *De judiciis* and *De rebus*, with, in the second year, Dig. 23, 26, 28, 30; in the third year, Dig. 20-22. The fourth year was given to private study of Dig. 24, 25, 27, 29, 31-36. Fifth-year students read privately the *Codex Justinianus*.

<sup>27</sup> *Constitutio Deo Auctore*, § 4: *Antiquorum prudentium quibus auctoritatem conscribendarum interpretandarumque legum sacratissimi principes praeberunt. Constitutio Tanta*, § 20 a: *Legislatores autem vel commentatores eos elegimus qui digni tanto opere fuerant et quos et anteriores piissimi principes admittere non sunt indignati.*

Alfenus, Ælius Gallus. And Gaius, who in all probability had not won the patent or diploma entitling one to the *ius respondendi*, was now included. Specific instruction was also given the redactors not to neglect the notes on Papinian. For out of reverence for that great name, *Constitutiones* of earlier Emperors had deprived of validity notes on Papinian's works.<sup>28</sup>

Justinian had an index of authors and their works placed at the beginning of the Digest. Though carelessly prepared, it gives a more vivid picture of the material worked over than does the Digest itself. The great names, Julian and Papinian, are placed first in this index; but after these names an order generally chronological is followed so far as the jurists' names are concerned, while in enumerating the works of the individual jurist the longer ones usually precede. Justinian reckons the writings excerpted at two thousand books, or three million lines. He gives Tribonian the chief credit for collecting this material for excerpting.<sup>29</sup>

As to the treatment of the individual excerpts, the redactors (often called compilers) were to avoid repetitions, cut out everything obsolete, superfluous or contradictory. Disputed or moot points of the law they were to decide. Suitable changes in the text were allowed.<sup>30</sup>

In the matter of repetitions, many a sentence having a bearing upon different institutes of law was repeated in each of the corresponding titles.<sup>31</sup> Sometimes not merely a

<sup>28</sup> So Constantine the Great (321), *Cod. Theod.*, I, 4, 1; *Perpetuas prudentium contentiones eruere cupientes Ulpiani ac Pauli in Papinianum notas, qui, dum ingenii laudem sectantur, non tam corrigere eum quam deprauare maluerunt, aboleri præcipimus.* Also, Valentinian II, *Cod. Theod.*, I, 4, 3.

<sup>29</sup> *Const. Tanta*, § 17: *Antiquæ autem sapientiæ librorum copiam maxime Tribonianus vir excellentissimus præbuit.*

<sup>30</sup> *Const. Deo Auctore*, § 7: *Ut si . . . aliquod . . . superfluum uel minus perfectum, superuacua longitudine semota, et quod imperfectum est repleatis . . . si aliquid . . . non recte scriptum inueniatis, et hoc reformetis.* § 8; *Nulla . . . antinomia . . . aliquem sibi uindicet locum sed sit una concordia, una consequentia.* § 10: *si quæ leges . . . in desuetudinem abierunt, nullo modo uobis easdem ponere permittimus.*

<sup>31</sup> Justinian himself recognizes this: *Cf. Const. Tanta*, § 13: *Aut enim ita lex necessaria erat ut diuersis titulis propter rerum cogna-*

sentence, but a whole excerpt would be thus treated. These are the so-called geminationes.<sup>32</sup> Such repetitions appear to have occurred sometimes by mere carelessness.

In the matter of obsolete institutes, the redactors avoided mention of them by merely striking out, when possible, the corresponding technical terms.<sup>33</sup>

When the statements of law relating to such a term could not be omitted, they simply substituted for that term the nearest equivalent of their day.<sup>34</sup> These substitutions are called emblemata Triboniani.

Again, without important changes in the wording, a different connection was made, and the rule extended to bear upon the later institute.<sup>35</sup>

Contradictions are not always avoided.<sup>36</sup> Some remain from the sources, others are brought in through unskillful editing.

Striving to cut out the superfluous, the editors sometimes omitted the names of persons addressed in responsa or quæstiones, or the fact that the text comes from a rescript. Under this process the names of older jurists sometimes

tionem applicari eam oporteat, aut cum fuerat aliis diuersis permixta, impossibile erat eam per partes detrahi, ne totum confundatur.

<sup>32</sup> Book 50, tit. 17, De Diversis Regulis Juris, the last title in the Pandects, is made up of such excerpts gathered from various titles of the Digest. But carelessness alone is responsible for a repetition within the same title, as, e. g., ff. 80 and 83 of book 23, title 3.

<sup>33</sup> So they struck out adstipulator, cognitor, cretio, caducum, do lego, per vindicationem and per damnationem legatum, dotis dictio, familiæ emptor, fidepromissor, sponsor, fiducia, formula, in iure cessio, iudicium legitimum and imperium continens, mancipatio, res mancipi, nexi solutio, potioris nominatio, recuperator, rei uxoriæ actio, stipendiaria and tributaria prædia, tutor prætorius, tutela mulierum, vadimonium, vindex, usucapio in immoveables, usureceptio.

<sup>34</sup> So for fiducia, pignus; for mancipare, tradere; for mancipio accipere, per traditionem accipere; for cretio, aditio; for the one and two years usucapio, statutum or constitutum tempus; for vadimonium, cautio iudicio sisti.

<sup>35</sup> Jurists' dicta regarding accessio temporis, which in the classical law referred to the interdictum *Utrubi*, were now applied to prescription; and those that had concerned the Publician action of the in bonis possessor now apply to the Publician action of the bonæ fidei possessor.

<sup>36</sup> Despite Justinian's claim: Const. *Tanta*, § 15: Contrarium autem aliquid . . . nullum sibi locum uindicabit nec inuenitur, si quis sup-tili animo diuersitatis rationes excutiet.

disappeared, their view being assigned to the quoting jurist who, in fact, does not share it. Sometimes a hesitating dictum is changed into a positive one. Some excerpts are extended by additions on the part of the redactors. In this way many new rules were inserted. The changes may be perceived sometimes through peculiarities in the choice of words, by the idioms, or by the sentence-structure, often by the disturbance of the connection.

The fifty books of the Digest are grouped into seven parts, of which the first five are named: (1) *πρῶτα* (bks. 1-4), (2) *De iudiciis* (bks. 5-11), (3) *De rebus* (12-19), (4) *Umbilicus* (20-27), (5) *De testamentis* (28-36). Part 6 includes books 37-43, and Part 7 includes books 44-50. This division is recognizable also in Paul's *Sententiæ*. It originated in the Commentaries on the *Prætor's Edict*. What order do the titles within the books follow? In particular in Book I, the order of the *Codex* is followed except in titles 5-8. Elsewhere Ulpian's *Libri ad Edictum* furnish the standard order. Into this *Edict-order* that part of the law belonging to the *Jus Civile* (Civil Law, in the technical meaning), basing upon the *Libri ad Sabinum*, was inserted. Some changes in the order of Ulpian were thus occasioned; others were due to the wish to establish a more scientific order.

Within the separate title an independent scientific order was attempted in the first titles of the first book, but later given up. We find a merely formal ordering of the fragments, showing that the compilers excerpted the jurists' writing in a certain order, and kept that order of the excerpts. These excerpts form three divisions. At the head of the first division are the *Libri ad Sabinum* (or on the *Jus Civile*); at the head of the second, the *Libri ad Edictum*; at the head of the third, the *Quæstiones* and *Responsa* of Papinian, Paulus and Ulpian. For these three divisions the terms *Sabinus-group*, *Edict-group* and *Papinian-group* are now used.<sup>37</sup>

<sup>37</sup> For the *Sabinus-group* were used: from the *Libri ad Edictum*, parts iii-v, which treat the same matters as do the *Libri ad Sabinum*; further, the Digest of Julian; the class of *Institutes* and *Regulæ*; and the supplementary monographs—*Libri Singulares*—on *iudicia publica*.

The divisions must have sprung up thus: The committee of redactors was divided into three sub-committees, each sub-committee taking a group of jurists' writings to work through. In relative mass of the excerpts, the Sabinus-group equals the Edict-group; the Papinian-group has about one-half as much.<sup>38</sup>

Of these three groups, as a rule, the longest in the particular title was placed first. When the three occur a second time in the same title, it is due to uniting into one two projected titles. On the other hand, the title *De legatis et de fideicommissis* (books 30-32) was divided into three titles, the first including the Sabinus-group excerpts, the second those of the Edict-group and the beginning of the Papinian-group, the rest of which, together with matter for a projected title *De verborum significatione*, was put in the third title. In many titles, particularly short ones, but two groups appear, or even one.

Within the group the writings most nearly alike were usually excerpted next each other. The task was simplified by adopting, as the general basis of the order for excerpting the Commentaries ad Edictum, the Commentary ad Edictum of Ulpian. Selections from Paul, Gaius and Pomponius were used to complete the text of Ulpian. Excerpts whose close internal connection struck the redactor's eye were

appeal, *lex Ælia Sentia*, *lex Fufia Caninia*, *lex Falcidia*, *lex Rhodia*, and several writings on *res militaris*.

For the Edict-group were used, after the *Libri ad Edictum*, the *Libri ad Plautium*, the Digests of Celsus, and of Marcellus, all the works of Modestinus, Javolenus's *Libri ex Cassio* and *Epistolæ*, Pomponius's ad *Q. Mucium* and some of the supplementary writings, particularly on the *lex Julia et Papia*, and *res militaris*.

In the Papinian-group, besides the above-mentioned *Quæstiones* and *Responsa*, writings on *Fideicommissa*, Paul's *Sententiæ*, Hermogenian's *Epitomæ*, Venuleius's *Stipulationes*, Tryphoninus's *Disputationes*, and monographs.

<sup>38</sup> Of the individual jurists (the names of ninety-two are preserved) Ulpian (died 228) contributes about 610 pages in Hommel's *Palingenesia*, or about a third of the whole Digest; Paul (contemporary), about 297 pages, or about a sixth. Next in the number comes Papinian, with 105; Julian, with 90; Pomponius, 80; Scævola, 78; Gaius, 71. Lenel's *Palingenesia* shows also the indirect citations, *i. e.*, of an earlier jurist in the excerpts from a later. This is particularly valuable in making clear the abiding influence of an earlier writer, like Quintus Mucius.

placed next each other. Such union often causes a word change or insertion, particularly of particles. Sometimes where one jurist had cited an earlier case, the redactors, upon looking up the text of the earlier jurist, enlarged the citation, or even added an excerpt in place of the citation. When the original order had been disturbed, the fragment that gave a definition, classification or concise statement was placed at the head of the title. In book 20, to conform to the requirements of the law-school curriculum for third-year students (Papinianistæ), every title begins with extracts from Papinian. Now and then excerpts are placed at the end of a title when the compilers had been uncertain to what title these belonged. A very few changes of order are due simply to carelessness.

Finally a fourth group, of very much smaller extent, can also be distinguished, containing works not used in the schools or in practice, and probably added as an afterthought. This group is called the Supplement-group. As a rule, it stands at the end of the title, never at the beginning.

The placing of the so-called *inscriptio*, the name of the jurist and his work, before the extract, was designed to preserve the memory of the jurists. So far from meaning to encourage thereby the study of the originals, their use as law was prohibited. Mention of the volume of each excerpt was mere ornamentation. Errors, both in authors' names and in volume numbers, crept into these inscriptions. Yet they are generally reliable, and with their help Lenel has reconstructed the original order of the fragments remaining from the individual jurists, and given a remarkable presentation of the original works, in his *Palingenesia*.<sup>39</sup>

The Institutes of Justinian were mainly pieced together from similar works of the classical jurists. The chief sources<sup>40</sup> are the Institutes of Gaius, and his *Res Cottidianæ* (or *Aurea*), the latter very likely in many places now

<sup>39</sup> Lenel: *Palingenesia Iuris Ciuilis—Iuris Consultorum Reliquiæ*, Voll. I and II; folio, columns 1308 and 1264, resp. Tauchnitz, Leipsic, 1889.

<sup>40</sup> *Const. Imperatoriam*, § 6; *ex omnibus antiquorum institutionibus et præcipue ex commentariis Gaii nostri tam institutionum quam rerum cottidianarum aliisque multis commentariis.*



credited to the Institutes.<sup>41</sup> Besides these, it can be proved that the Institutes of Florentine, Ulpian and Marcian, as well as Ulpian's *Regulæ*, were used.

In working over these excerpts to fit them for reception into Justinian's Institutes, the same method is followed as in the Digest. Not direct from the originals of the jurists themselves, but in the changed form in which they appear in the Digest, are the citations from the larger works. This is especially noticeable in the citations from all writings not classing with the Institutes and *Regulæ*. An independent task of adaptation consisted in the working over of the mass of new law contained in the *Constitutiones*. This is given generally in brief extracts, a few times also by verbal reception of the chief points.

The order of the Institutes of Justinian follows pretty closely that of Gaius's Institutes. The division into four books is also retained. However, as the larger part of the material treated by Gaius in the fourth book was dropped out as obsolete, in the new Institutes the fourth book began with *Delict obligations*. At the very end of the whole work were added two titles not occurring in Gaius, viz., *De officio Iudicis* and *De Publicis Iudiciis*.

Regarding now the division of labor among the three commissioners, Tribonian, Theophilus, Dorotheus, probably the first mentioned had the general oversight only, while to each of the other two one-half of the work was given, *i. e.*, two books each. In fact, a great difference is perceptible between the first two books and the last two. (The last title, 4-18, shows the peculiarities of the first two books.) We have absolutely no evidence as to which of the editors prepared the first two books.

Regarding the Codex of Justinian, it will be remembered that the first edition (*Vetus*), and the constitutions issued subsequent to it and prior to the Revised Codex, are not

<sup>41</sup> This consideration, that the *Res Cottidianæ* of Gaius may often be the source, instead of the Institutes, should be borne in mind when using T. E. Holland's very attractive edition, "The Institutes of Justinian, edited as a recension of the Institutes of Gaius," in which black-faced type is used to indicate the text which in the editor's opinion originates in Gaius's *Institutes*.

extant. Hence it is the Codex Repetitæ Prælectionis which must be considered.

Only those Constitutiones that were still valid law were admitted into it.

Its arrangement is based upon a combination of the system of the Gregorianus with that of the Theodosianus. Book 1 deals with ecclesiastical law, sources of law, functions of officials. Books 2-8 take up private law. Book 9 deals with criminal law. Books 10-12 treat administrative law.

Within the titles the Constitutiones are given, as before, the chronological order. Inscriptiones and Subscriptiones are taken over without change. The undated ones (*sine die et consule*) kept their original order as in the earlier Codices. Through misunderstanding, such as occurred in the Digest, Constitutiones were sometimes inserted in the wrong title (so-called *leges fugitivæ*). Several Constitutiones are repeated in different titles. The editors' parceling out of the same Constitutio into different titles is often perceptible. Respecting those Constitutiones that date before Constantine, it is unknown how far this was due to the earlier Codices. Sometimes such division obscures the meaning. The Inscriptio and Subscriptio of the first to be excerpted in each title is usually preserved. The editors might have cut out more of the repetitions and superfluities. On the other hand, some Constitutiones were omitted, reference to which was made in those that were admitted, and some that were referred to by the Institutes. The deletion of obsolete provisions (conforming to the process in editing the Digest) affected chiefly second- and third-century Constitutiones. Of those of the fourth century the simplification of the redundant and artificial language was the main task—leading often to a complete change of wording.

By way of retrospect, it may be said that of the three works the Codex was not so much of an innovation in plan, and it was designed to meet the needs of practitioners. The Institutes and the Digest or Pandects were innovations. That the Institutes was a success is evident from its enduring use as an elementary handbook. Its merit is due simply to the materials used by the editors. Both Institutes and

Codex, however, are but supplementary to the most significant of the three—the Digest. Its purpose was not merely to give what was necessary for the practitioner. For that purpose a revision of Ulpian or Paul would have sufficed. Justinian, in fact, wished rather to revivify in a practicable form, to be sure, but as completely as possible, the generally forgotten jurisprudence of the classical jurists.

Through the ostentatious introduction of as many writings as possible the harmony of the Digest is destroyed, and its practical usefulness for practitioners of the time was seriously impaired. Probably there were thus restored to life many statements and provisions that were at most enjoying a mere appearance of life in school or professors' books. So the retention of the peculiar antitheses and oppositions originally due to the status of the Honorary Law, and to the formulary procedure, could but confuse and impede legal development. Lawyers, too, were given no time to master these new books before they went into effect as law.

It may be objected that Justinian has prevented the transmission of the genuine sources. These, however, were rapidly becoming lost and a compilation made by other hands—judging by what was done in the West—would have been far inferior to his. Justinian insured a transmission of the sources of law more extensive than can be found in any other branch of the study of antiquity. The *Inscriptiones* and *Subscriptions*, for a thousand years not utilized, to-day are yielding a wealth of historical notes, and help to establish the original form of the jurists' writings as well as the chronology of the *Constitutiones*. The text contains so abundant material that no individual can hope to master it.

After all the labor of over thirteen hundred years, Justinian's redaction yet supplies an inexhaustible mine for jurists<sup>42</sup> and for those who would learn the secret of Rome's

<sup>42</sup> L'importanza dogmatica del diritto romano potrà forse diminuire colla pubblicazione del Codice Civile Germanico . . . ma la sua importanza storica verrà per ciò stesso ad essere accresciuta, perchè si tratterà pur sempre di determinare la parte, che nelle moderne legislazioni deve essere attribuita alla grande influenza del diritto romano . . . La scienza è nata e si è svolta nelle Università, ed è in esse, che deve essere tenuto vivo il focolare della medesima. È soltanto nelle

yet enduring empire—would know the stuff of which to-day's civilization is made.<sup>43</sup> "Three times," says Rudolf von Ihering, "has Rome dictated the order of the world; three times has she bound the nations in unity together: the first time, when the Roman people were still in the fullness of their power, in the unity of the State; the second time, after they had fallen into decline, in the unity of the Church; the third time, in consequence of the reception of the Civil Law in the middle ages, in the unity of Rights,—the first time by the force of arms but the second and third times by the power of ideas."

*Edgar S. Shumway.*

Università, che la storia del diritto antico può cessare di occuparsi esclusivamente di minute ricerche archeologiche, per cambiarsi in un sistema di concetti, che possa essere succo e sanguine per la giovine generazione.—*Carle*, Origine del diritto romano.

"En séparant le domaine du droit de celui de la morale, les jurisconsultes romains ont préservé les nations modernes des abus résultant des entreprises de l'État sur la liberté individuelle. C'est là un service que nous leur devons et dont on ne saurait assez les louer. Ils nous ont rendu un service non moins considérable en donnant au droit de propriété un caractère absolu: ils l'ont rendu indépendant du droit public. En fortifiant le droit du maître de maison, ils ont opposé une barrière aux empiétements de l'État.—*Cuq*. Institutions juridiques.