HISTORY OF ROMAN LEGAL SCIENCE

BY

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PREFACE

Δεῖ δὲ τὸν ἀγαθὸν κριτὴν οὐκ ἐκ τῶν παραλειπομένων δοκιμάζειν τοὺς γράφοντας, ἀλλ' ἐκ τῶν λεγομένων. POLYBIUS, VI. II. 7.

THIS book was begun as the article on Roman legal science in a comprehensive work—*The Oxford History of Legal Science*—which was to have been published by the Clarendon Press, under the editorship of Professors Hermann Kantorowicz and Francis de Zulueta. The outbreak of war, Kantorowicz's premature death, and the long continuance of the war unhappily made it necessary to abandon the larger plan. Only Professor George M. Calhoun's contribution has been published, posthumously, by Professor de Zulueta, as a separate work under the title of *Introduction to Greek Legal Science* (1944). The present work has been written after the abandonment of the original plan, and therefore without the limitations necessarily imposed on a contribution to a co-operative work. Though it is only in the light of the history of legal science as a whole that the world-wide importance of Roman legal science can be seen, the present work calls for no justification. There exists at present no work devoted to the history of Roman legal science specifically, no work which treats of it in full and with adequate regard to the present state of its study. Paul Krüger's standard work, *Geschichte der Quellen und Literatur des römischen Rechts*, deals, as its title indicates, with the subject only in so far as it is involved in a history of the sources and literature. It is, moreover, out of date; the last edition (the second) appeared in 1912, and even then was not quite abreast with the latest researches.

The present work is intended neither as an educational manual nor as a work of reference, but as a book to read. In it I have endeavoured to present the conception of Roman legal science and its growth which I have acquired by forty years of study of the sources, but I have been at pains not only to present that conception in readable form, but also to justify it and to invite criticism and further research by giving references to the sources and literature. I have not aimed at completeness, but have in general limited myself to the dominant characteristics of the various periods. Greater completeness has indeed been imposed on me in the literary chapter of Part III owing to the unsatisfactory state of our studies, but in general more detailed treatment would

have rendered several volumes necessary. In my references, too, I have not aimed at being complete. I have cited what I have myself read and found profitable—in fact the literary basis of my work, which it is needful for the reader to know and to bear in mind. Anything that appeared to me either entirely erroneous or irrelevant, or antiquated and not even of historical interest, has been simply passed over. The legal text-books are mentioned at the beginning, but are not cited continuously: a reader who wishes to refer to them can do so easily enough with the help of their indexes. In principle I have not cited critical reviews: to have done so would have overloaded the footnotes; they can easily be discovered. Where sources and literature have already been collected in some easily accessible work I have been content to refer to that. Thus, because I do not mention a work, the reader must not infer that I am unacquainted with it. Important works of the last 100 years are not likely to have escaped me. On the other hand many a valuable monograph or observation has doubtless been left unjustifiably unmentioned, but 'omnium habere memoriam et penitus in nullo peccare divinitatis magis quam mortalitatis est'. Moreover, numerous citations in my original manuscript had in the end to be struck out for the sake of brevity. I do specially deplore that, in spite of all my efforts, I have not been able to come by the continental literature of the last period (since 1939), or only exceptionally. Such works as have become known to me after the conclusion of my manuscript have been indicated in the *Addenda*.

I have written not only, and not in the first place, for the narrow circle of specialist scholars in Roman law, but with the hope of being read by advanced law-students and of assisting them in their study of the sources. I have written no less for students of classical philology and ancient history. Roman legal science is the purest and most original expression of the Roman genius; he who would pay homage to that genius cannot content himself with a distant bow to Roman legal science.

In conclusion I offer my thanks to all who have helped me in my work—they are so numerous that I cannot name them all—in the first place to Professor de Zulueta, who entrusted me with the article on Roman legal science in the original work, who has performed the laborious work of translation, and has assisted in the correction of the proofs. My warmest thanks are due to Balliol College, to the Society for the Protection of Science and Learning, and to the Clarendon Press: in particular to Mr. Kenneth

Sisam for his generous and understanding support. From the bottom of my heart I thank the Dutch Universities that came to my aid in a critical and almost desperate position. I owe a special debt to Mr. W. B. A. H. Heskes, Advocaat en Procureur in Leyden, and to his wife: they gave me refuge in their house, and it was there that work on this book was begun.

During the whole of the war the Oxford libraries have put their treasures at my disposal with unexampled generosity—the Bodleian Library, Haverfield and Codrington Libraries, the libraries of Christ Church and Jesus College, and the Taylor Institution. I thank them all, and most particularly the Bodleian, which in spite of its diminished staff has throughout ministered to my insatiable appetite for books with unfailing patience, kindness, and exactitude.

Lastly I have to thank my wife, to whom I dedicate this book. I do that with Roman brevity in the words of the *Laudatio Turiae:*

Repentinis nuntiis ad praesentia et imminentia vitanda excitatus tuis consiliis conservatus sum.

F. S.

OXFORD 1946

CONTENTS

PART IV. THE BUREAUCRATIC PERIOD OF ROMAN JURISPRUDENCE

LIST OF ABBREVIATIONS

ACI = *Atti del Congresso internazionale di diritto Romano*, 1934–5.

ACII = *Acta Congressus Iuridici Internationalis*, Romae, 1935.

AG = *Archivio Giuridico.*

AHD = *Anuario de Historia del derecho español.*

Albertario, *Introduzione* = Emilio Albertario, *Introduzione storica allo studio del diritto romano guistinianeo*, i (1935).

——, *Studi* = Emilio Albertario, *Studi di diritto romano*, i (1933); iii (1936); v (1937).

Allen, *Law in the making* = C. K. Allen, *Law in the making*, 3rd ed., 1939.

Annali Palermo = *Annali del seminario giuridico della R. Università di Palermo.*

Ann. ist. di storia del dir. rom. = *Annuario dello istituto di storia del diritto romano.* Catania.

AP = *Archiv für Papyrusforschung.*

Arangio-Ruiz, *Storia* = V. Arangio-Ruiz, *Storia del diritto romano*, 1937.

Arch. = *Archiv.*

Atti Torino = *Atti della Reale Accademia delle Scienze di Torino.*

BGU = *Aegyptische Urkunden aus den Kgl. Museen zu Berlin. Griechische Urkunden.*

Beseler, *Beitr.* = Gerhard Beseler, *Beiträge zur Kritik der römischen Rechtsquellen* i (1910); ii (1911); iii (1913); iv (1920); v (1931).

Bethmann-Hollweg = M. A. v. Bethmann-Hollweg, *Der Civilprozess des gemeinen Rechts in geschichtlicher Entwicklung*, 1864 ff.

Bonfante, *Corso* = Pietro Bonfante, *Corso di diritto romano*, 1925 ff.

——, *Scritti* = P. Bonfante, *Scritti giuridici varii*, 1916 ff.

Bremer = *Iurisprudentiae antehadrianae quae supersunt*, ed. F. P. Bremer, 1896 ff. (Teubner).

Bruns = *Fontes iuris Romani antiqui, pars prior*, ed. G. Bruns, 7th ed. by O. Gradenwitz, 1909.

Bruns II = *Fontes iuris Romani, pars posterior*, ed. G. Bruns, 7th ed. by O. Gradenwitz, 1909.

Bruns-Lenel, *Gesch. u. Quellen des RR* = *Geschichte und Quellen des römischen Rechts* von Bruns, neu bearbeitet von O. Lenel, in Holtzendorff-Kohler, *Enzyklopaedie der Rechtswissenschaft* i (1915), 303 ff.

BSR = *Papers of the British School at Rome.*

Buckland, *Manual* = W. W. Buckland, *A Manual of Roman Private Law*, 2nd ed., 1939.

——, *Textbook* = W. W. Buckland, *A Textbook of Roman Law from Augustus to Justinian*, 2nd ed., 1932.

Bull. = *Bullettino dell' Istituto di diritto Romano.*

Burckhardt, *Griech. Kulturgesch.* = Jakob Burckhardt, *Griechische Kulturgeschichte*, 1898–1902.

BZ = *Byzantinische Zeitschrift.*

C. = *Codex Iustinianus*, ed. P. Krüger, 1915.

CAH = *The Cambridge Ancient History.*

Castelli, *Scritti giur.* = G. Castelli, *Scritti giuridici*, 1923.

Chiazzese, *Confronti* = Chiazzese, *Confronti testuali. Contributo alla dottrina delle interpolazioni giustinianee. Parte generale* 1935. (Estratto dagli Annali Palermo XVI.)

CIG = *Corpus Inscriptionum Graecarum.*

CIL = *Corpus Inscriptionum Latinarum.*

Class. Phil. = *Classical Philology.*

Class. Quart. = *Classical Quarterly.*

Coll. = *Mosaicarum et Romanarum legum collatio.*

Collect. Libr. = *Collectio librorum iuris anteiustiniani*, ed. P. Krüger, Th. Mommsen, G. Studemund.

Collinet, *Ét.* = Paul Collinet, *Études historiques sur le droit de Justinien*, i (1912); ii (1925); iv (1932).

——, *École de Beyrouth* = *Histoire de l'école de droit de Beyrouth* = Études II, 1925.

Conferenze = *Conferenze per il XIV centenario delle Pandette. Pubblicazioni della Università Cattolica del Sacro Cuore, Scienze giuridiche*, vol. xxxiii, 1931.

Costa, *Cicerone Giureconsulto* = Emilio Costa, *Cicerone Giureconsulto*, 2nd ed.

CR = *Académie des Inscriptions et Belles-Lettres, Comptes Rendus.*

CSEL = *Corpus Scriptorum Ecclesiasticorum Latinorum.*

Cuq, *Consilium principis* = Édouard Cuq, *Mémoire sur le consilium principis d'Auguste à Dioclétien. Mémoires présentés par divers savants à l'Académie des inscriptions et belles lettres, 1. sér., tome ix*, 1884, pp. 311 ff.

C.Th. = *Codex Theodosianus*, ed. Th. Mommsen, 1905.

D. = *Digesta Iustiniani*, ed. minor, 1920 (Th. Mommsen and P. Krüger).

Devoto, *Storia* = Giacomo Devoto, *Storia della lingua di Roma*, 1940.

Diels, *Doxographi* = Hermann Diels, *Doxographi graeci*, 1879.

Dittenberger, *Syll.* = W. Dittenberger, *Sylloge inscriptionum Graecarum*, 3rd ed., 1905 ff.

Dix. ep. = *Dizionario epigrafico di antichità Romane* (Ettore de Ruggiero).

Drumann = W. Drumann, *Geschichte Roms*, 2nd ed. by P. Groebe, 1899 ff.

EHR = *English Historical Review.*

Ferrini = *Opere di Contardo Ferrini*, vols. i–v, 1929–30.

Festschrift Koschaker = *Festschrift Paul Koschaker*, i–iii, 1939.

FIRA = *Fontes Iuris Romani Anteiustiniani*, 2nd ed., i (1941); ii (1940); iii (1943).

Fitting, *Alter und Folge* (or *Alter*) = Hermann Fitting, *Alter und Folge der Schriften römischer Juristen von Hadrian bis Alexander*, 2nd ed., 1908.

Fraenkel, *Rome* = Ed. Fraenkel, *Rome and Greek Culture. Lecture delivered before the University of Oxford*, 1935.

De Francisci, *Storia* = Pietro de Francisci, *Storia del diritto romano*, i (1926); ii, 1 (1929); iii, 1 (1936).

Tenney Frank, *Economic Survey* = Tenney Frank, *An economic survey of ancient Rome*, i, *Rome and Italy of the Republic*, 1933.

Friedländer–Wissowa, *Sittengesch.* = Friedländer, *Darstellungen aus der Sittengeschichte Roms*, 9th ed. by G. Wissowa, 1919 ff.

F.V. = *Fragmenta Vaticana* (see below, p. 310).

Gesch. = *Geschichte.*

Girard, *Mélanges* = P. F. Girard, *Mélanges de droit Romain*, i (1912); ii (1923).

Guarneri Citati, *Indice:* see below, p. 260.

Hirzel, *Agraphos Nomos* = Rud. Hirzel, *Agraphos Nomos. Abhandlungen der phil.-hist. Classe der Kgl. Sächsischen Gesellschaft der Wissenschaften* xx, 1, 1900.

——, *Dialog* = Rud. Hirzel, *Der Dialog. Ein literarhistor. Versuch*, 1895.

Hitzig, *Assessoren* = H. F. Hitzig, *Die Assessoren der römischen Magistrate und Richter*, 1893.

HTR = *Harvard Theological Review.*

HZ = *Historische Zeitschrift.*

ILS = *Inscriptiones Latinae Selectae*, ed. H. Dessau, 1892 ff.

Index (or *Ind.*) *Interp.* = *Index Interpolationum*, ed. E. Levy and E. Rabel, i (1929); ii (1931); iii (1935); Supplem. I (1929).

Inscr. Ital. xiii, 3 = *Inscriptiones Italiae*, vol. xiii, Fasti et Elogia, Fasc. III, Elogia cur. A. de Grassi, 1937.

Jaeger, *Aristoteles* = Werner Jaeger, *Aristoteles. Grundlagen einer Geschichte seiner Entwickelung*, 1923. Engl. ed. by R. Robinson, 1934.

Jhering, *Geist* = R. v. Jhering, *Geist des römischen Rechts*, i (4th ed., 1878); ii, 1 (4th ed., 1880); ii, 2 (4th ed., 1883); iii, 1 (3rd ed., 1877).

Joers = Paul Joers, *Römische Rechtswissenschaft zur Zeit der Republik. Erster Teil: Bis auf die Catonen*, 1888.

Jolowicz, *Introd.* = H. F. Jolowicz, *Historical Introduction to the Study of Roman Law*, 1932.

Jonkers, *Invloed* = E. J. Jonkers, *Invloed van het Christendom op de Romeinsche Wetgeving betreffende het Concubinat en de Echtscheiding*. Academ. Proefschrift Amsterdam, 1938.

Jordan = Jordan, *M. Catonis praeter librum de re rustica quae extant*, 1860.

JRS = *Journal of Roman Studies*.

Kaerst, *Gesch. d. Hellenismus* = Julius Kaerst, *Geschichte des Hellenismus*, i (3rd ed., 1927); ii (2nd ed., 1926).

Karlowa, *RG* = Otto Karlowa, *Römische Rechtsgeschichte*, i (1885); ii, 1 (1901).

Kniep on Gaius = Ferdinand Kniep, *Gai Institutionum Commentarius Primus* (1911); *Commentarius Secundus*, §§ 1–96 (1912); *Commentarius Secundus*, §§ 97–289 (1913); *Commentarius Tertius*, §§ 1–87 (1914); *Commentarius Tertius*, §§ 88–225 (1917).

Kroll, *Kultur* = Wilhelm Kroll, *Die Kultur der Ciceronianischen Zeit*, 1933.

Krüger = Paul Krüger, *Geschichte der Quellen und Litteratur des römischen Rechts*, 2nd ed., 1912.

Kübler, *Gesch.* = Bernhard Kübler, *Geschichte des Römischen Rechts*, 1925.

Kunkel = Joers–Kunkel–Wenger, *Römisches Recht*, 2nd ed., 1935. *Enzyklopaedie der Rechts- und Staatswissenschaften, Abteilung Rechtswissenschaft*, herausgegeben von Kohlrausch und Peters.

KVJ = *Kritische Vierteljahrsschrift*.

L.c. = *loco citato*.

Leifer, *Ämterwesen* = Franz Leifer, *Studien zum antiken Ämterwesen*, i. *Zur Vorgeschichte des römischen Führeramts*, 1931 (Klio Beiheft XXIII).

Lenel, *Ed.* = Otto Lenel, *Das Edictum Perpetuum*, 3rd ed., 1927.

——, *Pal.* = Otto Lenel, *Palingenesia Iuris Civilis*, 1889.

Leo, *Gesch.* = F. Leo, *Geschichte der römischen Literatur*, i (1913).

Levy, *Ergänzungsindex* = Ernst Levy, *Ergänzungsindex zu Ius und Leges*, 1930.

——, *Paulus* = Ernst Levy, *Pauli Sententiae*, 1945.

LQR = *Law Quarterly Review*.

LR = *Law Review*.

Mallon = Jean Mallon, Robert Marichal, Charles Perrat, *L'écriture Latine de la Capitale à la minuscule*, 1939.

Marquardt–Mau, *Privatleben* = Marquardt, *Das Privatleben der Römer*, 2nd ed. by Mau, 1886.

Migne, *PL* = Migne, *Patrologia Latina*.

Mitteis, *Grundz.* = Mitteis–Wilcken, *Grundzüge und Chrestomathie der Papyruskunde*, ii, 1 *Grundzüge* von L. Mitteis, 1912.

Mitteis, *Reichsr.* = L. Mitteis, *Reichsrecht und Volksrecht*, 1891.

Mitteis, *RP* = L. Mitteis, *Römisches Privatrecht bis auf die Zeit Diokletians*, i (1908).

Mommsen, *RF* = Th. Mommsen, *Römische Forschungen*, i (1864); ii (1879).

Mommsen, *Schr.* = *Gesammelte Schriften* von Theodor Mommsen, 1905 ff.

——, *Staatsr.* = Th. Mommsen, *Römisches Staatsrecht*, i (3rd ed., 1887); ii (3rd ed., 1887); iii (1887–8).

——, *Strafr.* = Th. Mommsen, *Römisches Strafrecht*, 1899.

Monier, *Man.* = R. Monier, *Manuel élémentaire de Droit Romain*, i (1935); ii (1936).

München SB = *Sitzungsberichte der Bayrischen Akademie der Wissenschaften, philosophisch-philologische und historische Klasse*.

Münzer, *Adelsparteien* = Friedrich Münzer, *Römische Adelsparteien und Adelsfamilien*, 1920.

Norden, *Aus altrömischen Priesterbüchern* = Ed. Norden, *Aus altrömischen Priesterbüchern. Acta reg. soc. human. litt. Lundinensis* xxix, 1939.

Norden, *Apuleius* = Fritz Norden, *Apuleius von Madaura und das römische Privatrecht*, 1912.

NRH = *Nouvelle Revue Historique.*

OED = *The Oxford English Dictionary.*

Otto, *Sprüchwörter* = A. Otto, *Die Sprüchwörter und sprüchwörtlichen Redensarten der Römer*, 1890.

Perozzi, *Ist.* = Silvio Perozzi, *Istituzioni di diritto romano*, 2nd ed., 1928.

Peter, *Gesch. Lit.* = Hermann Peter, *Die geschichtliche Literatur über die römische Kaiserzeit und ihre Quellen*, 1897.

——, *Rel.* = Hermann Peter, *Historicorum Romanorum Reliquiae*, i (1914).

Phil. = *Philologus.*

Pringsheim, *Beryt und Bologna* = Fritz Pringsheim in *Festschrift für Otto Lenel zum 50jährigen Doktorjubiläum* (1923), 204 ff.

PW = Pauly–Wissowa, *Realenzyklopaedie der klassischen Altertumswissenschaft*, 1894 ff. The volumes of the second series are marked by 'A' added to the number of the volume, e.g. ivA = second series, vol. iv.

QB Pol. = *Quarterly Bulletin of the Polish Institute of Arts and Sciences in America.*

REL = *Revue des études Latines.*

Rend. Linc. = *Rendiconti della R. Accademia dei Lincei, Classe di scienze morali, storiche e filologiche*, Serie VI.

RH = *Revue Historique de droit français et étranger.*

Rhein. Mus. = *Rheinisches Museum.*

Riccobono jun., *Misc.* = Salvatore Riccobono junior, *Miscellanea critico-storica, Estratto dal* vol. xvii *degli Annali del Seminar. giur. di Palermo*, 1937.

Riv. it. = *Rivista italiana per le scienze giuridiche.*

RL = *Reale Istituto Lombardo di Scienze e Lettere, Rendiconti.*

Röm. Mitt. = *Mitteilungen des deutschen archaeologischen Instituts. Römische Abteilung.*

W. H. Roscher (1917) = Wilh. H. Roscher, *Die Zahl 50 im Mythus, Kultus, Epos und Taktik der Hellenen und anderer Völker. Abhandlungen der philologisch-historischen Klasse der Kgl. Sächsischen Gesellschaft der Wissenschaften*, xxxiii, 1917.

Rotondi, *Leges publicae* = G. Rotondi, *Leges publicae populi Romani. Estratto dalla Enciclopedia Giuridica Italiana*, 1912.

RR = *Römisches Recht.*

RSDI = *Rivista di Storia del Diritto Italiano.*

Rudorff, *RG* = A. F. Rudorff, *Römische Rechtsgeschichte*, i (1857); ii (1859).

RW = *Rechtswissenschaft.*

Savigny, *Gesch.* = Savigny, *Geschichte des römischen Rechts im Mittelalter*, 2nd ed., 1834 ff.

SB = *Sitzungsberichte, philosophisch-historische Klasse.*

Schanz–Hosius = M. Schanz, *Geschichte der römischen Literatur*, 4th ed. by C. Hosius, i (1927); ii (1935).

Schr. = *Schriften* or *Gesammelte Schriften.*

Schubart, *Papyruskunde* = Wilh. Schubart, *Einführung in die Papyruskunde*, 1918.

Schulz = F. Schulz, *Principles of Roman Law*, 1936.

Schulz, *Einführung* (or *Einf.*) = F. Schulz, *Einführung in das Studium der Digesten*, 1916.

SD = *Studia et Documenta Historiae et Iuris.*

Seckel–Kübler = *Iurisprudentiae Anteiustinianae Reliquiae*, ed. Seckel–Kübler, 1903 ff. (Teubner).

SHA = *Scriptores Historiae Augustae.*

St. = *Studies* or *Studi* or *Studien.*

Stein, *Ritterstand* = Arthur Stein, *Der römische Ritterstand. Münchener Beiträge zur Papyrusforschung und antiken Rechtsgeschichte*, x (1927).

Stolz–Schmalz = Stolz–Schmalz, *Lateinische Grammatik*, 5th ed. by Leumann and Hofmann, 1938.

Syll. = *Sylloge.*

Symb. Frib. = *Symbolae Friburgenses in honorem Ottonis Lenel*, 1935.

T = *Tijdschrift voor Rechtsgeschiedenis, Revue d'Histoire du Droit.*

TAPhA = *Transactions and Proceedings of the American Philological Association.*

Taubenschlag = Raphael Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri*, 1944.

Thes. = *Thesaurus Linguae Latinae.*

Voc. = *Vocabularium Iurisprudentiae Romanae*, 1894 ff.

Warmington, *Remains* = Warmington, *Remains of Old Latin* (Loeb Class. Libr.), 1935–40.

Max Weber = Max Weber, *Wirtschaft und Gesellschaft*, 2nd ed., 1925.

Wenger, *Canon* = L. Wenger, *Canon in den römischen Rechtsquellen und in den Papyri. Wien SB*, 1942.

——, *CP* = L. Wenger, *Institutes of the Roman Law of Civil Procedure*, translated by H. O. Fisk, 1940.

Westrup, *Roman pontifical college* = C. W. Westrup, *On the antiquarian-historiographical activities of the Roman pontifical college*, 1929.

Wiener St. = *Wiener Studien. Zeitschrift für klassische Philologie.*

Wien SB = *Sitzungsberichte der Akademie der Wissenschaften in Wien, philosophisch-historische Klasse.*

Windscheid, *Pandekten* (or *Pand*) = Bernhard Windscheid, *Lehrbuch des Pandektenrechts*, 9th ed. by Th. Kipp, 1906.

Wissowa = G. Wissowa, *Religion und Kultus der Römer*, 2nd ed., 1912.

Wlassak, *Abwehr* = M. Wlassak, *Anklage und Streitbefestigung. Abwehr gegen Philipp Lotmar. Akademie der Wissenschaften zu Wien, philosophisch-historische Klasse, Sitzungsberichte* vol. 194, *Abhandlung* no. 4, 1920.

——, *Anklage* = M. Wlassak, *Anklage und Streitbefestigung im Kriminalrecht der Römer. Kaiserliche Akademie der Wissenschaften in Wien, philosophisch-historische Klasse, Sitzungsberichte* vol. 184, *Abhandlung* no. 1, 1917.

——, *Judikationsbefehl* = M. Wlassak, *Der Judikationsbefehl der römischen Prozesse. Akademie der Wissenschaften in Wien, philosophisch-historische Klasse, Sitzungsberichte* vol. 197, *Abhandlung* no. 4, 1921.

——, *Provinzialprozess* = M. Wlassak, *Zum römischen Provinzialprozess. Akademie der Wissenschaften in Wien, philosophisch-historische Klasse, Sitzungsberichte* vol. 190, *Abhandlung* no. 4, 1919.

——, *Prozessformel* = M. Wlassak, *Die klassische Prozessformel I. Teil. Akademie der Wissenschaften in Wien, philosophisch-historische Klasse, Sitzungsberichte* vol. 202, *Abhandlung* no. 3, 1924.

Z = *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung.*

ZGerm. = *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung.*

Zilliacus = H. Zilliacus, *Zum Kampf der Weltsprachen im oströmischen Reich.* Helsingfors, 1935.

Zimmermann, *Vocabulary* = O. J. Zimmermann, *Late Latin Vocabulary of the Variae of Cassiodorus 1944. The Catholic University of America Studies in Medieval and Renaissance Latin Language and Literature*, vol. xv.

INTRODUCTION

Iurisconsultorum genera distinguere aetatibus.[1]

(i)

THE history of Roman legal science, not of Roman law, is our subject, but, since one cannot treat of legal science in complete abstraction from law, its sole external manifestation, we shall have recourse to Roman law for the purpose of illustration. It will, however, be for that purpose only; a detailed account of the history of Roman law must be sought elsewhere.

(ii)

We shall use the term 'legal science' in a wider meaning than the ordinary. Commonly it is confined to systematic thinking about actual law (legal dogmatics), to the exclusion, in particular, of the law-making processes. So at any rate it has been understood in previous accounts of Roman legal science, but the resulting defects of these accounts have proved that so narrow a conception of legal science is valueless to the historian. Our conception of 'legal science' (or 'jurisprudence'—we regard the terms as synonymous) embraces every vocational occupation with the law, its making, application, exposition, and transmission. The term 'vocation' must not be restricted to activities directed to earning a livelihood or to some other economic purpose. In its origin, which is Christian,[2] it had no such connotation, and the concept of vocational occupation not directed, or not necessarily directed, to economic ends is indispensable for a correct sociological analysis of the ancient world. Its essential implication is that of permanent dedication to, in contrast with occasional dilettante indulgence in, some definite sphere of activity. Such continuous occupation with a definite subject produces a specialized intimacy with it exceeding mere general acquaintance. The specialized knowledge thus produced, together with the activities directed to obtaining it, we call 'science'.

Thus for us 'legal science', or 'jurisprudence', embraces every

[1] Cic. *Brutus*, 19. 74: *oratorum genera distinguere aetatibus.*

[2] See 'Profession' and 'Vocation' in the *O.E.D.* Cf. Holl, 'Die Gesch. des Wortes "Beruf"', *SB Berlin*, 1924, p. xxix; *Ges. Aufsätze z. Kirchengesch.* iii (1928), 189 ff., and thereon N. Paulus, *Hist. Jahrb. d. Görresgesellsch.* xlv. 308 ff; F. K. Mann, 'Der Begriff des Berufes und die Rechtswissenschaft', *Arch. f. Rechts- u. Wirtschaftsphilosophie*, xvi (1923), 355 ff.

form of vocational activity in the sphere of law, and 'jurist' covers all who dedicate themselves to such activities. For example, the classical *iudex* was not a jurist, or only *per accidens*: in Roman eyes professional knowledge of law was no part of his qualifications; he was the representative of common sense. On the other hand, the members of the imperial chancery who drafted Diocletian's numerous rescripts were 'jurists', though they neither held academic chairs nor wrote books, but preserved strict bureaucratic anonymity. The rescripts, which represent their literary work, belong to 'jurisprudence' by as good a title as the *responsa* of the *praefectus praetorio* Papinian.

(iii)

Roman legal science is the science of Roman law within the framework of the Roman Empire. The idea of a Roman Empire embracing the whole Mediterranean world, eastern and western, remained a living reality[1] till the age of Justinian (A.D. 527–65). It survived the division of the Empire in A.D. 395, and even Theodoric's Ostrogothic Empire was still part of the Roman.[2] By destroying the Ostrogothic and Vandal Empire Justinian reunited the eastern and western territories of the Roman Empire, and this reunion, though it did not endure for long, was important as being the occasion of his legislation being introduced into Italy and consequently determining the character of European juristic civilization for centuries. The Empire came to an end when, after Justinian's death, the Lombards severed the greater part of Italy from it, but even then the idea of the *imperium Romanum* did not vanish: for long ages it sought realization, but in vain. Thus, it is with Justinian that the latest period of what can properly be called 'antiquity' ends, and with it ends that phenomenon of antiquity, 'Roman legal science'. The exact end is the year 534 in which Justinian's codification was finished. Thereafter the legal science of the East is properly called 'Byzantine', and that of the West 'Romanistic'.

(iv)

The study of the history of Roman legal science begins with Humanism. But humanistic jurisprudence was fully occupied

[1] Gelzer, *HZ* cxxxv (1927), 173 ff. Albertoni, *Per una esposizione del diritto bizantino* (1927), 10. On periodization in general: E. Troeltsch, 'Der Historismus u. seine Probleme', *Ges. Schr.* iii (1922), 700 ff., 730 ff.

[2] Mommsen, *Schr.* vi. 362 ff., 378.

with the editing of the texts and the reconstruction of Roman law. Apart from the examination of bio-bibliographical questions,[1] research into the nature and development of Roman jurisprudence was simply non-existent. This was natural enough at the beginning, but there was no advance till so late as Gibbon and Savigny, under whose impulse a fresh start was made.[2] Jhering's masterpiece, his *Geist des römischen Rechts*,[3] represents the highest point reached in this matter by nineteenth-century Romanists, but unfortunately it was never completed. Nor was it followed up. The Romanists of the closing decades of the last century (Alibrandi, Pernice, Lenel, Eisele, Ferrini, Gradenwitz), basing themselves on Mommsen's works, especially the editions of the sources made or inspired by him, sought chiefly to disentangle the classical law from the law of Justinian; the Romanists of the twentieth century have followed their example. Indirectly these labours have added much to our knowledge of classical legal science, but the main interest has continued to be Roman law, not Roman legal science. Joers's *Römische Rechtswissenschaft zur Zeit der Republik* was carried no farther than its first volume, and that did not reach even the period of Quintus Mucius.[4]

[1] Cf. Thomas Diplovatatius, *De claris iuris consultis* (*c.* 1500), edd. H. Kantorowicz and F. Schulz, i (1919). For the later humanistic literature of this kind see Spangenberg, *Einl. in das Römisch-Justinianeische Rechtsb.* (1817), 34, 203 ff.; Savigny, *Gesch.* iii. 48 ff. (nos. 20–2); Haubold, *Instit. iuris Romani litterariae*, i (1808); Zimmern, *Gesch. des röm. Privatr.* i (1826). This older bio-bibliographical literature culminates in Heineccius, *Hist. iuris civilis* (1733), and Joh. Aug. Bach, *Hist. iurispr. Romanae* (1754, ed. Wenck, 1822). See on this school in general Stintzing–Landsberg, *Gesch. der deutsch. RW.* vols. i–iii; René Dekkers, *Het Humanisme en de Rechtswetenschap in de Nederlanden* (1938); Coing, *Z* lix (1939), 697.

[2] Gibbon, *Decline and Fall of the Roman Empire*, chapter 44 (ed. Bury, iv. 441). This chapter was edited in German by Hugo: *Eduard Gibbons hist. Übersicht des röm. Rechts*, 1789. Savigny, *Vom Beruf unsrer Zeit f. Gesetzgebung u. RW.* (ed. 3, 1840), s. 4; Puchta, *Cursus d. Instit.* (ed. 1, 1841), the sections on Roman jurisprudence.

[3] Editions: see E. Landsberg, *Gesch. d. deutschen RW.* iii. 2, *Notenband*, 336; appreciation: *Textband*, 792 ff.

[4] For more recent surveys of Roman jurisprudence see the text-books. Cf. especially the sections dealing with the subject in Krüger, *Gesch. d. Quellen u. Lit. des. r. R.* (ed. 2, 1912)—antiquated, but still indispensable; Bruns–Lenel, *Gesch. d. Quellen des RR*; Bonfante, *Storia delle fonti del. dir. rom.* (1909); Kübler, *Gesch.*; Kunkel, ss. 13–21; Buckland, *Manual*; *Textbook*; Class. Rom. Law in *Cambridge Ancient History*, xi (1936), ch. xxi; De Zulueta, 'The Development of Law under the Republic', *Cambridge Ancient History*, ix (1932), ch. xxi; 'The Science of Law', in *The Legacy of Rome* (ed. by C. Bailey, 1923); Jolowicz, *Introd.*; De Francisci, *Storia*; Arangio-Ruiz, *Storia*; Monier, *Man.*; Hermesdorff, *Schets der uitwendige geschiedenis van het Romeinsche recht* (1936), is inaccessible. Max Hamburger, *The awakening of Western Legal Thought* (1942), does not deal with Roman jurisprudence. On Greek jurisprudence see Paul Vinogradoff, *Outlines of Historical Jurisprudence*, ii, 'The Jurisprudence of the Greek City' (1922); Calhoun, *Introduction to Greek Legal Science* (1944).

(v)

The task before us is clear. We must resolutely set aside purely biographical questions; we must concentrate on the history of the lawyer's art to the exclusion of the history of its individual exponents. The field of biography has already been harvested. The crop could not, from the nature of the case, be heavy; the personalities of the Roman jurists are hidden from us for good and all. The biographies of the individual jurists, with their fragmentary personal details and bare catalogues of works, must be left in the background and the first place must be given to their mistress, Roman legal science herself. Our main concern is with the sociological structure of that science, its tendencies and methods. It must, however, be admitted that, as soon as one seriously attacks this subject, one is forced to recognize that only a very modest contribution to it is possible at the present time, because indispensable preparatory studies are either totally lacking or incomplete. For that matter, no work exists which presents the history of science in antiquity as a whole, and it is only in that setting that Roman legal science can be completely understood. But the desired preparatory studies will not be forthcoming, unless a preliminary survey of the subject as a whole, bare outline though it be, is attempted. 'Aggrediar non tam perficiendi spe quam experiendi voluntate.'[1]

[1] Cic. *Orator*, 1. 2.

PART I

THE ARCHAIC PERIOD

Εἰ δή τις ἐξ ἀρχῆς τὰ πράγματα φυόμενα βλέψειεν, ὥσπερ ἐν τοῖς ἄλλοις καὶ ἐν τούτοις κάλλιστ' ἂν οὕτω θεωρήσειεν.[1]

ARISTOTLE, *Politica*, 1252*a*.

INTRODUCTION

(i)

PASSING over the question whether the Twelve Tables are to be attributed, as tradition has it, to the fifth century or only to the fourth,[2] we begin with the period immediately following them. Nothing is known about any earlier Roman jurisprudence; it cannot even be determined how far the Twelve Tables themselves were Greek or Roman work, though a strong Greek influence is undeniable.[3] In the period following the Twelve Tables the Roman jurisprudence we know so well, the jurisprudence which reached adolescence in the last century of the Republic and maturity in the age of Hadrian, was still in its infancy. It is therefore proper to begin with this period and to describe it as archaic (*ἀρχή* = beginning).[4]

(ii)

The period ends at the close of the third century B.C., that is about the end of the Second Punic War, when a mighty flood of Hellenism carried jurisprudence into a new phase.

[1] 'Here, as always, a correct view will be obtained if we consider the growth of things from their beginning.'

[2] Cf. Täubler, *Untersuchungen z. Gesch. des Dezemvirats und d. Zwölftafeln*, 127 ff.; Berger, *PW* iv A. 1900 ff.; Tenney Frank, *An Economic Survey*, 1, 13.

[3] Schulz, 124, 5. Ed. Norden, *Aus altröm. Priesterbüchern* (Acta reg. soc. human. litt. Lundinensis, xxix, 1939), 254 ff.; G. Devoto, 'I problemi del più antico vocabolario giur. Rom.', *Annali della R. Scuola Normale Sup. di Pisa*, ser. 2, vol. ii (1933), 225 ff. *ACI*, Roma 1, 15; *Storia* (1940) 72.

[4] Cicero several times (*p. Mur.* 12. 26: 'haec iam tum apud illos barbatos ridicula'; *p. Sest.* 8. 19; *p. Caelio* 14. 33; *De fin.* 4. 23, 62) ridicules this period as the age of the longbeards. But the civilization of the period, which as regards jurisprudence is the archaic period, was in fact anything but primitive (Tenney Frank, *Economic Survey*, 2 ff.). Knowledge of reading was common in Rome at least by the end of the sixth century: Ed. Fraenkel, *Rome*, 7. If, as Mommsen said (*Schr.* iii. 598), all science is a luxury, this is specially true of legal science, without which a high degree of civilization can exist.

I

THE JURISTS

(i)

1. THE earliest Roman jurists known to us are the State priests (*sacerdotes publici*),[1] in whose hands lay the application and development of sacral law. Not every such priest can be styled a jurist in the sense previously defined,[2] but in the ranks of the priesthood were always to be found larger or smaller groups of men who busied themselves vocationally with the sacral rules affecting their office and thus acquired a professional knowledge of them; these men may be styled 'jurists of the sacral law'. The history of Roman legal science is, however, concerned with sacral law and its science only in so far as sacral law touches profane and provides parallels to it; matters purely of cult belong to the history of religion. We may therefore confine our attention to the four great colleges: of pontiffs, augurs, *decemviri sacris faciundis*,[3] and *fetiales*.[4] Within the college of pontiffs, which is of outstanding importance, we distinguish: (1) the pontiffs, (2) the *rex sacrorum*, (3) the *flamines* (five in all), and (4) the Vestal virgins (six).[5]

2. It is necessary from the outset to be clear as to the religious and sociological character of the members of the four priestly colleges. Priests they were, but the great variety of meanings borne by the term 'priest'[6] has often been overlooked by legal historians. In the present case the spiritual and charismatic elements of priesthood are very much in the background.[7] The Roman State priests were no magicians or soothsayers, no clairvoyants, rainmakers, or medicine men,[8] they were not 'men of

[1] For the following see Wissowa 479 ff.

[2] Above, p. 2.

[3] A. A. Boyce, 'The Development of the "Decemviri sacris faciundis"', *TAPhA* lxix (1938), 161 ff.

[4] Liv. 36. 3. 7 is authority for a *collegium fetialium*. The distinction between *collegia* and *sodalitates* of priests (Wissowa, 485, 550 ff.) is of no legal interest.

[5] Th. C. Worsfold, *The History of the Vestal Virgins of Rome*, 1932.

[6] The art. 'Priest, Priesthood' (by various hands) in Hastings's *Enc. of Religion and Ethics*, x. 278 ff., gives an introduction to the morphology of priesthood. See also Bertholet, art. 'Priesthood', *Enc. of the Social Sciences* (ed. Seligman and Johnson), xii. 388 ff.; Max Weber, pt. 2, ch. 4, and pt. 3, ch. 11.

[7] Mommsen's (*Röm. Gesch.* i. 1, ch. 12) is still the best account.

[8] The *pontifices* were no 'Chaldaeans', as Cic. *p. Mur.* 11. 25 calls them, but only in joke, the point being (*De fin.* 4. 27. 74; Plutarch, *Cato* 21) that every one knew they were nothing of the sort. Nigidius Figulus was a 'seer' who, like Samuel

God' whose divine character derived from some mysterious personal endowment.[1] Though the *rex sacrorum*, the *flamines*, and the Vestals were subject to strict ceremonial precepts and taboos,[2] these did not apply to the most important priestly body, the *pontifices*, in the narrow sense, nor to the *fetiales*, *augures*, and *decemviri*. These priests were not 'spiritual' persons, leading an exemplary priestly life, but rather typical *honoratiores*,[3] that is men of high social standing, whom their economic position enabled to undertake public duties without pecuniary reward. The door to their illustrious guilds was opened partly by high birth and partly by meritorious service to the State in peace or war. The priests would, as a rule, have been magistrates before becoming priests: a *pontifex maximus* who had not previously held a curule magistracy was a rarity.[4] Some of them would be priests and magistrates at one and the same time; for the principle that priesthood and magistracy were incompatible was early abandoned, if ever it existed.[5] 'It is', says Cicero,[6] 'our ancient and excellent practice, that leadership in religious worship and in the State should be entrusted to the same persons, namely the most highly respected citizens.' The lists of the known members of the pontifical colleges confirm Cicero's words.[7]

3. Though we know the names of at least some of the jurists of sacral law, we are unable to connect particular juristic achievements with particular individuals. Their jurisprudence was a collective work in which the individual was covered by the body to which he belonged and whose representative he felt himself to be.

(1 Sam. ix. 8), would find lost property (Apuleius, *Apolog.* 42), but he was not a State priest (Kroll, *PW* xvii. 200). In the well-known rain-wonder of the Marcus-column (Mommsen, *Schr.* iv. 498 ff., 508 f.) Marcus did not act as *pontifex maximus*. The ceremony of *elicere aquam* is not a magical act (Wissowa, 121). The Vestals were believed to be capable of detaining a *servus fugitivus* by their prayers (Plin. *Hist. nat.* 28. 13).

[1] C. H. Dodd, *The Authority of the Bible* (1941), 47 ff.

[2] Gell. 10. 15; Wissowa, 506 f., 508; J. G. Frazer, 'Taboo and the Other Perils of the Soul' (*Golden Bough*, 3rd ed., Part II, 1911), 13 ff.

[3] The term adopted by M. Weber, pt. 1, ch. 3, s. 20.

[4] Liv. 25. 5. 4: 'Ante hunc intra centum annos et viginti nemo praeter P. Cornelium Calussam pontifex maximus creatus fuerat qui sella curuli non sedisset.' Mommsen, *Staatsr.* ii. 33.

[5] Leifer, *Aemterwesen*, i (1931), 125 ff. (*Klio*, Beiheft xxiii).

[6] *De domo*, 1. 1.

[7] The list of the known pontiffs of this period (up to about 200 B.C.) will be found below, p. 13; the lists of the augurs and decemvirs are given by Carl Bardt, *Die Priester der vier grossen Collegien aus römisch-repub. Zeit* (K. Wilhelms-Gymn. in Berlin xi. Jahresber., Berlin, 1871), 17 ff., 28 ff. They were reprinted by Brissaud, *Le culte chez les Romains*, i (1889), 35 ff.

(ii)

1. At the very beginning of our period, however, one of the four priestly colleges encroached into the domain of private law. The cradle of the science of private law is placed by Roman tradition in the college of pontiffs,[1] and, untrustworthy in regard to early legal history as that tradition in general is, in this matter it speaks truly: without this point of departure the form taken by the science of private law at Rome would be unintelligible. Thus the first jurists of private law were members of the college of pontiffs.

2. This encroachment requires explanation. Having grasped the true sociological position of the pontiffs, we are in no danger of finding the explanation in sacerdotal lust for power. The idea, too, that the law is a gift of God,[2] and the priest consequently its natural interpreter, was entirely absent. The true explanation is rather that in this period, when the law of commercial relations was but little developed, private law consisted mainly of the law of the family and of inheritance, and that this was 'a branch of law adjoining pontifical law',[3] it being of decisive importance for the purposes of family cult (*sacra privata*) to know who were members of the family and who was *heres*.[4] The concern of the pontiffs with these branches of private law is thus readily intelligible, and also that this special concern led on to the study of private law (including that of civil procedure) as a whole.

3. The names of the earliest jurists of private law are known to us from the list of the pontiffs of this period, but this branch of pontifical jurisprudence also was a collective activity, and tradition tells us nothing of individual contributions to it, except that Tiberius Coruncanius, the first plebeian *pontifex maximus*, was the first to give public instruction in law (private law, of course, is meant), a matter to which we must return below.[5]

(iii)

In the course of the third century a secular science of private law gradually developed by the side of the pontifical.

[1] Pomp. *D.* (1. 2) 2. 6.

[2] Demosth. *adv. Aristogitonem*, 774 (Reiske): *πᾶς ἐστι νόμος εὕρημα μὲν καὶ δῶρον θεῶν.* Often repeated by later writers: cf. *Rhet. Gr.* (ed. Spengel), ii (1854), 53, and *D.* (1. 3) 2. See also the characteristic beginning of Plato's *Leges*.

[3] Cic. *Brutus*, 42. 156: 'ius nostrum pontificium, qua ex parte cum iure civili coniunctum esset.'

[4] The right view is already taken by Rubino, *Untersuchungen*, 218; Krüger, 30. All other more or less fantastic views (e.g. Jhering, *Geist*, i. 300 ff.; Kunkel, s. 13) are erroneous.

[5] Below, p. 10.

1. A late and fluctuating tradition describes as a celebrated jurisconsult Appius Claudius Caecus (cons. 307 and 296 B.C.),[1] who was not a member of the pontifical college, and attributes to him a book *De usurpationibus*, which, however, was not extant in the time of the reporter.[2] His secretary, Cn. Flavius, a freedman (who was *aedilis curulis* in 304 B.C.),[3] published, so the tradition continues, both the pontifical calendar[4] and a book, later known as *Ius civile Flavianum*,[5] giving the formularies of the civil actions,[6] the two publications being inspired by Appius Claudius.[7] Thus was the secret of the pontifical jurisprudence revealed.[8] Latter-day Romanists have filled in the picture:[9] 'these two publications constituted a crushing blow delivered by Appius Claudius at the pontifical college; it broke down, once for all, the monopoly of jurisprudence which these "lords spiritual"[10] had appropriated, and forced open the way to a lay jurisprudence of private law.' All this must be rejected. Our information, which comes from the later annalists, is not entirely consistent and is, for the greater part, antecedently improbable. A work *De usurpationibus* by Appius Claudius is incredible: the earliest juristic writings appear a century later, and it is unlikely in the extreme that the first juristic work should have been so specialized a monograph.[11] It is either a later work wrongly credited to Appius Claudius, or a pure invention, suggested by the desire to make juristic literature begin with the man with whom Roman literature in general begins.[12] To that man of many (political) usurpations[13] a book *De usurpationibus* might be thought eminently appropriate. The possibility that Cn. Flavius did publish the calendar and the processual formularies is, of course, incontestable, although one part of our

[1] See his *Elogium* preserved by an Augustan inscription: *CIL* I, i. 192; *ILS* 54; *Inscr. Ital.* xiii. 3, no. 79, p. 59; Liv. 10. 22. 7; Pomp. *D.* (1. 2) 2. 36. Literature given by Schanz–Hosius, i, s. 20, notably Mommsen, *RF* i. 301 ff., and Münzer, *PW* iii. 2681.

[2] Pomponius l.c. and doubtless already in the time of Pomponius' authority.

[3] Münzer, *PW* vi. 2526.

[4] According to Cic. *p. Mur.* 11. 25; *ad Att.* 6. 1. 8; Liv. 9. 46. 5; Plin. *Hist. nat.* 33. 17.

[5] Pomp. *D.* (1. 2) 2. 7 is the sole authority.

[6] On this point Pomponius is supported by Cic. *De or.* 1. 41. 186, *ad Att.* 6. 1. 8, and Liv. 9. 46. 5.

[7] Only Pomponius.

[8] Only Liv. 9. 46. 5.

[9] Joers, 70, contributes considerably to it. There is grotesque exaggeration also in Mommsen, *RF* i. 304; slightly toned down in *Staatsr.* ii. 45.

[10] Jhering, *Geist*, ii. 393.

[11] So F. Leo, *Gesch. d. röm. Lit.* i (1913), 43, n. 2. Further literature: Joers, i. 86; Schanz–Hosius, i, s. 20.

[12] Schanz–Hosius, i, s. 20.

[13] Mommsen, *RF* i. 305 ff.

sources speaks of the calendar only.[1] But in any case a tradition which, on the strength of these publications, converts Cn. Flavius into a sort of democratic Prometheus betrays a complete misconception of the legal conditions of the fourth century. The calendar was no secret; neither were the processual formularies[2] which, for generations past, suitors had obtained from the pontiffs in writing or by dictation or by prompting in court. If they had been pontifical secrets, neither Appius Claudius nor Cn. Flavius could have published them, seeing that neither of them was a member of the college. What is more important, the mere publication of the formularies would not teach the juristic technique which had drafted them. Thus the publications of Cn. Flavius, even if we accept their existence, were in no sense a break with the past and the beginning of a new era. The *ius Flavianum*, assuming it to have existed, must have been a bare collection of formulae, such as we find elsewhere in early jurisprudence; it is, at most, some slight indication of the gradual development of a lay jurisprudence. Sensational events have no place in the history of Roman legal science.[3]

2. The same judgment must be passed on the late tradition[4] that Tiberius Coruncanius, the first plebeian *pontifex maximus*, was the first to provide some sort of instruction in law by giving his *responsa* publicly. The story is obviously fabricated out of a passage of Cicero,[5] which names a number of jurists as having given *responsa* publicly; Coruncanius heads the list. The story thus loses all value: even before Coruncanius pontiffs must on occasion have given *responsa* in public. How little Coruncanius marks a break[6] can be inferred from the fact that we know of no important pupils of his.[7] The first non-pontifical jurists mentioned by our tradition are the brothers Sextus and Publius Aelius Paetus,[8] and they

[1] Plin. *Hist. nat.* 33. 17 and (specially notable) Cic. *p. Mur.* 11. 25, where it is (humorously) suggested that after the publication of the calendar the pontiffs composed the procedural formulae in order still to have a secret.

[2] The correct view is already to be found in Puchta, *Cursus d. Instit.* i, s. 77, and Bechmann, *München SB*, 1890, ii. 153 ff.

[3] On the *ius Flavianum*: O. Seeck, *Die Kalendertafel der Pontifices* (1885), 1 ff.; E. Pais, 'Gneo Flavio e la divulgazione dell' ius civile', *Ricerche*, i (1915), 215 ff.; Danneberg, *PW* x. 1215; Schanz–Hosius, i, s. 17.

[4] Pomp. *D.* (1. 2) 2. 35: 'ante Tiberium Coruncanium publice professum neminem traditur'; s. 38: 'post hos fuit Tiberius Coruncanius, ut dixi, qui primus ⟨publice⟩ profiteri coepit.'

[5] *De or.* 3. 33. 133, 134.

[6] According to Joers, 76, Coruncanius produced a revolutionary change (!), but Cicero is unaware of anything of the sort.

[7] Contrast the effect of the appearance of Irnerius at Bologna.

[8] Pomp. *D.* (1. 2) 2. 38.

occur at the very end of our period, at the transition to the next; Sextus was consul in 198 and Publius in 201 B.C.

3. Other milestones are lacking, but the brothers Aelii certainly provide an indication that in the course of the third century B.C. a non-pontifical jurisprudence of private law did develop. One must, however, beware of attaching excessive importance to this. The men who now, towards the end of our period, appear as jurists without being members of the pontifical college come from the same social circles as the pontiffs: they hold high magistracies and even belong to other branches of the priesthood. Of this group the two Aelii are typical: both held the consulship as well as the censorship; Publius was also an augur.[1] Bearing in mind that the pontiffs were no 'Lords Spiritual', one realizes that, in itself, the 'secularization of the science of private law' was of no great importance: its exponents became more numerous, but its character and tendencies as a science remained unchanged. Of a conflict between secular and pontifical jurisprudence there is absolutely no question.

(iv)

There was also, even in this early period, a science of public law. The jurists of the *ius publicum* were to be found among the magistrates and especially the senators. It was in these circles that this not very extensive branch of legal science was continuously applied and developed. Once again we can point to no individual achievements, for, as the elder Cato rightly said, the *ius publicum* of Rome was the collective work of generations, not the creation of gifted individuals.[2]

(v)

The total result of what has been said is that the jurists, whether of sacral, private, or public law, all came from the same social circles, and that in part it was the same individuals who, as magistrates and senators, administered public and, as *pontifices*, sacral and private law. This is why Roman jurisprudence is so uniform and self-consistent; this is the explanation of the far-reaching similarity of its various creations. It is an error to argue, as has been argued from the resemblance of many of the institutions of private law with those of sacral, that the former was influenced by

[1] Joers, 99; Klebs, *PW* i. 526, 527, no. 105; Schanz–Hosius, i, s. 78.

[2] Cic. *De re pub.* 2. 1. 2: 'nostra res publica non unius ingenio, sed multorum, nec una hominis vita, sed aliquot constituta saeculis et aetatibus.' Likewise Polyb. 6. 10. 12 f. Corn. Nepos, *Cato*, 3. 4: 'Bellorum duces non nominavit (scil. Cato) sed sine nominibus res notavit.' F. Leo, *Gesch.* i (1913), 296.

the latter, and that the pontiffs 'just because they were priests',[1] modelled the *ius privatum* upon the *ius sacrum*. This is to overlook the equal similarities displayed by the *ius publicum* and to misconceive the sociological position of the pontiffs.[2] Sacral, private, and public law were alike forged by the same small, exclusive, socially and economically homogeneous class, and their identity in character needs no further explanation. There can be no question of any primacy of sacral law in this period.

(vi)

In every aristocratic system an important part is played by a subordinate staff, for the simple reason that the aristocrat has in general little inclination for routine-work. Thus the Roman priests (especially the pontiffs) and magistrates were supported by a large subordinate staff, notably of secretaries and copyists,[3] which necessarily exercised no small influence on the development and application of the numerous formulae. Sometimes these secretaries styled themselves jurists,[4] and quite rightly. Their contributions remain unrecorded in the history of Roman jurisprudence, but we should at least remember their existence. An aristocratic régime is unreal and unintelligible if one forgets the existence of subordinate functionaries.

(vii)

The Roman municipalities were organized on the pattern of Rome, having magistrates and priests as at Rome.[5] There must therefore have existed a municipal jurisprudence, but we can say no more. It played no part in the development of Roman legal science and may consequently be set aside by us.

(viii)

We will now give a full list of the *pontifices* during the archaic period whose names are known to us (p. = *pontifex*; p. m. = *pontifex maxi-*

[1] Mitteis, *RP* i. 26 ff., is right on the whole, but he had not seen through the basic error of earlier views. On A. Haegerström, *Der röm. Obligationsbegriff im Lichte der allgem. röm. Rechtsanschauung* (Upsala, 1927) and *Das magistratische jus in seinem Zusammenhang mit d. röm. Sakralrechte* (Upsala, 1929), see especially J. Binder's criticism of the first-named in *KVJ* (3. F.) xxiv (1931), 269 ff. Kübler, *Phil. Wochenschr.* 1929, 203 ff., and Kunkel, *Z* xlix (1929), 479 ff., are too hesitating. See further Beck, *Festschrift P. Koschaker*, i. 1 ff. (1939).

[2] See above, p. 7.

[3] On the subordinate staffs of the magistrates see Mommsen, *Staatsr.* i. 320 ff. (346 ff. on the *scribae* in particular), and Kornemann, *PW* ii A. 848 ff. On those of the priests see Wissowa, 497, 519.

[4] Mommsen, *Staatsr.* i. 352.

[5] *ILS* iii, pp. 568 ff., 682 ff.

mus). Readers who wish to have a clear picture of the sociological character of these men must read the biographical literature mentioned in the following list. See in general Carl Bardt, *Die Priester der vier grossen Collegien aus römisch-republikanischer Zeit.* Jahresbericht des K. Wilhelm Gymnasium Berlin, 1871; P. Habel, 'Fastes pontificaux', in Marquardt, *Le Culte chez les Romains* (trad. par Brissaud), i (1889), 385 ff.; Münzer, *Adelsparteien*, Index v. *pontifices*.

C. Papirius p. m., legendary, according to Dionys. 3. 36 at the beginning of the Republic.
Q. Furius p. m. 449. Münzer, *PW* vii. 317.
M. Papirius p. m. Münzer, *PW* vii. 317.
A. Cornelius p. m. 431. Münzer, *PW* iv. 1252.
Sp. Minucius p. m. 420. Münzer, *PW* xv. 1944.
M. Folius p. m. 390. Münzer, *PW* vi. 2828.
C. Fabius Dorsuo p. 390. Münzer, *PW* vi. 1768.
M. Valerius p. 340. Livy 8. 9.
P. Cornelius Calussa p. m. 332–304. Münzer, *PW* iv. 1273.
Cornelius Barbatus p. m. 304. Münzer, *PW* iv. 1426.
P. Decius Mus. p. 300; cos. 312. Münzer, *PW* iv. 2282.
P. Sempronius Sophus p. 300, cos. 304, cens. 300. Münzer, *PW* ii A. 1437.
C. Marcius Rutilius p. 300, cos. 310, cens. 294. Münzer, *PW* xiv. 1590.
M. Livius Denter p. 300, cos. 302. Münzer, *PW* xiii. 853.
Tiberius Coruncanius p. m. about 254, cos. 280, dict. 246. Münzer, *PW* iv. 1663.
L. Caecilius Metellus p. m. 243–221, cos. 251, dict. 224. Münzer, *PW* iii. 1203.
P. Scantinius p. till 216. Münzer, *PW* ii A. 352.
Q. Aelius Paetus p. died 216. Klebs, *PW* i. 526.
L. Cornelius Lentulus p. m. since 221, cos. 237, cens. 236. Münzer, *PW* iv. 1377.
C. Papirius Maso p. till 213, cos. 231. Münzer, *Adelsparteien*, 111, 114.
M. Pomponius Matho p. 217, cos. 231. Münzer, *Adelsparteien*, 161.
L. Aemilius Paullus p. 217, cos. 219.
T. Otacilius Crassus p. 217, praetor 217.
Q. Fabius Maximus Cunctator p. 216, cos. 233. Münzer, *PW* vi. 1814.
T. Manlius Torquatus p. 216, cos. 235. Münzer, *PW* xiv. 1207.
Q. Fulvius Flaccus p. 216, cos. 237. Münzer, *PW* vii. 243.
Q. Caecilius Metellus p. 216, cos. 206. Münzer, *PW* iii. 1206.
M. Cornelius Cethegus p. 213, cens. 209, cos. 204. Münzer, *PW* iv. 1279.
Cn. Servilius Caepio p. 213, cos. 203. Münzer, *PW* ii A. 1780, *Adelsparteien*, 147.
P. Licinius Crassus p. m. 212, cens. 210, cos. 205. Münzer, *PW* xiii. 331.

C. Livius Salinator p. 211, cos. 188. Münzer, *PW* xiii. 888.
C. Servilius Geminus p. 210, p. m. 183, cos. 203. Münzer, *PW* ii A. 1792, *Adelsparteien*, 147.
Ser. Sulpicius Galba p. 203, aed. cur. 209. Münzer, *PW* iv A. 759.
C. Sempronius Tuditanus p. 202, aed. pleb. 198, praetor 197. Münzer, *PW* ii A. 1440.
C. Sulpicius Galba p. 202. Münzer, *PW* iv A. 753.

II

THE LEGAL PROFESSION

THE present chapter describes the field in which the jurists operated and the forms of their operations. Though these forms were everywhere very similar, it will be necessary to treat sacral, private, and public law separately and, with regard to sacral and public law, owing to the scantiness of our information as to the archaic period, to rely on evidence from the following period.

(i)

1. The chief duty of the Roman as of other priests was, by meditation on the nature and will of the divinity and from religious experience, to discover the laws governing the relations of man to God (*ius divinum, sacrum, fas*);[1] in other words, to define and interpret the sacral law.[2] To the priests were due the complicated rituals, such as the hymn of the Arval brethren,[3] the chants of the *Saliares*,[4] and the multitudinous ceremonial rules which are to be inferred from various fragments[5] and the *Tabulae Iguvinae*.[6] To them also were due the principles governing vows, dedications and consecrations, the statutes of the temples and sacred groves, the sepulchral law, and the international law of declaration of war and conclusion of treaties.[7] In these matters, though in general the State left them a free hand, they were limited by the *ius publicum*. It was for the State to determine what cults might and should be practised within its territory, and it was within its competence to reject as erroneous the legal pronouncements of the priests.[8]

[1] Berger, *PW* x. 1212, 1292; Mitteis *RP* i. 22 ff.

[2] Cic. *De domo*, 41. 107: 'Equidem sic accepi, pontifices, in religionibus suscipiendis caput esse interpretari, quae voluntas deorum immortalium esse videatur.' *De harusp. resp.* 6. 12: '. . . quod tres pontifices statuissent, id semper populo Romano, semper senatui, semper ipsis dis immortalibus satis sanctum, satis augustum, satis religiosum esse visum est.' Cf. Liv. 1. 20. 5 f. Nillsson, 'Wesensverschiedenheiten der röm. u. griech. Religion', *Mitt. d. deutsch. archaeol. Instituts, Rom.* xlv (1933), 245 ff.

[3] Text and older literature: Schanz–Hosius, *i*, s. 7; later especially Ed. Norden, *Aus altröm. Priesterbüchern*, 109 ff., on which Weinstock, *JRS* xxx (1940), 84 ff.

[4] Schanz–Hosius, i, s. 7.

[5] On the existing collections of fragments (defective and in part difficult of access) see G. Rohde, *Die Kultsatzungen d. röm. Pontifices* (Religionsgeschichtliche Versuche u. Vorarbeiten, xxv, 1936), 6 ff.; Wissowa, s. 1 and p. 527, n. 5.

[6] On the *Tabulae Iguvinae* see Philipp, *PW* ix. 968. Latest edition: Devoto, *Tabulae Iguvinae*, 1937.

[7] On all these conceptions: Wissowa.

[8] Nillsson, 251, is wrong.

Conflicts with magistrates, Senate, and *Comitia* were inevitable,[1] but, owing to the sociological character of the priestly colleges[2] and to Roman discipline and piety in this period, also rare.

2. Sacerdotal declarations of the law took the following forms: (i) general rules in the style of the Twelve Tables, such as we have in the so-called *leges regiae*;[3] (ii) instructions for the performance, whether by priest or layman, of sacral acts;[4] (iii) oral formulae for use in sacral acts, often combined with the ceremonial instructions just mentioned; (iv) 'opinions' (*responsa, decreta*) on questions of sacral law,[5] to which we shall return immediately. (v) There is no mention of a sacerdotal *ius edicendi*, but the *pontifex maximus* must surely have possessed it,[6] seeing that inscriptions[7] have preserved edicts, though not earlier than the time of Augustus, of the *quindecimviri*, who correspond to the *decemviri sacris faciundis*[8] of our period. There was, however, no development of pontifical edictal law parallel to that of the praetorian edictal law of later days.

3. The formalism of the sacral law caused the assistance of a priest at the performance of the more important sacral acts to be considered desirable and even necessary. The actual performer of a *votum, devotio, dedicatio*, or *consecratio* was the magistrate, but he was assisted by a *pontifex*, who prompted him in the verbal formula and any prescribed ritual gestures.[9]

4. Of special importance in the development of legal science were the sacerdotal 'opinions' (*responsa, decreta*).[10] When the question put to the priests was whether a contemplated sacral act was admissible and, if so, in what form, the opinion would be in the

[1] E.g. Liv. 9. 46. 6 (from Calpurnius Piso, H. Peter, *Historicorum Rom. Reliq.* i, 1914, 132): 'Aedem Concordiae in area Vulcani summa invidia nobilium dedicavit (scil. *Cn. Flavius*); coactusque consensu populi Cornelius Barbatus pontifex maximus verbis praeire, cum more maiorum negaret nisi consulem aut imperatorem posse templum dedicare.' On the passage see O. Seeck, *Die Kalendertafel der Pontifices*, 42 ff.; Pais, *Ricerche*, i. 271 ff., needs correction; Leifer, *Aemterwesen*, i. 122 ff.; see also Joers, i. 41, with citations.

[2] Above, p. 6.

[3] Below, p. 89.

[4] Below, p. 34.

[5] Below, p. 16.

[6] Kipp, *PW* v. 1940; cf. Mommsen, *Staatsr.* ii. 39; Wissowa, 512, n. 3, 389, 498. Liv. 1. 32. 2: '. . . omnia ea ex commentariis regis' (Numae), 'pontificem in album relata proponere in publico iubet' (Ancus Marcius).

[7] In the *Acta* of the *Ludi Saeculares* of 17 B C.: *ILS* 5050, *vv.* 110, 155, 162. One of these edicts: Bruns, 74. Discussion: Mommsen, *Schr.* viii. 588.

[8] See above, p. 6.

[9] Wissowa, 394, 531; Doelger, *Antike u. Christentum*, ii (1930), 241 ff.: 'Vorbeter u. Zeremoniar.'

[10] *Responsa pontificum*: Wissowa, 514; *augurum* Wissowa, 527, 531; *Fetialium*: Wissowa, 551. *Responsa pontificum* only: Mommsen, *Staatsr.* ii. 44 ff., 48 ff.; Joers, 29 ff.

nature of advice on action to be taken: we will call such opinions 'cautelary'. But the priests might also be prayed to pronounce on the legality of an act already performed; in this case the answer would be in the nature of a judicial pronouncement, though not of a judicial sentence in the legal sense: we will call such opinions 'judicial'. In neither case did the priests inquire into the facts of the case; their answer would be given on the hypothesis that the allegations of fact were true ('si haec quae proponuntur vera sunt, secundum ea quae proponuntur'), and would thus deal solely with the question of law. In principle a priestly declaration of law was not argued, but authoritative: *stat pro ratione auctoritas*. One could disregard it, but at one's own risk.[1] Whether the *responsum* was given by the whole college or by an individual member of it depended on the importance of the case and of the person putting the question.[2] A magistrate, naturally, was always entitled to demand a *responsum* of the whole college, since in sacral law the four priestly colleges were his *consilium*, as the Senate was in public law.

Cautelary responsa of the *pontifices*. Octavian before marrying Livia, who had recently been divorced and was with child, asked the pontiffs: 'an concepto necdum edito partu recte nuberet' (Tac. *Ann.* 1. 10).[3] In 200 B.C. the consul, when considering the making of a *votum*, consulted them 'si posset recte votum incertae pecuniae suscipi'. The answer was, the *pontifex max.* dissenting: *posse rectiusque etiam esse* (Liv. 31. 9. 8). The consul Claudius Marcellus wished to dedicate a temple to *Honos* and *Virtus* jointly, in fulfilment of a vow made at the battle of Clastidium (223); the pontiffs, evidently in answer to a question, 'negabant unam cellam duobus diis recte dedicari'. The consul acted accordingly (Liv. 27. 25. 8). The *pontifices* were regularly consulted when there was a question of transferring a corpse from one grave to another. An inscription preserves an answer given on such an occasion:[4] 'Collegium pontificum decrevit, si ea ita sunt, quae libelo[5] continentur, placere . . . .[6] puela,[7] de qua agatur, sacelo[8] eximere et iterum ex praescripto

[1] After the pontifical college had advised on the consecration of Cicero's house (*Ad Att.* 4. 2. 3), the pontiffs who were members of the Senate were asked in the Senate for their reasons ('quid essent in decernendo secuti'); the *responsum* gave no reasons. They refused to answer: 'M. Lucullus de omnium collegarum sententia respondit: religionis iudices pontifices fuisse, legis senatum' (*Ad Att.* 4. 2. 4). See the passages of Cicero cited above, p. 15, n. 2.

[2] Cf. Joers, i. 36, 43 ff.; Cic. *De domo*, 45. 117; *De harusp.* 7. 13.

[3] So also Dio Cass. 48. 44, giving also the pontiffs' answer: it was that if there was any doubt whether conception had taken place, the marriage should be put off, but if the fact of conception was admitted, there was nothing to prevent its taking place immediately.

[4] *CIL* x. 8259; *ILS* 8381; Bruns, 76. Further evidences: Wissowa, 479; Bruns p. 385.

[5] = *libello*, the written question to the pontiffs.

[6] The text here is defective. [7] = *puellam*. [8] = *sacello*.

deponere et scripturam tituli at pristinam formam restituere piaculo prius dato operis faciendi ove atra.'[1] In ordinary cases such *responsa* were usually given by a single *pontifex* without a decree of the college.[2]

Cautelary responsa of the *Fetiales*: 'consulti fetiales ab consule Sulpicio (200 B.C.) bellum, quod indiceretur regi Philippo, utrum ipsi utique nuntiari iuberent, an satis esset, in finibus regni quod proximum praesidium esset, eo nuntiari. fetiales decreverunt, utrum eorum fecisset, recte facturum' (Liv. 31. 8. 3).[3]

Judicial responsa. In 57 B.C. the consuls asked the pontifical college whether the consecration of Cicero's house was valid. The terms of the *responsum* were: 'Si neque populi scitu neque plebi scitu is, qui se dedicasse diceret, nominatim ei rei praefectus esset, neque populi iussu aut plebi scitu id facere iussus esset, videri posse sine religione eam partem areae M. Tullio Ciceroni restitui' (*Ad Att.* 4. 2. 3). A similar *responsum*: Cic. *De domo*, 53. 136. Camillus had vowed one-tenth of the spoils to Apollo. Did this extend to movables? The pontiffs, when consulted by the Senate, decided: 'Quod eius ante conceptum votum Veientium fuisset et post votum in potestatem populi Romani venisset, eius partem decumam Apollini sacrum esse' (Liv. 5. 25. 7). In 194 B.C. the pontiffs pronounced that the vow of a *ver sacrum* had been improperly fulfilled: 'Cum P. Licinius "non esse recte factum" collegio primum, deinde ex auctoritate collegii patribus renuntiasset, de integro faciendum arbitratu pontificum censuerunt' (Liv. 34. 44. 2). In 327 B.C. the consul named a dictator: 'nec tamen ab dictatore comitia sunt habita, quia, vitione creatus esset, in disquisitionem venit. consulti augures "vitiosum videri dictatorem" pronuntiaverunt' (Liv. 8. 23. 14).[4]

5. The *pontifex maximus* was the judge in disciplinary proceedings against members of his college,[5] but otherwise no judgments in the true legal sense were delivered by the priests.

6. There was no formal instruction in sacral law. Members of the colleges learnt the law of their department empirically, with assistance from their seniors and the secretarial staff. The college archives lay open to the industrious.[6]

7. Literary activities were confined to the drafting of *responsa*

[1] Further evidences: Wissowa, 479.

[2] Settlement of a question by the *promagister* of the college: *ILS* 8380; *CIL* vi. 2120, but only in A.D. 155; cf. Wissowa, 509.

[3] Further evidences on this question: Wissowa, 551, n. 3.

[4] Similar *responsa* of the augurs: Wissowa, 531.

[5] Mommsen, *Staatsr.* ii. 54 ff.; Wissowa, 510; Zmigryder–Konopka, 'Pontifex maximus, iudex atque arbiter rerum divinarum humanarumque', *Eos*, xxxiv (1932/3), 361 ff.

[6] Thus, in this period, one who was not a member of a priestly college could not study sacral law. This is Cato's meaning when he says: 'Ego me nunc "volo" ius pontificium optime scire: iamne ea causa pontifex capiar? si "volo" augurium optime tenere, ecquis me ob eam rem augurem capiat?' (Cato, *Orig.*, in Gell. 1. 12. 17. See below, p. 40).

and of minutes for the archives. We shall have occasion to return to this subject below.[1]

8. The priests' purely religious functions lie outside our scope. Even the very singular proceedings of the *Fetiales* acting as international heralds of the Roman State (*publici nuntii populi Romani*)[2] require no more than bare mention.

(ii)

1. The rules of private law, like those of sacral, were 'found' by the *pontifices*, but the forms taken by their 'findings' were somewhat different. There was no formulation of abstract rules. Apart from the *rogatio* of the *pontifex maximus* in the *comitia calata*, the *responsum* was the sole medium available. We must proceed to further discussion of both *rogatio* and *responsum*.

2. From ancient times the *pontifex maximus* had the right to convoke the *comitia curiata* and to elicit its consent to adrogations (adoptions of persons *sui iuris*) and testaments.[3] The power of developing the law involved by this right, which was as old as adrogation and testament, should be clearly realized. A magistrate who wished to pass a statute through a popular assembly had to lay before it an exactly formulated proposal, which the assembly could only either accept or reject as a whole.[4] The *pontifex maximus*, similarly, had to present to the *comitia curiata* an exactly formulated adrogation or testament. Now this means that the *pontifex maximus* had complete control of the form to be taken by these acts in the law. He could refuse to propose any formulation which he judged to be incorrect: for example, he might insist that a testament should begin with the institution of a *heres*,[5] that this should be by the words *heres esto*,[6] that children not instituted must be expressly excluded (*exheredatio*), sons *nominatim*, daughters and grandchildren by a general clause,[7] and so on. In this way, so long as the *testamentum calatis comitiis* remained in use,[8] the *pontifex maximus* exercised a decisive influence on the development of the law of wills.

3. In private law, as in sacral, the giving of *responsa* or 'opinions', whether with regard to acts contemplated (cautelary opinions) or

[1] Below, p. 33.

[2] Wissowa, s. 70.

[3] Mommsen, *Staatsr.* ii. 37; iii. 318 ff.; Wissowa, 512; Kübler, *PW* iii. 1330 ff. That in this period an enactment of the *comitia* was as necessary for a testament as for an adrogation ought not to be disputed. Literature: see Kunkel, s. 200, n. 3.

[4] Mommsen, *Staatsr.* iii. 304.

[5] Gaius, 2. 229.

[6] Gaius, 2. 117.

[7] Gaius, 2. 123, 124, 127, 128.

[8] When it dropped out of use we do not know: Gaius, 2. 103.

acts already performed (judicial opinions), was the most important form of juristic activity. We read that the pontifical college delegated this function annually to one of its members,[1] which is likely enough, since the work would mostly be routine.[2] By their cautelary *responsa* the *pontifices* supplied applicants with the manifold formulae required for the acts (*actiones* in the wider sense)[3] of the older private and procedural law, and these were accepted by practice. They comprised the forms of *institutio heredis* (including the various kinds of *substitutio* or alternative institution), disinherison, nomination of tutors, *cretio* and its observation, legacies, *confarreatio*, adrogation, mancipation (including its fiduciary uses for the purposes of making a will and marriage), *in iure cessio* (conveyance by surrender in court), manumission *vindicta*, the oldest forms of the verbal contract (*sponsio, fidepromissio*), entry into bondage (*nexum*), release from obligation by the ceremony with bronze and scales (*solutio per aes et libram*) or by formal words (*acceptilatio*), and finally the forms of action (*legis actiones*).[4] The whole of this vast treasury of formulae is the work of the pontiffs: they are so obviously the product of rational technical thinking[5] and, on the other hand, so closely similar to the *actiones* of sacral law, that no other authorship is conceivable.

Some of these acts were already contemplated by the Twelve Tables, and the work of the *pontifices* consisted in giving them shape. But in other cases the whole act, form and content, was a pure creation of the pontifical cautelary jurisprudence: examples are adrogation, emancipation, the mancipatory testament, fiduciary mancipation, *cretio*, and the forms of legacy. Naturally the pontiffs would not recommend a formula to a client except as ensuring the validity of the act in question. If later its validity was disputed, an authoritative decision would be given by a court of law. There may have been argument in court, but on this point we have no real information: Pomponius' reference[6] to disputation in the *forum* is certainly not based on a genuine ancient tradition,[7]

[1] Reported only by Pomp. *D.* (1. 2) 2. 6: 'Omnium tamen harum et interpretandi scientia et actiones apud collegium pontificum erant, ex quibus constituebatur, quis quoquo anno praeesset privatis.' Though defective, the text seems sound in substance. With *privatis* must no doubt be understood *rebus* or *causis*. Cf. Wlassak, *Prozessformel*, 102.

[2] See also above, p. 18. n. 2. [3] Joers, 21. Beseler, *Z* lvii (1937), 1.

[4] On these formulae see the text-books, and below, p. 34.

[5] Jhering, *Geist*, ii. 599. Mommsen, *Schr.* vii. 213. [6] *D.* (1. 2) 2. 5.

[7] In any case *disputatio fori* was not a technical expression in jurisprudence, as many Romanists appear to think; it occurs nowhere else in juristic writings: *Voc.* ii. 277. 36.

but merely depicts olden times with colours borrowed from the last century of the Republic. As a rule the *auctoritas* of the pontiffs would secure the acceptance of any formula recommended by them. But many a formula may have had its history; the first drafting may not have given satisfaction, and there would be revision, additions, and clarifications until it was considered that the utmost perspicuity and legal precision had been achieved.

Of judicial *responsa*, on acts already accomplished, we know little except that they certainly were given.[1]

4. The *pontifices* did not function in the field of private law either as judges, in the proper sense, or even as advocates.[2] Nor, apparently, did they assist at the accomplishment of private acts in the law, the formulae being here simpler than those of sacral law. In the *legis actiones* parties were certainly prompted in their formal utterances by experts,[3] but this was a matter of routine, which the pontiffs may well have left to their secretarial staff.[4]

5. Instruction in private law was at first to be acquired only in the same way as in sacral. But early there grew up a kind of public instruction, in that *responsa* were given to some extent in public, which means that a circle of auditors was admitted to the consultations. We have already maintained that the tradition which gives Tiberius Coruncanius the honour of having been the first public teacher of private law rests on shaky foundations.[5]

6. Literary activity in private law was confined to the drafting of *responsa* and formulae. At first these were not published, but reposed in the pontifical archives.[6] We have already spoken of Cn. Flavius' collection of formulae.[7]

7. The *responsum*, whether cautelary or judicial, was so much the essential function of the jurists who, from the second half of the third century B.C., practised in private law without being members of the pontifical college,[8] that it gave them their title: they are called *iuris consulti*. But it was from this group of jurists that, towards the end of our period, came the first literary publications. The *commentaria tripertita* of Sex. Aelius Paetus Catus[9] are the

[1] The *responsum* reported Gaius 4. 11 must come from this period. *Responsa* of Tib. Coruncanius are mentioned by Pomp. *D.* (1. 2) 2. 38, but the two that survive (Bremer, 1, 8) are on sacral law. *Responsa* of Sex. Aelius Paetus are mentioned by Cicero, *De or.* 3. 33. 133; *De re pub.* 1. 18. 30.

[2] So Joers, 46 ff. Cf. Wlassak, *Prozessformel*, 108, n. 83, giving the literature.

[3] Cic. *p. Mur.* 12. 26: 'transit idem iure consultus tibicinis Latini modo.' Cf. Wlassak, *Anklage u. Streitbefestigung, Abwehr* 9; *Prozessformel* 84; Cic. *De or.* 3. 60. 225; R. Büttner, *Porcius Licinus* (1893), 80 ff.

[4] Above, p. 12. [5] Above, p. 10. [6] Below, p. 34.

[7] Above, p. 9. [8] Above, p. 11. [9] Above, p. 10.

first juristic work which advanced beyond a bare collection of formulae and which was composed for publication.[1]

(iii)

Within the limits set by statute (*leges*), the development of public law was in the hands of the circle of men whom we have previously[2] designated 'jurists of the public law'. Their work took the form of the composition of ceremonial instructions and formulae for the various acts of the public law. All the regulations and rules which we are accustomed to term indiscriminately 'Roman constitutional law' are of their making, for example the regulations governing the holding of the popular assemblies (*comitia*), of preparatory meetings (*contiones*),[3] and meetings of the Senate,[4] the scheme and style of a *lex* or *senatusconsultum*, the rules and programmes of certain regularly recurrent acts of the magistrates—prayers, oaths, official nominations and instructions.[5] The crabbed formalism of these sacramental formulae and symbolic rituals is the counterpart of the formalism of sacral and private law; it betrays infallibly the hand of the professional jurist. Their authors, of course, also functioned as consultants, but in this matter no special forms were developed, because legal advice on questions of public law would simply be delivered at a sitting of the Senate. Literary productions consisted merely in the drafting of ceremonial instructions and formulae, of the official records of the magistrates, and lastly of the *leges* and *senatusconsulta* themselves.[6] None of these productions, except the last, were intended for publication; they were kept in the archives of the State and of the earlier magistrates. In the official classes instruction in public law was often imparted by father to son, with the help of the family archives;[7] apart from this, a man was left to acquire his knowledge of and insight into the *ius publicum* in the school of political experience.

[1] On this work see below, p. 35.
[2] Above, p. 11.
[3] Mommsen, *Staatsr.* iii. 369 ff.
[4] Ibid. iii. 906 ff.
[5] Below, p. 36.
[6] Below, p. 36.
[7] Mommsen, op. cit. i. 5, no. 2.

III

CHARACTER AND TENDENCIES OF JURISPRUDENCE IN THE ARCHAIC PERIOD

(i)

As we have seen,[1] the jurists of the archaic period were *honoratiores*, coming from the most respected Roman families. This imparted to their science a distinctive atmosphere, which was not dissipated till the end of the classical period. Republican jurisprudence was as pronouncedly an aristocratic science as the republican administration was an aristocratic system. Jurisprudence was an honourable calling, deriving from its exponents a dignity and authority which secured for it the direction of the development of the law. Graven in the hearts of these men was the maxim: 'high above any human *virtus* stands the law.'[2] Jurisprudence was a national science, because it was controlled by the same men as was the political administration; among them was no place for non-Romans. It was an impersonal science, because the intense *esprit de corps* of the small and exclusive group of jurists suppressed individuality and imposed uniformity.[3] It had no fondness for theorizing, because the jurists were in no sense philosophers and anything but academic. Instruction in the proper sense they did not give, teaching being beneath their dignity: *docere dignitatem non habet.*[4] Modern European jurisprudence, on the contrary, is the child of the medieval school;[5] it was born at Bologna and cannot disown its parentage. To the founders of Roman jurisprudence, public men working out the Roman forms of life, the interpretation of the scanty statute-law was a secondary matter, whereas for the Bolognese professors the interpretation of Justinian's voluminous lawbooks was the essential thing. Also, being aristocratic, Roman jurisprudence was authoritarian; though a matter of reasoning, as its products show, it based its

[1] Above, p. 6 ff.

[2] Ennius, *Hectoris Lytra* (ed. Vahlen, p. 150, ed. Warmington, p. 290): 'Melius est virtute ius: nam saepe virtutem mali / Nanciscuntur: ius atque aecum se a malis spernit procul.' Cf. Büchner, 'Altröm. u. Horazische Virtus', *Die Antike*, xv (1939), 145 ff. (the passage from Ennius is overlooked).

[3] Schulz, 107 f.

[4] Cic. *Orat.* 42. 144; Cicero himself does not fully accept this. Cf. Cic. *Brutus*, 89. 306, on Q. Mucius Scaevola: *nemini se ad docendum dabat.* Below, p. 57.

[5] Irnerius began as a teacher of grammar and logic: H. Kantorowicz, *Z* xxxi (1910), 37.

decisions not on reasons given, but on the authority (*auctoritas*) of the jurists,[1] an authority which was outweighed only by an enactment of the *comitia*. It attached no binding force to previous decisions, particularly not to those of the *iudices*, who were mere laymen. Thoroughly aristocratic, too, is the reluctance of the jurists to commit themselves in advance: their principle was to wait till the case occurred,[2] and to feel their way from case to case. Hence their distaste for legislation, which as far as possible was prevented from intruding on the domain of true 'lawyer's law'.[3] Nor was custom, in the sense of Justinian and the *ius commune*, recognized.[4] Long observance did not endow a rule with an authority equal to that of statute. Great as was the importance attached to *mos maiorum*,[5] it was only 'well established custom', not lightly to be abandoned, but never as binding as statute. Abstract general rules were not deduced from the *responsa* deciding individual cases; the formularies of acts in the law long remained open to modification; the instructions for the performance of legal acts[6] remained *arcana* of the archives and could be varied to meet the occasion. All this shows a determination highly characteristic of an aristocratic régime to keep a firm hold on the development of the law. Finally, it goes without saying that the jurists were unpaid: an aristocrat does not work for money.

Such are the characteristics which formed the soul of Roman jurisprudence. Our period is one of small beginnings, but 'who dare despise the day of small things, if it has proved to be the dawn of mighty ones?'[7]

(ii)

The most immediately noticeable feature of archaic Roman jurisprudence is[8] what we call its actional formalism,[9] by which

[1] Above, p. 17 and p. 21.

[2] Cic. *De re pub.* 1. 18. 30: Laelius praises Sex. Aelius (above, p. 10) 'non quod ea quaerebat, quae numquam inveniret, sed quod ea respondebat, quae eos, qui quaesissent, et cura et negotio solverent'.

[3] Allen, *Law in the Making*, 266, 379.

[4] Schulz, 14; Kaser, *Z* lix (1939), 52 ff. These works give the earlier (out-of-date) literature. See further F. Senn in *Introduction à l'étude du droit comparé*, i (1938), 218 ff.

[5] Schulz, 82 ff.; H. Roloff, *Maiores bei Cicero*, Leipzig. phil. Diss. 1938; Rech, *Mos maiorum*, Marburg. ph. Diss. 1936.

[6] See above, p. 16, and below, p. 33.

[7] Kingsley, *Westward Ho!*, ch. 1.

[8] Already noticed by the ancients: Cic. *p. Mur.* 11. 25 f.; Plin. *Hist. nat.* 28. 3; Gell. 11. 1; Quint. *Inst.* 7. 3. 17.

[9] 'Actional' in the sense of *actio* mentioned above, p. 20.

we mean its tendency to endow every act in the law with a definite form.[1]

1. This tendency is observable in sacral, public,[2] and private law, and in the law of civil procedure, in fact throughout the law, but it has seldom been appreciated comprehensively, in its full extension, because the vision of modern Romanists has been narrowed by their one-sided interest in the private law. Roman law is hardly less rich in forms than Germanic, as the latter is presented in Jacob Grimm's *Rechtsaltertümer*.[3] Its outstanding formality is the spoken word, but witnesses and ritual acts are also found in abundance. There is, however, one formality in which the Roman arsenal of forms is deficient, namely writing.[4] Important legal acts were indeed recorded in writing as early as the sixth century B.C.,[5] but the writing was purely evidential, the record of an already fully accomplished legal act;[6] at most the document might serve to simplify the spoken formula by being referred to in it as containing details.[7] For international treaties also writing was not essential[8] nor even for a *lex rogata*.[9] A *lex* came into being as the result of an oral question and answer[10] and of an announcement of the votes cast made by the presiding magistrate's herald.[11] Thus official publication in writing was no more essential to a *lex* than was a document to the acts of private law during this period. It is true that a projected *lex* was publicly advertised in writing,[12]

[1] Jhering, *Geist*, ii, s. 45 ff., 470 ff.: antiquated, but fundamental and never yet superseded. Also Mitteis, *RP* i, s. 15; Rabel, *Z* xxvii (1906), 290 ff.; xxviii (1907), 311 ff.; Kaser, *Z* lix (1939), 31 ff.; Buckland, *Festschrift Koschaker*, i (1939), 16 ff.

[2] There must have been forms for contracts between the State and individuals. But they were not the forms of private law, and we know little of them. Mommsen's doctrine (*Staatsr.* i. 170 ff.; *Schr.* i. 358, iii. 139) that such contracts were formless is untenable. For the correct view see Jhering, *Geist*, ii. 518; Rabel, *Z* xxvii (1906), 329.

[3] See Note A, p. 333.

[4] The same appears to hold of Greek law in pre-Hellenistic times: Beauchet, *Hist. du droit privé de la république Athénienne*, iv. 16 ff.; Hasebroek, *Hermes*, lviii (1923), 393 ff. The 'literal contract' (Gaius, 3. 128) can hardly belong to our period.

[5] Ed. Fraenkel, *Rome*, 7.

[6] Mitteis, *RP* i. 294.

[7] As in the *testamentum per aes et libram*, Gaius, 2. 104: 'haec ita, ut in his tabulis cerisque scripta sunt, ita do ita lego ita testor.' In the *dedicatio* of an altar reference might be made to the already existing statute of some other temple: Bruns, 106; *ILS* 112: 'ceterae leges huic arae titulisque eaedem sunto quae sunt arae Dianae in Aventino.' Similarly *ILS* 4907; Bruns, 107.

[8] Cf. the formulary for the conclusion of a treaty by the *Fetiales* in Liv. 1. 24. 6 f.: 'ut illa palam prima postrema ex illis tabulis cerave recitata sunt'; on this Heuss, *Klio*, xxvii (1934), 16, 250. Mommsen, *Staatsr.* i. 248, is right and iii. 314 is wrong.

[9] Ibid. iii. 314 is wrong.

[10] The ballot was introduced only by a law of Papirius Carbo of 131 B.C.: ibid. iii. 404.

[11] Ibid. iii. 413.

[12] Ibid. iii. 370; *Schr.* iii. 293.

that the bill was read out to the assembly[1] and that the resolution arrived at was framed by reference to the written project. But the function of this document was precisely the same as that of the *tabulae testamenti* to which a testator referred in his solemn oral declaration (*nuncupatio*). What is the explanation of this determined refusal to recognize writing as a legal formality? One cause undoubtedly was that in ancient times the art of reading and writing was possessed only by few,[2] but the maintenance of the principle even after reading had become part of ordinary education, and when the illiterate could have recourse to professional scribes, cannot be attributed to mere conservatism. It reveals a deliberate and reasoned policy of the legal profession. The oral solemnization of an act ensures that the parties to it shall be present at its conclusion, and their presence was required by the jurists for the sake of clarity and the avoidance of misunderstandings. Solemnization *inter absentes* raises problems which the ancient cautelary jurisprudence preferred to avoid, problems which cannot arise, or arise but seldom, out of an act *inter praesentes*.[3]

2. At Rome, as everywhere, actional formalism passed through three stages of development.[4] In the earliest the jurists regarded the forms as what in fact they were, namely as creations of their own untrammelled cautelary science; at this stage the forms were plastic, adaptable, and capable of being added to. In the second stage the forms became petrified; the jurists felt that they ought not to be further altered; thus their canon became closed. In the third stage the forms were either simply disused or observed as an ancestral rigmarole to be gabbled with a smile; further development of the old forms ceased; in some cases new forms were deliberately devised, in others formalism was abandoned. The first two stages fall within the archaic period, but our defective tradition affords only occasional glimpses of the development.

In its youth *mancipatio* was plastic and adaptable. It began as a form of conveyance by way of sale for cash, but the form was extended to conveyance by way of gift or security or in trust, by means of the insertion of appropriate words, the price becoming nominal (*nummus unus*).[5] *Coemptio* was *mancipatio* with a clause showing that the bride

[1] Mommsen, *Staatsr.* iii. 391; *Schr.* iii. 290.

[2] Leo, *Gesch. d. röm. Lit.* i. 24; but see above, p. 5, n. 4.

[3] For example, the question at what moment a declaration becomes effective, or how mistakes and misunderstandings are to be treated.

[4] On what follows see Kaser, *Z* lix (1939), 31 ff., 64.

[5] Examples of mancipation *donationis causa*: Bruns, 136–40; *fidi fiduciae causa*: Bruns, 135; P. M. Meyer, *Jurist. Papyri*, 9; *FIRA* iii. 291 ff.

was not becoming the slave of the *coemptionator*.[1] A normal *mancipatio* did not admit of the insertion of a condition; yet *mancipatio* for testamentary purposes was so framed that, though the *familiae emptor* became owner, he did so only on condition of his surviving the testator.[2] With these simple adaptations contrast the clumsy and artificial rituals of emancipation and adoption; here petrifaction has set in and the origination of new formulae has been abandoned.[3] The process is carried a step farther when forms are applied, to alien purposes, without being suitably modified, with the result that the declarations of the parties are at variance with the facts. Thus, in spite of what he said, the *familiae emptor* of the mancipatory testament in its latest stage did not become owner, even if he fulfilled the condition of surviving the testator.[4] Again, *acceptilatio* and *solutio per aes et libram* were formal acknowledgements of payment received; their employment, unaltered, as methods of release from obligation involved that the creditor acknowledged untruly that the obligation had been performed.[5]

A similar evolution occurred in sacral law. Petrifaction attacked the purely religious forms first. From early days the language of the hymns of the Arval brethren and the *Saliares* was left unaltered, with the result that in the end not even the singers understood them;[6] they are our oldest monuments of Latin.[7] On the other hand, the language of the not purely religious formulae—of *votum*, *consecratio*, *devotio*, and *evocatio*—was continuously modernized:[8] later grammarians could discover no archaic Latin words in them. The formula of a *votum* was in no respect stereotyped, not even the word *voveo* being obligatory.[9] The story that Scipio Africanus the younger altered the lustral oath may be apocryphal,[10] but it shows at least that such an

[1] So, expressly, Gaius, 1. 123; cf. Kaser, 33 ff.

[2] Kaser, 49. Mancipatory will was unknown to the Twelve Tables, as Gaius, 2. 101, 102 clearly shows (*initio . . . deinde*). About the law of the times before the Twelve Tables Gaius could know nothing. See, on this question, Kunkel, s. 22, 3; Kübler, *PW* v A, 987, Leifer, *Festschr. Koschaker*, i. 239 ff.

[3] *Emancipatio*: Gaius, 1. 132. *Adoptio*: Gaius, 1. 134. Cf. Kaser, *Z* lix (1939), 34, 64.

[4] Gaius, 2. 103.

[5] Formula of an *acceptilatio*: Gaius, 3. 169; cf. Rabel, *Z* xxvii (1906), 331; xxviii (1907), 374. Usage of the formula for release is already presupposed by the *lex Aquilia*, cap. 2 (Gaius, 3. 215; on the date of the *lex* see below, p. 30, n. 7). Cf. Mitteis, *RP* i. 263, n. 22; Solazzi, *L'estinzione della obbligazione*, 64, n. 3, combating Kniep on Gaius, 3. 215 (p. 561). Formula of a *solutio per aes et libram*: Gaius, 3. 174. Cf. Rabel, *Z* xxvii (1906), 333; xxviii (1907), 374; further literature is cited by Kunkel, s. 122. Usage of this formula for release is also old: Mitteis, *RP* i. 263.

[6] Quint. *Inst.* 1. 6. 40. Marcus Aurelius, the model *Saliaris*, knew the traditional formulae by heart and needed no prompter: *Vita M. Antonini* (*SHA*), 4. 4.

[7] Above, p. 75.

[8] Below, p. 34.

[9] See the formula of a *votum* of 191 B.C.: Liv. 36. 2. 3. Cf. *Petron., Cena*, 85, 86.

[10] Val. Max. 4. 1. 10; cf. Marx, *Rhein. Mus.* xxxix (1884), 65 ff.

alteration was considered permissible. Changes of the ritual for the declaration of war by the *Fetiales* are mentioned by our tradition.[1]

3. The legal importance of these forms was not always the same. All sprang from the natural instinct for form, from human delight in fine speech and significant gesture, reinforced by that straining after complete perspicuity which is characteristic of cautelary jurisprudence in all ages, even the present. But not every detail of these forms was essential so that if they were disregarded the act would be void. All the forms of *ius publicum* were probably only customary and not essential. In the sacral forms ancient magical beliefs naturally played a part, but even here not every detail was essential. The formula had to be spoken faultlessly, without slip or stutter, else the act would be void and have to be repeated,[2] for God (so it is believed) listens only to perfect utterance. The practice therefore was to draw up the formula in advance, usually in writing, and either to read out the studied words (*concepta verba*)[3] or to repeat them from a prompter. In principle a declarant was free to choose his own words, but naturally certain formulae became customary.[4] An example of a non-essential is the clause 'according to my meaning' or 'intent', which constantly occurs in sacral formulae,[5] but in no others.[6] Its purpose, like that of the clause *qua de re agitur*[7] in profane law, was clarification. Its omission left the act valid, but liable, in possible circumstances, to produce results not contemplated by the declarant. If Jephthah had inserted some such clause in his vow, he would not have been obliged to sacrifice his daughter.[8] So with the formulae of private and procedural law: not every one of their *concepta verba* was

[1] Wissowa, 554. Changes in forms belonging to public law: Varro, *De l. l.* 6. 95 (Bruns, ii. 60): 'hoc nunc aliter fit atque olim.'

[2] Wissowa, s. 61 (p. 397).

[3] This is all that is meant by *concepta verba*: *Voc.* i. 864, 49 f.: *Thes.* 4. 55. 7 f.; Wissowa, 397; Ed. Norden, *Aus altröm. Priesterbüchern*, 91 ff.

[4] See above, p. 27, on *votum*. Wissowa, 397, is not satisfactorily expressed from the legal point of view.

[5] See Note B, p. 333.

[6] For God alone reads the heart. See Kritias in *Fragmente der Vorsokratiker* (Diels–Kranz), ii (1935), no. 88, B 25: 'There is a God (δαίμων) who can hear every word spoken among mortals and see their every act. And the evil that you plan in silence is not hidden from the gods.' Cf. Epict. 1. 14. See also Pettazoni, 'Allwissende höchste Wesen bei primitivsten Völkern', *Arch. f. Religionswissensch.* xxix (1931), 108 ff.

[7] Cic. *p. Mur.* 13. 28: 'neque tamen quicquam tam anguste scriptum est, quo ego non possim "qua de re agitur" addere.' Cf. the formulae in Gaius, 4. 34 f.; also those of the so-called *l. Rubria* (Bruns, 16). H. Krüger, *Z* xxix (1908), 378.

[8] Judges xi. 30.

essential.[1] Modern scholars generally have exaggerated views of the effects of actional formalism.

(iii)

Our sources yield little certain information as to the methods of interpretation applied in our period to *leges*, priestly rules, and private acts. No doubt it is a fact that the jurists in principle stuck to the letter, but this *formalism in interpretation* also had its limits and its history.

1. In sacral law the fear of God did produce very strict interpretation. This can be deduced from Livy's account of the reservations it was deemed necessary to make in the vow of the *ver sacrum* of 217 B.C.[2] In some cases juristic reasoning can be discerned behind formalistic interpretation. Thus, a vitiating noise occurring during a sacral act was innocuous if not heard by the celebrant; an unfavourable omen from birds might be ignored if not seen.[3] As Cato the elder put it: 'What I do not notice does not hurt me.'[4] This piece of formalism was taken so literally that it was applied even when precautions had been taken against seeing. For example, Hannibal's opponent, M. Marcellus, himself an augur, had no scruple in declaring that, when he had decided to give battle, he had himself carried in a veiled litter, *ne auspiciis impediretur*.[5] Especially to the layman this interpretation will appear highly archaic, but modern German courts have argued in precisely the same way in holding that the rule that an oral declaration is inoperative if not received by the addressee applies even where the addressee stops his ears or hangs up his telephone receiver.[6]

2. In private law interpretation was less strict.[7] Formalism in

[1] In Gaius, 1. 119 the formula of *mancipatio* ends: 'isque mihi emptus esto hoc aere aeneaque libra.' If we had no other evidence, modern Romanists would undoubtedly pronounce every bit of this formula to be essential. But for *familiae mancipatio* to a *familiae emptor* Gaius, 2. 104 reports: 'hoc aere, et ut quidam adiciunt, aeneaque libra esto mihi empta.' Thus the words *aeneaque libra* were not essential —a warning against exaggerating formalism. How much of these formulae was essential we moderns are naturally not in a position to say.

[2] Liv. 22. 10. 2 f. Cf. Hasenmüller, *Rhein. Mus.* xix (1864), 402 ff.; Appel, *De Romanorum precationibus*, 9; Wissowa, 410.

[3] Wissowa, 441 ff., 531; Mommsen, *Staatsr.* i. 86; Wagenvoort, *Glotta*, xxvi (1938), 12 ff.

[4] In his trenchant style he writes (Festus, 234 M; ed. Lindsay, 268; Jordan, 18. 1): 'Domi dum auspicamus, . . . servi ancillae si quis eorum sub centone crepuit, quod ego non sensi, nullum mihi vitium facit.'

[5] Cic. *De div.* 2. 36. 77; cf. Plin. *Hist. nat.* 28. 2. 11; Serv. *Aen.* 5. 530; 11. 2.

[6] See the commentaries on s. 130 of the German *Civil Code*.

[7] Jhering, *Geist*, ii, s. 44, 441 ff., though at times he sadly confuses evidence from the most various periods. On archaic interpretation: Roscoe Pound, *Harvard LR* xxi (1908), 383 ff.

interpretation seems to have passed through the same evolution as the forms themselves:[1] at first freedom, then servitude to the letter, and finally, from the Hellenistic period, return to comparative freedom.[2]

The ancient interpretation of the Twelve Tables was liberal. The rules of intestate succession (5. 4), and equally the law of assaults (*iniuria*, 8. 2), mentioned only males, but from the beginning females were held to be included.[3] Again the words (5. 4) 'if a man dies intestate' were justifiably held to cover not only the case where he had left no valid will, but also that where a valid will was rendered ineffective by the refusal of the heirs named by it to accept the inheritance.[4] Other liberal interpretations of the archaic jurisprudence are that *fundus* in the *Twelve Tables* law of *usucapio* (6. 5) covered *aedes*[5] and that the penalty for cutting another's trees (8. 11) extended to cutting his vines, though the pleading must describe them as trees.[6]

Later jurisprudence, while keeping to such established interpretations of the Twelve Tables, interpreted subsequent *leges* very strictly. Thus, no one thought of extending the *lex Aquilia*, which certainly falls in our period,[7] beyond the literal meaning of the words *occidere, urere, frangere, rumpere*.[8] Again, the *lex Silia*,[9] when penalizing a magistrate who should falsify weights and measures, meticulously adds 'or procures their falsification', which permits the inference that procuration would not have been included by interpretation. Again, if in contrast to the Twelve Tables, later *leges* constantly specify 'male or female',[10] it is a fair inference that interpretation would not have ventured to hold that 'male' implied 'female'.[11]

(iv)

A remarkable feature of the old jurisprudence is its tendency to keep sacral and profane law apart: 'Fuit haec sapientia quondam,

[1] That the two kinds of formalism must be kept distinct was pointed out by Jhering, *Geist*, ii. 443. Mitteis's 'external' and 'internal' formalism is not happy: *RP* i, s. 15.

[2] Above, p. 26.

[3] See Note C, p. 333.

[4] *Inst.* 3. 1 pr.

[5] Cic. *Top.* 4. 23; Gaius, 2. 42.

[6] Gaius, 4. 11. Probably even in this period the interdict *de glande legenda* was not confined to acorns: Jhering, *Geist*, ii. 459. The liberal interpretation reported by Gaius, i. 165 probably also comes from the same period.

[7] On its date: Pernice, *Zur Lehre v. d. Sachbeschädigungen* (1867), 17 ff.; Rotondi, *Leges publicae*, p. 241; Kunkel, s. 158; Jolowicz, *Introduction*, 285.

[8] Nor later; recourse was had to *actiones in factum*.

[9] Bruns, 3; Rotondi, *Leges publicae*, p. 473.

[10] As early as the *l. Aquilia* (Bruns, 2) and the *l. Cincia* of 204 B.C. (Bruns, 5).

[11] See Note C, p. 333.

publica privatis secernere, sacra profanis', says the well-informed Horace.[1]

1. For infractions of sacral laws there were penalties, but no system of enforcing them. *Deorum iniuriae dis curae*: the saying comes to us from a later date, but by the mouth of a thorough Roman;[2] it was already a leading principle in archaic jurisprudence. Whether a duty of expiation (*piaculum*) was observed or not was no concern of the priests. The *pontifex maximus* had indeed power to forbid the *impius* to visit the Roman temples, but we hear little of such prohibitions.[3]

It is no real exception that the *pontifex maximus* had a penal jurisdiction, extending to power to sentence to death, over the Vestals, whether this be a consequence of his *quasi-potestas* or *manus* over them or a relic of the royal prerogative,[4] or again that he could impose a fine (*multae dictio*) on the *flamines* of his college and on the *rex sacrorum*. This was a matter of discipline, and there could be *provocatio ad populum* against his sentence.[5]

Nor did the magistrates employ the secular arm for the enforcement of sacral penalties. The censor might visit impiety in virtue of his *regimen morum*.[6] A magistrate might impose a fine where breach of sacral law had aroused public indignation[7]—a question of police in matters of cult.[8] But there was absolutely no parallel to the Attic prosecution for ungodliness (δίκη ἀσεβείας).

2. If an act in profane law violated some sacral rule, it was not thereby rendered void. It was, in the stereotyped augural phrase, 'vicious',[9] but just as *vitiosa possessio* was nevertheless possession, so a magistrate elected without, or with faulty, auspices, though *vitio creatus*,[10] was none the less a magistrate.[11] Similarly, a manumission *vindicta* performed by the praetor on a *dies nefastus* was still a valid manumission.[12]

[1] *Ars poet.* 396. Cf. Schulz, 19.

[2] Tiberius, Tac. *Ann.* 1. 73. Wissowa, *Arch. f. Religionswissensch.* xxii (1923/4), 203.

[3] Wissowa, 392 ff.; Mommsen, *Staatsr.* ii. 52; *Strafr.* 37.

[4] For *potestas*: Mommsen, *Staatsr.* ii. 54; *Strafr.* 18; for *manus*: Wissowa, 509, n. 5, citing others; also Wissowa, *Arch. f. Religionswissensch.* xxii (1923/4), 201 ff.; for relic of royal power: Blumenthal, *Rhein. Mus. NF* lxxxvii (1938), 270. See further: Weinstock, *PW* xix. 441; Münzer, *Phil.* xcii (1937), 47 ff., 199 ff.

[5] Wissowa, 510 ff.; Mommsen, *Staatsr.* ii. 57 ff. See above, p. 6.

[6] Ibid. ii. 378, n. 4, 381, n. 3.

[7] Wissowa, 441, but the supposition of priestly *multae* is wrong; ib. 392, n. 7, 513, n. 1; Mommsen, *Strafr.* 36; *Schr.* iii. 390.

[8] Ibid. iii. 397 ff.

[9] Wissowa, 531. Also Hägerström, *Das magistratische ius* (above, p. 12, n. 1), 5 ff.

[10] Liv. 8. 15. 6; 23. 31. 13.

[11] Expressly stated by Varro, *De l. l.* 6. 30 (Bruns, ii. 55); cf. Mommsen, *Staatsr.* iii. 364.

[12] Varro, *De l. l.* 6. 30.

(v)

A last characteristic of jurisprudence, especially in the sphere of private law, is a highly developed capacity for abstract generalization, in spite of a complete absence of definitions, statements of abstract principles, and systematic arrangement. *Stipulatio*, for example, may originally have had a limited field of application,[1] but there is no doubt that as early as the fourth century it was just as abstract and just as capable of embodying any kind of obligation as in later days.[2] This implies that the abstract concept of an act undertaking obligation had already been reached. Similarly the extension of *mancipatio* from its original purpose of conveyance on account of sale to conveyance on other accounts[3] signifies that the concept of conveyance in the abstract had been achieved. Again, the abstract concept of release from obligation was implied, once the forms originally devised as solemn acknowledgements of receipt (*acceptilatio, solutio per aes et libram*) had come to be employed as forms of release without performance.[4] Thus the native Roman talent for *ratio* is apparent already in this period.[5]

[1] Mitteis, *RP* i. 268; Weiss, *PW* iii A, 2540 ff.; Luzzatto, *Per un' ipotesi sulle origini e la natura delle obbligazioni Romane* (1934), 233 ff., 257. A. Segrè, *TAPhA* lxxiii (1942), p. xxxi.

[2] Proved by the new fragments of Gaius (Gaius, 4. 17*a*), *Z* liv (1934), 265 ff.; *Bull.* i, NS (1935), 585. Cf. Levy, *Z* liv (1934), 296 ff.; Arangio-Ruiz, *Bull.* i (1935), 612 ff.

[3] Above, p. 26.

[4] Above, p. 27.

[5] Ed. Fraenkel, *Rome*, 25.

IV

THE LITERATURE OF THE ARCHAIC PERIOD: ITS FORMS[1] AND TRANSMISSION

(i)

1. IN this period literary activity in the sphere of sacral law consisted solely in the drawing up of records for the priestly archives, in the form of abstract rules, ceremonial instructions for the priesthood, formularies of sacral acts, and *responsa*.[2] The archives must also have contained minutes of meetings, official diaries, and temple statutes.[3] As to the exact nature of these books and records, our evidence, though it frequently mentions *libri* and *commentarii sacerdotum*,[4] permits of no safe inference; all attempts to reconstruct them have proved fruitless.[5]

2. Nothing of all this was published in our period. The only direct information comes from inscriptions preserving our two oldest sylvan statutes (*leges lucorum*);[6] for the rest, our knowledge depends on statements dating from the end of the Republic. These, however, carry us back indirectly to the archaic period, for, though it was formerly believed that the Gallic fire of 390 or 387 B.C. destroyed all the existing priestly records, modern excavations have shown that the God-fearing Celts spared the temples as far as possible. Thus the temple of Saturn, containing the State archives,[7] remained intact; on the other hand, the *Regia*, in which the pontifical and augural archives seem to have been kept,[8] was burnt to the ground.[9] But in those simple unlettered days human memory was more retentive than to-day, so that the records compiled in the fourth century, in order to replace the lost documents, would not differ essentially from the originals. But even the restored records have not come down to us in their original form.

[1] 'L'histoire des différents types d'ouvrages': Girard, *Mélanges*, i. 335.

[2] Above, p. 15 f.

[3] Wissowa, 5, 497, 502, 513, 527; Premerstein, *PW* iv. 729 ff.; on Roman archives in general Dziatzko, *PW* ii. 559 ff. See further A. D. Nock, *H.T.R.* xxxii (1939) 83 f.

[4] Schwegler, *Röm. Gesch.* i (ed. 12, 1867), 31 ff.; Wissowa and Premerstein as cited in the preceding note; Westrup, *Roman Pontifical College*, 14.

[5] A reference to G. Rohde, *Die Kultsatzungen der röm. pontifices* (1936), will suffice here.

[6] Below, p. 34.

[7] Including, doubtless, a copy of the Twelve Tables.

[8] Wissowa, 502, 527.

[9] L. G. Roberts, 'The Gallic Fire and the Roman Archives' (*Memoirs of the Am. Ac. in Rome*, ii (1918), 56 ff.).

We have only later redactions, in which the language, if no more, has been altered. Still, the substance of our tradition is in all essentials ancient and belongs to the third century.[1]

3. We defer discussion of the so-called *leges regiae*.[2] (*a*) Little enough is preserved of the ceremonial instructions. Festus, *v. nectere* (Lindsay, 160): ' "Nectere" ligare significat . . . quin etiam in commentario sacrorum usurpatur hoc modo: "Pontifex minor ex stramentis napuras nectito", id est funiculos facito, quibus sues adnectantur' (The *pontifex minor* shall twist ropes of straw, that is he shall make cords with which to bind the swine).[3] Varro, *De l.l.* 6. 21: 'Opeconsiva dies ab dea Ope Consiva, cuius in regia sacrarium, . . . actum, ut eo praeter virgines Vestales et sacerdotem publicum introeat nemo. "Is cum eat, suffibulum ut habeat" scriptum.'[4] Further, a longish fragment from Fabius Pictor giving the taboos for the *flamen Dialis*[5] looks as if it had been copied with only slight alterations from a priestly ceremonial. Some compensation for the lack of Roman evidence is afforded by the Umbrian ceremonial instructions (the Gubbio tablets—*Tabulae Iguvinae*),[6] from which one can form an idea of the nature and extent of their missing Roman parallels. (*b*) Examples of old sacral formulae (mostly late in their language): above all the formulae of the *Fetiales*.[7] (1) Dispatch of the *Fetialis*: Liv. 1. 24. 4–6 (slight modifications by Livy, the official form having been republican, as Liv. 1. 32. 6 shows). (2) *Foedus*: Liv. 1. 24. 6 f. Festus (Paul.), s.v. (Lindsay, 74).[8] (3) *Clarigatio* and declaration of war: Liv. 1. 32. 6 f. Also old in substance are the formulae for *evocatio* (Macrob. *Sat.* 3. 9. 7; Liv. 5. 21. 3. 5),[9] *devotio* (Liv. 8. 9. 8),[10] *consecratio* of hostile land (Macrob. *Sat.* 3. 9. 10),[11] *votum* of *ver sacrum* (Liv. 22. 10. 2 f). (*c*) The sylvan statutes of Lucera and Spoleto (Bruns 104 a and b, *ILS* 4912 and 4911)[12] certainly belong to the third century. (*d*) *Sacerdotal responsa* were used by the later historians and antiquarians and in this way have reached us in part, though not always in their original forms.

(ii)

1. The literature of private law, similarly, consisted solely of records made for the pontifical archives—*responsa*, formulae

[1] On the need to distinguish here between substance and form: Norden, *Aus altröm. Priesterbüchern*, 6, 9, 48 n., 56, 63.
[2] Below, p. 89.
[3] Wissowa, 191.
[4] Wissowa, 203.
[5] Gell. 10. 15. 1 f.; Bremer, i. 10; Seckel–Kübler, i. 2.
[6] Above, p. 15.
[7] The literature up to 1898 is given by Baviera, art. 'Feziali', in *Enc. Giur. Ital.*
[8] Wissowa, 552, is not satisfactory.
[9] Wissowa, 383, and (with Hittite parallels) Wohleb, *Arch. f. Religionswissensch.* xxv (1927), 206.
[10] Wissowa, 384; Norden, l.c. 48 n.
[11] Wissowa, 384, n. 6.
[12] Bücheler, *Rhein. Mus.* xxxv (1880), 627 ff.; Stolz–Schmalz, 323; *FIRA* III, 223 f.

and instructions for the performance of legal acts. Though the oldest records perished in the Gallic fire,[1] the reconstruction of the formulae from memory can have presented no difficulties. But of the reconstructed records we have no direct information; they reach us, not entirely in their original form, through later juristic literature.

2. In all essentials the formulae discussed above[2] are ancient; for example, the words *primam postremamque* of a *solutio per aes et libram* reported by Gaius (3. 174) recall the *prima postrema* of the ancient formula of the *Fetiales* preserved by Livy (1. 24. 7). Also essentially ancient are the formulae of *legis actiones* preserved by Cicero (*p. Mur.* 12. 26) and Gaius (4. 13 ff.), except that the *legis actio sacramento* is not in its original form, owing to the abandonment of the oath.

3. It was naturally from the pontifical records that, directly or indirectly, the earliest publications of our period were composed. Cn. Flavius' book of formulae (*ius Flavianum*) has already been discussed.[3] According to a statement of Pomponius,[4] which there is no reason to distrust,[5] a fuller collection was published by Sex. Aelius Paetus Catus[6] (*ius Aelianum*). This jurist also published the first legal work which was more than a bare collection of formulae, his *tripertita* (*scil. commentaria*),[7] containing, says Pomponius[8] (our sole authority), 'the elements of the law',[9] that is, the text of the Twelve Tables, the interpretation and the procedural formulae. It was thus the first commentary on the Twelve Tables. Probably each paragraph of the Tables was followed by its interpretation and then by the relevant formula, if any.[10] The book has not come down to us even fragmentarily, but it was in use till the end of the Republic.[11] Three other books

[1] Above, p. 33, n. 9.
[2] Above, p. 26.
[3] Above, p. 10.
[4] *D.* (1. 2) 2. 7.
[5] The reason why this collection is not mentioned by Pomponius in *D.* (1. 2) 2. 38 is that he did not reckon pure collections of formulae as jurisprudential literature. On the collection: Schanz–Hosius, i, s. 78.
[6] Above, p. 10.
[7] Joers, 108, n. 1.
[8] *D.* (1. 2) 2. 38.
[9] 'qui liber veluti cunabula iuris continet.' Here *cunabula* means 'elements': Val. Max., 3 praef. 'attingam quasi cunabula quaedam et elementa virtutis'; *Inst. Iust.* praef. 'prima legum cunabula non ab antiquis fabulis discere'. Cf. *Thes.* iv, 1389, 43 ff. 'Elements of the law' is, of course, an exaggeration; perhaps one should correct to *iuris civilis*, but rhetorical phrases of this kind are unprecise.
[10] It has been objected that a book so arranged could not have been called *tripertita*, but see Cassiodorus' *Hist. Eccl. tripartita*, a combination of three authors (Theodoretus, Sozomenus, and Socrates): Migne, *PL* lxix. 879 ff.; Schanz–Hosius–Krüger, iv. 2 (1920), s. 1033. Literature on the *Tripertita*: Schanz–Hosius, i, s. 78.
[11] See Bremer, i. 15; Seckel–Kübler, 1; Lenel, *Pal.* i. 1.

attributed to Aelius, of which we have not even the titles, were, so Pomponius says,[1] regarded by many as apocryphal.

Aelius stands at the end of the archaic and the beginning of the Hellenistic period, and the historian may well be in doubt to which of the two periods to assign him. That he should have written a juristic book at all is an indication of Hellenistic literary impulse, but for the rest he was clearly a lawyer of the old school. He was averse from speculation, and was wont to quote the verse of his contemporary Ennius: 'Greek science? Yes, but only a dash of it, for on the whole I dislike its taste.' This comes from Cicero,[2] who obviously got it from an excellent source, probably from his master in the law, Q. Mucius Scaevola, the augur, a 'jolly old boy'[3] given to anecdotes. Thus Aelius should be reckoned rather among the last of the old school than among the forerunners of Q. Mucius Scaevola, the *pontifex*.

(iii)

1. What has been said of the literature of sacral law applies to that of public: the archaic period was content to make entries in the archives and published nothing. Our knowledge of the contents of the archives is derived solely from writings of later times, which of course adapted their models, at least linguistically.

2. Of special value are three pieces which Varro[4] probably took direct from the archives. The first comes from the *tabulae censoriae*, being an extract from a programme for the taking of the census;[5] since it assumes the existence of the *praetor peregrinus*, it must be later than 242 B.C. The second, a programme for summoning the *comitia centuriata*, is taken from the consular *commentarii*. It must be old, for it still describes the consuls as *iudices*,[6] and Varro mentions a more modern version. The third, containing a programme for bringing a

[1] *D.* (1. 2) 2. 38: 'eiusdem esse tres alii libri referuntur, quos tamen quidam negant eiusdem esse.'

[2] *De re pub.* 18. 30: '. . . qui "egregie cordatus" et "catus" fuit et ab Ennio dictus est, non quod ea quaerebat, quae nunquam inveniret (!), sed quod ea respondebat, quae eos, qui quaesissent, et cura et negotio solverent . . . magis eum delectabat Neoptolemus Ennii, qui se ait philosophari velle sed paucis; nam omnino haud placere. quod si studia Graecorum vos tanto opere delectant, sunt alia liberiora et fusa latius' (Laelius is referring to jurisprudence) 'quae vel ad usum vitae vel etiam ad ipsam rem publicam conferre possumus.' See Ennius, *Scen.* ed. Vahlen, p. 191; ed. Warmington (Loeb), p. 368; *Ann.* ed. Vahlen, p. 59; ed. Warmington, p. 120; E. M. Steuart, *The Annals of Ennius* (1925), 186; *catus* means *acutus*: Varro, *L.L.* 7. 46.

[3] *ioculator senex*: Cic. *Ad Att.* 4. 16. 3. On the old augur as a *raconteur*: Cic. *De am.* 1. 1 f.

[4] *De l.l.* 6. 86–7, 88–9, 90–5. Bruns, ii. 58–60; Premerstein, *PW* iv. 733, 747.

[5] Mommsen, *Staatsr.* ii. 361, n. 2.

[6] Mommsen, *Staatsr.* ii. 76 ff.

capital charge,[1] is derived from a *commentarius anquisitionis*;[2] it too assumes the second praetor and shows other signs of being a revision. And we have many other formulae which must date from the third century or even earlier, for example the formula of *deditio* given by Liv. 1. 38, the military oath given by Gell. 16. 4. 2–4, and the like.[3]

[1] Mommsen, *Strafr.* 164; Brecht, *Z* 59 (1939) 299.

[2] Cf. Latte, *TAPhA* lxvii (1936), 27.

[3] We defer the description of the scheme and style of the *leges* and *senatus consulta* till we come to the next period, for which there is abundant and trustworthy evidence (below, p. 87).

PART II

THE HELLENISTIC PERIOD

Sint ista Graecorum, quamquam ab iis philosophiam et omnes ingenuas disciplinas habemus, sed tamen est aliquid, quod nobis non liceat, liceat illis.

CICERO, *De finibus*, 2. 21. 68.

INTRODUCTION

FROM the close of the Second Punic War Roman legal science entered on a new phase which should be called 'the Hellenistic period of Roman jurisprudence'. In no period known to us was Roman legal science entirely exempt from Greek influence, but it was only in the last two centuries of the Republic that it came to terms with the specific intellectual movement which we call 'Hellenism'.[1] There was no sudden revolution; the change took place with true Roman caution and deliberation. But gone were the days when honest Sextus Aelius could shrug his shoulders in humorous contempt of the new learning. The last two centuries of the Republic are the period in which Roman legal science, and indeed Roman civilization as a whole, was faced with the necessity of determining its relations with Hellenism. We shall obtain no comprehensive view of this process if, like the so-called 'school of elegant Jurisprudence', we are content to inquire in what particulars this or that juristic doctrine was derived from Greek philosophy and rhetoric. What we have to establish, in its totality and complexity, is the attitude of Roman jurisprudence towards Hellenism. In this matter what Roman jurisprudence took over from Hellenism was quite as important as what it rejected or modified. The Hellenistic wave arrived in Rome at a happy moment. On the one hand, Roman legal science was sufficiently developed not to be overwhelmed by Greek influences; on the other hand, it was still young and far from being petrified, capable of being and prepared to be stimulated and moulded by Greek thought.[2] Roman legal science contained in itself great potentialities (δυνάμεις), but to release them and bring them into activity (ἐνέργεια) there was needed

[1] See Note D, p. .

[2] Caesar in Sallust, *Cat.* 51. 37: 'neque maioribus nostris superbia obstabat, quo minus aliena instituta, si modo proba erant, imitarentur . . . quod ubique apud socios aut hostes idoneum videbatur, cum summo studio domi exequebantur: imitari quam invidere bonis malebant.' Polyb. 6. 25: *Ἀγαθοὶ γάρ, εἰ καί τινες ἕτεροι, μεταλαβεῖν ἔθη καὶ ζηλῶσαι τὸ βέλτιον καὶ Ῥωμαῖοι.*

the solvent energy of Greek forms. The immensely important result was nothing less than that Roman legal science developed into a professional science of the Hellenistic type, within the framework of Hellenistic science. This new science was not a *commixtio* of Greek and Roman elements but an organic unity. The formative discipline of Greece enabled the natural and national energy of the Roman science to reveal itself: *doctrina vim promovit insitam.*[1] The establishment of the Principate by Augustus marks the end of Hellenism[2] and equally of this period when in legal science a reaction,[3] observable in other fields also, especially in the plastic arts, set in, paving the way to classical jurisprudence.

[1] Horace, *Carm.* 4. 4. 33.

[2] So Wilamowitz, l.c.; *Reden u. Vorträge*, 2 (4 ed. 1926), 153 ff. Dissent by Otto, l.c. 95. But Otto agrees that a reaction set in under Augustus, so that the dispute is really terminological. Naturally Greek influence continued under the Empire. Thus, the science of Roman law constituted in the Hellenistic period went on.

[3] Schulz, 125.

I

THE JURISTS

(i)

1. THE jurists of sacral law continued at first to be members of the priestly colleges; to such alone were the necessary materials available. The situation is revealed by what the elder Cato said in 149: 'I wish to learn the pontifical law, but that does not make me a *pontifex*; I would learn the augural law but that does not make me an *augur*.'[1] Hence the writers on sacral law were at first exclusively priests: for example the pontiff Q. Fabius Maximus Servilianus, author of a large work on pontifical law,[2] and the augurs L. Iulius Caesar,[3] Appius Claudius Pulcher,[4] C. Claudius Marcellus,[5] and M. Valerius Messala,[6] all of whom wrote on augural law. It follows that the well-known historian Q. Fabius Pictor,[7] who did not belong to the pontifical college cannot have been the author of the comprehensive work on pontifical law which tradition attributes to him; its author must have been some *pontifex*, not otherwise known to us, belonging to the *gens Fabia*.[8] The sociological character of these priests remained unchanged from that which we have described above,[9] as a glance at the lists of the known priests at once shows.[10]

2. But in the second half of the first century laymen also began to concern themselves with sacral law: for example, the jurisconsults Servius Sulpicius[11] and C. Trebatius,[12] M. Terentius Varro, the

[1] From his speech prosecuting Galba for his treatment of the Lusitanians: Gell. 1. 12. 17: 'Tamen dicunt deficere "voluisse" (scil. Lusitanos). Ego me nunc "volo" ius pontificium optime scire: iamne ea causa pontifex capiar? si "volo" augurium optime tenere, ecquis me ob rem eam augurem capiat?' Cf. Cic. *De domo*, 12. 33; 54. 138.

[2] Consul 142 B.C. Münzer, *PW* vi. 1811; below, p. 89.

[3] Consul 64 B.C. Münzer, *Hermes*, lii (1917), 154; *PW* x. 468; Schanz–Hosius, i, s. 200, 600; also below, p. 89.

[4] Consul 54 B.C. Münzer, *PW* iii. 2849; *Röm. Adelsparteien*, 255; Schanz–Hosius, i, s. 200; also below, p. 89.

[5] Proconsul 79 B.C. Münzer, *PW* iii. 2733, no. 214; Schanz–Hosius, i, s. 200; below, p. 81.

[6] Consul 53 B.C. Schanz–Hosius, i, s. 200; below, p. 89.

[7] Münzer, *PW* vi. 1836; Schanz–Hosius, i, s. 64.

[8] Münzer, *PW* vi. 1842; Sigwart, *Klio*, vi (1906), 367; Schanz–Hosius, i, s. 64, p. 174.

[9] Above, p. 6.

[10] See, for the list of *pontifices*, *augures*, and *decemviri* (*quindecemviri*) of this period, Carl Bardt, l.c. (above, p. 13), and Ross Taylor, *Am. Journal of Philology*, lxiii (1942), 385 ff.

[11] See below, p. 42, for the man, and p. 90 for his work on sacral law. He also lectured on *ius pontificium* 'qua ex parte cum iure civili coniunctum esset': Cic. *Brut.* 42. 156.

[12] The man, below, p. 48; his work on sacral law, below, p. 90.

eminent antiquary,[1] and an otherwise unknown Granius Flaccus.[2] These men found in already published works on sacral law ample materials ready to their hand; all four, moreover, belonged to Julius Caesar's circle, and he, as *pontifex maximus*, was naturally in a position to throw open to them the pontifical archives.[3]

(ii)

In private law the movement that had begun as early as the third century B.C.[4] was carried farther: by the side of the pontifical jurists the non-pontifical waxed ever more numerous. The circle of jurists thus became very wide, but at the same time lost its uniformity. Various groups must be distinguished.

1. In the second century the pontiffs continued to be prominent consultants in private law. The best known are three members of the *gens Mucia*, P. Mucius Scaevola, his brother P. Licinius Crassus Mucianus, and Q. Mucius Scaevola the *pontifex*,[5] all of whom held the office of *pontifex maximus*. But with Q. Mucius we reach at once the climax and the end of the pontifical science of private law. The lists of *pontifices* after his death include not one of the jurisconsults known to us; clearly the pontiffs were withdrawing from private law, perhaps for the very reasons on which Cicero[6] bases his criticism of their private jurisprudence. This tendency had long been operative, for already P. Mucius had found it necessary to insist that no one could be a good *pontifex* without a knowledge of the *ius civile*.[7] His warning was ineffectual: the Hellenistic tendency to specialization[8] led to the abandonment of private law by the pontiffs.

2. A second group was formed by the non-pontifical jurisconsults. They practised mainly as consultants in private law; as advocates they figured only occasionally. This group must be subdivided.

(*a*) In the second century B.C. the jurisconsults still sprang from

[1] Schanz–Hosius, i, s. 187; Stella-Maranca, *Atti del 4 congr. naz.* iv (1938), 45 ff.

[2] Funaioli, *PW* vii. 1819; Schanz–Hosius, i, s. 201, 603. On his book, below, p. 89.

[3] Cincius and Veranius seem to have appeared in the time of Augustus; see below, p. 138.

[4] Above, p. 8 f.

[5] See the tree of the *gens Mucia* given by Münzer, *Röm. Adelsparteien*, 224; *PW* xvi. 413.

[6] Cic. *De leg.* 2. 21. 52: '. . . si vos tantummodo pontifices essetis, pontificalis maneret auctoritas, sed quod idem iuris civilis estis peritissimi, hac scientia illam eluditis.' Spoken, it is true, with reference to a special question, the treatment of *sacra*.

[7] Cic. *De leg.* 2. 19. 47: 'Saepe, inquit Publii filius' (i.e. Q. Mucius Scaevola *pont.*) 'ex patre audivi pontificem bonum neminem esse nisi qui ius civile cognosset.' Cf. Schulz, 26.

[8] Kaerst, *Gesch. d. Hellenismus*, ii. 146 ff.

the same social class as the pontiffs. Like the pontiffs they were members of the nobility;[1] as a rule they took part in public life and held high offices. A comparison of M'. Manilius or the augur Q. Mucius with the pontiff of the same name at once reveals a unity of type, but it was a type which from the end of the second century was becoming rare. From then to the end of the Ciceronian period we find only one jurisconsult who fully represents it, namely Servius Sulpicius Rufus. This man was a true jurisconsult in the style of the second and third centuries. He reckoned himself a member of the nobility, though according to his friend Cicero it was rather an obscure nobility (his father was an *eques*).[2] He climbed the ladder of magistracies, attaining, after a failure at his first candidature, the consulship in 51 B.C. He was given the proconsulship of Achaia by Caesar in 46 and stayed there till 45. After Caesar's murder he continued to take part in politics till the end of his life. Apart from him, the last years of the Republic produced only P. Alfenus Varus of Cremona, who reached the consulship in 39 B.C. He was a *homo novus*, but so had been M'. Manilius. The tale that in earlier life he was a cobbler or a barber[3] is about on a level with the tale that Augustus' great-grandfather was a freedman ropemaker or that Cicero's father was a fuller.[4] In the same group we may place Q. Aelius Tubero, who was of noble birth and pursued, though unsuccessfully, a political career, and also Pacuvius Labeo, who, though not of noble birth, belonged to Brutus' circle of friends and had political ambitions, which were only frustrated by the civil war.

[1] *Nobiles* were those who had held the highest offices (of dictator, consul, consular tribune) and their descendants: Gelzer, *Die Nobilität d. röm. Republik* (1912), 42; Strassburger, *PW* xvii. 785 ff.; Afzelius, 'Zur Definition der röm. Nobilität in der Zeit Ciceros', *Classica et Mediaevalia*, i (1938), 40 ff.

[2] Cic. *p. Mur.* 7. 16: 'Tua vero nobilitas, Ser. Sulpici, tametsi summa est, tamen hominibus litteratis et historicis est notior, populo vero et suffragatoribus obscurior: pater enim fuit equestri loco; avus nulla inlustri laude celebratus; itaque non ex sermone hominum recenti, sed ex annalium vetustate eruenda memoria est nobilitatis tuae.'And it is a *homo novus* who is introducing considerations of genealogy.

[3] Horace, *Sat.* 1. 3. 130: 'Alfenus vafer omni / Abiecto instrumento artis clausaque taberna / Sutor erat.' This text is adopted by F. Klingner in his edition of Horace (Teubner, 1939). The Cod. Bland. reads: 'Alfenus vafer omni / Abiecto instrumento artis clausaque ustrina / Tonsor erat.' This reading is defended by Pasquali, *Studi it. di filologia class.* x (1933), 255 ff.; *Storia della tradizione e critica del testo* (1934), 383 f. Cf. Tenney Frank, *Class. Quart.* xiv (1920), 160 ff. On rich cobblers see Marquardt–Mau, *Privatleben*, 597; *CIL* v. 7388 and Gummerus, *Röm. Mitt.* xxvii (1912), 233.

[4] Lies of this kind, imputing a base origin, are commonplaces of satire and invective at the end of the Republic: Gelzer, *Nobilität*, 11. This also is due to Hellenism, for it was from the Greeks that the Romans learnt the 'art' of detraction: W. Suess, *Ethos. Studien z. älteren griech. Rhetorik* (1910), 45 ff., giving ample Graeco-Roman materials.

(*b*) In the Ciceronian age there appeared a group of jurisconsults of an essentially different type. C. Aquilius Gallus, of equestrian stock, pursued the career of magistracies, but only as far as the praetorship (praetor of the *quaestio de ambitu* in 66 B.C.). He refrained from seeking the consulship in order to dedicate himself to the law. Aulus Cascellius, son of a speculator in estates (*praediator*) in the Sullan period,[1] became quaestor, but held no higher office: he refused the consulship which, in spite of his mere quaestorian rank, was offered him by Augustus. A. Ofilius was an *eques* whose family came into public consideration after the Social War. As a friend of Caesar's he would have found a political career open to him, but he preferred to confine himself to practising as a jurisconsult. C. Trebatius, of a respected family in Velia (Lucania), belonged to Caesar's and Cicero's circle of friends, but, though promoted by Augustus to the equestrian order, he never took office. The jurists of this group, by their withdrawal from politics[2] and their tendency towards specialization,[3] exhibit very clearly two characteristics of the Hellenistic spirit.

(*c*) A third group is formed by a number of jurisconsults of whom we know little more than their names, and who evidently came from humbler social origins. Lucilius Balbus was Servius' teacher, Cornelius Maximus was Trebatius'; that is all we know about them, the second being not even mentioned in Pomponius' list. We have no personal details at all about Servius' pupils, Titus Caesius, Aufidius Tucca, Aufidius Namusa, Flavius Priscus, Gaius Ateius, Cinna, and Publius Gellius. Mentioned in Cicero's letters are L. Valerius and Precianus. These minor jurists obviously did not belong to the social class which served the State without pay; doubtless they demanded and received remuneration for their legal services.[4]

3. From the jurisconsults we must sharply distinguish the advocates (*oratores*),[5] in spite of the modicum of legal knowledge which they necessarily possessed.[6] Greek example brought rhetoric into the Roman courts; Cato's plain, thoroughly Roman advice,[7] *rem tene, verba sequentur*, came to be thought old-fashioned

[1] The father was not a jurisconsult: Cic., *p. Balbo*, 20. 45, contrasts him with the jurisconsults.

[2] Burckhardt, *Griech. Kulturgesch.* iv. 390, 598; Kaerst, *Gesch. d. Hellenismus*, ii. 157 ff., 87 ff.; Tarn, *Hellenistic Civilization* (ed. 2, 1930), ch. 3; Kroll, *Kultur*, ii. 125. Condemnation of such withdrawal from politics: Cic. *De re pub.* i. 1–6.

[3] Above, p. 41.

[4] Cic. *De off.* 2. 19. 65: 'Nam in iure cavere, consilio iuvare atque hoc scientiae genere prodesse quam plurimis vehementer et *ad opes augendas pertinet* et ad gratiam.'

[5] Mommsen, *Schr.* i. 453. [6] Below, pp. 44 and 95. [7] Jordan, 80.

and out of date. Thus from the second century onwards there arose a class of specialists in forensic oratory; some knowledge of public and private law they might have, but not enough to qualify them to give consultations. Occasionally, as the cases of Servius[1] and Tubero[2] show, an advocate might develop into a jurisconsult, but that would be as a result of further studies.

The best-known representative of this group is Cicero.[3] In his youth he was instructed in the law by Q. Mucius *augur* and Q. Mucius *pontifex*.[4] Cicero took good note of the merry old augur's anecdotes[5] which are both entertaining and of real interest to the historian of Roman legal science. But obviously Cicero's main interest did not lie in his legal studies. In later life he showed a certain elementary knowledge of the law,[6] but also a thorough dislike and lack of understanding of the higher aspects of jurisprudence. He classes himself, in so many words, outside the jurisconsults, his feeling with regard to them being one of opposition and superiority.[7] He jeers at his friend Servius who, lacking the endowments of an orator, had conceived, *faute de mieux*, a fatherly affection for jurisprudence.[8] The jurisconsult Aquilius Gallus felt himself correspondingly antithetical to Cicero: 'Nihil hoc ad ius,

[1] See Note E, p. 334.

[2] Pomp. *D.* (1. 2) 2. 46: 'transiit a causis agendis ad ius civile.' He obtained legal schooling from A. Ofilius.

[3] Costa's useful *Cicerone Giureconsulto* (ed. 2, 1927) nowhere discusses Cicero's position in Roman jurisprudence. The title is misleading in that it implies that Cicero was a jurisconsult.

[4] See Note F, p. 344.

[5] On Sex. Aelius Paetus, above, p. 36, n. 2; Cic. *De or.* 2. 55. 224, when describing Iunius Brutus' *Dialogue* (below, p. 92), writes: 'Tum ex libro tertio, in quo finem scribendi fecit—tot enim, ut audivi Scaevolam dicere, sunt veri Bruti libri— . . .' Thus the work was in more than three books, but Cicero had it from Scaevola (probably the augur) that only the first three were by Brutus himself. Cic. *Ad Att.* 4. 16. 3: 'ioculatorem senem illum, ut noras. . . .'

[6] Cicero and Trebatius had spent an evening over their cups and a question of civil law had been discussed. On getting home Cicero, late as it was ('etsi domum bene potus seroque redieram'), turned up his lawbooks: Cic. *Ad fam.* 7. 22. Again, Cic. *De re pub.* 1. 13. 20: '*Laelius.* Immo vero te audiamus, nisi forte Manilius' (the jurisconsult, below, p. 47) 'interdictum aliquod inter duos soles putat esse componendum, ut ita caelum possideant, ut uterque possederit.' He is parodying the interdict *Uti possidetis*; a man could not write like this unless he were thoroughly familiar with the elements of the civil law. Cf. *Ad fam.* 15. 16. 3 (*interd. de vi*).

[7] This appears not only in the *pro Murena*, which was not meant quite seriously (see *De fin.* 4. 27. 74: 'Non ego tecum iam ita iocabor, ut isdem his de rebus, cum L. Murenam te accusante defenderem: apud imperitos tum illa dicta sunt, aliquid etiam coronae datum'). Also in other passages he always makes jurisprudence the *secunda ars* in comparison with rhetoric, his view being that men became jurisconsults only if they lacked the endowments of an orator: *Brut.* 41. 151; *p. Mur.* 13. 29 f.; *Orat.* 41. 141; *De off.* 2. 19. 65 f.

[8] Cic. *p. Mur.* 10. 23: 'mihi videris istam scientiam iuris tamquam filiolam osculari tuam.'

ad Ciceronem', he was wont to say when the case on which he was consulted raised an issue of fact.[1]

Allowing for individual idiosyncrasies, we may take Cicero as representing the whole class of forensic orators. He names and describes them, especially in his *Brutus*, and incidentally discusses their knowledge of law. In book I of the *De oratore* we find a debate between Q. Mucius *augur* and the two orators, L. Crassus and M. Antonius, on the question whether legal studies ought to form part of an advocate's education.[2] The picture painted by Cicero shows that here too Hellenistic influence had led to differentiation of professions and to the emergence of a class of specialists in rhetoric.[3] An advocate like Antonius rejected legal studies on principle,[4] and the majority of advocates possessed only a very meagre knowledge of law. 'Never yet have I seen the fine furniture of legal science among the household goods of an advocate',[5] remarked the old augur in his humorous manner. Crassus, who declares himself in favour of legal studies[6] and whom Cicero describes as the best lawyer among the orators,[7] is presented as an exception. It may well be that this judgment of Cicero's is correct, but Crassus was no jurisconsult and is quoted by Cicero as saying that he reserved legal studies for his old age.[8] What Cicero says as to the legal attainments of other advocates must be received with caution: *iuris civilis peritissimus* would come all too readily from the mouth of that lover of superlatives. Pomponius' sketch[9] is intended to be confined to the jurisconsults; consequently he omits not only the jurists of the *ius sacrum* and the *ius publicum*, but also the orators, including Cicero himself. Nevertheless, he is misled by Cicero's superlatives into the error of including some of the orators. These, as a class, are interesting and certainly not to be ignored by the historian of Roman legal science; in the sense defined above[10] they were certainly jurists, but they must be sharply distinguished from the jurisconsults. Socially there was no wide gulf between the two classes; still, the son of a freedman, as was L. Coelius Antipater, the teacher of the orator Crassus, could not in this period have ranked as a jurisconsult.

[1] Cic. *Top.* 12. 51. Cf. Schulz, 19, and below, p. 55. [2] *De or.* 1. 36. 165 f.
[3] *De or.* 1. 50. 216: 'ut singulis hominibus ne amplius quam singulas artes nosse liceat'; *De re pub.* 1. 22. 35.
[4] *De or.* 1. 37. 171: *semper ius civile contempsit.* Cf. 1. 48. 209 f.
[5] *De or.* 1. 36. 165. [6] *De or.* 1. 36. 166 f. [7] Cic. *Brut.* 39. 145.
[8] *De or.* 1. 45. 199; cf. *De leg.* 1. 3. 10; *Brut.* 42. 155 says expressly of Crassus: 'consuli nolebat, ne qua in re inferior esset quam Scaevola.'
[9] *D.* (1. 2) 2. 35 f. [10] Above, p. 2.

(iii)

About the jurists of public law there is little to be said.[1] As previously, they were to be found among the senators and magistrates. The only writers we know of are C. Sempronius Tuditanus, consul 129 B.C., who wrote a large work on the magistracy,[2] M. Iunius Gracchanus, the friend of C. Gracchus, whose work *De potestatibus* is mentioned,[3] and finally Varro, the famous antiquary.[4] Cincius and Nicostratus belong rather to the Augustan period.[5] In principle the jurisconsults did not concern themselves with public law;[6] Tubero,[7] however, who in this as in other respects is exceptional among the jurisconsults,[8] seems to have written on constitutional law.[9] Taken as a whole the republican literature of public law was not extensive; if Pompey, when preparing for his consulship, asked his friend Varro to write him an introduction to constitutional law,[10] it must have been because the existing literature was inadequate. Clearly the long constitutional crisis cramped the development of this branch of jurisprudence during the last century of the Republic.

(iv)

In conclusion we give a conspectus of the jurisconsults,[11] arranged so far as possible in chronological order. We omit the pontiffs who made no individual mark in private law. Biography lies outside our programme, but the literature cited will supply any details that may be required and also indicate the older literature of the subject. Pomponius' list (*D.* 1. 2. 2. 38 f.) is in many respects untrustworthy.

L. ACILIUS (corrupted in Pomponius, s. 38, to P. ATILIUS). Apparently early second century B.C. Nothing more known. Joers, 247; Klebs, *PW* i. 252.

M. PORCIUS CATO, †152, son of Cato Censorinus; died when *praetor designatus*.[12] Joers, 283; Schanz–Hosius, i, s. 79.

[1] On what follows: Dirksen, 'Ueber die Anfänge d. Staatsrechtswissensch. bei d. Römern'; H. Rehm, 'Gesch. d. Staatsrechtswissensch.' s. 36 (*Handb. d. öffentl. Rechts*, 1, 1896).

[2] Münzer, *PW* ii A. 1441; Schanz–Hosius, i, s. 70. 3. *CIL* i (ed. alt.), 652, Add. p. 725; *ILS* 8885.

[3] Wissowa, *PW* x. 1031; Schanz-Hosius, i, s. 77.

[4] See above, p. 40. Perhaps Furius Philus should be mentioned here: Schanz–Hosius, i, s. 77.

[5] Below, p. 138.

[6] Expressly stated by Cic. *p. Balbo*, 19. 45; *De leg.* 1. 4. 14.

[7] Pomp. *D.* (1. 2) 2. 46: 'doctissimus habitus est iuris publici et privati.'

[8] Pomp. *D.* (1. 2) 2. 46.

[9] Schanz–Hosius, i, s. 112. 4.

[10] Gell. 14. 7. 1 (Bremer, i. 124).

[11] See above, pp. 21 and 43.

[12] Whether the father, Cato Censorinus, also practised as a jurisconsult is quite uncertain. No safe conclusion can be drawn from Cic. *De or.* III. 33. 135. Joers, 275, goes wrong.

M'. MANILIUS, consul 149 (*homo novus*). Münzer, *PW* xiv. 1135; Schanz–Hosius, i, s. 79.

C. LIVIUS DRUSUS, son of the consul of 147, being blind held no office. Münzer, *PW* xiii. 855, no. 15; *Röm. Adelsparteien*, 312.

M. IUNIUS BRUTUS, probably son of the consul of 178; praetor at an uncertain date. Münzer, *PW* x. 971, no. 49; Schanz–Hosius, i, s. 79.

P. MUCIUS SCAEVOLA, *pont. max.*, consul 133. Münzer, *PW* xvi. 425, no. 17; Schanz–Hosius, i, s. 79.

P. LICINIUS CRASSUS MUCIANUS, *pont. max.*, consul 131, brother of the last mentioned. Münzer, *PW* xiii. 334, no. 72; Schanz–Hosius, i, s. 79.

Q. MUCIUS SCAEVOLA *augur*, consul 117. Münzer, *PW* xvi. 430, no. 21; Schanz–Hosius, i, s. 80.

C. MARCIUS FIGULUS, son of the consul of 162 and 156; stood unsuccessfully for the consulship. Joers, 256; Münzer, *PW* xiv. 1559, no. 62.

Q. AELIUS TUBERO, of noble family (Cic. *p. Mur.* 36. 75; Gelzer, *Nobilität*, 22), but did not reach the praetorship and therefore was *never* consul, in spite of Pomponius, s. 40. Of the Scipionic circle (†129). Klebs, *PW* i. 535, no. 155.

SEX. POMPEIUS, uncle of Pompey the Great. Held no office.

P. RUTILIUS RUFUS, consul 105. MÜNZER, *PW* i A. 1270, no. 34; Schanz-Hosius, i, s. 73. 3.

A. VERGINIUS (corrupted in Pomponius, s. 40, to PAULUS VERGINIUS), doubtfully a jurisconsult. Pomponius' mention seems to be fabricated out of Cic. *De am.* 27. 101.

Q. MUCIUS SCAEVOLA *pontifex, pont. max.*, consul 95, †82. Münzer–Kübler, *PW* xvi. 437. Schanz–Hosius, i, s. 80.

C. AQUILIUS GALLUS, praetor of the *quaestio de ambitu* 66; *praetor peregrinus*? Klebs–Joers, *PW* ii. 327, no. 23; Schanz–Hosius, i, s. 198; Beseler, *Bull.* xxxix (1931), 314.

L. LUCILIUS BALBUS, pupil of Q. Mucius, teacher of Servius; member of Aquilius Gallus' *consilium* in 81. Nothing more known. Münzer, *PW* xiii. 1640, no. 19.

VOLCATIUS (corrupted in Pomponius, s. 45, to VOLUSIUS), pupil of Q. Mucius, teacher of Cascellius (Plin. *Hist. nat.* 8. 40. 144). He is probably identical with L. Volcacius, *tribunus plebis* and *curator viarum* 71 B.C.: *CIL* i (2nd ed.), 744; *ILS* 5800.

A. CASCELLIUS, quaestor before 73. Joers, *PW* iii. 1634; Schanz–Hosius, i, s. 198, p. 597; Wlassak, *Prozessformel*, i. 28 ff.; Ferrini, II. 53 ff.

SERVIUS SULPICIUS RUFUS, consul 51. Münzer–Kübler, *PW* iv A. 851, no. 95; Sternkopf, *Hermes*, xlvii (1912), 329. Groag, *Die röm. Reichsbeamten von Achaia bis auf Diokletian*, 6 (Ak. Wien, Schriften d. Balkankommission. Antiquar. Abt. ix. 1939).

Q. CORNELIUS MAXIMUS, teacher of Trebatius. Joers, *PW* iv. 1406, no. 264.

L. VALERIUS, only known from Cic. *Ad fam.* 1. 10; 3. 1; 7. 11. 2.

PRECIANUS, only known from Cic. *Ad fam.* 7. 8. 2.

SCHOOL OF SERVIUS: T. Caesius, Aufidius Tucca, Flavius Priscus, C. Ateius, Cinna, Publicius Gellius, Aufidius Namusa. No further personal details known.

PACUVIUS LABEO, †42. Schanz–Hosius, i, s. 198, p. 595; Pernice, *Labeo*, i. 7 ff.

P. ALFENUS VARUS, consul 39. Klebs–Joers, *PW* i. 1472, no. 8. Schanz–Hosius, i, s. 198, p. 596; L. de Sarlo, *Alfeno Varo e i suoi Digesta* (1940? inaccessible).

A. OFILIUS, pupil of Servius. Münzer, *PW* xvii. 2040; Schanz–Hosius, i, s. 198, pp. 595 ff.

Q. AELIUS TUBERO, prosecutor of Ligarius in 46. Klebs, *PW* i. 537, no. 156; Schanz–Hosius, i, s. 112, p. 322.

C. TREBATIUS (only Cicero calls him 'Trebatius *Testa*'). Sonnet, *C. Trebatius Testa*, Giessener phil. Diss. (1932); *PW* vi A. 2251.

The following are the outstanding *orators* having some knowledge of law, but not jurisconsults, and therefore wrongly reckoned as such by Bremer I, and others.

L. COELIUS ANTIPATER, teacher of the orator Crassus, *valde iuris peritus* (Cic. *Brut.* 26. 102), but not a jurisconsult. Pomponius, s. 40, is doubtful. Gensel, *PW* iv. 186, no. 7; Schanz–Hosius i, s. 71.

C. ACULEO, friend of Crassus the orator. His legal knowledge receives exaggerated praise from Crassus in Cic. *De or.* 1. 43. 191; cf. *Brut.* 76. 264. But Pomponius excluded him from his list of jurists.

T. IUVENTIUS (C. IUVENTIUS by error in Pomponius, s. 42), an orator *magna cum iuris intellegentia* according to Cic. *Brut.* 48. 178, but not a jurisconsult, though Pomponius classes him as such because he had been a pupil of Q. Mucius. But so, for that matter, was Cicero!

L. LICINIUS CRASSUS, the famous orator, †91. According to Cic. *Brut.* 39. 145, *eloquentium iuris peritissimus*, but not a jurisconsult, for all that Pomponius, s. 40, confusing him with P. Licinius Crassus Mucianus, mentioned above among the jurisconsults, includes him in his list. Häpke, *PW* xiii. 252, no. 55.

P. ORBIUS, pupil of T. Iuventius and, according to Cic. *Brut.* 48. 179, not inferior to his teacher as a lawyer. Not in Pomponius. Münzer, *PW* xviii. 880, no. 3.

Q. LUCRETIUS VISPILLO, †81. Cic. *Brut.* 48. 178: 'in privatis causis acutus et iuris peritus.' Not in Pomponius. Münzer, *PW* xiii. 1691, no. 35.

C. VISELLIUS VARRO. Cic. *Brut.* 76. 264. Not in Pomponius. Schanz–Hosius, i. 224.

II

THE LEGAL PROFESSION

In sacral and public law legal practice continued during the Hellenistic period unchanged from what it had been in the archaic period. Thus there is nothing to add to what has already been said,[1] and the present chapter may be confined to private law.

(i)

In private law the main function of a jurisconsult continued to be to give cautelary and judicial *responsa*.[2] He had to advise how a will or contract should be framed in order to produce the desired practical results, or on the legal position resulting from the facts of a case submitted to him and on any consequent processual remedies.

1. The jurists of this period were much engaged in drafting wills and contracts. Cicero gives a clear picture of the importance of this function (*cavere*) in the practice of the leading men of the second century;[3] he is drawing on a sound oral tradition, in particular on the reminiscences of his teachers,[4] and what he says is confirmed by M'. Manilius' book of precedents (*formulae*), to which we shall return later.[5] Naturally illustrations cannot be numerous, but the *cautio Muciana*,[6] the *stipulatio Aquiliana*,[7] and the *postumi Aquiliani*[8] are sufficient evidence. Even the latest republican jurists—Servius, Cascellius, Ofilius, and Trebatius—continued to exercise this same function. In Cicero's time, however, the routine of advising the ordinary public, especially the small man, had passed into the hands of minor jurisconsults and subordinate scribes. The great *iurisconsulti* came into action only on behalf of their friends or of exalted personages, or when an unusually knotty point arose.[9]

2. In its application to litigation cautelary jurisprudence under-

[1] Above, p. 15 ff. [2] Above, p. 19 ff. [3] See Note G, p. 334.
[4] Above, p. 36, 44. [5] Below, p. 90. [6] See Note H, p. 335.

[7] A form of *stipulatio* devised by Aquilius Gallus whereby all outstanding obligations of one party to another were novated into a single money obligation, which, having been created *verbis*, could be released by *acceptilatio* (Gaius, 3. 170). On our tradition of the precedent: Wlassak, *Z* xlii (1921), 394 ff.; De Ruggiero, *St. Marghieri*, 413 ff. (not accessible).

[8] See *D.* (28. 2) 29 pr. (interpolated). Cf. U. Robbe, *I postumi nella successione testamentaria Romana* (1937), 66 ff.; Dülckeit, *Z* lvii (1937), 463.

[9] See Note I, p. 335.

went in this period a notable development. The pontiffs, and the lay jurisconsults who succeeded them, had instructed parties in the solemn words of the forms of action (*legis actiones*) by dictation or by prompting in court (either personally or through their secretaries).[1] By the second century these forms had become stereotyped; they were few, and the development of new forms seemed impossible. But with the introduction of the formulary procedure by the *lex Aebutia* (second century) a task of unprecedented importance was laid upon the jurisconsults.[2] It was now the business of the plaintiff to present to the magistrate (the most important was the praetor) a draft statement of claim (*formula*); the defendant might propose modifications of the draft, for example the insertion of a special defence (*exceptio*); the magistrate too might make his authorization of the proposed formula conditional on the plaintiff accepting certain changes in it. The settling of the formula was thus an extremely technical process, for which professional help was indispensable, since neither the parties nor the magistrate, unless by exception he happened to be a jurist himself, would possess the requisite legal knowledge.[3] The work of the pontiffs in composing the solemn words of the *legis actiones* was insignificant in comparison with the achievements of the jurists of the Hellenistic period in devising the formulae of the new procedure. The old forms had been few and by the second century at latest their canon had become closed, whereas those of the new procedure were in principle inexhaustible. The magistrate had full discretion to accept any formula that might be proposed to him, and equally the jurisconsults were free to propose for his acceptance such formulae as they thought proper: even after numerous formulae had been permanently incorporated in the Edict, they remained at liberty to propose analogous and even unprecedented formulae.

A full account of the fruitful use made by the jurists of this great opportunity would carry us into every branch of private law.

[1] See above, p. 10 and p. 21.

[2] On what follows see especially the admirable discussion in Wlassak, *Prozessformel*, i. 6 ff.; Lévy-Bruhl, 'Prudent et préteur', *RH* v (1926), 5 ff.; Wenger, *Praetor u. Formel*, 19, 101 ff. (*München SB*, 1926); *CP* (1940), 87 n. 26, 134 n. 5.

[3] Cic. *p. Plancio* (accused of having attained the office of *curule aedile* corruptly), 25. 62: 'quaeris num (Plancius) disertus sit? immo, id quod secundum est, ne sibi quidem videtur. num iurisconsultus? quasi quisquam sit, qui sibi hunc falsum de iure respondisse dicat! . . . virtus, probitas, integritas in candidato, non linguae volubilitas, non ars, non scientia (!) requiri solet . . . quotus enim quisque disertus, quotus quisque iuris peritus est!' Also *De leg.* 3. 20. 48, below, p. 53, n. 2. Cf. Wlassak, *Prozessformel*, i. 19.

A few illustrations must suffice. In the field of delict, the meagre provisions of the *l. Aquilia* were very considerably extended by means of modified formulae (*actiones utiles*);[1] also the archaic law of *iniuria* of the Twelve Tables[2] was modernized by means of the new *actiones iniuriarum*, the concept of *iniuria*, from having denoted only personal assaults, being widened so as to cover any attack on the moral personality.[3] The *actiones metus* and *de dolo* were complete novelties. In the field of contract the most important development was the recognition of the legal validity of the consensual contracts.[4] How this came about is no mystery: some jurist or jurists proposed to the praetor the formula of an *actio empti* or *venditi* which instructed the *iudex* to award to the plaintiff whatever as a matter of good faith (*ex fide bona* in contrast to *ex iure Quiritium*) was due to him from the defendant, and this formula was accepted by the praetor and acted on by the *iudex*, who himself was advised by jurisconsults. The fact that Cicero, not merely in his burlesque *pro Murena*,[5] but also in his serious treatises *De oratore* and *De legibus*,[6] jeers at the juristic elaboration of formulae is merely further proof that he was indeed 'vir nihil minus quam ad iurisprudentiam natus'.[7] Exceptionally we find formulae named after the jurist who first conceived it[8] or the praetor who first sanctioned it or incorporated it in his Edict.[9] It would, however, often happen that a formula as first proposed would not be found satisfactory and that it would be perfected by other jurists.[10] Hence, on the whole, the formulae are a corporate work and are consequently anonymous.

[1] Gaius, 3. 219, and the text-books. *D.* (9. 2) 39 shows that the *actio l. Aquiliae utilis* was already known under the Republic, for the action allowed by Q. Mucius *si consulto equam vehementius egisset* was an *actio utilis*, as we see from Gaius, 3. 219; our text has been shortened.

[2] 8. 2–4.

[3] Cf. Lenel, *Ed.* s. 190 ff., p. 397.

[4] Below, p. 83.

[5] 13. 29; cf. above, p. 44, n. 7.

[6] *De or.* 1. 55. 236; *De leg.* 1. 4. 14; Wlassak, *Prozessformel*, 1. 37 ff.

[7] Liv. *Perioch.* 111: 'Cicero vir nihil minus quam ad bella natus.' Cf. above, p. 44.

[8] So the *iudicium Cascellianum* (Gaius, 4. 166*a*, 169), from the jurist Cascellius: Wlassak, *Prozessformel*, i. 32. The *actio de dolo* is never called after its originator Aquilius Gallus. He probably composed it as a practising jurisconsult, not as praetor. Beseler, *Bull.* xxxix (1931), 314, believes that he introduced the formula as *praetor peregrinus*.

[9] Certain in the cases of the *formula Octaviana* (Cic. *in Verrem*, ii. 3. 65, 152; cf. Schulz, *Z* xliii. 217), of the *actio Rutiliana* (Gaius, 4. 35), and the *actio Publiciana* (*Inst.* 4. 6. 4). In other cases we are left in doubt whether the name comes from a jurist or a praetor: e.g. the *actio Serviana* of the *bonorum emptor* and the *creditor pignoris*, the *interdictum Salvianum*, the *actio Calvisiana*, the *actio Fabiana*. On these actions see Lenel, *Ed.*; Weiss, *Z* l (1930), 255; Wlassak, *Prozessformel*, i. 33.

[10] Aquilius Gallus himself did not propound several *formulae de dolo*: Beseler, *Bull.* xxxix (1931), 314, against Wlassak, *Prozessformel*, i. 26, n. 3.

3. *Responsa* in the narrower sense,[1] that is of the type we have denominated judicial, retained their great importance. Gladly and frequently sought by the public, they were readily given by the jurists. Just as a person accused of a crime would procure several orators (sometimes as many as twelve)[2] to defend him, so on one and the same question of private law the *responsa* of a number of jurists might be obtained—a parallel to medieval practice in obtaining *consilia*. For example, Cicero, in the matter of the succession to his friend P. Silius, applies for a *responsum* first to Trebatius, then to Servius, and finally to Ofilius (*Ad fam.* 7. 21). Again, in the *Digest* (*D.* 33. 7. 16. 1) we find a man asking Cornelius Maximus for a *responsum* about a question of a legacy and later appealing to Servius; the two jurists disagree. In another passage (*D.* 28. 6. 39. 2) *responsa* on one and the same case by both Ofilius and Cascellius are reported. There was no special form in which a *responsum* had to be given. It would usually be an oral answer to an oral question,[3] and would be reduced to writing only if the matter was taken to court.[4] It should be noted that a judicial *responsum* might be partly cautelary:[5] if the jurist advised that on the facts stated the praetor ought to allow an action, in other words ought to accept the plaintiff's proposition of a formula, he would, unless the desired formula was already offered by the Edict, append a draft formula.

(ii)

Not less important than their advice to private clients was the advice given by them to lay *iudices* and to the magistrates administering private law—the praetors, aediles, and provincial governors. In every branch of Roman life it was the practice that a man who had to make a serious decision should take counsel of competent and impartial persons.[6] A *iudex*, once the law had begun to shed its primitive simplicity, could hardly dispense with professional advice, unless indeed he happened to be himself a jurist. There is clear evidence that in Cicero's day *iudices* normally took jurists into their *consilia*;[7] the magistrates did the same, at

[1] *Responsum* covers equally advice on drafting of contracts and wills; but sometimes *respondere* is contrasted with *cavere*: e.g. Cic. *De or.* 1. 48. 212; *De leg.* 1. 5. 17.

[2] Mommsen, *Strafr.* 377.

[3] Cic. *De or.* 1. 45. 200, from personal observation; 3. 33. 133; *De leg.* 1. 3. 10.

[4] Pomp. *D.* (1. 2) 2. 49: the subject to *scribebant* is *qui consulebant*; see De Visscher, *RH* xv (1936), 618.

[5] Wlassak, *Prozessformel*, i. 40 ff.

[6] Mommsen, *Staatsr.* i. 307 ff.; Liebenam, *PW* iv. 915; Schulz, 168.

[7] Cic. *Top.* 17. 65: 'Privata enim iudicia maximarum quidem rerum in iuris consultorum mihi videntur esse prudentia. Nam et adsunt multum et adhibentur

least on occasion,[1] and furthermore their secretarial staffs would possess some knowledge of the law.[2] But more important than this is the unofficial collaboration of the jurists in the composition of the Edicts. It is beyond doubt, though there appears to be no direct evidence,[3] that the real authors of the praetorian, aedilician, and provincial Edicts were the jurisconsults.[4] That this is true of individual model formulae offered by the Edicts has already been pointed out.[5] More than this, the whole principle underlying the edictal development of the law can have been originated by no layman. It consisted in utilizing the fact that the formula was an agreement on the terms of an arbitration confirmed by the magistrate in such a way as to amend and complete every branch of private law. Those who conceived this masterly idea were surely pupils of the *pontifices*, who in their own day had found in agreement an instrument for introducing some striking reforms, such as the mancipatory will.[6] Technicalities such as *nudum ius Quiritium* and *bonorum possessio* are manifestly of professional origin.

(iii)

Like any other qualified persons jurisconsults might serve as *iudices*, and occasionally we hear of their doing so.[7] But in general their activities in this respect were not important; only Aquilius Gallus seems to have engaged in them to any notable extent.[8]

(iv)

The jurisconsults of this period also appeared in court as advocates. So far as proceedings before the magistrate (*in iure*) are concerned, this is implied by their collaboration in the drafting of formulae.[9]

in consilia et patronis diligentibus ad eorum prudentiam confugientibus hastas ministrant.' Cf. Joers, 241; Schulz, 241.

[1] Cic. *p. Flacco*, 32. 77; *De or.* 1. 36. 166; 1. 37. Cf. Joers, 241; Wlassak, *Prozessformel*, 23. Not right: Mommsen, *Staatsr.* i. 310; De Ruggiero, *Diz. epigr*, i. 101; ii. 612.

[2] Cic. *De leg.* 3. 20. 48: 'animadverto plerosque in magistratibus ignoratione iuris sui tantum sapere quantum adparitores velint.' The *adparitores* were the magistrate's *scribae*. On their legal knowledge see above, p. 12. Seneca, *De tranqu.* 3. 4: 'Praetor adeuntibus adsessoris verba pronuntiat.'

[3] Karlowa, *RG* i. 479. Joers, 241.

[4] Mommsen, *Schr.* vii. 712; Joers, l.c. [5] Above, p. 50 f. [6] Above, p. 26 f.

[7] P. Mucius as *iudex*: Auctor, *ad Herenn.* 2. 13. 19. Aquilius Gallus: Val. Max. 8. 2. 2, and in Quinctius' case: Kübler, *Z* xiv (1893), 54.

[8] Aquilius Gallus refused the consulship (above, p. 43), 'et iuravit morbum et illud suum regnum iudiciale opposuit': Cic. *Ad Att.* 1. 1. 1; cf. Wlassak, *Z* xlii (1921), 394. Cic. *Ad fam.* 9. 18. 1 refers to his own *regnum forense*.

[9] Above, p. 50 f. This is what Cic. *De or.* 1. 48. 212 means by *agere* (procedure *in iure*) by the side of *cavere* and *respondere*. Cf. Wlassak, *Prozessformel*, i. 64, n. 15 *i.f.*

But they also appeared before the *iudex* or *iudices* and presented their clients' cases. Here, however, from the middle of the second century they were confronted with the competition of the orators,[1] with which, as time went on, they were less and less able to cope. The elements of rhetoric, which they had learnt as schoolboys,[2] were no longer a sufficient armament in the battle with professional orators. Ordinary private cases before single *iudices* would give little scope for the display of rhetorical skill;[3] in the sphere of private law it was the centumviral court that became the favourite arena of the orators.[4] Jurisconsults such as Q. Mucius *pontifex* and Servius took up their challenge. But Cicero criticizes Q. Mucius' style of oratory as 'too juristic';[5] it is significant that he can only describe him as 'the best orator among the jurisconsults'.[6] Servius was a fully trained rhetorician, but as an orator he was, according to Cicero's not entirely impartial opinion, only in the second rank.[7] As a rule the jurisconsults were not masters of the higher flights of rhetoric[8] and had no desire to become such, the truth being that they were not at ease in the unscrupulous atmosphere of Hellenistic forensic rhetoric. Faithful to the pontifical tradition they were not mere partisans, ready to forward a client's cause by any and every available means,[9] including falsehood,[10]

[1] Above, p. 43 ff.

[2] Cic. *De or.* 1. 35. 163 (puerorum elementa); 1. 57. 244 ('in hoc genere pueri apud magistros exercentur omnes'); 2. 24. 100 ('hoc in ludo non praecipitur: faciles enim causae ad pueros deferuntur', where *in ludo* means *in schola*); 3. 10. 38; 2. 1. 1 (prima illa puerili institutione). Cf. A. Gwynn, *Roman Education from Cicero to Quintilian* (1926).

[3] Cic. *Orat.* 21. 72: 'Quam enim indecorum est, de stillicidiis cum apud unum iudicem dicas amplissimis verbis et locis uti communibus!' *De optimo genere or.* 4. 10: 'Sed si eodem modo putant, exercitu in foro et in omnibus templis, quae circa forum sunt, conlocato, dici pro Milone decuisse, ut si de re privata ad unum iudicem diceremus, vim eloquentiae sua facultate, non rei natura metiuntur.'

[4] Plin. *Ep.* 6. 12: 'in arena mea, hoc est apud centumviros.' Cf. Mommsen, *Schr.* iv. 438.

[5] See Note J, p. 335.

[6] *Iuris peritorum eloquentissimus*: *Brut.* 39. 145; *De or.* 1. 39. 180—a very doubtful compliment when one remembers Cicero's low opinion of the lawyers generally as orators (below, Note K, p. 336).

[7] Cic. *Brut.* 41. 151: 'videtur mihi in secunda arte' (jurisprudence) 'primus esse maluisse quam in prima' (rhetoric) 'secundus'. In other words, had he been an orator, he would have been in the second rank. Cf. Pomp. *D.* (1. 2) 2. 43.

[8] See Note K, p. 336.

[9] In Gell. 1. 6 an orator declares: 'turpe esse rhetori, si quid in mala causa (!) destitutum atque inpropugnatum relinquat'.

[10] Plato, *Phaedr.* p. 260*e*: ἡ ῥητορικὴ ψεύδεται; Cic. *De or.* 2. 7. 30 (*quae mendacio nixa sit*); *Brut.* 11. 42: 'concessum est rhetoribus ementiri in historiis.' The orator in Gell. 1. 6 says squarely: 'Rhetori concessum est sententiis uti falsis, audacibus, versutis, subdolis, captiosis, si veri modo similes sint et possint movendos hominum animos qualicumque astu inrepere.' Quint. *Inst.* 2. 17, 18 f. Previously Aristotle himself: *Rhet.* 1. 15.

calumny,[1] and emotional appeals,[2] but guardians and promoters of the law. To this tradition they were resolved to be true, and fortunate it was for Roman legal science that they stood fast and refused to suffer the noisome weed of rhetoric, which choked so much else that was fine and precious, to invade their profession. The history of Greek law demonstrates that Hellenistic forensic rhetoric was incapable of producing a legal science. As of the philosopher,[3] so of the Roman jurisconsult, it may be said that he despised words and sought truth with a single mind: *res spectatur, non verba penduntur.*[4] Even Servius, trained orator though he was, appeared in court but seldom,[5] whilst Aquilius Gallus was firm in his refusal ever to do so.[6] There is no trace of any rhetorical activity on the part of Cascellius, Ofilius, Trebatius, or Alfenus. The jurisconsults confined themselves to the quasi-judicial function of instructing the orators in the law.[7] Here we see professional specialization in the Hellenistic manner carried to its limit, and the words which Tacitus[8] puts in the mouth of a eulogizer of the republican period give a true picture of our period: 'whether a man engaged in military matters or in law or in oratory, he concentrated on that and mastered it.'

(v)

In the field of legal education the Roman jurists were faced with the question how far to yield to the pedagogical tendencies of Hellenism.[9] The Hellenistic world was profoundly convinced of

[1] On the technique of διαβολή see Arist. *Rhet.* 3. 15, and the Graeco-Roman materials collected by W. Suess, *Ethos. St. z. ältern griech. Rhetorik* (1910), 245 ff. This deliberate detraction falls under the heading ἠθικόν: Cic. *Orat.* 37. 128.

[2] The παθητικόν of Greek rhetoric: Arist. *Rhet.* 2. 1 ff.; Cic. *Orat.* 37. 128: 'παθητικὸν nominant, quo perturbantur animi et concitantur, in quo uno regnat oratio'; *De or.* 2. 51. 206 f. Part of it was the parade (παραγωγή) of the weeping family at the end of the speech: Cic. *Orat.* 37. 130 f.; Kroll, *PW* s.v. 'Rhetorik', col. 30; R. Volkmann, *Die Rhetorik d. Griechen u. Römer* (ed. 2, Leipzig, 1874), s. 28.

[3] *Schol. Aristid.* (Aristides, ed. Dindorff, 3 (1829), p. 484): 'Φιλοσόφου ἀλλότριον ἡ φράσις, ἀλλὰ μόνον σκοπῆσαι ἀλήθειαν.'

[4] Cic. *Orat.* 16. 51.

[5] Cic. *Brut.* 42. 155.

[6] Cic. *Top.* 12. 51, above, p. 44. Probably he (as other jurisconsults) thought like M. Piso (Cic. *Brut.* 67. 236): 'Is laborem forensem diutius non tulit, quod . . . ineptias ac stultitias quae devorandae nobis (scil. oratoribus) sunt, non ferebat iracundiusque respuebat . . . ingenuo liberoque fastidio.'

[7] In rhetorical jargon *hastas ministrare*, 'to provide ammunition': Cic. *De or.* 1. 57. 242; 59. 253; *Top.* 17. 65.

[8] *Dialog.* 28; cf. Ed. Norden, 'Antike Menschen im Ringen um ihre Berufsbestimmung', Berlin *SB* 1932, p. xxxvii f.

[9] On what follows see Pernice, *Labeo*, i. 33 ff.; Joers, 231 ff.; Kübler, *PW* i A, 394 ff.; Dilthey, *Ges. Schr.* ix (1934), 55 ff.; H. Peter, *Geschichtliche Literatur*, i (1897), 3–53 (Geschichte d. Jugendbildung); Barbagallo, *Lo stato e l'istruzione pubblica nell'*

the value of systematic training (*παιδεία*). From cradle to coffin a man was to be schooled and trained.[1] There was nothing, so men thought, that could not be taught and learnt—statesmanship, art and literature, how to love[2] and finally how to die, for even *εὐθανασία* seemed teachable.[3] The instruction of youth was to be provided by State schools and universities, following fixed and uniform programmes, teachers being appointed and paid by the State.[4] To the Roman of the second century this eternal scholastic education seemed alien and antipathetic,[5] and the government, usually extremely tolerant in such matters, was moved to take special measures precisely against the Hellenistic teachers.[6] Nevertheless, though there was still no question of State schools,[7] the Hellenistic system of education was copied, and when a young man whose schooldays were over could not find teachers of more advanced studies at Rome or in Italy, he would betake himself to the Greek provinces in order to prosecute his studies there.[8] Julius Caesar showed himself, as in other matters, thoroughly Hellenistic by being the first to confer Roman citizenship on the Greek teachers of medicine, grammar, and rhetoric practising at Rome, and by holding out the same prospect to others who should migrate to Rome for the same purpose.[9]

The jurisconsults, however, refused to adopt the Hellenistic

impero Romano (1911); Gwynn, *Roman Education from Cicero to Quintilian* (1926), 22 ff.; R. Herzog, *Urkunden z. Hochschulpolitik der röm. Kaiser*, Sb. Preuss. Ak., phil.-hist. Kl., 1935, 967 ff. (with the literature), on the republican period 979.

[1] Plato, *Protag.* 325*c*: '*ἐκ παίδων σμικρῶν ἀρξάμενοι μέχρι οὗπερ ἂν ζῶσι καὶ διδάσκουσι καὶ νουθετοῦσιν.*' 'Education and admonition begin in the first years of childhood, and last till the very end of life.' Cf. Thucyd. i. 84. 4: *Πολύ τε διαφέρειν οὐ δεῖ νομίζειν ἄνθρωπον ἀνθρώπου, κράτιστον δὲ εἶναι, ὅστις ἐν τοῖς ἀναγκαιοτάτοις παιδεύεται.*

[2] As regards politics, art, and literature, a general reference to Plato and Aristotle suffices. On Ovid's *Ars Amatoria* and its Hellenistic precursors see Schanz–Hosius, ii, s. 299.

[3] Jakob Burckhardt, *Griech. Kulturgesch.* ii. 420 ff.

[4] Aristot. *Eth. Nic.* 1180^{a}25; *Pol.* 1337^{a} *lib.* 8; Cic. *De re pub.* 4. 3.

[5] Cato ridiculed the Isocratean eternal paideia in rhetorics. Plut. *Cato maior* 23: *Τὴν δ' Ἰσοκράτους διατριβὴν ἐπισκώπτων γηρᾶν φησι παρ' αὐτῷ τοὺς μαθητὰς ὡς ἐν Ἅιδου παρὰ Μίνῳ χρησομένους ταῖς τέχναις καὶ δίκας ἐροῦντας.* (These eternal students probably think to make use of their art in Hades and to plead before Minos.)

[6] See the *SC* of 161 B.C. against the Greek philosophers and rhetoricians, Bruns, no. 38, with Schanz–Hosius, s. 74; also the Edict of the censors against the Latin rhetoricians, Bruns, no. 67, with Schanz–Hosius, l.c.

[7] Cic. *De re pub.* 4. 3: 'disciplinam puerilem ingenuis, de qua Graeci multum frustra laborarunt, . . . (maiores nostri) nullam certam aut destinatam legibus aut publice expositam aut unam omnium esse voluerunt.' *FIRA*, i, 247, 305.

[8] So, e.g., Cicero and Servius. On Cicero: Schanz–Hosius, i, s. 140; Gelzer, *PW* vii A, 838. On Servius: Münzer, *PW* iv A, 852. Other examples: Kroll, *Kultur*, ii. 120.

[9] Sueton. *Caes.* 42, with Herzog, 979.

system of education. Of their own educational methods at the beginning of the last century of the Republic we are well informed by Cicero. He gives us a lively picture of his own legal studies under Q. Mucius *augur* and Q. Mucius *pontifex*,[1] and also a description of his own conception (formed after the model of the traditional legal education) of how higher studies in rhetoric ought to be conducted at Rome.[2] We are thus made acquainted with the nature of the legal instruction imparted by the jurisconsults. On leaving school, where he would have acquired some elementary notions of the law,[3] a young man attached himself to some jurisconsult with whom his parents had some connexion, much as the medieval student attached himself to some *dominus*,[4] except that Roman social habits were more aristocratic. Entering the household of his master, the young man lived with him and his family, attended when clients came for legal advice, accompanied his master to the *forum* and observed his behaviour there both as counsel giving *responsa* and as member of the *consilium* of a praetor or a *iudex*, or when he assisted a party in proceedings before a magistrate (*in iure*) at which the terms of a processual formula were settled. In the evening, in the course of general conversation, the great man would turn to the discussion of some interesting case or would indulge in reminiscences of his own teacher or of the lawyers of the previous generation.[5] The young man would keep his ears open and take note of what he thought memorable; he would also study lawbooks for himself and discuss difficulties with his master. The traditional method of legal education thus consisted in impregnating oneself, by contact with practice and professional tradition, with the spirit of the law, in 'living oneself into it';[6] systematic instruction of the Hellenistic type was entirely lacking. Indeed, teaching in the proper sense was abjured by the jurisconsults as being beneath their dignity.[7] There was no legal propaedeutic, no philosophical or historical introduction to law. The jurisconsults did not discuss with their pupils basic concep-

[1] *De amic.* 1. 1; *Brut.* 89. 306; *Ad Att.* 4. 16. 3; *De leg.* 1. 4. 13. Cf. above, p. 44.
[2] *Orat.* 41. 142; 42. 144. [3] Cic. *De leg.* 2. 4. 9; 2. 23. 59.
[4] Savigny, *Geschichte*, iii. 261, 540. [5] Above, p. 36, 49.
[6] So Dodd, *Authority of the Bible* (1941), 295, renders the German phrase *sich einleben*.
[7] Cic. *Orat.* 42. 144: '"At dignitatem docere non habet!" Certe si quasi in ludo!' (*sc. in schola*). *De re pub.* 1. 24. 38: 'Nec enim hoc suscepi, ut tamquam magister persequerer omnia.' Thus, that Q. Mucius *nemini se ad docendum dabat* is no sign of any exceptional haughtiness on his part (Cic. *Brut.* 89. 306). One should speak of the 'school' of Q. Mucius or Servius only as one speaks of the school of Raphael; but it is better to avoid this misleading expression altogether.

tions like justice,[1] law, or legal science, though to the Greeks these seemed problems of the highest, nay almost of sole, importance.[2] The student was plunged straight into practice, where he was faced with the ever-recurrent question: What, on the facts stated, ought to be *done*? What he learnt by slow steps was neither a philosophy of law, a theory of legal method, legal history, comparative law, nor sociological jurisprudence, but simply the art of deciding on the concrete case, and his teacher was not the school, but rough-and-tumble practice:[3] in the Roman phrase 'he learnt how to fight on the field of battle'.[4] To this essentially aristocratic type of legal education the jurisconsults clung up to the end of the Republic. Not even Servius abandoned it;[5] had he done so, Cicero, who is constantly mentioning him, would have told us. On the contrary, Servius still represents the old-style lawyer-statesman,[6] and the fact that his enthusiasm for legal science[7] attracted an unusually large circle of pupils is no ground for inferring that he developed into a teacher of the academic type.

(vi)

Hellenistic example led to some increase of juristic literary activity,[8] but, apart from the productions of the school of Servius, the volume of legal literature remained small. We know that such great jurists as Aquilius Gallus and Cascellius wrote no books.[9] The statement[10] that Servius at his death left 180 books (rolls are

[1] Cic. *De leg.* 1. 6. 18: 'Qui ius civile tradunt non tam iustitiae quam litigandi tradunt vias.'

[2] Latte, *Arch. f. Religionswissensch.* xxiv (1926), 257.

[3] Polyb. 6. 10. 14: '*οὐ μὴν διὰ λόγου, διὰ δὲ πολλῶν ἀγώνων καὶ πραγμάτων.*'

[4] Tac. *Dialog.* 34, says of the old Roman method, in contrast to the Hellenistic: 'apud maiores nostros iuvenis ille, qui foro et eloquentiae parabatur, imbutus iam domestica disciplina, refertus honestis studiis' (i.e. having completed his schooling) 'deducebatur a patre vel a propinquis ad eum oratorem, qui principem in civitate locum optinebat. Hunc sectari, hunc prosequi, huius omnibus dictionibus interesse sive in iudiciis sive in contionibus adsuescebat, ita ut altercationes quoque exciperet et iurgiis interesset, utque sic dixerim, pugnare in proelio disceret.'

[5] Nor Lucilius Balbus or Aquilius Gallus. All hypotheses (e.g. Joers, 236 ff.) built on Pomponius' untrustworthy phraseology are erroneous. Naturally, in view of the slight disparity in their ages, Aquilius Gallus' instruction of Servius would not have been in the usual form. Similarly Cicero gave lessons in rhetoric to Hirtius and Dolabella: *Ad fam.* 9. 16. 7; Drumann, 6. 548.

[6] Above, p. 42.

[7] Cic. *p. Mur.* 10. 23: 'videris istam scientiam iuris tamquam filiolam osculari tuam'.

[8] Below, p. 89.

[9] Cascellius: Pomp. *D.* (1. 2) 2. 45. The *liber bene dictorum* was not a juristic work: Schanz–Hosius, i, s. 198, p. 597. Aquilius Gallus: Pomp. *D.* (1. 2) 2. 42. The words *itaque . . . confecti* in s. 43 refer to Servius: Schanz–Hosius, i, s. 198, p. 594.

[10] Pomp. *D.* (1. 2) 2. 43.

meant) refers no doubt to legal diaries (*commentarii*) found among his papers by his pupils and utilized by them. If he had published works of the number or bulk suggested, we should have known at least their titles.[1] Works in the classical style appear only after Servius.[2]

[1] Below, p. 96.

[2] Below, p. 91.

III

CHARACTER AND TENDENCIES OF ROMAN JURISPRUDENCE IN THE HELLENISTIC PERIOD

(i)

IN this period the leading jurists still came from the most esteemed and influential families. A detailed picture of their social position could only be obtained by tracing their interrelationships by marriage and adoption, their political associations and personal friendships.[1] We have no need to pursue the subject thus far; suffice it that our sources stress the fact that the leading jurists belonged to the class of *clarissimi et amplissimi viri*,[2] and leave us in no doubt as to their membership of the ruling classes and their consequent authority. In short, Roman jurisprudence continued in this period to be a frankly aristocratic profession, exhibiting all the characteristics of such a profession.

1. Jurisprudence was occupied not so much with the interpretation of the statutes or of books of authority, nor with the exposition and discussion of the law, as with its advancement and development, whether by means of *lex rogata*, Edict, formula, or *responsum*.[3] This was the tradition of the legal profession and the republican jurists were at pains to preserve it. One may claim that the wisdom of the Roman method of legal progress lay precisely in the fact that the lawyers had, in principle, authority to create and modify the law.[4] This authority was used by them with the conscious purpose of defending the law from petrification and sterilization. For this purpose statutory legislation was used as little as possible,[5] though naturally in some cases it was unavoidable. It was required, for example, where the functions of State organs had to be regulated: thus the criminal procedure of the *quaestiones* and the use of the formula in litigation between *cives* were introduced by statute, as was appointment in certain cases of tutors by the praetor and tribunes (*tutela Atiliana*). Again, certain social and economic measures could only be taken by statute. But the number and scope of the *leges* remained restricted: the complaint that no man could find his way in the jungle of statutes is an

[1] For this purpose see F. Münzer, *Röm. Adelsparteien u. Adelsfamilien* (1920), and M. Gelzer, *Die Nobilität der röm. Republik* (1912).

[2] e.g. Cic. *De or.* 1. 45. 198; 1. 55. 235; *De leg.* 1. 4. 14; 1. 5. 17.

[3] On their forms see the previous chapter.

[4] Mommsen, *Schr.* vii. 212.

[5] Schulz, 6 ff.

empty rhetorical τόπος.[1] Caesar's scheme for a codification of the civil law[2] was conceived in a thoroughly Hellenistic spirit, but it received no support from the lawyers and died with him on the Ides of March. But all this does not imply that customary law in the sense of Justinian and the *ius commune* was admitted.[3] Previous decisions had no binding force. For all their traditionalism the jurists were determined to keep their hands free to preserve the law from becoming petrified. The Edict, which is the most characteristic product of the jurisprudence of the Hellenistic age,[4] provides the clearest proof of this. It was a method of legislation after the jurists' own heart—a *lex annua*, to use their own expression,[5] deliberately enacted for one year only and bearing on its face the stamp of work not yet finished and therefore to be resumed and completed. Equally characteristic is the fact that the lawyers did not move a finger to provide the public with a correct text of the existing statutes;[6] we know of no published collection of statutes; no jurist troubled to establish a correct version of even the Twelve Tables.

2. Jurisprudence remained authoritarian: *responsa* were brief and in principle disdained to give reasons,[7] forming thus a complete contrast to the lengthy argumentation of a medieval *consilium* or a modern counsel's opinion. In a juristic dispute *auctoritas* counted heavily, and it was from this point of view that precedent and *mos maiorum* were appealed to, particular weight being attached to the decisions of jurists of established repute. Even contemporaries were struck by the non-rational, authoritarian character of republican jurisprudence and sometimes satirized it.[8]

The short and accurate account given by the orator Crassus (Cic. *De orat.* 1. 45. 198) is worth quoting: 'whereas the Greek practice is that men of the lowest orders assist the advocates in their cases in return for a pittance, . . . in our State, on the contrary, men of the highest esteem and renown . . . having attained eminence by their talents, are thereby enabled to give legal advice which carries weight rather on account of their authoritative position than of their very talents.'

[1] Cic. *p. Balbo*, 8. 21; Liv. 3. 34; Sueton. *Jul. Caes.* 44; Tac. *Ann.* 3. 25; and Schulz, 9.

[2] Sueton. l.c.; Plutarch, *Caes.* 58; Isid. *Etym.* 5. 1. 5.

[3] Literature above, p. 24.

[4] Above, p. 53.

[5] Cic. *In Verr.* ii. 1. 42. 109.

[6] Cic. *De leg.* 3. 20. 46: 'legum custodiam nullam habemus, itaque eae leges sunt, quas adparitores nostri volunt; a librariis' (i.e. from the *scribae*) 'petimus, publicis litteris consignatam memoriam nullam habemus'; cf. *p. Balbo*, 6. 14: *quod librarioli se scire profiteantur*. Mommsen, *Schr.* iii. 291; *Staatsr.* ii. 490, n. 2; Schulz, 243 f.; Allen, *Law in the Making* (1939), 359 ff.

[7] Above, pp. 17, 24.

[8] Cf. Schulz, 185 f.

Also significant is a story told by the orator Antonius (Cic. *De orat.* 1. 56. 239). The *pontifex maximus* and jurisconsult P. Licinius Crassus had occasion to give an unfavourable opinion to a peasant who had consulted him in a case. The peasant went away sorrowful and, meeting the orator Galba, laid the case before him too. Galba held Crassus' *responsum* to have been mistaken, and asked him how he could have so decided. Crassus replied that the law was unquestionably as he had stated, but, proving no match for Galba in the discussion, took refuge in *auctoritas*, claiming that his brother P. Mucius Scaevola and Sex. Aelius Paetus would have held precisely what he had. Again, Q. Mucius Scaevola, appearing as advocate in the famous *causa Curiana*, appealed expressly to the *auctoritas* of his father who, he said, had always been of the opinion he was now maintaining (Cic. *Brut.* 52. 197). In letters to Trebatius Cicero caricatures the authoritarian juristic style. Thus (*Ad fam.* 7. 17): 'take the present opportunity of making friends with that famous and generous man [Julius Caesar]; if you miss it, you will never find another so good. This was also the opinion of Q. Cornelius, as you jurists are wont to write in your books.' Again (*Ad fam.* 7. 10): 'I fear you are freezing in your winter-quarters [in Gaul]. I am therefore of opinion that you should keep a good fire—both Brutus and Manilius hold the same—especially as you have no superfluity of wraps.' In the same vein Horace (*Sat.* 2. 1) describes a conversation in which Trebatius answers questions put to him by a single word. Asked by Horace how to combat sleeplessness he is made to reply in the laconic style of the Twelve Tables: 'whoso would sleep well o'nights; let him swim the Tiber thrice, and take a strong draught of wine before going to bed.'

(ii)

1. Thus far jurisprudence simply held to the tradition of the third century. But the importation of the dialectical method from Greece worked a far-reaching change.[1] To Plato this method meant, in a word, the study of kinds (genera and species). Kinds were to be known by distinction (*differentia*, διαίρεσις) on the one hand and synthesis (συναγωγή, σύνθεσις) on the other.[2] This discernment of kinds was to lead on to the discovery of principles governing the kinds and explaining individual cases.[3] The

[1] On what follows see especially the learned studies by La Pira: 'La genesi del sistema nella giurisprudenza Romana, I. Problemi generali' (in *Studi in onore di F. Virgilii*, 1935); 'II. L'arte sistematrice' (*Bull.* xlii, NS 1, 1934, 336 ff.); 'III. Il metodo' (*SD* 1, 1935, 319 ff.); 'IV. Il concetto di scienza' (*Bull.* xliv, 1936, 131).

[2] Plato, *Sophistes*, 253 D: τὸ κατὰ γένη διαιρεῖσθαι. On this text see Julius Stenzel, *Plato's Method of Dialectic* (transl. by D. J. Allan, 1940), pp. 96 ff.

[3] Every work on Plato's philosophy naturally describes his dialectic. Cf. Ed. Zeller, *Die Philosophie d. Griechen*, ii. 1 (ed. 5, 1922, a mere reprint of ed. 4 of 1888, with an appendix by Ernst Hoffmann), 614 ff.; Natorp, *Hermes*, xxxv (1900), 385 ff.

method, which had brought the Academic school good repute and evil,[1] was also practised in the Aristotelian[2] and Stoic schools.[3] It was, of course, well known to the leading Roman lawyers, regardless of the particular philosophic school they individually followed. M'. Manilius, Q. Mucius Scaevola *augur*, P. Rutilius Rufus, Q. Aelius Tubero, and Q. Mucius Scaevola *pontifex* all belonged to the circle of the younger Scipio and Panaetius.[4] Q. Mucius Scaevola *pontifex* naturally passed the method on to his pupils: only philosophical studies can be referred to when Lucilius Balbus is called *doctus et eruditus*.[5] Servius' education was the same as Cicero's, and his vigorous application of the dialectical method is praised by Cicero.[6] Similar knowledge of the method must be presumed in other leading lawyers from the second half of the second century onwards. If they did not make its acquaintance by philosophy, they certainly did so by their studies in mathematics, rhetoric,[7] and grammar, for in all these branches of knowledge they met the same dialectic method. Especially grammatical studies provided them with models showing how to reduce to a system an extensive and unwieldy material.[8]

2. The adoption of dialectic by jurisprudence thus led to a systematic study of legal genera and species.[9] The technical name for such distinctions had been since Aristotle διαίρεσις;[10] in Latin it was *divisio*, *distinctio*, or *differentia*; in the medieval Bolognese school the designation *distinctio* became technical.[11]

406 ff.; Mutschmann, *Divisiones quae vulgo dicuntur Aristoteleae* (ed. Teubner, 1906), *praef.* p. vii. Theiler, *Die Vorbereitung des Neuplatonismus* (1930), 4 ff. The method is brilliantly illustrated by Aristotle's *Poetica*, *Politica*, and *Historia animalium*.

[1] See the mocking line of the comic poet Epicrates in Athenaeus, 2, 59*d* (Kaibel), *Comic. Att. Fragm.* (ed. Kock), ii (1884), 287 fr. ii.; also in Mutschmann, *praef.* p. xvi.

[2] Zeller, *Die Philos. d. Griechen*, ii. 2 (ed. 4: reprinted 1921), 254 ff.; Mutschmann, *praef.* xx. The differences between Plato and Aristotle do not concern us here.

[3] Cf. v. Arnim, *Stoicorum veterum fragmenta*, Index, s.vv. διαίρεσις and διαλεκτική.

[4] On the *grex Scipionis* (Cic. *De am.* 19. 69) see Leo, *Gesch. d. röm. Lit.* i. 315 ff.; Schanz–Hosius, 1 (1924), s. 75. 2; Münzer, *PW* iv. 1439; Ed. Meyer, *Kleine Schr.* ii (1924), 423 ff.; R. M. Brown, *A Study of the Scipionic Circle* (Iowa, 1934) is not accessible.

[5] Cic. *Brut.* 42. 154.

[6] Below, p. 68.

[7] For example *Ad Herenn.* 1. 4. 6: 'Exordiorum tria sunt genera . . .'; 1. 8. 12: 'Narrationum tria genera sunt . . .'; 1. 2. 2: 'Tria sunt genera causarum: demonstrativum, deliberativum, iudiciale . . .'.

[8] Ed. Fraenkel, *Rome*, 16; Stroux, *ACI Roma*, i. 116 ff.; Peter, *Der Brief*, 21, on *genera epistularum*.

[9] Seckel, in his brilliant 'Distinctiones Glossatorum' (*Festschr. f. Martitz*, 1911), 285, writes: 'The Romans had already distinguished', but so above all had the Greeks, from whom the Romans learnt the art. Goudy, *Trichotomy in Roman Law* (1910), conceives the subject too narrowly: there is no point in singling out division into three.

[10] Zeller, ii. 2, p. 256, n. 2.

[11] See Genzmer, *ACI Bologna*, i (1934), 397 ff.

Pomponius[1] informs us that Q. Mucius *pontifex* was the first to arrange the civil law *generatim*. He cannot have been the earliest lawyer to employ the method, but he was the first to use it for the systematic arrangement of a lawbook. His distinctions were eagerly discussed, amended, and perfected by later jurists. Thus, where Mucius distinguished five kinds of tutorship, others, with Servius, recognized only three, and others two.[2] We have no detailed information,[3] but the lengthy *disputatio* of this question by the republican jurists betokens their interest in the method. We hear also that Mucius distinguished various *genera possessionis*,[4] and that Servius recognized four *genera furti*.[5] These are isolated examples, coming to us from casual reports, but the number of republican *distinctiones* must have been considerable, seeing that Mucius applied the method systematically to the whole *ius civile*,[6] though we have no materials for reconstructing the details of his book. Probably a great part of the *distinctiones* found in classical works, especially the *Institutes* of Gaius, come from republican sources; but again it is impossible for us to draw between republican and later *distinctiones* a line which the classical writers themselves had no reason for drawing.[7] To conclude, the same method of διαίρεσις was applied in public and sacral law; but here our sources fail us completely.[8]

3. *Distinctio* was the first, but not the last, step in the dialectical process. Genera and species having been distinguished, the next business was to discover their governing principles.[9] That much knowledge of the nature of the several kinds can be gained by one who will take the necessary trouble was a saying of Aristotle's[10] of which the jurists can hardly have heard; but it was in its spirit that they worked.[11] Here are some illustrations.

[1] *D.* (1. 2) 2. 41.

[2] Gaius, 1. 188. It is irrelevant whether this text is genuine or not; see Beseler, *T.* x (1930), 180.

[3] Conjectures: Pernice, *Labeo*, i. 23 ff.

[4] *D.* (41. 2) 3. 23.

[5] Gaius, 3. 183.

[6] He was thus a true ἐραστὴς τῶν διαιρέσεων καὶ συναγωγῶν (Plato, *Phaedr.* 266).

[7] One must also bear in mind that many a distinction found in our supposedly classical texts is of post-classical origin. Of this more below.

[8] See (Bremer, i. 263) the fragment from Messala's *Augural Law*: 'Patriciorum auspicia in duas divisa sunt potestates . . .'.

[9] The right-angled triangle is a species of triangle resulting from the διαίρεσις of the triangle, and the Pythagorean theorem is a principle governing this species. The distinction between epic and drama in Aristotle's *Poetics* is a διαίρεσις. The rule of the three unities is a principle governing the species 'drama'.

[10] *De part. anim.* A 5. 644^{b}29: 'Πολλὰ γὰρ περὶ ἕκαστον γένος λαβοί τις ἂν τῶν ὑπαρχόντων βουλόμενος διαπονεῖν ἱκανῶς.'

[11] On what follows see Joers, 290 ff., citing the older literature, though itself out of date.

The διαίρεσις of *stipulationes* (formal verbal promises) according to the person in favour of whom performance is promised yields four kinds: (1) *mihi dare spondes?*, (2) *Titio dare spondes?*, (3) *mihi et Titio dare spondes?* and (4) *mihi aut Titio dare spondes?*. That finishes the διαίρεσις; next comes the question of formulating the principles governing the several kinds. According to Gaius (3. 103) the classical jurists, as might be expected, held the first promise valid; the second invalid where Titius is an *extranea persona*, but valid where he is, for instance, the promisee's *paterfamilias*; the third always valid, subject, where Titius is an *extranea persona*, to a doubt whether the promisee, who alone can have a right of action, is entitled to full performance (the Sabinian view) or to only half (the Proculian view). The fourth is always valid, subject to this, that Titius' sole function, if he is an *extranea persona*, is to serve as an alternative person to whom performance can validly be rendered in discharge of the obligation. How much of all this goes back to the republican jurists we do not know, except that they already distinguished the first two cases and held a stipulation in favour of a third-party, if he were an *extranea persona* (*stipulatio alteri*), to be null and void. Q. Mucius (*D.* 50. 17. 73. 4) enunciates this principle for a wider genus of acts in the law, comprising other agreements as well as *stipulatio*.

Sacral law forbade work on *feriae publicae*, but exceptions were admitted first in one case and then in another, so that we find lists of allowed works;[1] at length Mucius formulated the general principle that any work was allowable the omission of which would cause damage.[2]

After C. Gracchus' death his widow sued his *heres* for the return of her dowry (*dos*). The *heres* pleaded that during the riot in which Gracchus was killed various things comprised in the *dos* had been destroyed. Mucius Scaevola gave the *responsum* that, seeing that Gracchus was to blame for the riot, his *heres* must compensate his widow for the damage done to her dotal property. Servius, proceeding from the simple *distinctio* between *dos* consisting of money and *dos* consisting of other objects, formulated for the latter the principle that a husband is responsible for damage caused by himself intentionally or through negligence. Whether Servius was the first to formulate this abstract principle we do not know. P. Mucius was content simply to decide the actual case; of course the principle was implicit in his decision (*D.* 24. 3. 66. pr.).[3]

[1] Cato, *De agr.* 2. 4; Columella, 2. 22; 11. 1. 20; Plin. *Hist. nat.* 18. 40. Cf. Wissowa, 441.

[2] Macrob. *Sat.* 1. 16. 10: 'Umbro negat eum pollui, qui opus vel ad deos pertinens sacrorumve causa fecisset vel aliquid ad urguentem vitae utilitatem respiciens actitasset. Scaevola denique consultus, quid feriis agi liceret, respondit: quod praetermissum noceret.'

[3] The text is corrupt, but the meaning clear.

Another instructive example is furnished by the evolution of the principles governing *furtum usus*. A man borrowed a horse to ride from Rome to Aricia, but rode through Aricia up the hill beyond. He was held liable for *furtum*. Thus far Valerius Maximus (8. 2. 4), we know not from what source. Gellius (6. 15) adds an extract from Labeo on the Twelve Tables which seems to show (the text is corrupt) that in the second century Brutus advanced but one step beyond the reported case, laying down that in general one who borrowed a horse was guilty of theft if he took it elsewhere or farther than he had stated when borrowing it. Q. Mucius' formulation, also reported by Labeo, is far more abstract: he makes the principle extend to *depositum* as well as *commodatum*, and for horse substitutes *res* in general. He was feeling his way to the general category, *furtum usus*, but had not yet got beyond two of its species. A complete formulation would be: 'furtum fit si quis usum alienae rei in suum lucrum convertat'.[1]

The technical Greek name for such principles is ὅροι[2] or κανόνες,[3] the Latin *definitiones* or *regulae*;[4] the importation of dialectic into jurisprudence thus led to the composition of *regulae iuris*.[5] There were certainly many republican principles or *regulae*, but once again our materials do not permit us to draw an exact line between republican and classical *regulae*, because the classical writers repeated many formulations of republican jurisprudence without marking them off from their own;[6] and even where they cite republican authority, it is possible that instinctively they gave what they borrowed a more abstract form than had republican jurisprudence, which often was content simply to decide the concrete case laid before it.

The republican search for principles has been designated 'regular jurisprudence',[7] an unhappy expression, based on insufficient comprehension of the method in question. Since *regula* means simply principle, any and every search for principles ought to be described as 'regular jurisprudence', which would be absurd. Further, the expression leads to *regula* being taken as designating a short maxim in the style of the rules of school grammar. Among the Roman principles we certainly do find short proverbial formu-

[1] *D.* (47. 2) 55. 1. Huvelin, *Ét. sur le furtum*, i (1915), 329 ff., does not help much.

[2] Cf. Nicolai Hartmann, *Aristoteles u. das Problem des Begriffs*, xii (Abh. d. Preuss. Ak. 1939, 5).

[3] Cf. H. Oppel, '*ΚΑΝΩΝ*. Zur Bedeutungsgesch. d. Wortes u. seiner lateinischen Entsprechungen', *Phil.* Suppl. 30 (1937), 94 ff. Wenger, *Canon* (1942).

[4] Cicero's texts are given below, p. 336, and by Oppel, op. cit. in the last note.

[5] Oppel fails to see this, as op. cit. 100, n. 4, shows.

[6] Many principles also are of post-classical formulation.

[7] Joers, 283 ff. (Die Regularjurisprudenz), followed by most writers.

lations, but the term *regula* or *definitio* was not confined to such as these.[1] True Sabinus (*D.* 50. 17. 1) says: 'regula est quae rem *breviter* enarrat . . .[2] per regulam igitur *brevis* rerum narratio traditur', but then, in comparison with the statement of the facts of a particular case, every principle is *brevis*. Lastly, the expression 'regular jurisprudence' emphasizes only the search for principles and ignores the preceding διαίρεσις. It ought therefore to be abandoned in favour of the expression 'dialectical jurisprudence'.

4. In the formulation of definitions in the ordinary sense of the term (likewise covered by ὅρος, *definitio*, *regula*) republican jurisprudence was decidedly backward, and even in classical jurisprudence, though it inherited many a definition from the earlier age, quite a number of fundamental legal conceptions are still left without a definition—for example, *actio*, *dominium*, *possessio*, *servitus*, *pignus*, *obligatio*, *contractus*, *delictum*, *heres*, *legatum*, *dos*, and so on.[3] In the last century of the Republic dialectical jurisprudence was still in its infancy and the definition of fundamental conceptions was beyond its capacity. Here and there we find traces of the Hellenistic theory of language.[4] The Stoic doctrine, accepted by other schools also, was that words possess a natural meaning, in which they ought to be used. That meaning is given by etymology. Hence we find the republican jurists applying etymological analysis to legal terms, though their common sense saved them from straying far on this false trail. Many examples might be cited.[5]

5. The importation of dialectic was a matter of extreme significance in the history of Roman jurisprudence and therefore of jurisprudence generally.[6] It introduced Roman jurisprudence into the circle of the Hellenistic professional sciences and turned it into a science in the sense in which that term is used by Plato and Aristotle no less than by Kant. It is only systematic research

[1] One has only to look at Gaius, 1. 83–5; 2. 68, 78, 114; 3. 142.

[2] Reminiscent of Cic. *De or.* 1. 42. 189 and Aristot. *Top.* 7. 5. 154[a]31.

[3] Schulz, 43 ff.

[4] Gell. 10. 4; Augustinus, *De dialectica* (ed. A. Wilmanns, *De M. Terentii Varronis libris grammaticis* (1864), 141 ff.); Orig. *Contra Celsum*, 1. 24. Cf. Steinthal, *Gesch. d. Sprachwissensch. bei d. Griechen und Römern* (1863), 39 ff., 312 ff.; Ludwig Stein, *Die Erkenntnistheorie der Stoa* (Berliner St. f. klass. Philol. u. Archäologie, vii. 1 (1888)), 76 ff.; Zeller, *Philos. d. Griechen*, ii. 1. 629 ff.; H. Dahlmann, 'Varro u. d. hellenistische Sprachtheorie', *Problemata*, v (1932), 4 ff.; O. Rieth, *Problemata*, ix (1933), 36 ff.; Reitzenstein, *PW* vi. 807 ff.; Luigi Ceci, *La lingua del diritto Romano*, 1, *Le etimologie dei giureconsulti Romani* (1892; not continued). There is no satisfactory modern exposition.

[5] See Note L, p. 336.

[6] Not sufficiently noticed by historians of Roman jurisprudence and entirely ignored by historians of philosophy.

and organized knowledge that can properly be so called,[1] and these are attainable only by the dialectical method.[2] It was only through dialectic that Roman jurisprudence became fully logical, achieved unity and cognoscibility, reached its full stature, and developed its refinement. Not only does dialectic subsume individual phenomena under their genera; it is also an instrument of discovery, suggesting, when applied to jurisprudence, problems which have not actually occurred in practice.[3] But, as Plato saw, dialectic is a method easy to describe but difficult to employ:[4] as might be expected, a critical examination of the republican dialectical jurisprudence reveals shortcomings and defects.[5] The fact, however, remains that the importation of the dialectical method transformed Roman jurisprudence into a systematic science, and was therefore of incomparable importance in the history of legal science. Here, if anywhere, Plato's enthusiastic laudation of the dialectical method[6] is seen to be fully justified: for Roman jurisprudence it proved to be verily the fire of Prometheus.

6. It remains to consider what Cicero has to tell us of this memorable development. His philosophical studies had made him acquainted with the dialectical method,[7] and his personal relations with the jurisconsults had made him aware that it had been imported into their science. He extols his friend Servius as the first and only representative of dialectical jurisprudence, hailing him, with evident reference to the passage in Plato's *Philebus* cited above, as the new Prometheus, the bringer of the

[1] The various formulations of the philosophers all come to the same thing. Cf. Eisler–Roretz, *Wörterbuch d. philosophischen Begriffe*, 3 (ed. 4, 1930), 617 ff. On a wider conception of science see above, p. 1.

[2] Look, for example, at the *Sachsenspiegel*, the author of which was ignorant of the dialectical method. The various subjects, so far as they are not connected by more or less vague associations, succeed each other without connexion or plan: 'and then', 'and then', 'and then . . .' ('nu vernemet . . .', *Landrecht*, 1. 20; 1. 33; 2. 13; 2. 66, &c.). Modern students of the work, who have the dialectical method in their blood, instinctively arrange its subjects *generatim*.

[3] Cic. *De leg.* 1. 5. 15: 'Quaeramus isdem de rebus aliquid uberius, quam forensis usus desiderat.'

[4] Plato, *Phileb.* 16 C: '*ἦν δηλῶσαι μὲν οὐ πάνυ χαλεπόν, χρῆσθαι δὲ παγχαλεπόν.*'

[5] A subject requiring closer study. A beginning in Joers, 301 ff. The fragment of Cato in *D.* (45. 1) 4 is, however, accepted by Joers as genuine, but is in fact heavily interpolated: Beseler, *Z* xlvi (1926), 100; Scherillo, *Bull.* xxxvi (1928), 34; *Index. Interp.*

[6] Plato, *Phileb.* 16 C: '*θεῶν μὲν εἰς ἀνθρώπους δόσις, ποθὲν ἐκ θεῶν ἐρρίφη διά τινος Προμήθεως ἅμα φανοτάτῳ τινὶ πυρί.*'

[7] Cf. *Ad Att.* 6. 1. 15: 'Breve autem edictum est propter hanc meam *διαίρεσιν*, quod duobus generibus edicendum putavi.' Cic. *Or.* 4. 16; *De or.* 1. 41. 186.

heavenly light of dialectic into the murky world of law. This, however, was a gross exaggeration.[1] Cicero was too much biased in favour of his friend to realize that dialectic had already been employed by Q. Mucius and even earlier, and that Servius stood by no means alone. He also failed to perceive that the jurists, Servius included, were far more cautious in their employment of the new method than he chose to imagine. But on the whole his appreciation and description of the development is correct enough. Insufficient use has been made by scholars of the passage in which he contrasts the rule-of-thumb knowledge of law acquired by Q. Scaevola and others in the course of mere practice with the true science to which Servius had attained by the systematic application of the dialectical method.[2] And it is in similar terms that he represents the orator Crassus as expounding a plan for the dialectical presentation of the *ius civile*,[3] though whether Crassus ever conceived or intended to execute such a plan is doubtful. It is certainly the plan which Cicero, in his lost work *De iure civili in artem* (*i.e.* to a dialectical system) *redigendo*, once more propounded and perhaps carried out.[4] Dialectic was to be applied to jurisprudence. But Cicero's conception of the task was immature and inadequate. What he aimed at was a short, hard-and-fast system, built up out of elementary distinctions, definitions, and principles. What the jurists aimed at was the very reverse: it was, by a systematic application of the dialectical method, to master the evergrowing multiplicity of the concrete cases, an eternal dialectical research, an 'open system'. The real value of the Promethean fire was better understood by the professional lawyers than by the 'philosopher' Cicero.

(iii)

Although, in the manner we have described, Roman jurisprudence took on the character of a true science, it remained nevertheless in the hands of Roman priests, senators, magistrates, and lawyers, of men, that is, immersed in practical politics and law. This produced a clear separation of jurisprudence from other sciences.

1. Although a number of the leading lawyers drank deep of the well of Greek philosophy,[5] a philosophy of law was not developed,

[1] Cf. Di Marzo, *Bull.* xlv (1938), 261.
[2] See Note M, p. 336.
[3] See Note N, p. 337.
[4] Cf. Schanz–Hosius, i, s. 171. 6. On what follows see Cic. *De leg.* 1. 4. 14 ff.
[5] Above, p. 63.

and philosophy stopped at the frontiers of Roman law.[1] This was in keeping with the Hellenistic tendency to division of labour and specialization of the professional sciences. It was equally in keeping with the thorough Romanism of the lawyers, their sturdy, sober sense of realities and their predilection for an intelligible and clearly defined task. The nature of justice, a central problem in Greek philosophy, they do not discuss. About Natural Law, with which generations of Greek thinkers had occupied themselves, the republican jurists have not a word to say. They certainly drew on Natural Law, but, in Aristotle's terminology, this was relative Natural Law (*φύσει δίκαιον καθ' ὑπόθεσιν*), not absolute (*ἁπλῶς δίκαιον*),[2] and they did this unconsciously, or at least without reflection, and certainly without saying or writing a word on the subject. Speculation as to the ideal State and the ideal law there was none, not that the jurists were narrow positivists,[3] interested only in actually existing law—on the contrary, as has been shown above,[4] they were active in developing the law—but that the concrete problems of life, not far-reaching speculations, were what occupied their attention. Nor did they touch on questions of methodology, such as the theory of the interpretation of statutes, although invited to do so by Greek literature.[5] They held equally aloof from legal history, where there were no Greek models.[6] They displayed no interest in comparative law, in which subject an impressive beginning had been made by Aristotle and his school;[7] foreign law lay clearly outside the practical scope of the jurisconsults, and they seem to have given no *responsa* on peregrine law. Lastly we never find them treating law from the sociological point of view, although here too the Greek contribution was worthy of attention.[8] They never attempted a description of Roman constitutional law, in the manner of Aristotle's *Πολιτεία*

[1] Good account of what follows by Latte, *Arch. f. Religionswissensch.* xxiv (1926), 257; Ed. Fraenkel, *Rome*, 25.

[2] Aristot. *Eth. Nich.* 1094^{b}25, 1137^{b}18; *Polit.* 1280^{a}8, 1284^{b}15, 1317^{b}7, 9, 1328^{b}37. Cf. Karl Hildenbrand, *Gesch. u. System d. Rechts- u. Staatsphilosophie.* 1, 'Das klass. Altertum' (1860), 283, 307. What is in question is natural law in the setting of given legal institutions and maxims, the *φύσις τῶν πραγμάτων*, *rei natura* (Cic. *De opt. genere or.* 4. 10) or *natura causae* (Cic. *p. Caec.* 4. 10). Cf. Dilthey, *Ges. Schr.* ii (1929), 10; xii (1936), 154; Beseler, *Byz. neugriech. Jahrb.* xiv (1937/8), s.v. 'natura rei'.

[3] As were the German jurists of the *Gemeines Recht* in the 19th century; cf. Schulz, 100.

[4] Above, p. 61.

[5] Himmelschein, *Symb. Frib.* 391 ff.

[6] Cf. Wilamowitz-Möllendorff, *Hellenistische Geschichtsschreibung, Reden u. Vorträge* (ed. 4, 1926), ii. 216 ff.; Ed. Schwartz, *Ges. Schr.* i (1938), 47 ff., 67 ff.; Schulz, 101.

[7] Ibid.

[8] Adolf Menzel, 'Griech. Soziologie', *Wien SB* ccxvi, Abh. i (1936).

Ἀθηναίων, nor a discussion of the Roman constitution, in the style of Polybius. They stood too near these things and were too deeply immersed in political life and legal practice to be able to view their own institutions as matters of purely intellectual interest or to raise questions about their nature and justification. The Greek philosophers from the time of Aristotle, on the other hand, had stood aloof from politics and legal practice,[1] and viewing them with the eyes of strangers saw things which the natives overlooked.

The contrast is well illustrated by a question raised in Aristotle's *Problemata*:[2] 'Why do many legal systems prefer intestate to testamentary succession? Perhaps because family relationships cannot be falsified, whereas experience shows that testaments often are.' An interesting sociological question, but how remote is the author from the practice of Greek law! It never occurred to any Roman jurist to raise the converse question: Why does Roman law give preference to testaments and treat intestacy as a last resort, to be avoided by all possible means? We are reminded that Aristotle was the non-Athenian in Athens, the stronghold of Macedonian influence in what had formerly been the leading city of the Attic empire.[3] He sees things with the eye of the explorer and does not even dare to interrogate the natives, whereas the Roman jurists were at home and their approach to the law was that of men actively engaged in national affairs.

2. The attitude of the orators to these questions was fundamentally different. Some of them possessed a certain stock of legal knowledge, but they did not belong to the circle of the *iurisconsulti*.[4] Having acquired the art of advocacy entirely from Greek teachers and manuals, they were more deeply hellenized than the jurisconsults, and adapted their Greek models to native Roman conditions only very superficially. In particular, they took over from Greek rhetoric certain *τόποι*: the contrasts of *ius naturae* and *ius civile*, of *ius gentium* and *ius civile*, of *ius scriptum* and *non scriptum*, of *lex* and *mos* as manifestations of *ius*, and of *ius* and *aequitas*. All these importations from Greece were turned to practical use by the Roman advocates, but were remote from Roman law and jurisprudence. Many scholars have been misled by the Roman *toga* in which these conceptions are clothed into accepting the utterances of the advocates as revealing Roman jurisprudence, just as, not so long ago, every legal allusion in

[1] This Hellenistic tendency has already been mentioned above, p. 43.
[2] *Probl.* 950. 6.
[3] W. Jaeger, *Aristoteles*, 333 (Engl. ed. 313).
[4] Above, p. 43 f.

Plautus used to be exploited as illustrating Roman law.[1] But the republican jurists took no interest whatever in the Greek conceptions we have mentioned; these penetrated into Roman jurisprudence only in classical and post-classical times. Still more remote from Roman jurisprudence is legal philosophy of the kind exhibited by Cicero in his *De re publica* and *De legibus*, works which are nothing more than offshoots of Greek legal philosophy. On close analysis they throw no light on Roman jurisprudence.[2]

Iustitia. The definitions given by the *Auct. ad Herennium* and Cicero are simply copied from the Greeks.[3]

Ius naturae and *ius civile.* The former term translates *φύσει δίκαιον* and the latter *νόμῳ* or *θέσει δίκαιον*. This usage of *ius civile* was misleading, since the lawyers had for ages used it in a narrower sense. As *bellum civile* meant war *inter cives*, so to the lawyer *ius civile* meant *ius inter cives* and was thus equivalent to Roman *ius privatum*, in contrast to *ius publicum* which denoted the law respecting the *res publica*, including that of its relations with *cives*. This is the only sense in which *ius civile* is used by the republican lawyers. Q. Mucius' *Libri iuris civilis* were confined to private law, including praetorian law which could not be entirely segregated and in the time of Mucius had no literature of its own. The contents of Cato's *Commentarii iuris civilis* and of M. Junius Brutus' *Libri de iure civili* were similar. Thus Cicero's usage of *ius civile* is quite alien to that of the lawyers; nor is it uniform, because he writes now as a Roman and now as a translator of Greek terms. It is some time since scholars have been converted to distinguishing in Plautus what is truly Plautine and what is merely copied from his Greek models,[4] and we must apply the same distinction to Cicero.[5] In this chapter, therefore, we need not discuss the *ius naturae*: it is not mentioned by the republican lawyers, and Cicero's speculations on the subject ought to be treated as an offshoot of Greek theories.[6]

[1] The first to see the truth was J. Partsch, *Hermes*, xlv (1910), 595 ff. ('Aus nachgelass. u. kleineren Schriften', *Freib. Rechtshist. Abh.* i, 1931). See further W. M. Green, 'Greek and Roman Law in the Trinummus of Plautus', *Class. Phil.* xxiv (1929), 184, n. 1; Schanz–Hosius, i. 79.

[2] On Cicero's *De legibus* see W. Theiler, *Die Vorbereitung des Neuplatonismus* (1930), 44, giving literature. Pohlenz, *Phil.* xciii (1938), 102, does not help. Harder, *ACI Roma*, i (1934), 171, needs development.

[3] *Ad Herenn.* 3. 2. 3. The Ciceronian passages are given by Costa, *Cicerone giureconsulto*, i. 20. On their Greek precursors: F. Senn, *De la justice et du droit* (1927). Further literature is given by Westrup, *Introduction to Early Roman Law*, iii. 1 (1939), 18.

[4] Above, p. 72, n. 1.

[5] E. Ehrlich's *Beitr. z. Theorie d. Rechtsquellen* (1902) is defective in method and to be rejected.

[6] See Note O, p. 337.

Ius gentium and *ius civile*.[1] These are respectively translations of κοινὸν δίκαιον (an occasional substitute is *ius commune* or *ius commune gentium*) and πολιτικὸν or ἴδιον δίκαιον.[2] The Greek distinction is between law obtaining among all peoples and law obtaining only in a given State. But the Greek discussion of these terms did not arrive at precision. The republican lawyers nowhere employ the distinction, it being useless for their purposes. Even in classical legal literature the term *ius gentium* does not occur before Gaius. In lay literature it occurs for the first time in Cicero. It is not found in Plautus, and that it was used in a speech by Cato Censorinus is not proved by Gellius' (6. 3) report, which is only a summary and does not pretend to reproduce Cato's language. Nor does it follow from a well-known passage of Cicero (*De off.* 3. 17. 69) that 'our ancestors' had used the term.[3] It is sheer fantasy to hold that by *ius gentium* the republican lawyers ever denoted those parts of Roman law which were applicable to *peregrini* as well as *cives*.[4] If a contract of sale made between two Greeks, or between a Greek and a Roman, came before the Roman praetor, the praetor applied the Roman law of sale, but the republican lawyers never in consequence described that law as being *ius gentium*. The expression, it may be noted, is coined on the analogy of familiar phrases like *ubi gentium* (where in the world?) and *nusquam gentium* (nowhere in the world).

Ius scriptum and *non scriptum*. This simply reproduces the distinction νόμος γεγραμμένος and νόμος ἄγραφος.[5] Here too the Greek meaning vacillates. Since νόμος includes also the rules of social and personal morality and of religion, these were the first rules suggested by the term νόμος ἄγραφος as not having been originated by statutes and being independent of reduction to writing.[6] The distinction is one which might well provide the orator with an occasional purple patch,[7] but how could it serve the lawyer? Statutes being few, Roman

[1] For the evidence see: Nettleship, *Journ. of Philol.* xiii (1885), 169 ff.; *Thes.* vi, 1860, 68 f.; Costa, *Cicerone giureconsulto*, i. 25 ff. For the older literature, see Weiss, *PW* x. 1218. Cf. Bruns–Lenel, 330 ff.; Bögli, *Beitr. z. Lehre vom ius gentium d. Römer* (1913), with Beseler, *Berl. Phil. Woch.* 1913, 1647; Schönbauer, *Z* xlix (1929), 383 ff.; Beseler, *Bull.* xxxix (1931), 334 ff.; Frezza, *Riv. it.* viii (N.S. viii, 1933), pt. 2, no. 3 f.; Kaser, *Z* lix (1939), 67 ff.; Lauria, *Festschr. Koschaker*, i (1939), 258 ff.

[2] Aristot. *Rhet.* 1368^{b}7 and 1373^{b}.

[3] As, for example, P. Krüger, 45, wrongly says. Moreover the words *itaque . . . debet* are interpolated: Beseler, op. cit. The term is equally absent from the *Auct. ad Herenn.*, where instead we find *ius commune* (2. 10. 14; cf. Cic. *Verr.* i. 4. 13); *ius commune gentium*: Cic. *De harusp.* 14. 32.

[4] e.g. Mitteis, *RP* i. 62; Kunkel, s. 34, 4.

[5] R. Hirzel, *Agraphos Nomos* (1900); Pernice, *Z* xxii (1901), 82 ff.; Ehrenberg, *Arch. f. Gesch. d. Philos.* xxxv (NF xxviii, 1923), 125 ff.

[6] See Diog. Laert. 3. 86 and Mutschmann (above, p. 62, n. 3), p. 10.

[7] e.g. Cic. *p. Milone*, 4. 10: 'haec, iudices, non scripta, sed nata lex, quam non didicimus, accepimus, legimus, verum ex natura ipsa adripuimus, hausimus, expressimus, ad quam non docti, sed facti, non instituti, sed imbuti sumus.' Cf. *Auct. ad Herenn.* 4. 24.

law consisted very largely of law which had not been reduced to the written form of statute, but what object could a lawyer have in drawing a line between statutory and non-statutory law, when the two were inseparably interlocked? Moreover, the Edicts, though distinct from the statutes, were equally law definitely formulated by the State. Thus the republican jurisconsults never mention the distinction and have no special term with which to denote law not formulated in statute. Combinations such as *lex iusque*[1] must be taken in the same way as *patres conscripti*, where *conscripti* is the wider term and includes *patres* (the patricians). We read in one place that the republicans used the term *ius civile* in a restricted sense to denote the private law evolved by jurisprudence, but the source is untrustworthy, and closer examination shows it to be post-classical.[2]

Leges et mores as constituents of *ius*. So the Roman orators translated ἤθη καὶ νόμοι,[3] subsuming both terms under *ius*. All that the orators meant was that a legal rule (*ius*) could be proved either from statute or from custom. The jurisconsults certainly admitted the *auctoritas* of *mores maiorum*, but they made no use of the distinction *leges-mores* because they did not admit Roman customary law.[4]

Ius or *lex* and *aequitas*.[5] According to Aristotle,[6] equity (ἐπιείκεια) is necessary in order to correct law (νόμος), because the generality of the formulation of law renders it unsuitable in some particular cases. The pettifogger (ἀκριβοδίκαιος) sticks to the letter of a statute; equity corrects it, but in so doing gives what is really a better interpretation, because it is what the legislator would himself decide were he now confronted with the particular case, or what he would have provided had he foreseen the case. The Roman orators rendered ἐπιείκεια by *aequitas*; we read that 'every schoolboy learns to argue for equity against the letter of the statute'.[7] But to the lawyers this distinction between law and equity was useless. Of course the problem raised by Aristotle had long been familiar to them; they were well aware that statutes may lead to injustice, and that not merely because the gener-

[1] Schulz, 6. Cato (Jordan, p. 74): *iure lege . . .*; (p. 30) *iurum legumque cultores.*

[2] *D.* (1. 2) 2. 12. Previously, in s. 5, we have read that *ius non scriptum* has no special name, but is covered by the indiscriminate term *ius civile*, but now in s. 12 we are told that on the contrary it is *ius civile* in the strict sense (*proprium ius civile*). But all this s. 12, forming the conclusion of the part on the sources, is merely a clumsy post-classical summary of what precedes; cf. Kreller, *Z* xli (1920), 264.

[3] e.g. Herodot. 2. 35; Polyb. 18. 34. 8: 'ἔθη καὶ νόμιμα.' *Auct. ad Herenn.* 1. 2. 2; 2. 12. 18; 3. 3. 4; Livy, 1. 19. 1; rather less openly Cic. *Brut.* 2. 7: 'bene moratae et bene constitutae civitatis' (i.e. *bonis moribus et bonis legibus constitutae civitatis*). See further Mommsen, *Staatsr.* iii. 692, n. 1; *Schr.* v. 535, n. 2.

[4] Above, p. 61.

[5] Kipp, *PW* i. 598; Costa, *Cicerone giureconsulto*, i. 29 ff.; Beseler, *St. Riccobono*, i. 287 ff.; Albertario, *Studi*, v. 107; Lanfranchi, *Il diritto nei retori Romani* (1938), 96 ff., with the literature.

[6] *Eth. Nic.* 1137[a]31 ff.; *Rhet.* 1374[a]27 ff.

[7] Cic. *De or.* 1. 57. 244: 'pueri apud magistros exercentur omnes, cum . . . alias scriptum alias aequitatem defendere docentur'; 1. 56. 240: 'multaque pro aequitate contra ius dicere'; *De off.* 3. 16. 67: 'ius Crassus arguebat . . . aequitatem Antonius.'

ality of their terms may render them unsuitable in particular cases. But the problem raised for them as practising lawyers was always simply this: is it possible to meet the given case either by interpretation of the statute or by propounding an *actio* or an *exceptio*? A negative *responsum* rendered further discussion useless, because the amendment of statutes is no part of a practising lawyer's business, while an affirmative *responsum* purported to lay down what was the law (*ius*), not to correct the law by equity (*aequitas*).[1] For them the problem was always the same: what redress? In their search for its solution Aristotle's appeal to the hypothetical intention of the legislator could only be misleading. It would have seemed to them farcical to rack their brains as to what the authors of the Twelve Tables would have laid down had they been called on to advise on the case in hand. Once again we perceive that Aristotle was a student, remote from legal practice and its real problems. In republican legal phraseology the noun *aequitas* does not occur; *aequum est* means nothing else than *iustum est* or *ita ius est*; the term *iustum* is avoided as being too emotional. In translating the standing clause in *senatus consulta—Senatus aequum censuit*[2]—the Roman chancery rendered *aequum* by δίκαιον.[3] When a jurist in a *responsum* declares *aequum est*, he means no more than that such is the law and that any other decision would be against the law.[4]

The distinctions we have been examining were too vague to be kept clearly separate; in both Greek and Roman sources they are entangled one with the other and lack individuality. They served the Greek philosophers well enough in sociological discussions; for the rhetoricians they were just τόποι to be enlarged on according to accepted methods. Modern attempts to extract clear and uniform legal conceptions from Cicero's disquisitions were, therefore, foredoomed to failure.[5] The sure instinct of the republican jurists closed the door of jurisprudence to this medley of ideas.

(iv)

In our present period the formalism which we have already described as characterizing the archaic[6] period was sensibly moderated.

[1] Seneca, *De Clem.* 2. 7. 3: 'Clementia liberum arbitrium habet. Non sub formula, sed ex aequo et bono iudicat; et absolvere illi licet et, quanti vult, taxare litem. Nihil ex his facit, tamquam iusto minus fecerit, sed tamquam id, quod constituit, iustissimum sit.' This is the true Roman attitude.

[2] Bruns, nos. 36. 27; 39. 1. 4; 41. 7, 11, 50, 55.

[3] Ibid. 41. 7, 11.

[4] *D.* (3. 5) 20 pr. (Servius). *D.* (44. 1) 14 (Alfenus–Servius). Cf. also Cato Censorinus, Jordan, p. 64. 6; 24. 5. 14. Ennius' *ius atque aecum* (above, p. 23) is merely tautological.

[5] If only because Cicero derives from a variety of authors. Modern lawyers are inclined to interpret Cicero's works as if they were a legal code; it is their habit, if the same expression recurs in a code, to interpret it always in the same sense and to make it express one idea. But this method is incorrect when one is dealing with a lively man of letters like Cicero, who was no great thinker.

[6] Above, p. 24 f.

1. In principle acts in the law still remained formal.[1] The old forms lost vitality, but were piously preserved. The archaic forms of the *legis actiones* were, after the *lex Aebutia*, gradually superseded by the more flexible *formula*,[2] but acts in private law—contracts, testaments—remained, as before, in principle formal, and oral formalities continued to be preferred to writing,[3] the document remaining purely evidential, except in the case of the literal contract.[4] But by the side of the formal acts there now gradually appeared the formless contracts—the consensual and real contracts and the so-called praetorian pacts, all of which are creations of jurisprudence collaborating with the praetor.[5]

2. Formalism in interpretation was likewise relaxed.[6] Roman rhetoric adopted the Greek τόπος of *verba* (*scriptum*) against *voluntas* (*mens*, *aequitas*);[7] even schoolboys were taught, as a rhetorical exercise, to argue for and against the literal interpretation of a statute, contract, or will.[8] On this as on other topics rhetoric taught one to take either side indifferently[9] (*disputatio in utramque partem*, δισσοὶ λόγοι).[10] The question of law, namely which of the two interpretations, the literal or the equitable, ought to prevail, was simply outside the province of rhetoric. An advocate either accepted the view recommended by a jurisconsult[11] or adopted that which best suited his client's interest.[12] Rhetoric is a theory of advocacy, not of law; it arms its pupils against every eventuality, and thus equally to defend or to attack literal interpretation. It may be that rhetoricians were mostly

[1] Actional formalism, as we have called it above, p. 24.

[2] Schulz, 93.

[3] Above, p. 25.

[4] Gaius, 3. 128.

[5] Above, p. 50 f.

[6] On what follows see J. Stroux, *Summum ius summa iniuria* (n.d.); Himmelschein, *Symb. Frib.* 373 ff.; Albertario, *Studi*, v. 91 ff.; Levy, *Z* xlviii (1928), 668 ff.; Maschi, *Studi sull' interpretazione dei legati. Verba et Voluntas* (1938); Lanfranchi, *Il diritto nei retori Romani* (1938), 65 ff., 134 ff. Stroux is correctly judged by Beseler, *St. Riccobono*, i. 288; *Bull.* xlv (1938), 172, 189, n. 21 ('Strouxische Wahnvorstellung'); Schulz, 130.

[7] Hermagoras (about 150 B.C.) cited by Quint., *Inst.* 3. 6. 61; *Auct. ad Herenn.* 2. 9. 13 f.; Cic. *De inv.* 1. 38. 68 ff., 2. 40. 116 ff.

[8] Cic. *De or.* 1. 57. 244 (above, p. 74, n. 7).

[9] Cicero (above, p. 74, n. 7) says this expressly—'alias scriptum alias aequitatem defendere docentur'.

[10] Diels–Kranz, *Fragmente der Vorsokratiker*, ii (1935), 405; Diog. Laert. 9. 51, Protagoras B 6 (Diels, *Doxograph.* 266): *Πρῶτος ἔφη δύο λόγους εἶναι παντὸς πράγματος ἀντιλεγομένους ἀλλήλοις*; Cic. *De fin.* 5. 4. 10: 'Ab Aristotele principe de singulis rebus in utramque partem dicendi exercitatio est instituta'; *Orator*, 14. 16: 'unde omnis in utramque partem traheretur oratio.' Cf. A. Levi, 'On Twofold Statements' (δισσοὶ λόγοι), *Am. Journ. of Phil.* lxi (1940), 292.

[11] Above, p. 55.

[12] Above, p. 54 f.

opposed to literalness, but that was due not to rhetoric but to Hellenistic individualism. If it suited his client, a rhetorician was equally ready to plead for the letter of the law. What other purpose was served by the above-mentioned school exercises? Hence an orator makes no scruple 'eadem de re alias aliud defendere'.[1] The result was that the Roman jurists found nothing worth learning in rhetoric. They were not interested in how best to argue for or against the letter, which is a rhetorical question, but in the legal question how far it might be right and proper to depart from the letter. These discussions in the schools and in the law courts certainly kept the problem of interpretation ever before the eyes of the jurisconsults. That much must be admitted, but no more. The jurisconsults were thus forced to define their own position. Now what was that position? The materials for forming a judgment on the republican period have not yet been subjected to a comprehensive critical examination, but it is not too early to forecast the probable result of such an examination.

(*a*) Our evidence as to the republican interpretation of *leges* is very slender. The painfully scrupulous style of the *leges rogatae*,[2] the growing practice of hedging every clause with safeguards,[3] may well suggest the inference that juristic interpretation was growing ever less flexible and more meticulous; but this inference is, of course, not maintainable. Still, the interpretation of the *lex Aquilia* does betray a clinging to the letter: thus *occidere*, in the first chapter, was not taken to cover every case of *causam mortis praestare*,[4] and the difficulty was overcome not by adopting a more elastic interpretation, but by means of actions 'on the case' (*actiones in factum*), proposed, of course, by the jurists and accepted by the praetor.

(*b*) In interpreting the Edict the jurists felt somewhat freer, but here too our evidence is slight.

Thus, the edictal phrase 'Quod vi aut clam factum est' (Lenel, *Ed.* s. 256) is interpreted by Mucius (*D.* 43. 24. 5. 8) as covering 'quod tu fecisti aut tuorum quis aut tuo iussu factum est'—free interpretation, to judge by the meticulous detail of the *l. Silia de ponderibus* (Bruns, no. 23), though suggested by the very formulation of the Edict. Again, to the question (*D.* 43. 24. 1. 5) 'quid sit "vi factum" vel "clam factum"', Mucius answers: 'vi factum videri . . . si quis contra quam prohiberetur fecerit', which is a 'principle' in the true Mucian style described above. The Edict 'Ex quibus causis maiores' (Lenel, *Ed.* s. 44) has the clause:

[1] Thus the orator Antonius in Cic. *De or.* 2. 7. 30.
[2] Above, p. 30.
[3] Below, p. 96.
[4] Ofilius, *D.* (9. 2) 9. 3.

'sive cui per magistratus sine dolo malo ipsius actio exempta esse dicetur' (*D.* 4. 6. 26. 4); on this we read: '"per magistratus autem factum" ita accipiendum est, si ius non dixit; alioquin si causa cognita denegaverit actionem, restitutio cessat; et ita Servio videtur.' On the Edict 'Ne quis eum qui in ius vocabitur vi eximat' (Lenel, *Ed.* s. 12) we read (*D.* 2. 7. 1. 2): 'Ofilius putat locum huic edicto non esse, si persona, quae in ius vocari non potuit, exempta est, veluti parens et patronus.' Note also the free interpretation of *restituere* in the *actiones arbitrariae*.[1]

(*c*) We know rather more of the republican interpretation of acts in private law, but here our materials have been in part falsified, because strictness of interpretation had become intolerable to the Byzantine compilers. Confining oneself to undeniably authentic texts[2] one arrives at the following principle:[3] if a clear meaning can be obtained by taking the expressions used in the sense of common speech, this meaning must be accepted, even if it in no way corresponds to the intention of the party using them. Rectification of expressions used was resorted to only with the utmost caution. The maxim *falsa demonstratio adiecta non nocet* was still under debate at the end of the Republic, and the doctrines of mistake were in their infancy. A man was protected against his own words only when they had been uttered under duress or owing to fraud;[4] in the second century even this much relief had been unknown.

A few specially clear illustrations may be given. A testator institutes Titius as *heres*, with the requirement that he shall make formal acceptance (*cretio*) of the *hereditas* within 100 days; if he fails to do this, Maevius is to be *heres*, but the testator omits to declare Titius *exheres* in that event. Titius accepts the *hereditas*, but without *cretio*. This lets Maevius in, but with the result that the *hereditas* is divided equally between him and Titius. This literal interpretation, which obviously defeats the testator's intention, was not abandoned till a constitution of M. Aurelius (Gaius, 2. 177; *Epit. Ulp.* 22. 34). Where a man had made a legacy of all his female slaves 'et omne quod ex his natum erit' and one of the women had died, Servius held that there was no legacy of her offspring, because they were bequeathed as appurtenant to their mother. Celsus disapproves this rigid interpretation (*D.* 30. 63).[5] The owner of two male mules bequeathed to Titius 'duos mulos qui mei

[1] Kaser, *Restituere als Verpflichtungsgrund* (1932).

[2] In the light of these doubtfully authentic texts must be examined. Thus, in Alfenus, *D.* (35. 1) 27, we must presume that the *heredes* merely asked whether they were liable to the *poena*, the answer being: *poenam nullam vim habere*. Cf. *Index Interp.* on this passage and on Alfenus, *D.* (28. 5) 45.

[3] So, rightly, Beseler, *Bull.* xlv (1938), 171 ff., 182, 189, n. 21.

[4] This too by the Edict! Lenel, *Ed.* ss. 39, 40.

[5] Wrong Maschi, 44; Himmelschein, 405.

erunt cum moriar', but died leaving two female mules. Servius holds that the *heres* must surrender them to the legatee—a decision which he regards as remarkable (*D.* 32. 62).[1] Contrast the miserable literalism of his decision that tutors nominated *filio filiisque meis* are not tutors of the daughters (*D.* 50. 16. 122). Servius too held that where a testator had manumitted a slave by his will and left him 'aureos quinque quos in tabulis debeo' the legacy was void, because a debt from a master to his slave was an impossibility (*D.* 35. 1. 40. 3). Here *falsa demonstratio nocet.*[2] A will says: 'Cornelius et Maevius, uter eorum volet, heres esto.' In the event of both of them wishing to be *heres*, Trebatius holds that neither succeeds, a piece of literalism later rejected by Proculus (*D.* 28. 5. 70). A testator appoints L. Titius tutor, or, if Titius is dead, C. Plautius. Titius dies after having been tutor for some time. Is Plautius now tutor? No, says the literal Trebatius; yes, and rightly, say Labeo and after him Proculus (*D.* 26. 1. 33). Another very strict interpretation: *D.* (32) 100. 2 Trebatius.[3]

It is against this background that we must appreciate the *causa Curiana.*[4] A testator, expecting the birth of a son, instituted him *heres* and, in the event of the expected son dying before reaching puberty, substituted Curius (pupillary substitution). No posthumous son having been born, Curius claimed to be *heres ex testamento*, and the heirs on intestacy that the will had failed. Q. Mucius, appearing for the heirs on intestacy, argued that the testator had instituted Curius as substitute in the event only of the expected son having succeeded and died under age, and that therefore in the events which had happened the substitution failed. It might have been the testator's intention to substitute Curius in the further event of no son being born, and therefore of no previous succession (vulgar substitution), but he had not expressed this. Mucius' position was undoubtedly in keeping with the whole republican tradition. Appearing for Curius, the orator Crassus appealed to the testator's intention and was successful before the centumviral court, where the orators were constantly to the fore.[5] We do not know whether this decision led the jurisconsults to abandon their opinion,[6] but we do know that it remained an

[1] Cf. ibid. 410; Maschi, 48.

[2] Grosso, *St. Bonfante*, ii. 208.

[3] Maschi, 103.

[4] See Cic. *De or.* 1. 39. 180; 1. 57. 242 f.; 2. 6. 25; 2. 32. 140 f.; *Brut.* 39. 144 f.; 52; 53. 194 f.; *De inv.* 2. 42. 122; *Top.* 10. 44; *p. Caec.* 18. 53; 24. 67 f.; Quint. *Inst.* 7. 6. 9 f. Literature given by Windscheid, *Pandekten*, iii, s. 559, n. 9.

[5] Above, p. 54.

[6] Anyhow there was a constitution issued by Marcus and Verus on this question: *D.* (28. 6) 4 pr.

isolated decision,[1] and that no republican jurisconsult extended it by analogy. It was a bold foray which the lawyers hesitated to follow up.[2] Outside the formal testamentary law they may have adopted freer methods of interpretation, but on the whole they stuck to the literal method.[3] In this respect as in others[4] they resolutely marked their difference from the forensic orators: they were not the men to be impressed by hellenizing schoolmasters and rhetoricians.

(v)

It remains to review summarily the various departments of law: *ius sacrum, publicum,* and *privatum.*

1. In this period the sacral law was, for the first time, expounded in books.[5] But the religion which was the very foundation of the sacral law was being shattered by Hellenistic enlightenment.[6] The aristocratic class, in whose hands the science of sacral law lay, had abandoned the simple piety of their ancestors for an enlightened, though irresolute, scepticism, which, while accepting the rationalized theology of Greek philosophy, shrank from breaking with time-honoured usages. When Ennius declares that though the gods exist, they do not trouble themselves with human lot,[7] he is not simply translating a Greek original. But if that were true, to what purpose were the *vota, piacula, auspicia,* and the rest of the complicated sacral law? The only possible answer was that they were a useful anodyne for the lower classes. The *pontifex maximus* Q. Mucius Scaevola openly declared as much.[8] Applying, as we should expect, his favourite method of διαίρεσις,[9] he distinguished three genera of religious tradition: the mythology of the poets, the theology of the philosophers, and the official State *cultus.* Mythology, in his view, was sheer nonsense; philosophical theology was in part superfluous, and to that extent, he remarked sardonically, might be saved by the maxim *superflua non nocent,* but for the rest it seemed to him dangerous and unfit for the

[1] One has only to consider Trebatius' decision, just mentioned (*D.* 26. 1. 33), in a case similar from the legal point of view.

[2] Schulz, 130, n. 4.

[3] *D.* (5. 1) 80: 'Si in iudicis nomine praenomine erratum est, Servius respondit, si ex conventione litigatorum is iudex addictus esset, eum esse iudicem, de quo litigatores sensissent.' The asyndeton *nomine praenomine* is odd; perhaps *nomine* is a later addition.

[4] As in other matters: above, pp. 43, 54.

[5] Above, p. 40, and below, p. 89.

[6] Mommsen, *Röm. Gesch.* i, bk. 3, ch. 13; Wissowa, s. 14; Kroll, *Kultur,* ii. 1 ff.

[7] *Ennius Scen.* 316 (ed. Vahlen): 'Ego deum genus esse semper dixi et dicam caelitum, / sed eos non curare opinor quid agat humanum genus.'

[8] Augustinus, *De civ.* 4. 27; also in Bremer, i. 102.

[9] Above, p. 64, n. 6.

masses: public worship must be maintained. This profession of faith was very like that of the Greek thinkers from whom it was derived;[1] its originality was that it came from the mouth of a Roman pontiff. Now Mucius was only expressing the common creed of the Roman upper classes in the last century of the Republic.[2] The augur C. Claudius Marcellus expressed himself in precisely the same sense on the subject of the auspices.[3] It is no accident that Caesar's histories never mention consultation of the gods before battle; and Caesar was *pontifex maximus*.[4]

The decline of augural science, already deplored by Cato,[5] proceeded steadily, while Fetial law became fossilized and merely ornamental.[6] As early as Cicero the jurisconsults refused to continue to study pontifical law even in that part which *cum iure civili coniunctum erat*.[7] Religious sentiment still survived in the upper classes, but this is a subject which belongs to the history of Roman religion and to biographies of individuals. The science of sacral law was on its death-bed. The founder of Romano-hellenistic jurisprudence, Q. Mucius Scaevola *pont. max.*, read the times truly when he wrote an epoch-making treatise on the *ius civile*, but no book on the *ius sacrum*.

2. Of the science of *ius publicum* there is little to be said. The literature dealing with Roman constitutional law, which does not seem to have been bulky, has not reached us. The subject had little attraction for jurists because the last 150 years of the Republic were occupied by a continuous constitutional crisis. The attempt to govern the Roman empire through legal institutions devised for a city-state exercising hegemony over Italy was absurd and bound to fail. But the law-abiding and conservative *iurisconsulti* could not reconcile themselves either to revolutionary acts[8] or even to drastic reforms. Thus it was Q. Mucius Scaevola, the famous founder of a new legal science, who by his equally honourable and pernicious legality inflamed more than anyone else the war between Romans and Italians.[9]

[1] See the trichotomy in Aetios: Plutarch, *De placitis phil.* 1. 6. 9; Diels, *Doxographi graeci* (1879), 295. Critias, on religion as a means of political appeasement: Diels–Kranz, *Fragmente der Vorsokratiker*, ii (1935), no. 88, B 25, pp. 386 ff.; Polyb. 6. 56. 6 f.

[2] Varro in Augustinus, *De civ.* 4. 27.

[3] Cic. *De leg.* 2. 13. 32; *De div.* 2. 35. 75.

[4] On Caesar see Kroll, *Kultur*, ii. 19.

[5] Cic. *De div.* 1. 15. 28. Cf. Varro in Augustinus, *De civ.* 6. 2.

[6] Wissowa, 554.

[7] Cic. *De or.* 3. 33. 136.

[8] See on P. Mucius, Val. Max. 3. 2. 17. Cf. Münzer, *PW* xvi. 427.

[9] Mommsen, *RG* 2. 223, Engl. ed. 3 (1894), 497 f.; Münzer, *PW* xvi. 438.

The one considerable achievement of legal science in public law during this period lies outside constitutional law. We refer to the procedure before the *quaestiones*, which were gradually set up for one offence after another. This procedure, alike in its laxity and its *humanitas*, bears the unmistakable stamp of aristocratic jurisprudence.[1] There was no prosecution by the State; the prosecutor was a private citizen, armed with certain official powers which, however, frequently proved inadequate. In principle accuser and accused were equals before the court. The accused was allowed the fullest, indeed excessive, opportunities of defending himself; pending trial, he was not, in practice, put under arrest. The death-penalty was replaced by banishment (*aquae et ignis interdictio*), which to a member of the aristocracy meant, one must admit, social death. No literature was produced on the statutes governing this branch of law, though their unwieldy and prolix texts presented a special opportunity for the exercise of the dialectical method. But the orators naturally found in trials before the *quaestiones* their most important field of activity. They took over the Greek rhetorical 'topic' of circumstantial evidence.[2] Thus in the *Auct. ad Herennium* we find edifying advice on how to inculpate an accused from his previous life[3] and how to exploit his behaviour since the commission of the crime. If, on first being charged with it, he shows perturbation, the prosecution will claim this as a sign of guilt, while the defence will explain it as due to the greatness of the peril. If he remains calm and collected, the prosecution cries out on such brazen impudence, while the defence is eloquent on the peace of a good conscience.[4] The whole 'topic' was remote from jurisprudence, but it opened up new perspectives, and though the jurists refused to concern themselves with it, it may have influenced the practice of the law courts in their treatment of circumstantial evidence, as it did probably during the Middle Ages and at the beginning of modern times.

3. The jurisprudence of private law is far too abundant to be examined here in any detail. We can mention only what is of the greatest and most general importance.

(*a*) Apart from the importation of the dialectical method, nothing that happened was of so great moment as the evolution of the prae-

[1] On what follows see Schulz, 205; Levy, 'Die röm. Kapitalstrafe' (*Heidelberg SB* 1931), 14 ff.

[2] R. Volkmann, *Rhetorik d. Griechen u. Römer* (ed. 2, 1874), 150 ff., is valueless. Clearly the author has never had experience of such evidence taken before a modern law court. Cf. *Auct. ad Herenn.* 2. 2. 3 f.

[3] Ibid. 2. 3. 4 f.

[4] Ibid. 2. 5. 8.

torian and aedilician Edicts, which, as we have already insisted,[1] were products of jurisprudence. How far their evolution had proceeded by the end of the Republic cannot be established in full detail;[2] apparently but little was added under the Empire to the form they had attained under the Republic. They produced a duplication of private law: *ius civile* in the sense of private law became divided into *ius praetorium*[3] (in certain matters *aedilicium*) and *ius civile* in a narrower sense. The line between them cannot be sharply drawn:[4] for example, while the *actio de dolo* is pure *ius praetorium*, *rei vindicatio* belongs to both departments.[5] There was, however, no need to keep them distinct. No treatise on 'praetorian law' was ever written. In their exposition of the Edict the commentaries, which began to appear from the end of the Republic, took account of the civil law so far as was necessary or convenient. Unfortunately we know very little about the history of the Edict during the republican period,[6] but down to Servius it must still have been largely fluid. At any rate it is unbelievable that from the beginning the *actiones* fell into the schematized classification which we find in Gaius. The first jurist who drafted an *actio empti* was not faced with the question whether it should be *in ius* or *in factum concepta*, because these two categories had not yet been distinguished. The formula instructed the *iudex* to decide what, as a matter of good faith (not *ex iure Quiritium*), was due from seller to buyer—'quidquid . . . dare facere oportet ex fide bona'.[7] The action would at first be regarded as an *actio in factum concepta*, just as in English law the question of reasonableness is left as one of fact to the jury. Only later, when the actions came to be classified, the *actio empti* was conceived of as being *in ius concepta*, the words *ex fide bona* being taken not as determining the question of actionability, but as the measure of such performance as might be due.[8] Recently there has been talk of a 'reception' of edictal law into the civil law;[9] it is an unfortunate expression, which explains nothing and is even misleading: at the time when the *actio*

[1] Above, p. 53.

[2] There is no recent study. Weyhe, *Libri tres edicti* (1821), describes the edictal material in the time of Labeo (pp. 14 ff.), but is naturally quite out of date.

[3] Cic. *p. Caec.* 12. 34; *In Verr.* ii. 1. 44. 114; 2. 12. 31; *De off.* 1. 10. 32; *Phil.* 2. 2. 3.

[4] Cf. Wlassak, *Prozessformel*, i. 7, n. 1.

[5] One has only to consider the significance of the restitution clause.

[6] Weiss, *Z* 1 (1930), 249 ff.

[7] Lenel, *Ed.* s. 110. On *oportere* see Paoli, *REL* xv (1937), 326–43.

[8] This view is already taken by H. Krüger, *Z* xi (1890), 168; P. Krüger, 48 ff.; Pflüger, *Z* xliii (1922), 161; Kaser, *Z* lix (1939), 69; Kunkel, *Festschrift Koschaker*, ii. 5 ff.

[9] Wlassak, *Prozessformel*, i. 22, n. 44, giving literature.

empti was taking shape the question whether it belonged to civil law or to praetorian had not arisen, because the idea of *ius praetorium* was not yet current among lawyers.

(*b*) Private law was kept strictly separate from public.[1] The jurisconsults concerned themselves with neither constitutional nor administrative law, nor with criminal procedure. Refusing to appear as advocates,[2] they lost all interest in the question of evidence.[3] This isolation of private law had its disadvantages, but except in isolation private law could not have been elaborated in its classical purity.[4]

(*c*) The individualism of Hellenistic liberalism caused the private law to be developed on a basis of freedom and individualism. This feature of republican jurisprudence is so well marked and has so often been described that no more need be said here.[5]

(*d*) The most important non-Roman factor in republican jurisprudence is Greek philosophy. The leading jurisconsults were familiar with it,[6] with Plato and Aristotle indirectly at least. It made little difference to which of the Greek schools this or that jurist belonged—whether he was a strict Stoic or an Eclectic. Since the humanistic age attention has continually been given to the problem of the influence of philosophy on Roman law,[7] but uncritically and without proper distinction of periods. It needs no proof that the jurists of the fourth and fifth centuries of our era were influenced by it more considerably than were men of the stamp of a Q. Mucius.[8]

The necessity of applying critical methods to our evidence is well illustrated by the following passage of Alfenus Varus (*D.* 5. 1. 76):

'Proponebatur ex his iudicibus, qui in eandem rem dati essent, nonnullos causa audita excusatos esse inque eorum locum alios esse sumptos, et quaerebatur, singulorum iudicum mutatio [eandem rem] an aliud iudicium fecisset. Respondi, non modo si unus aut alter, sed et si omnes iudices mutati essent, tamen [et eandem rem et] iudicium idem quod antea fuisset permanere.

['Neque in hoc solum evenire, ut partibus commutatis eadem res esse existimaretur, sed et in multis ceteris rebus; nam et legionem eandem haberi, ex qua multi decessissent, quorum in locum alii subiecti essent: et populum eundem hoc tempore putari qui abhinc centum annis fuissent, cum ex illis nemo nunc viveret: itemque navem, si adeo saepe refecta esset, ut nulla tabula eadem permaneret quae non nova fuisset,

[1] Schulz, 32. [2] Above, p. 55. [3] Schulz, 32.
[4] Ibid. 20. [5] Ibid. 146 ff., 157. [6] Above, p. 63.
[7] The literature is collected by Kübler, *ACI Roma*, i (1934), 84.
[8] Schulz, 129.

nihilo minus eandem navem esse existimari. Quod si quis putaret partibus commutatis aliam rem fieri, fore ut ex eius ratione nos ipsi non idem essemus, qui abhinc anno fuissemus, propterea quod, ut philosophi dicerent, hae cottidie ex nostro corpore decederent aliaeque extrinsecus in earum locum accederent. Quapropter cuius rei species eadem consisteret, rem quoque eandem esse existimari.']

Here the influence of Greek philosophy is obvious. The philosophers are expressly mentioned in connexion with the atomic theory. The example of the ship recalls the passage in which Plutarch (*Theseus*, 23) relates that Theseus' ship, which was preserved at Athens and was regularly repaired with new planks, served as the standard example in philosophical discussions of the problem of identity, one view being that it remained the same ship, the other that it did not. All this has, of course, long been recognized;[1] the text has been accepted as authentic, and conclusions have been drawn from it as to the philosophical views of Alfenus or Servius. But in truth the second paragraph is a later addition, and the author of the disquisition on the general question of the persistence of the identity of a thing in spite of its parts having been changed connected it with the original *responsum* by twice inserting in the *responsum*, before *iudicium*, the clumsy expression *eadem res*, whereas obviously what was under consideration was a question of *idem iudicium*, not of *eadem res*.[2] Further, the illustration of the *populus* is in faulty style, and the *reductio ad absurdum* by means of the atomic theory is scarcely convincing.[3] If this criticism is correct, it is clear that Alfenus (or Servius) may have reached his decision without the help of Greek philosophy. A similar critical examination is necessary of every text in which the influence of Greek philosophy seems certain or probable.

The most considerable effect of Greek philosophy on Roman jurisprudence was the adoption by jurisprudence of the dialectical method,[4] an event which has proved of decisive and lasting importance particularly in the science of private law. Here we are concerned with forms and methods, not with contents and results. The characteristic feature of the Hellenistic period is precisely

[1] Alciatus, *Pareg.* 6. 17; Gothofredus, in his commentary on the passage; Beseler, *Z* xlv (1925), 189; Momigliano, *JRS* xxxi (1941), 155.

[2] See Wlassak, *Judikationsbefehl*, 235. Lenel, *Z* xxxix (1918), 148, rightly strikes out the first *eandem rem*: 'it was a fair question', he says, 'whether the change produced *aliud iudicium*, but not whether it produced *eandem rem*. The words are a stupid gloss taken from the *eandem rem* that follows.' But *eandem rem* is quite as inappropriate in the second case as in the first.

[3] Beseler, *Beitr.* v. 18, declares the text spurious from *Quod si* onwards. On *deductio ad absurdum*: ibid. iv. 16; *T* x (1930), 202; on *quis*: Beseler, *Beitr.* iv. 232 ff.; *T* l.c. 213 ff.

[4] Above, pp. 62 ff.

that Hellenism provided the mould of theory into which the Romans poured their national life.[1]

The influence of other non-Roman factors was small.[2] The intensity of Roman nationalism was greater in jurisprudence than in the other professional sciences.[3]

[1] Ed. Schwartz, *Hermes*, xxxii (1897), 565.
[2] Schulz, 124 ff.
[3] Mommsen, *Schr* vii. 212.

IV

THE LITERATURE OF THE HELLENISTIC PERIOD: ITS FORMS AND TRANSMISSION

(i)

JURISTIC literature, widely understood, covers acts of State creating new or declaring existing law (*leges, senatusconsulta, edicta magistratuum*) and international treaties. We are at present concerned only with their form and the nature of their transmission.

1. *Drafting.* The technicalities of these acts being beyond the capacity of politicians generally, their texts were framed by professional draftsmen.[1] These men, who were of course jurists and *scribae*,[2] evolved traditional schemes for the various kinds of act, veritable counterparts to the traditional forms of acts in sacral, public, and private law.[3] These schemes,[4] being well known, need not be discussed here; their style will be dealt with later.[5]

2. *Transmission.*[6] We have already emphasized[7] that no steps were taken to supply the public with accessible and correct texts of these State acts and that no official or private collection of them was ever published. Naturally juristic literature took account of them, but our evidence does not permit us to judge how far the texts thus presented to the public were accurate. In general the jurists depended on copies obtained through *scribae* from the public archives, but Cicero seems to imply that such copies were not always reliable.[8] Exceptionally, *leges* and *senatusconsulta* were published on bronze tablets; international treaties

[1] Cic. *De domo*, 18. 48: '. . . alios qui leges scribere solerent . . . neque tu legum scriptoribus isdem potuisti uti quibus ceteri.' Cf. Ilbert, *Legislative Methods and Forms* (1901), ch. v; Allan, *Law in the Making* (3rd ed. 1939), 398.

[2] See above, p. 12.

[3] See above, pp. 33 ff., and below, p. 90.

[4] On the scheme of the *lex* see Mommsen, *Staatsr.* iii. 315; Krüger, 20; Rotondi, *Leges publicae*, s. 16. On the scheme of the *senatus consultum* see Mommsen, *Staatsr.* iii. 1007; O'Brien Moore, *PW* Suppl. vi. 802. On the scheme of the treaties see E. Täubler, *Imperium Romanum*, i (1913), 14 ff., 318 ff., 373 ff.; A. Heuss, 'Abschluss und Beurkundung des griech. und röm. Staatsvertrages', *Klio*, xxvii (1934), 14 ff., 218 ff. On the *edictum praetoris* see below, p. 148.

[5] Below, p. 96.

[6] See Fr. v. Schwind, 'Zur Frage der Publikation im röm. Recht', *Münchner Beiträge zur Papyrusforschung und antiken Rechtsgeschichte*, xxxi (1940) [inaccessible].

[7] Above, p. 61.

[8] Cic. *De leg.* 3. 20. 46: 'Legum custodiam nullam habemus, itaque eae leges sunt, quas adparitores nostri volunt: a librariis petimus, publicis litteris consignatam memoriam publicam nullam habemus.' On this passage Mommsen, *Schr.* iii. 291. See further Cic. *Verr.* 3. 79, 183; H. Peter, *Geschichtliche Literatur*, i. 238.

were always so published.[1] *Edicta magistratuum* were published on wooden boards (*alba*), which were destroyed at the end of the magistrate's term of office.

3. *Leges.* A full survey is given by G. Rotondi, *Leges publicae populi Romani* (1912, offprint from *Enciclopedia giuridica italiana*). Texts in Bruns, *Fontes*, and *FIRA* i. To the collection in Bruns's *Fontes* add a large fragment of the *lex Gabinia* (58 B.C., *CIL* i². 2500). For the literature see, besides Rotondi, Bruns, and *FIRA*, *PW* xii. 2319 ff. and *CIL* i², Addenda, 123 ff., 139 ff. Useful, though now in part antiquated: E. G. Hardy, *Roman Laws and Charters*, i, 'Six Roman Laws' (1911); ii, 'Three Spanish Charters' (1912)—with translations.

Senatusconsulta: list by O'Brien Moore, *PW Suppl.* vi. 808; selected texts in Bruns, *Fontes*, and *FIRA* i. 237 ff.

4. The following *leges* are remarkable for their problematical form:

(*a*) The *lex tabulae Heracleensis*, the so-called *lex Iulia municipalis*. It is a rough draft published by Antonius from Caesar's papers after the latter's death. Text: *CIL* i (ed. altera), 573; *ILS* 6085; Bruns, no. 18; *FIRA* i. 140. Literature: v. Premerstein, *Z* xliii (1922), 45 ff.; Kornemann, *PW* xvi. 611; *CIL* i, Addenda ad no. 573, pp. 724, 739; *FIRA* l.c. Translation: Hardy, 'Six Roman Laws', 136 ff.

(*b*) *Lex de Gallia Cisalpina* (*Lex Rubria*). It was enacted after 49 and before 42 B.C.; the tablet must needs have been written before 42. The text shows stratification—an original text overlaid with additions—but it must nevertheless be the text as enacted, because in the short space of at most seven years lying between the enactment and our inscription the numerous additions and glosses which are recognizable in our text cannot have been inserted by the municipal scribes. The draftsmen of the *lex* seem to have had a model scheme which they amplified by additions. Perhaps this text also is a rough draft published by Antonius from Caesar's papers. Text: *CIL* i (ed. alt.), 592; Bruns, no. 16; *FIRA* i. 169. Literature: *CIL* i, Addenda ad no. 592, p. 724; Kübler, *Geschichte*, 143; *FIRA* l.c. Particularly Gradenwitz, 'Versuch einer Dekomposition des Rubrischen Fragmentes', *Heidelberg SB* 1915, Abhandl. 9; Beseler, *Acta CII*, i. 342. Translation: Hardy, 'Six Roman Laws' (1911), 119.

(*c*) The case of the *lex Ursonensis* is somewhat similar. It too dates from the last years of Julius Caesar, and again we discern stratification. Here the interval between the enactment and the inscription (the tablets are of the Flavian period) would suffice for the text to have been amplified by the municipal clerks, but in fact none of the additions

[1] Mommsen, *Schr.* iii. 290 ff.; *Staatsr.* iii. 418, 1014; i. 255 ff. Sueton. *Caes.* 20 reports that Julius Caesar (59 B.C.) 'primus omnium instituit ut tam senatus quam populi diurna acta confierent et publicarentur'. The meaning of this passage is not quite clear, but the publication of all *senatusconsulta* and *leges* in the Roman periodical, the *acta diurna*, was scarcely compulsory.

are later than Caesar's time. Text: *CIL* i (ed. alt.), 594; Bruns, no. 28; *FIRA* i. 177. Literature: Manuel Torres, *Lecciones de Historia del Derecho Español*, i (2nd ed. 1935), Lec. 19, pp. 247 ff., 252; *CIL* i, Addenda ad no. 594, p. 724; Kübler, *Gesch.* 144; *FIRA* l.c.; particularly Gradenwitz, *Heidelberg SB* 1920, Abhandl. 17; *Z* xlii (1921), 565 ff.; xliii (1922), 439 ff.; v. Premerstein, *Z* xliii. (1922), 113 ff. Translation: Hardy, 'Three Spanish Charters' (1912), 7 ff.

(ii)

The writers on sacral law have been mentioned already.[1] Next to nothing survives of their works. We possess a fairly long fragment of Fabius Pictor's work on pontifical law; it shows that its author still adhered closely to the pontifical archives. In contrast, our two fragments of Messala *De auspiciis* exhibit the method of Q. Mucius. Granius Flaccus' *De iure Papiriano* was a commentary on the so-called *leges regiae*, that is on rules of sacral law attributed to one or other of the kings.[2] In the pontifical archives there appears to have been a collection of such rules, supposed to have been made by one Papirius, a *pontifex maximus* who was assumed to have lived about the time of the expulsion of the kings.[3] Obviously Granius Flaccus cannot have invented these rules—the pontifical college, of which he was not a member, would have denounced such an imposture—but simply made use of the pontifical records. The rules themselves are ancient, though their language is not conclusive on the point, since it was then the fashion to archaize. It is possible that the *leges regiae* were revised for publication; in that case the pontiffs probably collaborated.[4]

Surviving fragments. Fabius Pictor, *Iuris pontificii libri* (at least 16): Bremer, i. 9; Peter, *Reliquiae*, i. Fabius Maximus Servilianus, *Iuris pont. libri* (at least 13): Bremer, i. 29. L. Iulius Caesar, *Augurales* (or *Auspiciorum*) *libri* (at least 16): Bremer, i. 106. Appius Claudius Pulcher, *Auguralis disciplinae libri*: Bremer, i. 244. Nothing of C. Claudius, *Auguralis disciplinae libri* (title conjectural): Bremer, i. 244. M. Valerius Messala, *De auspiciis libri*: Bremer, i. 263. Granius Flaccus,

[1] Above, p. 40.

[2] On this and what follows see O. Hirschfeld, *Kleine Schr.* (1913), 239 ff.; Steinwenter, *PW* x. 1285; Pais, *Ricerche*, i. 241; *Storia critica*, i. 2. 685, 731; Giov. Oberziner, 'Appunti sull' iure Papiriano', *Historia*, i (1927), 15; Carcopino, 'Les Prétendues lois royales', *Mél. d'archéologie et d'histoire*, liv (1937), 344 ff.; Ciaceri, *Le Origini di Roma* (1937), 58 ff. The older literature is given by Schanz–Hosius, i, s. 16, p. 35.

[3] Dionys. Halic. 3. 36. His *praenomen* is variously reported: 'Gaius' according to Dionysius, l.c., 'Sextus' according to Pomponius, *D.* (1. 2) 2. 2, and 'Publius' according to the same, *D.* (1. 2) 2. 36.

[4] Neither the *ius Papirianum* nor Granius Flaccus' book had been published when Cicero wrote his letter to Papirius Paetus (*Ad fam.* 9. 21. i, 46 B.C.).

De indigitamentis ad Caesarem: Bremer, i. 262; *De iure Papiriano*: Bremer, i. 261. Servius Sulpicius Rufus, *De sacris detestandis libri* (at least 2): Bremer, i. 225. C. Trebatius, *De religionibus libri* (9 or 11): Bremer, i. 404.

(iii)

Of the literature on *ius publicum*, likewise, too little survives to permit of its forms being described.[1]

C. Sempronius Tuditanus, *Magistratuum libri* (at least 13): Bremer, i. 35. M. Iunius Gracchanus, *De potestatibus libri ad Pomponium* (at least 7): Bremer, i. 37. Q. Aelius Tubero, *On the Senate* (exact title unknown): Bremer, i. 367. Anonym.: Liv. 3. 55; Mommsen, *Strafr.* 580. 3; Bremer, ii. 2, 530.

(iv)

On the literature of private law we are better informed.

1. *Collections of formulae* (books of precedents for contracts, wills, and pleadings). This type of literature, which we have encountered already, in the archaic period,[2] continued to be composed during the period now being considered. A collection composed by M'. Manilius[3] remained in use till the end of the Republic,[4] but the successors of that very eminent jurisconsult considered this type of literature beneath their dignity and left it to lesser jurists and the scribes. The existence of such a literature is, however, expressly attested by Cicero[5] and is confirmed by the fact that Varro's *De re rust.* makes use of later collections as well as of Manilius'.[6] Again, the formularies in Cato's *De agri cultura* come from some collection the author of which we do not know and which was perhaps anonymous.[7]

2. *Commentaries*. This form of literature was infrequent. It seems that L. Acilius, an otherwise unknown jurist, wrote a commentary on the Twelve Tables; it may have been only a new edition of Sextus Aelius' already mentioned work.[8] That there

[1] On the following jurists above, p. 46.

[2] Above, p. 35.

[3] Above, p. 47.

[4] Lenel, *Pal.* i. 589; Bremer, i. 26. Literature: Joers, 88; Schanz–Hosius, i, s. 79, p. 239; Münzer, *PW* xiv. 1135.

[5] Cic. *De leg.* 1. 4. 14: 'an ut stipulationum et iudiciorum formulas componam? quae et *conscripta a multis sunt* diligenter et *sunt humiliora*. . . .'

[6] Varro, *De re rust.* 2. 3. 5; 2. 4. 5; 2. 5. 11. Cf. Bruns, ii. 63.

[7] Cf. Bruns, ii. 47; Arcangeli, 'I contratti agrari nel De agricultura di Catone (prolegomena)', *St. dedicati alla mem. di P. P. Zanzucchi* (Pubbl. della univ. cattolica del Sacro Cuore, ser. 7, vol. xiv, 1927), 65 ff.

[8] Schöll, *Legis duodecim tabularum reliquiae* (1866), vii. 25. It is uncertain whether Servius Sulpicius also wrote a commentary on the Twelve Tables: Bremer, i. 228; P. Krüger, s. 9, p. 67, n. 30.

should have been no commentaries published on later *leges* accords with the whole attitude of the jurists towards statute law.[1] That Ofilius wrote a commentary on the laws relating to the taxation of *hereditates* and manumissions is unlikely.[2] The Edict was only now reaching its full development; it was made the subject of a commentary only at the end of our period, by Servius in a brief work in only two books. The first extensive commentary on the Edict comes from his pupil Ofilius.[3] We have no ascertained fragments of either work.[4] They were utilized by Labeo for his own commentary, which superseded them, and the citations of them by later writers are obviously at second hand, from Labeo. To the same type, the commentary, belongs Servius' *Reprehensa Scaevolae capita*, the earliest work *ad Q. Mucium*, a polemic against Mucius' *ius civile*, of which all that survives is one fragment and a few citations.[5]

3. *Responsa.* These, if delivered in writing, would be preserved in the family archives of the respondent,[6] where they would be available for his future literary publications and open presumably to his friends and pupils. Again, pupils present at the consultations of their master might take notes of his *responsa*[7] and use them subsequently. Thus preserved, a jurist's *responsa* might come later to be published as a collection, it might be in full or abbreviated; for example, they might be compiled from the respondent's own papers after his death. From this class of literature we have numerous citations, sometimes at second hand, but fragments of original text are scarce. The collections of Servius and his pupils were no longer confined to actual cases, but contained, to an indeterminable extent, *responsa* on theoretical questions raised by friends and pupils. These latter are the earliest examples of a type of literature which in classical times became very considerable, the literature of problems.[8]

[1] Above, p. 61.

[2] Pomp. *D.* (1. 2) 2. 44: *de legibus vicensimae primus conscripsit.* Cf. Lenel, *Pal.* i. 798; Bremer, i. 351; P. Krüger, *Quellen*, s. 9, p. 68, n. 40.

[3] Pomp. *D.* (1. 2) 2. 44.

[4] It is not certain that the citations given by Lenel, *Pal.* ii. 322; i. 795, and by Bremer, i. 232 ff. and i. 341 ff., refer to the commentaries on the Edict.

[5] Lenel, *Pal.* ii. 323; Bremer, i. 220. The polemical commentary is a well-known literary γένος: Herophilus (*c.* 300 B.C.) wrote one on Hippocrates' *Prognostica* (Susemihl, *Alexandrin. Literaturgesch.* i. 795. See also E. Maass, *Commentariorum in Aratum reliquiae* (1898), p. xi f.).

[6] The *responsa pontificum*, of course, in the pontifical archive; see, e.g., Cic. *De domo*, 53. 136 (*responsum* of the *pontifex maximus* P. Mucius Scaevola).

[7] Above, p. 57.

[8] See below, p. 223. Alfenus (Gell. 7. 5. 1) interprets a treaty between Rome and

The *Commentarii iuris civilis* of Cato (son of Censorinus), in at least fifteen books, were known to Cicero, who informs us that they contained Cato's *responsa*, word for word, even the names of the parties being retained.[1] But the work was not a mere collection; it contained also theoretical notes by the author, as appears from the unique fragment preserved by Festus (p. 154 M). The original work was no longer used by the classical jurists; thus Paul, *D.* (45. 1) 4. 1, is drawing on an intermediate work, apart from the fact that his own text has been considerably interpolated.[2] For the fragments see Lenel, *Pal.* i. 1265.

According to Cicero, Brutus' *De iure civili libri VII* reproduced Brutus' *responsa* word for word.[1] But the first three of the seven books were in the form of a dialogue, of which more immediately. The *responsa* must have been in the last four books,[3] which Q. Mucius *augur* pronounced to be *non veri Bruti libri*.[4] One may conjecture that the collection of *responsa* was annexed to the dialogue posthumously. Fragments: Lenel, *Pal.* i. 77.

Presumably the three books of M'. Manilius ('Manilii monumenta'), the ten of P. Mucius Scaevola, and the writings of Livius Drusus consisted in substance of *responsa*. Lenel, *Pal.* i. 589, 755.

Servius left at his death a large collection of *responsa*; it is to this that Pomponius probably refers when he says (*D.* 1. 2. 2. 43): 'reliquit prope centum et octoginta libros.'[5] They were published by his pupils, especially by Aufidius in a work of forty books,[6] and by Alfenus Varus[7] in his *Digesta*, of which we possess a considerable number of fragments taken from later epitomes.[8] The collections of his other pupils are known only through citations. The collectors added *responsa* of their own. Lenel, *Pal.* i. 75. 37, ii. 324; Krüger, 71.

Trebatius used some of his own *responsa* in his publications,[9] but some were probably first published in the writings of his pupil Labeo.

4. The jurists did not make, or at any rate did not publish, collections of notable judicial decisions, their own *auctoritas* being superior to that of the *iudices*, who were laymen.[10] But appeals to previous decisions in argument in court were recommended by the schools of rhetoric,[11] and the orators therefore presumably made

Carthage, which in his time can no longer have raised a case. Nor can the grotesque facts put by Servius in *D.* (28. 5) 46 have arisen in practice. That our texts, wherever they mention a *responsum*, mean a *responsum* of the traditional kind is a groundless assumption, though it must be admitted that the line between speculative and practical *responsa* is often hard to draw: below, p. 224.

[1] Cic. *De or.* 2. 32. 142.
[2] Above, p. 68, n. 5.
[3] R. Hirzel, *Dialog* (1895), i. 429, Krüger, 61, are in error.
[4] Cic. *De or.* 2. 55. 224; above, p. 44, n. 5.
[5] Above, p. 58.
[6] Pomp. *D.* (1. 2) 2. 44; cf. P. Krüger, 72.
[7] Above, p. 42.
[8] Below, p. 205.
[9] Lenel, *Pal.* ii. 343 ff.; Bremer, i. 396 ff.
[10] Above, p. 24.
[11] e.g. *Auct. ad Herenn.* 2. 13. 19; 2. 9. 13; 2. 10. 14.

collections of precedents (*exempla*);[1] it is from such collections that the reports given by Valerius Maximus are derived.[2]

5. *Epistulae.* The epistolary form[3] was not used by the republican jurists, though *responsa* would have fallen into it very readily. Republican habits were those of a patriarchal city-state: if one wanted a jurist's opinion, one came for it or sent a representative. There appears to have been no juristic correspondence with more distant clients. The first collection of juristic letters comes from Labeo.[4]

The subject of Servius' letter to Varro (Gell. 2. 20. 1) is certainly juristic, but it contains a question, not a *responsum*; it was presumably published in Varro's *Epistolicae Quaestiones*. There is nothing juristic in Servius' two letters to Cicero (*Ad fam.* 4. 5, 4. 12).[5]

6. Occasionally the jurisconsults published their court speeches —Servius,[6] for example, and probably Q. Mucius.[7] Some would have been delivered in cases of private law; for example, Q. Mucius' in the *causa Curiana*[8] or Servius' *pro Aufidia*.[9] But no attention was paid to them in juristic discussions.

7. Monographs were rare. Known to us are only Servius' *De sacris detestandis*[10] (at least two books) and his *Liber de dotibus*. We have an interesting fragment of the latter,[11] which was still in use in the second century A.D.

8. There was also but little isagogic literature, such a work as Gaius' *Institutiones* being unknown in the republican period, when, as we have shown,[12] legal education in law was so little scholastic that introductions to private law were hardly required. An introduction in the form of a dialogue between Brutus and his son was provided by the first three books of Iunius Brutus' *De iure civili* mentioned above.[13] In this period dialogue of this kind was

[1] Thus Galba, the orator, is ready (Cic. *De or.* 1. 56. 240, above, p. 62) with *multae similitudines*, which in the context cannot be understood to have been *responsa*.

[2] e.g. Val. Max. 8. 2. 2. On this literary γένος see K. Alewell, *Ueber das rhetorische παράδειγμα*, Kiel. philol. diss. 1913; C. Bosch, *Die Quellen d. Val. Max. Ein Beitrag z. Erforschung d. historischen Exempla* (1929); Klotz, *Hermes*, xliv (1909), 198; *Philol. Wochenschr.* 1914, 1129; 1929, 1327; Schanz–Hosius, i, s. 124; ii, s. 345 and s. 424, p. 590.

[3] Cf. H. Peter, *Der Brief in d. röm. Literatur* (Abh. Sächs. Ges., phil. hist. Kl. xx, 1901), 220. Below, p. 226.

[5] On Servius' letters: Schanz–Hosius, i, s. 198, p. 395.

[6] Ibid.

[7] Cic. *Brut.* 44. 163: 'Scaevolae dicendi elegantiam satis ex eis orationibus, quas reliquit, habemus cognitam.'

[8] Above, p. 79.

[9] The fragment in Festus, p. 153 M, proves as much.

[10] Lenel, *Pal.* i. 224; Bremer, i. 224.

[11] Lenel, *Pal.* ii. 321; Bremer, i. 226.

[12] Above, pp. 55 ff.

[13] Above, p. 92. Cf. R. Hirzel, *Dialog*, i. 428.

a favourite form for introductory works,[1] the best known being Cicero's *Partitiones oratoriae*.[2] Cicero had before him Brutus' little work, which in 66 B.C. was still a popular elementary law book,[3] but he preserves only three short sentences of it[4] (all we have); for the characterization of this literary form they are important. Also isagogic in character was Q. Aelius Tubero's *De officiis iudicis*, which was still read in the second century A.D.,[5] but it was designed for the lay *iudex*, not the law student. We must mention finally Q. Mucius' *Liber singularis ὅρων*, of which the compilers of the *Digest* possessed a copy.[6] But its authorship is doubtful; the work may have consisted simply of extracts from his *Ius civile*.[7]

9. The most considerable work of our period was beyond doubt Q. Mucius Scaevola's *Ius civile*. A product of the dialectical method, which Mucius was the first to employ systematically,[8] it was the first dialectical system of law in the grand manner and long remained fundamental. Commentaries on it were written by Gaius and Pomponius as late as the second century and it may still have been read in the third. After that it disappeared; the compilers of the *Digest* did not possess it; otherwise Tribonian's classicism would surely have led him to preserve at least a few fragments. We possess a single short fragment of the original text[9] and, for the rest, only a number of more or less faithful citations.[10] Well may we complain of the fate which has preserved so utterly worthless a work as Cicero's *De legibus*, but has allowed the book which laid the foundations not merely of Roman, but of European, jurisprudence to perish.

The general scheme of this work[11] is recoverable, though not in full detail. The four citations mentioning the number of the book referred to reveal that the making of testaments was dealt with in book I,[12]

[1] Ed. Norden, *Hermes*, xl (1905), 517 ff.; v. Arnim, *Dio von Prusa*, 279; Oellacher, *Wiener St.* lv (1937), 68 ff., 78. Also Hirzel, *Dialog*, i. 429, n. 4.

[2] Ibid. 494.

[3] Cic. *p. Cluent.* 51. 141, cites the *initia* of the three books, adding: *quae vobis nota esse arbitror*.

[4] Cic. *De or.* 2. 55. 224 (Lenel, *Pal.* i. 77; Bremer, i. 24). Also Cic. *p. Cluent.* 51. 141.

[5] Gell. 14. 2. 20. Nothing survives. Ferrini, ii. 45.

[6] Fragments: *Pal.* i. 762; Bremer, i. 103 ff.

[7] *Pal.* i. 762, n. 7; H. Krüger, *St. Bonfante*, ii. 336.

[8] Above, p. 64.

[9] Gell. 6. 15. 2; *Pal.* i. 758. The text of the fragment in Gell. 4. 1. 17 is not quite sound: Lenel, *Pal.* i. 757.

[10] Cf. ibid. 757 ff.; Bremer, i. 69 ff.

[11] On the scheme see Lenel, *Pal.* i. 757 ff.; Lenel, 'Das Sabinussystem' (*Festg. Strassburg f. Jhering*, 1892); Bremer, i. 58 ff.; G. Lepointe, *Quintus Mucius Scaevola*, i (1926), 53 ff., 127 ff. It is best to ignore M. Voigt, 'Ueber das Aelius- und Sabinussystem' (*Abh. d. Sächs. Ges., phil.-hist. Kl.* vii. 1879).

[12] Gell. 15. 27.

legacies in book 2,[1] *societas* in book 14,[2] and *furtum* in book 16.[3] For the rest, lacking Gaius' commentary, we must rely on Pomponius', which was based on the Mucian order.[4] Details apart, the general scheme may be reconstructed as follows:

I. Law of inheritance.
  (1) Testaments.
    (*a*) Execution of the will. (*b*) Institution of the *heres*. (*c*) Exheredation. (*d*) Acceptance and rejection of the *hereditas*. (*e*) Legacies.
  (2) Intestate succession.

II. Law of persons.
  (1) Marriage. (2) Guardianship. (3) *Statuliberi*. (4) *Patria potestas*. (5) *Dominica potestas*. (6) *Liberti*. (7) Appendix: *Procurator* and *negotiorum gestor*.[5]

III. Law of things.
  (1) Possession and *usucapio*. (2) Non-use and *libertatis usucapio*.

IV. Law of obligations.
  (1) *Ex contractu*.
    (*a*) The real contracts (perhaps only *mutuum*).[6] (*b*) Sale. (*c*) *Locatio conductio*. (*d*) Appendix: Servitudes.[7] (*e*) *Societas* (perhaps also *mandatum*).
  (2) *Ex delicto*.
    (*a*) *Iniuria*.[8] (*b*) *Furtum*. (*c*) *Lex Aquilia*.

As appears at first glance, we have here a true dialectical system, the same as that adopted by Gaius in his *Institutiones*, with one small and not very happy modification (I after III). The position of servitudes in the Mucian scheme is interesting: the connexion seems to be that both servitudes and *locatio conductio* involve some sort of right to use another's thing. Evidently Mucius had not reached the stage of distinguishing between a contractual right and a *ius in re aliena*, which further explains why under the law of things he treats only of the kinds of things and of possession and ownership. The position of the *procurator* and *negotiorum gestor* in appendix to *liberti* is due to the fact that these persons were mostly freedmen of the principal—a reversion to the primitive practice of grouping by association.

[1] *D.* (33. 9) 3 pr. [2] *D.* (17. 2) 30. [3] Gell. 6. 15. 2.

[4] Fragments: Lenel, *Pal.* ii. 62. The inscriptions of the *Digest* fragments occasionally give wrong book-numbers: Lenel, *Ed.* p. 8.

[5] *D.* (3. 5) 10; 47. 2. 76. Lenel, *Pal.* ii. 71, 72.

[6] *D.* (12. 6) 52 shows that Pomponius dealt with *condictio* in book 27.

[7] *D.* (8. 2) 29; (8. 3) 14. 15; (39. 3) 21; Lenel, *Pal.* ii. 74.

[8] Pomponius in book 37, before *furtum* (book 38), dealt with *iniuria*, as *D.* (50. 7) 18 shows. This last text is on *si quis legatum hostium pulsasset*. Now *pulsare* is a leading term in the *lex Cornelia de iniuriis* (*D.* (47. 10) 5 pr. 1). Thus Q. Mucius also must have dealt with *iniuria* before *furtum*, though naturally not of the *lex Cornelia*, which was after his time.

Q. Mucius' work remained in republican times the only systematic exposition of the whole private law. If we had only Cicero to guide us,[1] we should be obliged to accept Servius as the earliest systematizer and to regard Mucius' treatise as a disorderly assemblage of materials in the old style. But here, as always where his sympathies are affected, Cicero is untrustworthy. The fact that Servius was his friend and had written a polemic against Mucius[2] sufficed to make him cheapen Mucius' work, with which his acquaintance was clearly only superficial, and to hail Servius as the true Prometheus. No doubt it is true that Servius employed the dialectical method, but he wrote no systematic work like Mucius'. There is no express mention in Cicero of any works by Servius, but if he had written a systematic work, it would have left traces in later literature, and of such there are absolutely none.[3]

10. We must mention finally the praetorian and aedilician Edicts, but we know so little of their republican forms that any appreciation of them must be reserved till we come to the classical period.

(v)

Our literary survey must conclude with a few words on the language of lawyers and the law. We must distinguish:

1. The language of the *leges*. In contrast to the Twelve Tables the later *leges* are written in a circumstantial, clumsy, pedantic, and meticulous style, the purpose of which is to achieve complete certainty and to leave nothing to juristic interpretation. These characteristics became ever more pronounced as time went on.[4] Their stereotyped style shows that the *leges* were formulated not by the proposing magistrates, but by professional draftsmen drawn from the ranks of the senatorial jurists and the secretariate of the archives.[5] Then suddenly we come upon a retrogression to the style of the Twelve Tables in the *lex Ursonensis*[6] which

[1] Cic. *Brut.* 41. 152, above, p. 69.

[2] Above, p. 91.

[3] Di Marzo, *Bull.* xlv (1938), 261. Perhaps Alfenus Varus' *Digesta* followed the Mucian order, but it was only a collection of *responsa*.

[4] Cf .Allen, *Law in the Making*, 397: 'The style of (English) statutes has differed greatly from age to age. From the laconic and often obscure terseness of our earliest statutes we swung in the sixteenth, seventeenth and eighteenth centuries to a verbosity which succeeded only in concealing the real matter of the law under a welter of superfluous synonyms.' It was the same at Rome, between the Twelve Tables and the last century of the Republic.

[5] Above, p. 87.

[6] Bruns, no. 28; above, p. 88. Cf. Norden, *Aus altröm. Priesterbüchern* (1939), 12, n. 3.

archaizes in the manner of Cicero's *De legibus* 2, 8. There is at present no comprehensive study of the language of the republican *leges*.[1]

The *lex Rubria*, c. 20,[2] furnishes a signal monument of their pedantry. The law, having given the text of processual *formulae* with L. Seius and Q. Lucius as imaginary plaintiff and defendant, deems it necessary to say that in practice the fictitious names are to be replaced by the real names of the parties. It even adds that the fictitious names are to be retained if they happen to be the true names! It cannot be accepted that this monstrous piece of pedantry was meant as a gibe at the newly admitted Gallic citizens.[3]

2. The language of the *senatusconsulta* is different. Here too a stereotyped scheme[4] betrays the collaboration of the secretariate, but the pedantic circumstantiality of the *leges* is avoided.[5]

3. The language of the Edicts and their formulae is again distinct. It is not uniform, as the clauses of the Edicts were framed by various hands in various periods; in the main we know only the text settled in the time of Hadrian, rarely the republican. No analysis of edictal language has yet been made.

4. The translation Greek employed by the Roman Chancery when the Roman government was addressing eastern parts of the Empire is peculiar. The style developed in the second century B.C. was adhered to subsequently.[6]

5. The numerous solemn formularies of the *ius sacrum*, *publicum*, and *privatum* belong to very various periods, though, as remarked above,[7] they were continually being revised. No close study of their language has yet been made.

6. The juristic literature forms a special genus from the linguistic point of view. Though we possess but little of it in the original texts, it is permissible to argue back from the classical

[1] Norden (last note) rightly notes this deficiency. J. Swennung, *Untersuch. z. Palladius u. z. lateinischen Fach- u. Volkssprache* (1935), unfortunately does not concern himself with juristic technical language. J. F. Westermann, *Archaische en archaistische Woordkunst* (Diss. Amsterdam, 1939), 56, is inadequate. Useful is O. Altenburg, 'De sermone pedestri Italorum vetustissimo', *Jahrbücher für class. Philol.* 24th Supplementbd. (1898), 485 ff.

[2] Bruns, no. 16 ; above, p. 88.

[3] As Gradenwitz, op. cit. (above, p. 88), seems to assume; similarly Hardy *Six Rom. Laws*, 128, n. 14.

[4] Above, p. 87.

[5] But here, too, a growth of empty formularization is observable: Mommsen, *Staatsr.* iii. 1009, n. 5.

[6] It was a more or less barbarous languag: eibid. iii. 1007; v. Wilamowitz-Möllendorff, *Reden u. Vorträge*, ii (ed. 4, 1926), 154, n. 1; P. Viereck, *Sermo graecus, quo senatus populusque Romanus magistratusque populi Romani ad Tib. Caesaris aetatem in scriptis publicis usi sunt, examinatur* (1888); Gallet, *RH*, xvi (1937), 259–61.

[7] Above, pp. 27, 34.

style of the next two centuries, because only in the last century B.C. can the classical style have taken shape; such remains as there are of the republican jurists confirm this conclusion. It is a style remote from the overloaded formalism of the *leges* and equally, or more, from any archaizing.[1] It is elegant, idiomatic Latin, weighty, unadorned, correct, and terse. Contentiousness and rhetoric are avoided; the sentences are short, the terminology is fixed, things are called by their plain and proper names, clarity and objectivity are the chief aims. However the writers may have spoken and written in daily life, when they wrote of law they were under the sway of the literary tradition of their profession.[2] The style of the Roman jurists may have been influenced by the Stoic theory of style[3] and by the usages of the Alexandrine learned world, but it expresses the innermost core of their national character.

Read, for example, the fragment of Fabius Pictor's *Ius pontificium* in Gell. 10. 15 (Bremer, i. 10), the two fragments of Messala in Gell. 13. 15, 16 (Bremer, i. 263), or the two fragments from Servius Sulpicius' *De dotibus* in Gell. 4. 44. 4 (Bremer, i. 226). The last is specially instructive, since it exhibits an accomplished orator writing on law: he uses short simple sentences and completely unrhetorical Latin. It has already been observed[4] that even in their court-speeches the jurists used a simple objective style. Aquilius Gallus defined *litus* as *qua fluctus eluderet* (Cic., *Top.* 7. 32); this struck that connoisseur of style, Quintilian, as remarkable. He observes (*Inst.* 5. 14. 34): '. . . cum etiam iuris consulti, *quorum summus circa verborum proprietatem labor est*, "litus" esse audeant dicere, qua fluctus eludit.' Evidently what strikes him as extraordinary is the word *eludere* meaning 'as far as the tide disports itself', which would be suitable in the mouth of a poet or an orator, but in that of a jurist is too metaphorical. It is not the appropriate word (*verbum proprium*). From the period of Hellenism to the end of antiquity the power of literary tradition remained unbroken. Compare, for instance, the execrable and affected rhetoric of Cassiodorus' *Variae* with the simple straightforward style of his *Institutiones*: to each category of literature its own style. That is a truth to which we must hold fast.

[1] Tubero is an exception, but his archaizing was not liked: *D.* (1. 2) 2. 46; cf. Beseler, *SD* 1935, 280.

[2] v. Wilamowitz-Möllendorff, *Hermes*, xxxv (1900), 25 ff.; Norden, *Antike Kunst. prosa*, i (1909), 11, 323, 365; ii. 603. Basically wrong: Kübler, *Z* xlii (1921), 517, n. 1.

[3] Fiske, 'The Plain Style in the Scipionic Circle' (*Class. St. in Honour of Ch. P. Smite*, Wisconsin St. in Language and Literature, iii, Madison, 1919); Stroux, *De Theophrasti virtutibus dicendi* (1912); Kroll, *PW* Suppl. vii, art. 'Rhetorik', 33 ff., 43.

[4] Above, p. 54.

PART III

THE CLASSICAL PERIOD

Τὸ κάλλιστον ἅμα δ' ὠφελιμώτατον ἐπιτήδευμα τῆς τύχης.[1]
POLYBIOS, I. 4. 4.

INTRODUCTION

(i)

THE jurisprudence of the Principate (i.e. from Augustus to Diocletian) has, since the nineteenth century, been called 'classical jurisprudence'.[2] The name should be retained, for it hits the mark: the jurisprudence of this period is classical in both senses of the term.[3]

1. The heroic age of creative geniuses and daring pioneers had passed away with the Republic. Now their ideas were to be developed to the full and elaborated down to the last detail. The culminating point in the curve of this development lies unquestionably in the age of Trajan and Hadrian, when the Principate itself reached its zenith. Julian's *Digesta* are the greatest product of Roman jurisprudence; they dominate legal science till the end of the Principate. After Julian a slight decline is sometimes observable, but on the whole the science of law remained on the same high level till the middle of the third century. But then, with the close of the Principate, came a complete transformation. Thus the end of our period is not doubtful; it may, however, be questioned whether its beginning should not rather be placed in the age of Trajan and Hadrian. But the difference in scientific level between Labeo, Proculus, Sabinus, and Cassius on the one side and Julian and Celsus on the other is not sufficiently pronounced to make this necessary. The jurists of the second and third centuries treat those of the first as their equals, whereas they

[1] 'The finest and most profitable provision of fortune.'

[2] At any rate in general: Pernice, *Labeo*, I. 6; Kübler, *Gesch.* 256; Biondi, *Dir. Rom.* i, s. 5, p. 18. However, for Neuber, *Die juristischen Klassiker* (1806), both the republican and the imperial jurists were classical. For Savigny, *Vom Beruf unsrer Zeit*, 28 (3rd ed. 1840), the age of Papinian and Ulpian was the classical age; for Jolowicz, *Introduction*, 6, the second and third centuries of our era; for Pringsheim, *JRS* xxxiv (1944), 60, the period from 150 B.C. till A.D. 300.

[3] W. Jaeger, *Das Problem des Klassischen in der Antike*, Essays by various Authors (1931); Körte, 'Der Begriff des Klassischen in der Antike' *Leipzig SB* lxxxvi (1934), Heft 3; Jaeger, *TAPhA* lxvii (1936), 363 ff.

style the republican lawyers *veteres*.[1] Thus we shall be justified in treating the jurisprudence of the Principate as a single whole.

2. The jurisprudence of this period is classical also in the sense that it became the model and pattern, the *μέτρον καὶ κανών*, of later generations. What happened in general literature[2] happened in jurisprudence: in the post-classical period a select band of authors came to be set apart and to be regarded as *κεκριμένοι*, as 'classics'.[3] Modern jurisprudence, beginning with Irnerius, had no choice but to adopt as 'classics' the jurists of the Principate, since their republican forerunners had left no monuments. That the Bolognese school was born of the rediscovery of the *Digest* and that thenceforward the jurists of the *Digest* became accepted as the pattern and followed as such[4] may be taken as admitted facts. This means that the inspiration of modern jurisprudence comes from classical jurisprudence. The so-called reception of Roman law was at bottom a reception of Roman jurisprudence; this was the only complete and lasting reception.[5]

(ii)

Within the classical period two phases can be distinguished, the line of division being the accession of Hadrian. The Principate is a period of long-drawn-out and ever-increasing bureaucratization of public administration.[6] This movement could not leave jurisprudence unaffected. The tendency of every bureaucracy is to concentrate a monopoly of the development of the law in a government office, to codify the law and to control its application and execution in detail. In promoting bureaucratization on Hellenistic lines Julius Caesar acted with the lightning rapidity which he displayed on his travels;[7] Augustus preferred the more leisurely tempo of his own movements,[8] his motto in this as in

[1] See texts in Bremer, ii. 2. 505.

[2] Kroehnert, *Canonesne poetarum, scriptorum, artificum per antiquitatem fuerint?* (Königsberg) phil. diss. 1891; Pollux, *Onomasticon* (ed. Bekker, 1846), 9. 15: *Παρὰ δὲ Θουκιδίδῃ μόνῳ τῶν κεκριμένων.* Similarly *Onomast.* 9. 153. On the canon of the New Testament see Harnack, *Die Entstehung des Neuen Testaments* (1914), Engl. ed. by Wilkinson, *The Origin of the New Testament* (1925).

[3] Below, pp. 278, 281, 283.

[4] Savigny, *Vom Beruf*, 35; Rudorff, *Röm. RG.* i (1857), 364; Allen, *Law in the Making* (1939), 234 ff.

[5] R. Sohm, *Grünhuts Z. f. d. priv. u. öffentl. Recht*, i (1874), 258.

[6] There is still no comprehensive work on the development of the Roman bureaucracy. Mattingly, *The Imperial Civil Service of Rome* (1910), deals only with selected questions and is a little out of date.

[7] Sueton. *Caes.* 57: 'longissimas vias incredibili celeritate confecit.'

[8] Id. *Aug.* 82: 'itinera . . . lenta ac minuta faciebat, ut Praeneste vel Tibur biduo procederet.'

other matters being *festina lente*. Tiberius, as usual, stuck to Augustus' method.[1] It was left to Hadrian to take decisive action by codifying the Edict, to make a practice of employing the leading jurists as members of his *consilium*, and to provide for the more thorough legal training of future officials.[2] But republican forms were still preserved. Septimius Severus took some further steps forward,[3] but not till Diocletian's monarchy brought the whole republican façade tumbling down was the victory of bureaucracy complete. That victory spelt the doom of the old aristocratic jurisprudence.

[1] For the period Augustus–Nero (inclus.) see Sherwin-White, 'Procurator Augusti', *Papers of the British School of Rome*, xv (1939), 11–26.

[2] Pringsheim, 'The legal policy and reforms of Hadrian', *JRS* xxiv (1934), 144 ff.

[3] Mason Hammond, 'Septimius Severus, Roman bureaucrat', *Harv. St. in Class. Phil.* li (1940), 137.

I

THE JURISTS

(i)

THE very names of the numerous jurists known to us as consultants, teachers, and writers under the Principate tell a tale. The families prominent in public affairs during the last century of the Republic are no longer represented. The sole exception is C. Cassius Longinus, a descendant of Caesar's murderer, by his mother a grandson of Q. Aelius Tubero and a great-grandson of Servius Sulpicius Rufus.[1] All the rest come either from urban Roman families that had come to the front only in the last decades of the Republic, from rising families of Italian towns, or, as begins to be demonstrable in the second century, from Roman families settled in the provinces. The old families were extinct or worn out; new, unexhausted stocks were taking their place.[2] They were still Roman families[3] but pedigree no longer counted.[4] Such little information as we have regarding the parentage of the jurists confirms what their names suggest.[5]

Labeo was the son of Pacuvius Labeo, who was of the circle of Brutus, Caesar's murderer, but held no magistracy.[6] Capito was grandson of a Sullan centurion who reached the praetorship.[7] Massurius Sabinus was of an impoverished Veronese family; he had to be supported by his pupils and became an *eques* only at the age of 50.[8] Pegasus was the son of a trierarch,[9] taking his name from the figurehead—a winged horse—

[1] *Prosopogr.* ii². 118; Joers, *PW* iii. 1736.

[2] R. Syme, *The Roman Revolution* (1939), 490 ff.; *BSR* xiv (1938), 1–31; *JRS* xxvii (1927), 127–33; Stech, *Klio*, Beiheft x (1912), 127 ff., 142 ff.

[3] On O. Spengler's groundless views see Schulz, 132. It is not certain even of Gaius, Tryphoninus, and Callistratus, that they were not of Roman stock. Their manner of speech is not decisive.

[4] Juv. *Sat.* 8. 1: 'Stemmata quid faciunt, quid prodest, Pontice, longo / Sanguine censeri . . .?'

[5] Dessau, 'Die Herkunft der Offiziere u. Beamten des röm. Kaiserreiches während d. ersten zwei Jahrhunderte', *Hermes*, xlv (1910), 1 ff.

[6] Above, p. 42.

[7] Tac. *Ann.* 3. 75; *Prosopogr.* i². 260; Joers, *PW* ii. 1904.

[8] *D.* (1. 2) 2. 50; A. Stein, *Der röm. Ritterstand*, 131.

[9] *Schol. ad Juv.* 4. 76, 77 (*Juv. Sat.* libri v, ed. Friedländer, i (1895), 246; ed. Wessner, Teubner 1931, p. 59 f.): 'Filius trierarchi, ex cuius liburnae parasemo nomen accepit, iuris studio gloriam memoriae meruit, ut "liber" vulgo, non homo diceretur. Hic functus omni honore cum provinciis plurimis praefuisset, urbis curam administravit.' Cf. Mommsen, *Schr.* v. 407; A. Stein, *Ritterstand*, 205; Cichorius, *Röm. St.* (1922) 257 ff., 403 ff.; Dessau, *Die Herkunft der Offiziere*, 24 ff.; Ch. G. Starr, *The Roman Imperial Navy* (1941), 50, n. 71. According to Mommsen Pegasus' father was a freedman. Against Mommsen (scarcely convincing) Starr, 66 ff. See *ILS* 2815 ff.

of his father's ship. Julian was of a respectable family of Hadrumetum in Africa;[1] Pactumeius Clemens was from Cirta in Africa.[2] Gaius must have been from some eastern province.[3] Licinnius Rufinus was from Thyateira in Lydia;[4] Ulpian from Tyre;[5] and both Tryphoninus and Callistratus were also from the East.[6,7]

(ii)

1. Up to Vespasian the participation of the jurists in public administration remained essentially what it had been during the last decades of the Republic. Labeo pursued the *cursus honorum* as far as the praetorship, but as a republican *frondeur* refused the consulship offered him by Augustus.[8] Capito held the republican magistracies, being *consul suffectus* in A.D. 5 and during the last nine years of his life *curator aquarum*.[9] Cocceius Nerva, grandfather of the Emperor and friend of Tiberius, was *consul suffectus* in 24, *curator aquarum* in 24–33.[10] C. Cassius Longinus was *consul suffectus* in 30, proconsul of Asia in 40–1, and *legatus Syriae* in 45–9.[11] Caelius Sabinus was *consul suffectus* in 69.[12] There are other jurists, such as Massurius Sabinus and Proculus, who were never magistrates, but simply law-teachers and consultants. As we have shown above,[13] the two groups thus illustrated already existed in the last century of the Republic.

2. With Vespasian a new type appears. We now encounter a group of jurists who for the greater or at least the more important part of their lives were constantly in office and increasingly in receipt of salaries.[14] The old conception of the statesman-jurist assumes a new shape, more suited to the times. Like Manilius and Q. Mucius of old, these men belonged to the class of *clarissimi et amplissimi viri*, were intimately connected with government,

[1] Mommsen, *Schr.* ii. 2 ff.; Ferrini, ii. 497; disputed by Kornemann, *Klio*, vi (1906), 178 ff., 182 ff.; Dessau, *Die Herkunft der Offiziere*, 21; W. Weber, *Hermes*, l (1915), 52.

[2] Dessau, *Herkunft*, 21. Mommsen, *Schr.* v. 470 ff. 485.

[3] This would not exclude his having been a law teacher at Rome: Kübler, *PW* vii. 489 ff.; Brassloff, *Wiener St.* xxxv (1913), 170 ff.

[4] Two inscriptions from Thyateira (*CIG* ii, nos. 3499, 3500) call him κτίστην· καὶ εὐεργέτην τῆς πατρίδος.

[5] *D.* (50. 15) 1 pr. [6] Krüger, 225; below, p. 107.

[7] That Iavolenus Priscus came from Dalmatia was inferred by Hirschfeld from *CIL* iii, *Suppl.* no. 9960, *cum nullo honore in Dalmatia functus sit*, followed by Dessau, *Herkunft*, &c., 13. But the premiss is wrong: below, p. 104.

[8] *D.* (1. 2) 2. 47, with Pernice, *Labeo*, i. 14 ff.

[9] *Prosopogr.* i². 260. [10] Ibid. ii². 291. [11] Ibid. ii². 118.

[12] Ibid. i². 238. [13] Above, p. 43.

[14] Mommsen, *Staatsr.* i. 302 ff.; *Schr.* ii. 3 ff.; Kübler, *Gesch.* s. 25; Brassloff, *Epigraph. Analekten* (1926), 25; Stein, *Ritterstand*, 426; Merkel, *Entstehung des röm. Beamten gehalts* (Abhandlungen aus d. Gebiet des röm. Rechts, iii, 1888).

and exercised a decisive influence on legal development. The leading republican jurists had passed, more or less completely, through the *cursus honorum*, entered the Senate, and thus taken a permanent part in government. The men we are now speaking of held various republican and imperial offices and entered the *consilium principis*.[1] This was now the true, up-to-date Senate, the older body having shown its incompetence in the course of the first century. But these imperial jurists were not independent aristocrats like those of the Republic; they were salaried officials. Thus in conformity with the tendencies of the times there developed a new type of bureaucratic jurist, the jurist who was a member of the Ministry of Justice. Our information, though haphazard and incomplete, is not inconsiderable; taken as a whole it renders the emergence of this new type certain.[2]

PEGASUS. His origins have been stated. This learned man, who was nicknamed 'the book', was *praefectus urbi* under Vespasian, an office held only by men of consular rank as the crown of a long and honourable career. He must therefore have climbed the ladder to the consulship (consul probably soon after A.D. 70) and must also have held some other offices, partly in the provinces, of which we have no details.[3]

IAVOLENUS PRISCUS. Having held some urban magistracies, he became legate of *legio IV Flavia*, which went to Dalmatia in 70 and about 86 was sent to Moesia. He held this position whilst the legion was quartered in Dalmatia, probably about 81. In 83 we find him as *legatus Augusti pro praetore* of *legio III Augusta* at Theveste in Numidia, an office with which the governorship of Numidia was combined. Later he became *iuridicus* of Britain and, probably in 87, consul. After that he went as governor to *Germania superior*; there is evidence that he was there in 90. Next he became governor of Syria and, finally, of Africa. Then he returned for good to Rome, where he entered Trajan's *consilium*. We have evidence of his being in that position in 106 or 107. He continued to be of the *consilium* till a great age; thus still under Hadrian.[4]

TITIUS ARISTO. He was of Trajan's *consilium*; we know of no other office.[5]

L. NERATIUS PRISCUS. He passed through the urban magistracies as far as the consulship (year not known). About the year 100 he was governor of Pannonia. He was also *praefectus aerarii Saturni* and a member of Trajan's and Hadrian's *consilium*.[6]

[1] Cuq, *Consilium principis* (1884), 317 ff.

[2] For the following see Cuq, op. cit. 317 ff., 328 ff.

[3] See the obviously well-informed *scholium* on Juvenal quoted above, p. 102, n. 9; Mommsen, *Staatsr.* ii. 1061; Hirschfeld, *Verwaltungsbeamten*, 262; Cichorius, *Röm. St.* 403 ff.; Stein, *Ritterstand*, 205; Stech, *Klio*, Beiheft x. 14; Berger, *PW* xix. 64.

[4] See Note P, p. 337.

[5] Mommsen, *Schr.* ii. 22.

[6] Inscription: *CIL* ix, no. 2454, with Mommsen's comment ibid. and *Schr.* ii. 22,

P. IUVENTIUS CELSUS THE YOUNGER. He held urban magistracies, was praetor in 106 or 107, and twice consul, for the second time in 129. He was governor of Thrace before 114; apparently also he was governor of Asia. He was a member of Hadrian's *consilium*.[1]

SALVIUS IULIANUS. After being *decemvir litibus iudicandis* he became Hadrian's *quaestor*, in which capacity he received double the usual salary *propter insignem doctrinam*. Later he was *tribunus plebis*, *praefectus aerarii Saturni* and *aerarii militaris*, and, finally, consul in 148. In 150 he was *curator aedium sacrarum*. Under Pius he was governor of *Germania inferior* (before 155), under Marcus and Verus governor of *Hispania citerior* (between 161 and 166), and lastly governor of Africa. He was a member of the imperial *consilium* under Hadrian, Pius, Marcus, and Verus; also *pontifex* and *sodalis Hadrianalis* and *Antoninianus*.[2]

ABURNIUS VALENS. In 118 he was named by Hadrian *praefectus urbi feriarum Latinarum*, an honorific position held by distinguished young men shortly after their assumption of the *toga virilis*. He was *IIIvir aere argento auro flando feriundo*, *quaestor Augusti* and *tribunus plebis*, *pontifex*, and presumably of the imperial *consilium*.[3]

SEX. CAECILIUS AFRICANUS. In an inscription of A.D. 145, found in Andretium (Dalmatia),[4] is mentioned *M. Caecilius Africanus*, *praefectus cohortis VIII Voluntariorum*.[5] In spite of the discrepancy as to

iv. 374; *ILS* 1033; Asbach, *Bonner Jahrb.* lxxii (1882), 23 ff.; Ritterling, *Archaeol.-epigraph. Mitteil. aus Oesterreich-Ungarn*, xx (1897), 14 ff.; Stech, *Klio*, Beih. x (1912), 47; Berger, *PW* xvi. 2549.

[1] Mommsen, *Schr.* iv. 384; Stech, *Klio*, Beih. x. 83; A. Stein, *Die röm. Reichsbeamten d. Provinz Thracia* (1920), 10; Betz, *PW* vi A. 454; Diehl, *PW* x. 1363; P. Lambrecht, *La Composition du sénat romain de l'accession au trône d'Hadrien à la mort de Commode* (1936), 38. On Dio Cass. 67. 13 see Gianturco, *Studi Fadda*, v (1906), 37 ff.; K. Scott, *Class. Phil.* xxix (1934), 66; *The Imperial Cult under the Flavians* (1936), 111.

[2] Inscriptions: (1) *CIL* viii. 24094 (*ILS* 8973) from Pupput; (2) *CIL* vi. 375 (*ILS* 2104) on his consulship; (3) *CIL* vi. 855 on his *cura aedium*; (4) *ILS* 7776 on the governorship of Germania. Diptych of 148 (on his consulship): Seymour de Ricci, *NRH* xxx (1906), 483. (For new editions see Schulz, *JRS* xxxii, 1942, p. 79.) Literature: Mommsen, *Schr.* ii. 1; Girard, *Mél.* i. 214, 322; Kornemann, *Klio*, vi (1906), 178 ff.; De Francisci, *RL*, ser. II, vol. xli (1908), 442; Hüttl, *Antoninus Pius*, ii (1933), 90; Niccolini, *I Fasti dei tribuni della plebe* (1934), 473; Lambrecht, *La Composition du sénat*, 38. See *Addenda*.

[3] Inscription: *CIL* vi. 1421; *ILS* 1051. The father of the person named in this inscription was C. Aburnius Valens, who was consul in 109, as the *Fasti Ostienses* now show. The only question is which of the two is to be identified with Aburnius Valens, the Sabinian mentioned by Pomponius, *D.* (1. 2) 2. 53—the L. Valens of the first inscription or the consul of 109. Groag is for the consul, but his reasons are not compelling. Literature: *Prosopogr.* ii. 92; Calza, *Notiz. d. Scavi*, 1932, 190; Groag, *Jahreshefte d. oesterreich. archäologischen Instituts in Wien*, xxviii (1933), 185; Niccolini, *I Fasti dei tribuni della plebe*, 472; Lambrecht, *La Composition du sénat*, &c., 56; Hülsen, *Rhein. Mus.* lxxxii (1933), 365. On his praefecture of the *feriae*: Mommsen, *Staatsr.* i. 671; *Schr.* ii. 13; Hüttl, *Antoninus Pius*, i. 82. On his membership of the *consilium*: *SHA*, *Pius*, 12, with Mommsen, l.c.; Hüttl, i. 79, n. 23.

[4] *Revue Archéologique*, xvi (1940), 253, no. 176; xviii (1941), 315, no. 54.

[5] On this cohors see Cichorius, *PW* iv. 352.

the *praenomen* the prefect may be identical with the jurist[1] (he might have had two *praenomina* like Julianus and Licinnius Rufinus[2]); we know that the *praefecti cohortium* were charged with judicial functions in Hadrian's times.[3]

P. PACTUMEIUS CLEMENS. He was *decemvir litibus iudicandis* and then *quaestor*. Seemingly at the beginning of Hadrian's reign he was legate to his father-in-law, who was governor of Achaia. After being *tribunus plebis* he went as Hadrian's legate to Greece. Later he was *praetor urbanus*, Hadrian's legate in Syria and Cilicia, and in 138 consul. Next he was Pius' legate, once again in Cilicia, and again legate of his father-in-law, who was governor of Africa. He was of the imperial *consilium* under Pius, perhaps already under Hadrian; also a member of the college of *Fetiales*.[4]

M. VINDIUS VERUS. He was consul with Pactumeius Clemens in 138 and a member of Pius' *consilium*.[5]

ULPIUS MARCELLUS. A member of the *consilium* under Pius and Marcus, he must have held offices, but there is no certain information.[6]

L. VOLUSIUS MAECIANUS. He was law teacher of the future Emperor Marcus, *praefectus fabrum*, *praefectus* of *cohors I Aelia classica*, *adiutor* of the *curator operum publicorum*, *a libellis* under Hadrian and Pius, *praefectus vehiculorum* and *praefectus et procurator bibliothecarum*, *a libellis et censibus*, *praefectus annonae*, and finally, about 160, *praefectus Aegypti*. He was of the *consilium* under Pius, Marcus, and Verus.[7, 8]

TARRUTENIUS PATERNUS. He had under Marcus the *cura epistularum latinarum*, was *praefectus praetorio* at latest from 179 to 183, and was then summoned by Commodus before the Senate and executed for alleged treason.[9]

[1] Thus Abramic, cited *Rev. Arch.* l.c.

[2] See Hüttl, *Ant. Pius*, ii. 90, and below, p. 107.

[3] Mommsen, *Schr.* i. 452.

[4] *CIL* viii. 7059 (*ILS* 1067), from Cirta. Military diploma with consulship, *CIL* xvi. 84. Literature: Carcopino, *CR* 1914, 32 ff.; Hüttl, *Ant. Pius*, ii (1933), 20; i (1936), 84; Graindor, *Athènes sous Hadrien* (1934), 112 ff.; Niccolini, *I fasti dei tribuni*, &c., 473; Lambrecht, *La Composition du sénat*, &c., 44; Groag, *Die röm. Reichsbeamten von Achaia* (1939), 104. On the legations: Mommsen, *Staatsr.* ii. 858, n. 2; 861, n. 4; v. Premerstein, *PW* iv. 1646; Mancini, *Diz. epigr.* ii. 1243; M. Tod, *JHS* xlii (1922), 172 ff.

[5] Consulship: *CIL* xvi. 84; *consilium*: *SHA*, *Pius*, 12. Krüger, 197; Hüttl, *Ant. Pius*, i. 79.

[6] *Consilium*: *SHA*, *Pius*, 12; *D.* (28. 4) 3 pr. The inscriptions are problematical: *CIL* iii. 3307; iii. 10285 (*ILS* 3795); *CIL* vii. 504 (*ILS* 4715). Literature: *Prosopogr.* iii. 461; Haverfield, *Archaeol. Aeliana*, xix (1898), 179 ff.; Hüttl, *Ant. Pius*, i. 80.

[7] *CIL* xiv. 5347 and 5348. Cf. Levy, *Z* lii (1932), 352 ff.; O. W. Reinmuth, 'The Prefect of Egypt', p. 135 (*Klio*, Beiheft xxxiv, 1935); Hüttl, *Ant. Pius*, i. 80, ii. 11 ff. The new inscriptions have put the older literature out of date. A new papyrus, dated 13 February A.D. 161, containing a summons to the *conventus* to the Prefect L. Volusius Maecianus was published by N. Hohlwein, *Mélanges Maspero*, ii (1934–7), p. 27.

[8] On *Cervidius Scaevola* see below, *Addenda*.

[9] Tarruntenus in the *Digest*, but Tarrutenius in Dio Cass. 71. 12. 3, and inscriptions.

CLAUDIUS TRYPHONINUS. Member of Severus' *consilium*.[1]

ARRIUS MENANDER. Member of Severus' and Caracalla's *consilium*.[2]

AEMILIUS PAPINIANUS. He was *assessor* of the *praefecti praetorio*, then *magister libellorum* under Severus, and finally *praef. pr.* from 203 to 211 or 212.[3]

IULIUS PAULUS. He was *assessor* to Papinian as *praef. pr.*, then *magister memoriae* and member of the *consilium*. Whether, under Alexander, he became *praef. pr.*, is doubtful.[4]

M. CN. LICINNIUS RUFINUS. He was consul at an uncertain date and held other offices, in the provinces. He was *amicus Augusti*.[5]

DOMITIUS ULPIANUS. He was *assessor* to Papinian as *praef. pr.*, next, under Alexander Severus, *magister libellorum* and member of the imperial *consilium*, then (at latest by 222) *praef. annonae* and finally *praef. pr.*[6]

HERENNIUS MODESTINUS. He was *praef. vigilum* at Rome. Other offices are not known.[7]

3. By the side of the above there were still in the second and third centuries jurists who held no office, but simply practised as consultants, law teachers, and writers. This group had already existed in the two preceding centuries. But there now developed, perhaps as early as the first century A.D., a further class of jurists, as novel as the bureaucratic group, who not only held no offices, but also were not practising consultants, but merely teachers and writers. One may call them the academic group. It is represented for us by Gaius, Florentinus, and Marcian.[8]

4. We are not in a position to place each jurist whose name is known to us in his proper group; and there may well have been intermediate cases.[9] The names known to us represent, naturally, but a small proportion of the legal profession. Thus there were

Literature: Krüger, 215; Berger, *PW* iv A. 2405; *Prosop.* iii. 296. 24; A. Passerini, *Le coorte pretorie* (St. pubb. dal Ist. Ital. per la storia antica, fasc. i, Rome, 1939), 304. Cf. Fluss, *PW* iv A. 2407; Laurence L. Howe, *The Pretorian Prefect from Commodus to Diocletian* (1942), p. 65.

[1] Krüger, 225; Joers, *PW* iii. 2882.

[2] Krüger, 226; Joers, *PW* ii. 1257; *Prosopogr.* i². 217.

[3] Joers, *PW* i. 572. Costa, *Papiniano* i (1894). Howe, *The Pretorian Prefect*, 74. The Greek inscription *Bull. de corr. hell.* 1883, p. 325, does not concern our Papinian; *contra* Sir W. Ramsay, *The Social Basis of Roman Power in Asia* (1941), 298.

[4] Berger, *PW* x. 690; Howe, op. cit., p. 105 ff.

[5] Four inscriptions: *CIG* ii, nos. 3499, 3500; *Mitteil. d. K. deutsch. archaelog. Instituts, Athen.* Abt. xxvii (1902), 269; *Z* xxvii (1906), 420. The three first are from Thyateira in Lydia, Rufinus' home town. The fourth, from Salonika, shows that he must have held some office there. For the rest: Miltner–Berger, *PW* xiii. 457. On the *amici Augusti*: Mommsen, *Staatsr.* ii. 834 ff.; *Schr.* iv. 318 ff.; Cicotti, *Diz. Epigr.* i. 448; H. Krüger, *St. Bonfante*, ii. 231, overlooks the inscriptions.

[6] Joers, *PW* v. 1436; Howe, op. cit., pp. 100 ff.

[7] Brassloff, *PW* viii. 668.

[8] There can be no doubt about Gaius. From the fact that Marcian quotes many rescripts it follows that he must have had access to the imperial archives, not that he held a position there.

[9] e.g. Pomponius: Krüger, 193 ff.

learned *assessores*,[1] of whom we know little. At Rome, in the Italian towns, and in the provinces there were lawyers of lower standing,[2] and from the second century there were certainly law schools in the provinces.[3] Here and there in Italy there was, as early as the first century, law teaching of an elementary sort, on which Rome looked with disdain.[4] We must be content barely to note the existence of these lower strata of the profession.

(iii)

Under the Principate, as during the closing years of the Republic,[5] there existed by the side of the jurists in the strict sense a class of forensic orators.[6] The jurists abstained on principle from appearing in either criminal or civil cases;[7] they left this to the professional advocates (*advocati*, *causidici*, *patroni*).[8] These latter knew some law, but not much. Discerning teachers of rhetoric such as Quintilian continued as under the Republic to exhort their pupils to deeper legal studies,[9] but obviously with little success. The old lofty contempt of the rhetorician for law, as being work for duller minds, lived on;[10] a thorough study of law was even regarded as being dangerous for a student of rhetoric.[11] The orator needed just enough law to understand the legal advice obtained from a jurisconsult.[12] The antagonism of advocates and jurists is patent on all sides. The younger Pliny, who may be

[1] H. F. Hitzig, *Die Assessoren der röm. Magistrate u. Richter* (1893).

[2] Among them, e.g. Nasennius Apollinaris, Latinus Largus, and Nymphidius, addressees of letters from Paul: Krüger, 238. Ulpius Dionysodorus: *P. Oxy.* 237, viii. 2.

[3] Below, p. 123.

[4] Petron. *Cena Trimalch.* 46: *qui plus docet quam scit.* Sepulchral inscription of a *magister iuris*, who was an *eques*, date uncertain: *CIL* x. 8387; of a Carthaginian *magister iuris*, date also uncertain: *CIL* viii. 12418; *ILS* 7748.

[5] Above, p. 43.

[6] The two professions are kept apart by Juv. *Sat.* 14. 191. See F. Lanfranchi, *Il diritto nei retori Romani* (1938), 39; Mitteis, *Reichsr.* 189 ff.; Seidl, *PW* iv A. 1355.

[7] As under the Republic there were exceptions. Pliny, *Epist.* 1. 22. 6, says of Aristo: 'in toga negotiisque versatur, multos advocatione, plures consilio iuvat.' Paul, *D.* (32) 78. 6, says of himself: 'ego a praetore fideicommissario petebam.'

[8] These are the titles of advocates in classical times: Tac. *Dial.* 1; Mommsen, *Schr.* i. 453.

[9] *Inst. or.* 12. 3. 1 f.

[10] Quint. 12. 3. 9: 'plerique desperata facultate agendi ad discendum ius declinaverunt; quam id scire facile est oratori, quod discunt qui sua quoque confessione oratores esse non possunt!' Similarly Libanius, *Or.* 4. 18 (vol. i, p. 292, in Förster's ed.), says that law is a subject for sluggish minds (*τῶν τὴν διάνοιαν βραδυτέρων*), and, *Or.* 62. 21 f. (Förster, vol. iv, p. 357), that in the good old times (he means our period, the Principate) *ἐδόκει τὸ μὲν τοὺς νόμους μανθάνειν τῆς χείρονος τύχης.*

[11] Iulius Severianus (on him Radermacher, *PW* x. 805; Seeck, *PW*. ii A. 1930), *Praec. artis rhet.* (Rhetorici lat. minores, ed. Halm, 1862, p. 356): 'Iuris vero civilis neque omittendum studium est nec penitus adpetendum. Nam nec rudis esse debet orator, et si se multum dederit, plurimum de cultu oratoris atque impetu amittet.' The author imitates Cicero, *De leg.* 1. 4. 12.

[12] See Note Q, p. 338.

taken as the leading representative of the orators in our period, as Cicero is in the preceding,[1] appeared in important cases, criminal and civil, especially before the centumviral court;[2] like Cicero he expresses aloofness from the jurists.[3]

This antagonism appears with special clarity in Seneca, *Apocol.* 12. Claudius' death was deplored, he says, only by a few *causidici*, whereas the jurisconsults could once more emerge from the shadows into the light of day. One of the jurisconsults, seeing how the *causidici* were putting their heads together and bewailing their ill fortune, goes to them and says: 'Did I not often tell you that the carnival would not last for ever?'[4]

Among the orators there were naturally great social differences; there were eminent orators such as the younger Pliny, Seneca, and Fronto, but there were also second- and third-class men who had made their way up from the lower classes. In the advocate's *toga* a plebeian could win promotion.[5] Satirists[6] inveighed against the unscrupulosity, lack of conscience, and avarice of these petty orators, but that does not justify us in judging them to have been specially corrupt. The vices of advocates are an undying topic for satirists.

(iv)

Lastly we must mention the writers of private documents, who already existed in republican times. They were not a uniform body. The craft was partly exercised by the jurisconsults. By their side were humbler practitioners, who made a living out of their modest legal lore by drafting legal documents (*tabelliones*).[7] This was also a popular side-line, for *habet haec res panem*,[8] and many a

[1] Above, p. 44.

[2] Mommsen, *Schr.* iv. 437 ff.

[3] *Epist.* 4. 10: 'contuli cum prudentibus'; 5. 7: 'vereor, quam in partem iuris consulti, quod sum dicturus accipiant.' Cf. Schulz, 211 ff. The surprise often expressed at Pliny's ignorance of law shown by his correspondence with Trajan is misplaced: he was no jurisconsult.

[4] 'Agatho et pauci *causidici* plorabant, sed plane ex animo. *iurisconsulti* e tenebris procedebant, pallidi, graciles, vix animam habentes, tamquam qui tum maxime reviviscerent. Ex his unus cum vidisset capita conferentes et fortunas suas deplorantes *causidicos*, accedit et ait: dicebam vobis: non semper Saturnalia erunt.' On the Saturnalia as something like carnival see Wissowa, *Religion*, 207; Nilsson, *PW* ii A. 201 ff.

[5] Petron. *Cena Trimalch.* 46; Juv. *Sat.* 8. 44 f.; 14. 191; Tac. *Ann.* 11. 7: 'cogitaret plebem, quae toga enitesceret'; Mommsen, *Schr.* v. 616.

[6] Collected by Friedländer–Wissowa, *Sittengesch.* i. 182 ff.

[7] *D.* (48. 19) 9. 4. Sachers, *PW* iv A. 1848; Mitteis, *Reichsr.* 176; Grundz. 56; Koschaker, *Z* xxix (1908), 15. The classicality of the text cited is doubtful.

[8] Petron. *Cena Trimalch.* 46.

small schoolmaster may have earned a little pocket-money by writing testaments.[1]

[1] *CIL* x. 3969; *ILS* 7763, a sepulchral inscription from Capua, extols a schoolmaster (*magister ludi litterarii*) thus: 'idemque testamenta scripsit cum fide.' *CIL* x. 4914; *ILS* 7750, the sepulchral inscription of a freedman P. Pomponius: 'qui testamenta scripsit annos xxv sine iurisconsulto.' He was not a hedge-advocate, as Mommsen called him (*Schr.* iii. 123: 'Winkeladvokat'), but a hedge-notary. An inscription from Cadiz mentions a *sevir*, Q. Valerius Littera (a so-called *signum*: Diehl, *Rhein. Mus.* lxii (1907), 590 ff.; Lambertz, *Glotta*, iv (1912), 78; v (1913), 99) *testamentarius*.

II

THE LEGAL PROFESSION

(i)

1. THE jurisconsults continued to some extent to assist parties in such private acts as testaments and contracts; a testament, in particular, was hardly ever made without professional assistance.[1] But the leading men withdrew more and more from what we have called cautelary jurisprudence. They left it to lesser men, lawyers and mere scribes,[2] and confined themselves to discussing the theoretical aspects of draftsmanship in their writings and teaching.

2. The same happened to the cautelary jurisprudence of litigation. The jurisconsults of earlier generations had composed formulae of actions and defences and in this way had created entirely new remedies.[3] But such a method of legal development had become incompatible with the contemporary tendency towards bureaucracy;[4] consequently Augustus suppressed it in his usual unostentatious way. Unofficially he gave the judicial magistrates to understand that the development of the law in this way was not favoured by him, and that it was to be left to *lex*, *senatusconsultum*, and *constitutio principis*, so that control would lie in the hands of the *princeps* and the central bureaucracy. Naturally this was never announced as a principle; it was one of the *arcana imperii*. But, to give an illustration, if *fideicommissa* had been made legally enforceable in the days of Q. Mucius or Aquilius Gallus, the development would have come about in the same way as the creation of the *actio de dolo* or of the actions on the consensual contracts. Some jurisconsult would have composed an *actio in factum ex fideicommisso*, which the praetor would have approved and which, at once or after a period of probation, would have been incorporated in the Edict. But Augustus proceeded quite otherwise. Having shown due respect for republican tradition by first consulting the jurisconsults, he placed the *actio ex fideicommisso* under the *cognitio*, which the *princeps* could direct inconspicuously.[5] Thus an edictal development of *fideicommissa*

[1] Cf. *D.* (31) 88. 17: 'Lucius Titius hoc meum testamentum scripsi sine ullo iuris perito (!).'

[2] Above, p. 49.

[3] Above, p. 50.

[4] Above, p. 100.

[5] *Iust. Inst.* 2. 23. 1; 2. 25 pr. Cf. v. Premerstein, *Vom Wesen des Prinzipats* (Abh. Bay. Ak., phil. hist. Kl., 1937), 205; Schulz, 182; M. Scarlata Fazio, *La successione codicillare* (1939), 19 ff.; Lemercier, *RH* xiv (1935) 455 ff.

was avoided. More generally, the codification of the Edict ordained by Hadrian (of which below)[1] finally ended the application of cautelary jurisprudence of the grand style to litigation. Though the jurisconsults were still able to propose actions analogous to those existing (*actiones in factum, utiles*), and did so, of course, throughout the classical period, the drafting of the required formulae had become matter of routine, capable of being performed by lesser lawyers or mere scribes.[2] It is doubtful whether the jurisconsults, when their *responsum* concluded in favour of the granting of an action, still appended draft formulae.

(ii)

Respondere had been the essential function of the republican jurisconsult, but in our period, as already observed,[3] there were jurists who gave no *responsa*. The *responsum* still played an important part, but the effects of the change in the constitution of the State extended to this branch of juristic activity also.[4]

1. In principle Augustus did not interfere with the ancient custom of *responsa*, but sought rather to save it. It was one of the good old customs which he wished to preserve; it belonged to the 'Republic' which it was his policy to restore. Nevertheless, he took measures to bring the power of declaring the law which the custom conferred on the jurists into line with his own scheme of government. He bestowed on some, not very numerous, jurists the right to give *responsa ex auctoritate principis*: they were to give them by his permission, on the personal *auctoritas* of the *princeps*.[5] This did not mean that *responsa* could only be given by imperial licence:[6] such a breach with republican tradition would have been in flat contradiction with Augustus' policy, and there is no evidence of it. Unauthorized jurists were at liberty to continue to give *responsa* in the republican style, *propria et*

[1] Below, p. 127.

[2] The *formularii* referred to by Quint. *Inst.* 12. 3. 1. Cf. Ulp. *D.* (48. 19) 9. 5.

[3] Above, p. 107.

[4] On what follows: Solazzi, *St. Riccobono*, i. 95; Wieacker, 'St. z. Hadrianischen Justizpolitik' (*Romanist. St., Freiburger Rechtsgeschichtl. Abhandlungen, Heft 5*, 1935), 43 ff., where the older literature is cited and considered. Also Wenger, *CP* § 9, n. 26, p. 87; *Praetor u. Formel*, 101 ff. (*München SB*, 1926, Abh. 3); Schulz, 186 ff.; v. Premerstein, *Vom Wesen d. Prinzipats*, 202 ff., is uncritical; De Visscher, *Conferenze*, 56 ff., and *RH* 4, sér. xv (1936), 615 ff. See *Addenda*.

[5] Schulz, 186 ff. It is possible that the expression *ius publice respondendi* was used of these authorized jurists. If so, *publice* means *nomine rei publicae*: Caes. *Bell. Gall.* 1. 16; *Bell. civ.* 2. 21; Sall. *Cat.* 11; Cic. *In Verr.* 4. 9. 20 (*publice commodare*); *ILS* 5513 (*publice debere*); Wlassak, *Prozessformel*, i. 41, n. 2. Unfortunately *D.* (1. 2) 2. 49 is a contaminated source.

[6] Mommsen, *Staatsr.* ii. 912, is wrong.

privata auctoritate. A *ius respondendi* existed no more than a right to breathe. Augustus' idea was that the *responsum* of an authorized jurist should carry higher *auctoritas*; it would be proper for magistrates and *iudices* to accept the ruling of a man whom the Emperor had trusted, but they were to be under no legal compulsion; if they disregarded the ruling, there was no sanction. The whole institution was in complete harmony with Augustus' statecraft, combining as it did respectful recognition and even exaltation of a republican institution with facilities for the *princeps*, inconspicuously and under republican forms, to influence the rulings of the jurisconsults. The jurisconsult remained simply a private citizen; he was not a magistrate, but he spoke *ex auctoritate principis*, and this would be an inducement for praetor and *iudex* to accept his opinion, although they were not legally bound to do so. The relation of the authorized to the unauthorized jurisconsult might be described by paraphrasing Augustus' own words:[1] 'praestat ceteris auctoritate, potestatis nihil amplius habet quam ceteri iurisconsulti.'

2. Like so many of Augustus' creations, this institution did not endure long. Under his successors some of the outstanding lawyers, being in opposition, probably preferred not to ask for imperial authorization, but to give their *responsa* in the proud old republican fashion, *propria auctoritate*. Again emperors who, like Claudius[2] and Caligula,[3] disliked the lawyers, may have refused authorization or given it but rarely. Hadrian,[4] after he had reorganized the *consilium principis*,[5] abandoned the authorization of individual jurists. The entire direction of legal administration and practice was to be centred in the *consilium*, to which the Emperor had now called the leading lawyers;[6] this corresponded better than Augustus' timid reform with the bureaucratic tendency and yet left to the leading lawyers their traditional influence. Authorization of individual jurists was incompatible with this

[1] *Res gestae* 34: 'Post id tempus praestiti omnibus auctoritate, potestatis autem nihilo amplius habui quam qui fuerunt mihi quoque in magistratu conlegae.'

[2] Above, p. 109.

[3] Sueton. *Calig.* 34: 'De iuris quoque consultis, quasi scientiae eorum omnem usum abolituros, saepe iactavit: "se mehercule effecturum, ne quid respondere possint praeter eum."' The last word is a corruption, and the older emendations are unsatisfying. Recently Naber has proposed to read *eu* (*heu*) instead of *eum*: 'ne quid responderent praeter: "eu!"'

[4] Since Vespasian the Augustan principle to reign by *auctoritas principis* was abandoned: M. A. Levi, 'I principi dell' impero di Vespasiano', *Riv. di Fil. Class.* lxvi (1938), 1 ff.; 'La legge dell' Iscriz. *CIL* vi. 930', *Athenaeum*, NS xvi (1938), 85 ff.

[5] Below, p. 118.

[6] Above, p. 104.

conception of a Council of State; what was aimed at was the unitary direction of a central office. This is why in the inscriptions recording the *cursus honorum* of the jurists we never find mention of imperial authorization to give *responsa*. That relating to Julian[1] mentions no such grant; yet if Hadrian had made such grants, Julian would surely have been a recipient. The style *iurisconsultus*, which we find applied to Pactumeius Clemens[2] and Volusius Maecianus,[3] cannot be taken as implying imperial authorization;[4] this age-old title never betokened anything but a jurist who gave *responsa* in answer to questions put to him. Even this title is absent from Julian's inscription and from one of Maecianus' two inscriptions.

3. Thus in appearance, so far as *responsa* were concerned, the Republic was 'restored'. But the codification of the Edict caused an essential diminution of the importance of this juristic function. It now ceased to be an instrument of bold legal innovation and became essentially mere advice on existing law, like a medieval or modern legal opinion; only in matters of detail was there still room for jurisprudential development.[5]

4. In post-classical times there was no clear conception of the Augustan system of authorization of *responsa*,[6] nor was it known which of the jurists had been authorized and which not. The pre-conceptions of a bureaucratic age led to the belief that Augustus and his successors had empowered the jurists *iura condere*, and all the jurists of the Principate whose writings had survived were assumed to have been so empowered. In these writings references to *leges*, *senatusconsulta*, and imperial constitutions were so few that in an age when the Emperor, through his central office, was the fountain of all law it seemed incredible that the jurists had spoken as mere private citizens. It was there-

[1] Above, p. 105. [2] Above, p. 106. [3] Above, p. 106.

[4] An unhappy idea of P. Krüger's (*Quellen*, 125).

[5] This is shown by the *responsa* of Cervidius Scaevola, Marcellus, Papinian, Paul, Ulpian, and Modestinus.

[6] Eunapius (*Vitae philosophor.* Chrysantius, ed. Boissonade, 1878, p. 500) writes of an otherwise unknown Innocentius of the time of Diocletian: *ἐγεγόνει δὲ αὐτῷ πάππος Ἰννοκεντιός τις, εἰς τε πλοῦτον ἐλθὼν οὐκ ὀλίγον καὶ δόξαν ὑπὲρ ἰδιώτην τινὰ λάχων, ὅς γε νομοθετικὴν εἶχε δύναμιν παρὰ τῶν τότε βασιλευόντων ἐπιτεταμμένος.* It has long been thought that this refers to the *ius respondendi* (Puchta, *Kleine civilist. Schriften* (1851), 300; Krüger, 296, n. 6; Seeck–Steinwenter, *PW* ix. 1558). But this is uncertain and improbable. Diocletian can hardly still have conferred a *ius publice respondendi*. Probably Innocentius held a prominent position in the imperial Chancery. Hermogenianus, the author of the 'Codex Hermogenianus' (below, p. 309), is styled 'iurislator' by Sedulius (5th cent.): *CSE* x (1885), p. 172, 10; Migne, *PL* xix. 547. Later 'legislator' becomes a title for lawyers: *Const. Tanta*, s. 20; Savigny, *Gesch.* i. 472.

fore assumed that the Emperor had authorized them to legislate *vice principis*. This assumption is found not only in the age of Justinian [1] but also in an apocryphal text of the Veronese *Institutes* of Gaius.[2] The question then naturally arose how differences of opinion between the classical writers were to be got over. The principle *lex posterior derogat priori* was of no avail, because the chronological order of the writings was far from certain. The simplest solution was to give the judge a free hand in such cases; another was that adopted by the Law of Citations, to which we shall have to return when we come to the next period.[3]

5. The history of the so-called *ius respondendi* has been obscured by two apocryphal texts.

(i) Gaius 1. 7: 'Responsa prudentium sunt sententiae et opiniones eorum, quibus permissum est iura condere. quorum omnium si in unum sententiae concurrunt, id quod ita sentiunt, legis vicem optinet; si vero dissentiunt, iudici licet quam velit sententiam sequi; idque rescripto divi Hadriani significatur.'

The fact that Gaius, unlike Pomponius,[4] puts the *responsa prudentium* among the sources is in itself suspicious, but more than this, the whole section reflects post-classical ideas so completely that it cannot be genuine. The true contents of Hadrian's rescript can only be divined. He cannot have imposed on magistrates and *iudices* a legal duty to follow the *responsum* of an authorized jurist in the particular case for which it was emitted. Of such a principle there is nowhere a vestige;[5] it would have been in diametrical opposition to Hadrian's policy. It is possible that he laid down that if, in a lawsuit, two authorized jurists had given conflicting *responsa*, the *iudex* was to be entirely free; but he cannot have confined him to choosing between the two *responsa*.[6]

(ii) Pomponius *D.* (1. 2) 2. 48–51.[7]

(*1st hand*) *Et ita Ateio Capitoni Massurius Sabinus successit, Labeoni Nerva, qui adhuc eas dissensiones auxerunt. Hic etiam Nerva* ⟨*Tiberio*⟩ *Caesari familiarissimus fuit.*

(*2nd hand*) Massurius Sabinus in equestri ordine fuit et publice primus respondit posteaque hoc coepit beneficium dari; a Tiberio Caesare hoc tamen illi concessum erat.

(*3rd hand*) 49. Et ut obiter sciamus, ante tempora Augusti publice respondendi ius non [a principibus] dabatur, sed qui fiduciam studiorum suorum habebant, consulentibus respondebant; neque

[1] See, e.g., Theoph. *Paraph.* 1. 2. 4 and 9, and below, p. 288.
[2] *Inst.* 1. 7. Literature on this passage above, p. 112, n. 4.
[3] Below, p. 282. [4] *D.* (1. 2) 2. 12. [5] See Note R, p. 338.
[6] So Pernice in his lectures.
[7] On this text see particularly Wieacker, op. cit. 72; De Visscher, op. cit. 66 ff. (both not satisfying); Lenel, *Pal.* ii. 51; Beseler, *Z* xlv (1925), 457.

responsa utique signata dabant, sed plerumque iudicibus ipsi scribebant aut testabantur, qui illos consulebant. Primus divus Augustus, ut maior iuris ⟨consultorum⟩ auctoritas haberetur, constituit, ut ex auctoritate eius responderent: et ex illo tempore peti hoc pro beneficio coepit.

(*4th hand*) [Et ideo] optimus princeps Hadrianus, cum ab eo viri praetorii peterent, ut sibi liceret respondere, rescripsit eis [hoc non peti sed praestari solere et ideo] 'si quis fiduciam sui haberet, delectari se, si populo ad respondendum se ⟨praestaret⟩' [praepararet.] 50. [Ergo.]

(*1st hand*) *Sabino concessum est a Tiberio Caesare, ut* ⟨*publice*⟩ [*populo*] *responderet: qui in equestri ordine* [*iam grandis natu et*] *fere annorum quinquaginta receptus est. Huic nec amplae facultates fuerunt, sed plurimum suis auditoribus sustentatus est. 51. Huic successit . . .*

Like much of the whole fragment in *D.* (1. 2) 2,[1] the present passage is very corrupt; besides containing scribal errors it shows signs of stratification. At least four hands have been at work.

1st hand. The beginning of s. 48 is in order, except that 'Tiberio' must have dropped out. The text of the first hand is continued in s. 50, *Sabino concessum est* join up with the last words of the first hand in s. 48, and *ergo* at the beginning s. 50 is just a hasty piece of tacking. In s. 50 *populo* must be a mistake for *publice*, and *iam grandis natu et* must be a gloss.

2nd hand. This statement concerning Sabinus cannot be classical: that Sabinus belonged to the equestrian order and was authorized by Tiberius to give *responsa* is repeated in s. 50; the statement that he was the first to be so authorized is absurd, since Augustus must have made earlier grants. It has been attempted by deleting *fuit et* to make the text say that Sabinus was the first *eques* to receive the grant, but this too is improbable, since Trebatius, for example, must have received it.[2] The text is beyond cure; it comes from some glossator who simply did not know of any jurist before Sabinus who had had the *ius respondendi*. The text was recognized to be an addition by Lenel long ago.

3rd hand. This text cannot have been written by the second hand, as it is in contradiction with the preceding sentence. The second hand believed that the *ius respondendi* was first granted by Tiberius; the third hand asserted that this *ius* was introduced by Augustus. The third hand was obviously well informed. The text is mainly sound, except that *a principibus* must be a silly gloss, seeing that there were no *principes* before Augustus, and that *consultorum* must be supplied after *iuris*.

4th hand. The text yields no reasonable meaning and is therefore certainly unclassical. It has been suggested[3] that Hadrian was taking the petition literally: the *viri praetorii* had petitioned for leave to give

[1] Below, p. 170. [2] *Inst.* (2.25) pr. [3] Krüger, 123, n. 15.

responsa and not for leave to give them *ex auctoritate principis*, to which Hadrian replied that no leave was required to give *responsa*. But it is unbelievable that Hadrian resorted to so perverse a misconstruction of a petition from men of so high rank. If in some such case Hadrian really answered that he would be delighted if the petitioners would give *responsa propria, non principis, auctoritate*,[1] he must be taken to have been intimating that his intention was to make no further grants of *ius publice respondendi* at all. That would be an important declaration of policy, and the rescript making it would deserve to be mentioned in juristic literature. After all, whoever wrote our text must have got his information from some book. The word *delectari* smacks of a constitution: see in an epistle of Vespasian (Bruns, no. 80): 'Otacilium Sagittam, amicum et procuratorem meum, ita vobis praefuisse, ut testimonium vestrum mereretur, delector.' The text cannot have been written by the third hand, as *et ideo* is meaningless. These words are obviously an addition of a redactor who wished to connect this fourth addition with the preceding text. Probably *hoc non . . . et ideo* is a later addition made by someone who wished to clarify the meaning of the rescript.

(iii)

1. As under the Republic,[2] the jurists still served as advisers on the *consilia* of *iudices* and magistrates,[3] but here too we can observe the effects of growing bureaucratization. The jurists, once aristocratic volunteers, had now become salaried officials. The Principate hesitated before frankly recognizing the principle that the magistracies were to be held by professionally trained officials, but at least from the reign of Hadrian the position was reached that a magistrate should have a permanent legal adviser at his side.[4] Naturally this applied specially to the magistrates concerned with judicature—the consul, praetor, provincial governor, *praefectus urbi*, and *praefectus praetorio*. Such permanent, salaried legal advisers were termed *adsessores, comites, consiliarii*, or sometimes *studiosi iuris*. It is intelligible that the *adsessor* should gradually have overshadowed the other members of the *consilium*.[5] He even acquired an independent competence

[1] For 'populo praestare' cf. Cic. *De leg.* 1. 4. 14: 'sed hoc "civile" quod vocant, eatenus exercuerunt, quod populo praestare voluerunt.'

[2] Above, p. 52.

[3] *D.* (31) 29 pr.: 'Celsus: Pater meus referebat, cum esset in consilio Duceni Veri consulis. . . .'

[4] Bethmann-Hollweg, ii. 136 ff.; H. F. Hitzig, *Die Assessoren d. röm. Magistrate u. Richter* (1893); De Ruggiero, *Diz. epigr.* i. 97 ff.; Seeck, *PW* i. 423; Friedländer–Wissowa, *Sittengesch.* i. 188.

[5] Seneca, *De tranqu.* 3. 4, above, p. 53, n. 2.

extending beyond the mere giving of advice; he became a sort of chief secretary, who merely submitted his decisions to his chief for signature and in many matters gave the decision himself.[1]

2. The participation of the lawyers in the *consilium principis* is of special importance.[2] Augustus and the *principes* of the first century had already summoned lawyers to their *consilium*, but this was a *consilium* of the old republican kind. It was only under Hadrian that it became a standing organ of State with permanent, salaried members. To it, as already observed,[3] Hadrian and his successors summoned a number of leading jurists. The competence of this Council of State extended to every branch of legal administration, in the widest sense. Its establishment by Hadrian is the counterpart of his codification of the Edict and his disuse of the *ius auctoritate principis respondendi*. The ancient right of the jurists to apply and develop the law[4] was respected, but the bureaucratic tendencies of the times demanded centralization and officialization.[5] The ancient aristocratic jurisprudence was gradually coming to an end.

(iv)

In this period the jurists were more active as judges in civil and criminal cases than they had been under the Republic.[6] Their service as *iudices* in cases under the ordinary civil procedure remained as occasional as before, but a number of important offices, with which judicial functions were connected, were now permanently occupied by a group of important jurists.[7] Since Augustus it had become obligatory to hold one of the offices of the vigintisexvirate before becoming *quaestor*,[8] and naturally the office which a jurist would, if possible, choose would be that of a *decemvir litibus iudicandis*.[9] The offices of provincial governor, *legatus legionis*, *iuridicus provinciae*, and, above all, of *praefectus urbi*[10] and *praefectus praetorio*[11] involved some judicial duties, and even the consuls and praetors functioned as judges in civil cases of their competence under the *cognitio*.[12]

[1] Hitzig, *Assessoren*, 45; Seeck, *PW* i. 425.

[2] E. Cuq, *Consilium principis*, 311 ff.; Mommsen, *Staatsr.* ii. 902 ff., 988 ff.; Hirschfeld, *Verwaltungsbeamte*, 339 ff.; Hitzig, *Assessoren*, 29 ff.; Seeck, *PW* iv. 926 ff.; Friedländer–Wissowa, *Sittengesch.* i. 74, 152 ff.

[3] Above, p. 104.

[4] Above, p. 60.

[5] Above, p. 100.

[6] Above, p. 53.

[7] Above, pp. 104 ff.

[8] Mommsen, *Staatsr.* i. 544, ii. 592.

[9] Proved in the case of Julian and Pactumeius Clemens; above, p. 105 f. On the *decemviri*: Mommsen, *Staatsr.* ii. 605; Kübler, *PW* iv. 2260.

[10] Ibid. 1066.

[11] Ibid. 1120.

[12] Kübler, *Gesch.* 210 ff.

(v)

From advocacy the jurists continued to abstain.[1] The antagonism between jurisconsults and advocates, which had developed under the Republic, remained as sharp as of old. Normally the jurist confined himself to instructing the advocate in the law; if ever he appeared as advocate himself it was an exception, confined to civil suits, that is to cases in which rhetoric in the proper sense would be out of place.

(vi)

Legal education assumed a more definite and academic form in classical times. The admirable, unacademic, legal instruction of the Republic was no longer equal to the growing demand for more lawyers. Unfortunately we are still badly informed as to the history of this change.[2]

1. There is clear evidence of the existence of two law schools at Rome in the first and second centuries. The chief authorities are Gaius' *Institutes* and Pomponius' *Enchiridion*,[3] though what we have of the latter is a miserable later revision.[4] According to Pomponius the schools were founded by the two luminaries of the Augustan period, Labeo and Capito,[5] who were succeeded by other jurists in the two following series:

Antistius Labeo	Capito
Nerva pater	Massurius Sabinus
Proculus	Cassius
Pegasus	Caelius Sabinus
Celsus pater	Iavolenus Priscus
Celsus filius and Neratius Priscus	Aburnius Valens, Tuscianus, and Salvius Iulianus.

Like the rest of the fragment of the *Enchiridion* this information demands methodical and cautious criticism. The school carried back by Pomponius to Capito was in reality founded by Cassius.

[1] Above, p. 55.

[2] On what follows see Kübler, *PW* i A. 380 ff., 394 ff., giving the older literature. Bremer, *Die Rechtslehrer u. Rechtsschulen im röm. Kaiserreich* (1868), is uncritical and quite out of date. Baviera, *Le due scuole dei giureconsulti rom.* (1898) and *Scr. giurid.* i (1909), 111 ff.; Di Marzo, *Riv. it.* lxiii (1920), 109 ff.; Barbagallo, *Lo stato e l'istruzione pubb. nell' impero rom.* (1916); R. Herzog, *Urkunden zur Hochschulpolitik d. röm. Kaiser* (*Berlin SB*, 1935), 907 ff.; Festa, *Bull.* xliv (1936–7), 13 ff.; *FIRA* i. 420; Ebrard, *Z* xlv (1925), 117 ff., goes quite astray—a monument of injudicious research. On Arnò's often fantastic works see H. Krüger, *Z* xlvi (1926), 392 ff.

[3] *D.* (1. 2. 2) 47–53.

[4] Below, p. 120.

[5] Tac. *Ann.* 3. 75: *duo pacis decora.*

We know this from the younger Pliny,[1] whose date is so close to that of Cassius (he was born in 61 or 62; Cassius died in 69 or shortly afterwards) that his evidence may be accepted unreservedly.[2] This school was known as *schola Cassiana*. We know further that Cassius was a pupil of Massurius Sabinus,[3] of whose wide activities as a teacher we have sure information;[4] his short, comprehensive work *De iure civili*, in three books, was no doubt designed for scholastic purposes.[5] It is therefore in substance correct to carry the *schola Cassiana* back to Sabinus, but its formal founder was Cassius. Sabinus was a man without property or standing,[4] whereas Cassius had both. Possibly the two men conducted the school together for a time. The carrying back of the school to Capito, on the other hand, is nothing but a mistaken historical inference drawn by Pomponius or his sources.[6] Capito's contribution to the science of private law was insignificant, and it was to private law that the schools of the first century confined themselves. Indeed, the *schola Cassiana* paid not the slightest attention to the works of its alleged founder.[7] It was common knowledge that the rival school went back to Labeo, and the personal and political antagonism of Labeo and Capito was also well known.[8] The rivalry between the two schools was therefore traced back to the rivalry between the two jurists.

Pomponius is probably right to derive the other school from Labeo, for Labeo is known to have been very active as a teacher.[9] That the followers of this school are called *Proculiani* tells us nothing, since the name appears first in post-classical times;[10] it is never used by Gaius. We do not know the classical name of this school, but Proculus cannot have been its founder, seeing that Gaius expressly refers to the elder Nerva as being a member of it.[11]

[1] *Epist.* 7. 24. 8: 'Laetor etiam quod domus aliquando C. Cassi, huius qui Cassianae scholae princeps et parens fuit, serviet domino non minori.'

[2] Baviera, *Scr. giurid.* i. 118, is wrong.

[3] *D.* (4. 8) 19. 2 (Paul): 'Cassius sententiam magistri sui bene excusat et ait Sabinum non de ea sensisse sententia. . . .'

[4] *D.* (1. 2) 2. 50. [5] Below, p. 156.

[6] Tac. *Ann.* 3. 75 shows that there was a tradition which put Capito on a par with Labeo.

[7] Pernice, *Labeo*, i. 82.

[8] Ibid. 14; Schanz–Hosius, ii. 385; an impetuous letter written by Capito on Labeo after his death is quoted by Gell. 13. 12.

[9] *D.* (1. 2) 2. 47.

[10] Below, p. 123.

[11] Gaius, 2. 15: 'Nerva vero et Proculus et ceteri diversae scholae auctores'; 2. 195: 'Nerva vero et Proculus ceterique illius scholae auctores.'

For the rest Pomponius' two lists may be accepted.[1] The only item that we can check is the mention of Julian, and here Pomponius is confirmed by Julian's own description of himself as a pupil of Iavolenus Priscus.[2]

2. The two schools were not mere schools of thought or intellectual coteries, but educational establishments, as is implied by the term *schola* used by both Gaius and Pliny. Gaius, when referring to his own school, speaks of *praeceptores nostri*. Pomponius uses the term *secta* instead of *schola*, but his meaning is the same. His terminology recurs in an official document (preserved in an inscription)[3] concerning the *schola Epicurea* at Athens: the school is *secta* and the passing on of its presidency from one person to another (*diadochus*) is *successio*.[4] Nothing is known of the organization of the two law schools, but it is certain that as early as Vespasian schools of grammar and rhetoric and schools of medicine existed at Rome, which the State recognized as corporations and the teachers in which received salaries and enjoyed a number of privileges.[5] From the silence of our sources it must be assumed that the law schools were not yet corporations in our period and that they had no definite legal constitution.[6] The schools of grammar and rhetoric and of medicine had existed at Rome before being granted incorporation; similarly, in the times of Irnerius and the Four Doctors neither the university nor the law school of Bologna was a corporation.[7] Men of the standing of Cassius, Pegasus, Iavolenus, Celsus, and Julian cannot be supposed to have engaged continuously in elementary legal teaching; indeed their

[1] Where several jurists are named side by side, without mention of *succedere* (*D.* 1. 2. 2. 53), the presumption is that several jurists held the succession together. Groag, *Jahreshefte d. österreich. archäolog. Instituts in Wien*, xxxix (1935), Beiblatt 185, overlooks this. [2] *D.* (40. 2) 5.

[3] The full inscription is given by Wilhelm, *Jahreshefte des österreich. arch. Instituts*, ii (1899), 270, and in *CIL* iii, Suppl., nos. 1283 and 14203. 15; a photograph in Otto Kern, *Inscriptiones Graecae* (Tabulae in usum schol. ed. by Lietzmann, no. 7, 1912), tab. 44. Only the Latin text *ILS* 7784 and *FIRA* i. 430; only the Greek text in Dittenberger, *Syll.* (3rd ed.), no. 834. Literature: Mommsen, *Schr.* iii. 50; Diels, *Arch. f. Gesch. der Philosophie*, iv (1891), 153 ff.; Dareste, *NRH* xvi (1892), 612; Herzog, l.c. (above, p. 119, n. 2); Steinwenter, *Z* li (1931), 404; Beseler, *Z* lii (1932), 284; Oliver, *TAPhA* lxix (1938), 494.

[4] Kübler's opinion on the meaning of *secta* (*PW* i A. 382) is therefore wrong.

[5] See Krüger, 152, and, above all, Herzog, l.c.; Riccobono jun., *Miscellanea critico-storica* (Annali Palermo, xvii, 1937), 48 ff.

[6] And no privileges. Ulp. *F.V.* 150: 'Neque geometrae neque hi qui ius civile docent, a tutelis excusantur.' Contradicted by Modestinus, *D.* (27. 1) 6. 12, but Modestinus' work has reached us only through a post-classical revision (below, p. 252). Cf. Kübler, *PW* i A. 397, who, however, is undecided.

[7] Koeppler, *EHR* liv (1939), 592, dissenting from Rashdall, *Universities of Europe in the Middle Ages* (ed. Powicke and Emden), i (1936), 145.

time was largely taken up by the magistracies they held. We must therefore assume that the scholarch provided a (small) staff of regular teachers. Permanent lecture-rooms seem not to have existed as yet;[1] as in the German universities of the eighteenth century, it was the lecturer's own business to find one. If accommodation was lacking in his own residence, he would hire a room or use one in some public building.[2] It is improbable that the heads of the schools or the great jurists received fees for their services, but the subordinate teachers did so, though without the right to recover them by action, even *extra ordinem*.[3]

3. Repeated attempts[4] to find a fundamental difference of scientific principle between the two schools, to which their numerous differences on points of detail[5] might be traced, have failed. There is no difference either of point of view or of method; indeed differences of principle existed in the classical period as little as in the republican. 'Idem fons erat utrisque et earum rerum expetendarum fugiendarumque partitio.'[6]

4. That the two schools continued to exist later than Hadrian is shown by Gaius' *Institutes*;[7] it is possible, or even probable, that they continued for a long time after, but conclusive evidence is lacking. Their old controversies were laid to rest by the authority of Julian, whose work dominates subsequent jurisprudence. The discussions of the classical period at its zenith start from the results reached by him. The scientific importance of the schools waned, and the leadership of legal thought lay unquestionably with the great lawyers of the imperial *consilium*; the professors of the law schools were reduced to the status of purely academic teachers. It may be that jurists such as Papinian, Paul, and Ulpian still did some teaching,[8] but this would not be in a formal school but, as under the Republic, in the intimacy of a circle of

[1] The 'stationes ius publice docentium aut respondentium' mentioned by Gell. 13. 13 can hardly be the two famous law schools. *Schol. ad Iuv.* 1. 128: 'aut quia iuxta Apollinis templum iuris periti sedebant et tractabant, aut quia ibi bibliothecam iuris civilis et liberalium studiorum in templo Apollinis Palatini dedicavit Augustus'; cf. Hirschfeld, *Verwaltungsbeamte*, 298 ff. This again can hardly refer to the two schools.

[2] Medicine was taught in the *templum Pacis*: Galen. 19. 21 (ed. Kühn).

[3] *D.* (50. 13) 1. 5. Though certainly not authentic Ulpian (Kübler, *PW* i A. 397 ff.), the text is proof of this.

[4] Ibid. 381 ff.

[5] Conspectus: ibid. 385 ff.

[6] Cic. *Acad.* 1. 4. 18.

[7] Cf. Epictet. *Diss.* 4. 3: 'These are the laws that are sent you from God, these are his ordinances. These you must expound and these obey, not those of Masurius and Cassius' (*οὐ τοῖς Μασουρίου καὶ Κασσίου*).

[8] But 'auditorium' in connexion with jurists sometimes means the law court, not the lecture-room; see below, p. 225.

friends. There is no evidence of fresh differences of opinion having arisen between the schools after Julian, and in the subsequent literature mention of conflicts between the *Sabiniani* and *Proculiani* is rare. It is clear that these names are used to denote only jurists before Julian, and seeing that there were still *Cassiani* and *Proculiani* such a limitation is strange and can hardly be classical. Gaius never uses the names *Sabiniani*, *Cassiani*, and *Proculiani*, but writes *Sabinus*, *Cassius ceterique nostri praeceptores* and *diversae scholae auctores*. The few texts in which the names are found must all be corrupt or interpolated.[1]

5. Legal education was also carried on in the provinces, but our information about the classical period is scanty. All that can be taken as certain is that the law school of Berytus existed by the beginning of the third century.[2] When Apuleius speaks of Carthage as the *Camena togatorum* (i.e. *advocatorum*),[3] he is not implying that there was a law school there,[4] for, as we have shown, the *advocati* were rhetoricians. But no doubt some elementary instruction in law was imparted in the school of rhetoric.

6. From the juristic literature we can at least infer this, that in the law schools, as in the schools of rhetoric, there were lectures and disputations, but we have no further information as to classical ways and methods of instruction.

[1] See Note S, p. 338.

[2] Gregor. Thaumat., *Orat. paneg. ad Orig. cap.* 5, ed. Koetschau; Collinet, *Ét.* ii (1925), 16 ff., 26.

[3] *Florida*, 4. 20.

[4] So, wrongly, Krüger, 153, n. 86; F. Norden, *Apuleius* (1912), 9 ff.

III

CHARACTER AND TENDENCIES OF CLASSICAL JURISPRUDENCE

(i)

THE old aristocratic jurisprudence was now gradually coming to its end, succumbing to the bureaucratic tendencies of the age. The leading jurists were coming to be either high imperial officials or academic teachers. Nevertheless, it was of the essence of the Principate so far as possible to preserve at least the externals of the Republic, and this was reflected in the attitude adopted by the jurists.

1. The science of law still retained non-rational, authoritarian characteristics. The belief persisted[1] that a man of standing and versed in political and legal affairs possessed, if he had devoted his mind seriously and conscientiously to the subject, an intuitive perception of the law.[2] Thus, when a man such as Iavolenus, after profound legal studies and being now, at the end of a long and honourable official career, a member of the imperial *consilium*, endorsed the opinion of an earlier jurist by his *hoc probo, haec vera sunt*, or *verum puto*,[3] he stamped the older opinion with the seal of his own *auctoritas*. If so eminent a jurist as Julian pronounced on a question in the law of manumission 'so held by my master Iavolenus, and so advised by myself when consulted by the praetors',[4] this for the classical lawyers was a confirmation of the opinion by force not of reasoning, but of *auctoritas*. Their respect for authority was not in the least slavish[5]—on the contrary, their general bearing was that of equals dealing with equals[6]—but they were on their guard against overrating mere logic and underrating the intuitions of experience. Hence in the classical discussions authority often took the place of argument, just as it had

[1] Above, p. 61.

[2] Aristot. *Eth. Nic.* 1113[a] 29: ὁ σπουδαῖος γὰρ ἕκαστα κρίνει ὀρθῶς καὶ ἐν ἑκάστοις τἀληθὲς αὐτῷ φαίνεται . . . καὶ διαφέρει πλεῖστον ἴσως ὁ σπουδαῖος τῷ τἀληθὲς ἐν ἑκάστοις ὁρᾶν (!) ὥσπερ κανὼν καὶ μέτρον αὐτῶν ὤν.

[3] *D.* (18. 1) 77; (19. 2) 57; (34. 2) 39. 1; (40. 12) 42; (9. 2) 57.

[4] *D.* (40. 2) 5.

[5] No classical jurist would have carried the worship of authority so far as *Schol.* A *ad Hom. Il. Δ*, 235: μᾶλλον πειστέον Ἀριστάρχῳ ἢ τῷ Ἑρμαππίᾳ, εἰ καὶ δοκεῖ ἀληθεύειν: 'One should trust Aristarchus rather than Hermappias, even when the latter seems to be speaking the truth!'

[6] Gaius, of course, is not of this company.

under the Republic.[1] This feature is specially observable in *responsa*; a *responsum* remained the authoritative finding of a man who knew; it therefore contained neither citations of previous authorities nor confutations of other opinions, and no, or only very laconic, argumentation. This authoritarian attitude of the jurists was regarded as a peculiar and remarkable phenomenon by their contemporaries; 'to answer like a jurist' became a proverbial expression.[2]

2. This aristocratic atmosphere gave little scope for scientific individuality. The old republican *esprit de corps* was kept alive by the sturdy professional tradition of the small select band of leading jurists. The individual had no desire to step outside the tradition or at least to deviate seriously from it. If we cannot among the classical jurists discover personalities of pronounced scientific originality, it is because none such existed.[3] With this the tone of the classical discussions is in harmony. The battle of the law is μέγας ἀγών, not an ἔρις. The atmosphere is one of strict and composed objectivity which, even at the cost of a certain monotony, eschews all verbal adornment. There is no attempt to be persuasive, no contentiousness, no advocacy. Legal witticisms, and strong and malicious criticisms such as even Aristotle at times indulged in, are excluded. It strikes us into surprise when Celsus occasionally describes another jurist's opinion as ridiculous.[4] In their dealings with one another these great gentlemen did not stoop to polemics fit only for rhetoricians.

(ii)

If one makes a serious study of the central works of classical jurisprudence, if one is not content merely to read the *Institutes* of Gaius or individual fragments in the *Digest*, but examines consecutively the remains of Cervidius Scaevola's *Digesta* or *Responsa*, Papinian's *Responsa* or *Quaestiones*, or Ulpian's *Libri ad Edictum*, one is penetrated by a feeling of their overwhelming and inexhaustible wealth of problems and ideas. If one then reflects that the literature we possess is but a small selection, made it is true by such experts as Tribonian and his colleagues, well may

[1] Schulz, 183 ff.

[2] Seneca, *De benef.* 5. 19. 8: 'ut dialogorum altercatione seposita tamquam iuris consultus respondeam: "mens spectanda est dantis; beneficium ei dedit, cui datum voluit."' *Epist.* 94. 27: 'quid quod etiam sine probationibus ipsa monentis auctoritas prodest? sic quomodo iuris consultorum valent responsa, etiamsi ratio non redditur.' Regenbogen, *Die Antike*, xii (1936), 116 ff.

[3] Schulz, 106 f.

[4] See Note T, p. 339.

one exclaim: *ὦ βάθος πλούτου καὶ σοφίας καὶ γνώσεως τοῦ δικαίου.*[1] Abundance is indeed a distinctive mark of the classical period, for it was then that the picture sketched in bare outline by the republican jurists was filled in down to the last detail. Servius' commentary on the Edict was in two short books (papyrus rolls); Pomponius' runs to about 150, and a glance at their remains shows that the length of the work was due to its thoroughness and fecundity. The saying was indeed verified: *ἦλθεν τὸ πλήρωμα τοῦ χρόνου.*[2] With untiring patience and unvarying acumen the classical writers subject the institutions of the law ever and again to a searching casuistic examination which, by applying it in concrete cases, real or imaginary, pursues each principle to its most remote and minute consequences. No problem of private law, however petty or singular, but was welcomed and probed. One is astonished at the number of insignificant and practically unimportant questions that are discussed. The sections on the law of succession in Scaevola's *Digesta* and *Responsa* and in Papinian's *Responsa* and *Quaestiones* contain endless acute observations on eccentric testamentary clauses or on misbegotten institutions such as the *quarta Falcidia*, pupillary substitution, or *fideicommissum universitatis*. One wonders whether it was really justifiable to spend so much time and labour on these difficult, tortuous questions, the practical importance of which was so small. The classical jurists either did not ask the question or answered it by a silent affirmative. Their professional relish for the tiniest details reveals them as belated, but true, followers of Aristotle.[3] There is no doctrine in private law that they have not in some way advanced and enriched. But for that very reason the intensity and minuteness of their discussions can be appreciated only through personal study of their works. For this purpose illustrative excerpts are valueless, and the most extensive textbook can give but an inadequate picture of their work.

(iii)

But there is another side to the picture. Classical jurisprudence, for all its innumerable contributions to the detail of private law, was not productive on a great scale.[4] 'Nihil est simul inventum et perfectum', as Cicero truly says.[5] The jurists of the Principate perfected the work of the great originators of the Republic.

[1] S. Paul, *Ad Rom.* xi. 33; cf. Rudorff, *RG* i. 364.
[2] Cf. S. Paul, *Ad Galat.* iv. 4.
[3] Jäger, *Aristoteles*, 359 ff., 362 (Engl. ed. 336 ff., 338).
[4] De Zulueta, *CAH* ix (1932), 842; Joers, 1–7.
[5] Cic. *Brut.* 18. 71.

1. The Edict, that masterpiece of republican jurisprudence,[1] became stabilized. It seems to have been little altered in the course of the first century,[2] and under Hadrian it was stereotyped.[3] By order of that Emperor the famous jurist Julian settled the final form of the praetorian and aedilician Edicts, rewording here and there, altering the order of topics, but making only small changes of substance. His 'little book' was laid before the Senate, which proceeded to direct[4] that future praetors and aediles should issue their Edicts in the form settled by Julian. Only within the framework of these Edicts did the magistrates retain discretionary powers: they could still allow analogous *actiones* and *exceptiones*, and this they continued to do throughout the classical period.[5] At the same time a uniform jurisdictional Edict for the provinces (*Edictum provinciale*) was composed, which the governor of every province was bound to adopt.[6] We have here a codification, but in a style proper to the Principate: formally the Edict remained, as before, the official programme which the magistrate advertised at the beginning of his term of office.[7] It was not turned into *lex*, but remained *ius honorarium*. It was also in keeping with the Principate that the direction to the magistrates emanated from the Senate. But the outcome was that the *lex annua*, as the republicans proudly termed their masterpiece,[8] had become stereotyped as an *Edictum perpetuum*.[9] Thus ended a great chapter in the history of Roman jurisprudence.

2. On the other hand, new paths of legal progress were now thrown open. Instead of by *lex rogata*, at which the jurists had

[1] Above, p. 53.

[2] The point deserves further consideration. Examples of changes in the Edict under the Principate: *D.* (4. 6) 26. 7; (29. 2) 99; (42. 8) 11; (44. 4) 4. 33. Cf. Weiss, *Z* l (1930), 249 ff.

[3] On what follows see Weiss, *St. z. d. röm. Rechtsquellen* (1914), 112, 135 ff.; Wieacker, *St. z. hadrianischen Justizpolitik* (l.c. above, p. 112, n. 4), 72 ff.; Ebrard, *Z* xl (1919), 121.

[4] *Const. Tanta-Δέδωκεν*, s. 18. On the date of this SC. see Girard, *Mélanges*, i. 214 ff.; P. Strack, *Untersuchungen zur röm. Reichsprägung des 2. Jahrh.* ii (1933), 123 and 127.

[5] This was what the *senatusconsultum* ordained, as Const. *Δέδωκεν* shows. The corresponding passage of the Latin version, *Tanta*, is so expressed by Tribonian as to make one believe that the Senate ordained that where the Edict as formulated was unsatisfactory the praetor was to appeal to the Emperor.

[6] Lenel, *Ed.* 4; Buckland, *RH* xiii (1934), 81 ff.; Reinmuth, 'The Prefect of Egypt', 46 ff. (*Klio*, Beiheft xxxiv. 1935); Volterra, *Dir. rom. e diritti orientali* (1937), 297.

[7] *C.* (8. 1) 1 (Alexander). Eger, *Z* xxxii (1911), 378 ff.; P. M. Meyer, *Jur. Papyri*, no. 27; Weiss, 123; Wilcken, *Z* xlii (1921), 135.

[8] Above, p. 61.

[9] On the origin of the term: Pringsheim, 'Zur Bezeichnung des Hadrianischen Edikts als edictum perpetuum', *Symb. Friburg.*, 1 ff.

always looked askance, legislation could now be by *senatusconsultum* or *constitutio principis*, to which methods they were necessarily more favourable. At first the lawyers, or some of them, observed a certain reserve towards the *Princeps* and his associates, and the Emperors for their part kept the lawyers at a distance. But all this disappeared from the time of Nerva. The leading jurists were thenceforward the trusted agents of the *Princeps* and, from Hadrian onwards, members of his *consilium*. Hence we now meet with a number of *senatusconsulta* dealing with private law and betraying the hand of the jurist; imperial constitutions dealing with private law also become more frequent. It can be no accident that the first comprehensive collection of constitutions made in post-classical times, the *Codex Gregorianus*, begins with Hadrian's enactments. Nevertheless no drastic reforms were undertaken. For this the emperors were not responsible: Hadrian, for example, would have been the very man for such work, and it was the jurists who stood in the way. The fine network of their own juristic spinning held them prisoners. The keys were in their hands, but they shrank from opening the door of legislative reform. If one looks for basic innovations in this period, for entirely new legal institutions, one finds but little, and that little shows the style of old age.[1] The new institution of *fideicommissum*, as applied to *res singulae*, was workmanlike, and a clear advance on *legatum*. But the *Sca. Pegasianum* and *Trebellianum* are far from creditable to the professional lawyers by whom they were evidently drafted. It was not a happy inspiration to cling to the old rule *semel heres, semper heres*, and to use *fideicommissum* as a makeshift for the creation of successive *heredes*. Like all half-measures, it resulted in endless practical difficulties. The law as to the proprietary capacity of persons *in patria potestate* was completely out of date; reform was long overdue. Yet the classical lawyers could reconcile themselves to no more than the institution of *peculium castrense*. The soldier son did not own his *peculium castrense*, but could dispose of it *inter vivos* or by will; yet, if he died intestate, there was no succession to it, but it went to the *paterfamilias* as his son's *peculium* and therefore as already his. The jurists swallowed this artificiality because the son's proprietary incapacity had become for them an article of faith, which they would not give up. In its time the mancipatory testament had been a brilliant creation of republican jurisprudence, but for many a day it had become an archaic theatre-piece. The praetor would

[1] On what follows see the text-books.

grant possession to the *heredes* named in a written record of the last will, if sealed by seven witnesses, but they could be ousted by the *heres* at civil law (*bonorum possessio secundum tabulas*, but *sine re*). It would have been a very short step to give the document full validity as a testament, but all that the classical jurists could bring themselves to allow was that the possession granted by the praetor should receive protection by *exceptio* (*bonorum possessio cum re*), and even for this timid 'reform' they needed an imperial constitution (Gaius, 2. 120). The law of intestate succession as between mother and child needed reform, but that provided by the *Sca. Tertullianum* and *Orfitianum* was quite inadequate; the *Tertullianum* actually resuscitated the *ius trium liberorum*, which had been proved unsatisfactory by previous experience. Many another crying need for legal reform was left with no redress at all. It was time, surely, to substitute a contract in writing for the verbal contract (*stipulatio*), to modernize the forms of *mancipatio* and *in iure cessio*, to reconstruct the law of land-charges so as to give capital reasonable security, to introduce assignment of personal claims, agency, and contracts in favour of third parties, to abolish *mulierum tutela*, to raise the age of legal majority and so on. Looking deeper we may well ask whether it was not time, now that the Edict had been codified, to proceed to the fusion of *ius civile* and *ius honorarium*, a heavy task no doubt, but who would have been equal to it, if not Julian and Papinian? It was shirked, but in the long run it had to be faced; it was left to be carried out by a later age, which had neither the leisure nor the capacity it demanded.

The great and unforgettable achievements of the classical jurists must not blind us—*τολμητέον γὰρ οὖν τό γε ἀληθὲς εἰπεῖν*[1]—to the fact that for drastic legal reform they had neither the inclination nor the energy. Here, as elsewhere, we have to recognize symptoms of the intellectual fatigue characteristic of the age.[2] The sun of jurisprudence still shone, but with an autumn brilliance.

(iv)

The classical jurists continued to apply the dialectical method described above.[3] Distinctions continued to be drawn,[4] principles

[1] Plato, *Phaedr.* 247 c.

[2] Mommsen, *Schr.* iv. 469; v. Wilamowitz-Möllendorff, *Einl. in die griech. Tragödie*, 176.

[3] Above, p. 62. On Pedius' method see La Pira, *Bull.* xlv (1938), 293 ff.

[4] Common in Gaius' *Institutes*, e.g. 2. 99, 101, 152; 3. 88, 89, 182, 183; 4. 45 f., 53a,

and definitions to be formulated; as under the Republic, in the definitions etymology played at times a sorry part.[1] It is difficult, indeed impossible, to compute exactly the dialectical work of the classical jurists, because possibly much that is of republican and much certainly that is of post-classical origin is sailing under their colours.[2] But this at least is clear, that the advance made in our period was not so great as the achievement of the Republic would lead one to expect.[3] After Labeo and Sabinus juristic interest in dialectic declined; there was a return to the national tendency to stick to concrete cases. In systematization no essential advance was realized. In their treatises on the *ius civile* (in the narrower sense) the classical writers were content to follow the scheme of Sabinus' *Iuris civilis libri tres*, which itself was merely an improved version of the Mucian scheme and, even so, was far from perfect.[4] The same scheme was adopted, with some not particularly successful modifications, in Gaius' *Institutiones*.[5] For the rest, the jurists either followed the order of the Edict or what moderns called the system of the *Digesta*,[6] which is simply the edictal order with various insertions and appendices.

Abstract formulations of principle occur chiefly in the elementary works.[7] Even in them the task of defining basic concepts is shirked.[8] Questions of detail were what really interested the classical lawyers, and the method they applied to them remained at bottom casuistical. The *responsa* in the collections were fitted somehow into the system of the *Digesta*, but there was no attempt at rational concatenation by means of connecting abstract headings. Even in the more theoretical works, such as Julian's and Marcellus' *Digesta*, case law is dominant, and no attempt is made to translate the cases into abstract principles.[9] It is true that in these works opinions on cases that had arisen in practice are not simply strung together as in the collections of *responsa*; in spite of the casuistical form we can see that problems are considered from the point of view of general theory, with the result that imagined cases play a considerable, perhaps even a predominant, part. But even so, a plain statement of the theoretical result of

82, 103, 120, 142 f., 156. On Labeo's distinctions: Pernice, *Labeo*, i. 23 ff. There is a long distinction in the Bolognese style by Claudius Saturninus in *D.* (48. 19) 16 pr.–8. Other examples: Ulp. *D.* (43. 1) 1; Paul, *D.* (43. 1) 2, &c.

[1] On Labeo: Pernice, *Labeo*, i. 25 ff. Ceci, op. cit. above, p. 67, n. 4, collects the etymological definitions.

[2] See Note U, p. 339.

[3] As already correctly observed by Joers, i. 310, n. 3.

[4] Below, p. 156.

[5] Below, p. 159.

[6] Below, p. 226.

[7] e.g. in the *Institutes* of Gaius.

[8] Above, p. 67; Schulz, 43 ff.

[9] Ibid. 56 f.

the cases, a formulation of the principle to be deduced from them, is avoided. When the jurist does attempt such a formulation, his heart is evidently not in the work. One has the impression that he is only completely in earnest when he gets back to his beloved cases. It must not be imagined that abstract principles have been cut out of the classical texts by Justinian's compilers. Far from that, the men of the post-classical age cherished simplicity and brevity; abstract formulations were just what they were looking for,[1] and at times they inserted them in the classical texts.[2] If they had found them already there, they would have been only too glad to adopt them. 'All abstract formulations in private law are dangerous; they generally prove fallacious': this saying of Iavolenus[3] is more than a casual remark; it voices the intimate conviction of the second-century jurists. It reveals an opposition to Q. Mucius in which one may well see a 'Roman' reaction against the imported dialectic. Modern text-books and monographs fail to give any idea of this frame of mind in the classical jurists, for the very good reason that every modern work on Roman law does what the classical jurists purposely refrained from doing: it reduces their case law to abstract principles. It cannot do otherwise, unless it is simply to copy out the cases from the texts.

Let us give a few illustrations. Observe the unhappy classical attempt (*D.* 21. 1) to throw the case law of *vitium* and *morbus* in the aedilician Edict into the form of an abstract principle;[4] or Celsus' attempt (*D.* 9. 2. 7. 6) to summarize an endless mass of case law (see Gaius 3. 219) under a general principle. Stating when the action under the *l. Aquilia cap.* 1 must be *utilis*, not *directa* he distinguishes between *occidere* (*actio directa*) and *causam mortis praestare* (*actio utilis*), as though *occidere* were not *causam mortis praestare*. Nor are the formulations of Julian (*D.* 9. 2. 51 *pr.*) and Gaius (3. 219) much better. We read in a modern writer:[5] 'the texts frequently insist that the *l. Aquilia* applies only where the injury is *in a certain sense* (!) the direct result of the act', but in truth the texts nowhere formulate the principle in this way; it is a modern deduction from the classical case law. Take again passages so difficult but interesting as *D.* (44. 4) 7 and (39. 5) 2. 3;[6] both Julian and Ulpian confine themselves to deciding the case in hand; it was left to

[1] Schulz, *Z* 1 (1930), 227 ff.; below, p. 296.

[2] e.g. *D.* (28. 5) 29, quoted below, p. 133. The cases are very numerous.

[3] *D.* (50. 17) 202: 'Omnis definitio in iure civili periculosa est; rarum est enim ut non subverti posset.'

[4] Ernst Fuchs's protest against this (*Die Gemeinschädlichkeit der konstruktiven Jurisprudenz* (1909), 261 ff.) shows a lack of historical sense.

[5] Kunkel, *Z* xlix (1929), 159.

[6] Mitteis, *RP* i. 165; Beseler, *Z* xlv (1925), 234.

modern research to discover the underlying principle. Such examples could without difficulty be multiplied indefinitely.

(v)

Formalism continued to decline, but only slowly and reluctantly, without the republican doctrine[1] being rejected in principle.

1. By the side of the highly formal testament there appeared the formless codicil, by that of manumission *vindicta* manumission *inter amicos*, by that of the formulary procedure the formless *cognitio*. But superannuated forms such as *mancipatio* and *in iure cessio* were clung to with a senile obstinacy that is truly amazing.

2. In interpretation formalism likewise underwent some attenuation. Except where interpretation was fixed by tradition,[2] statutes (*lex*, *senatusconsultum*, and constitution) were now interpreted somewhat more liberally, and the same is true of the interpretation of testaments, codicils, and contracts, though here too the advance was nothing prodigious. The intention of a declarant was in principle followed only in so far as it was the actual intention underlying his declaration. To his hypothetical intention, to what he would have said or written had certain possibilities been present to his mind no attention was paid, however certain that might be. Thus the formula of a claim for money lent ran: 'si paret Nm.Nm.Ao.Ao. centum dare oportere, iudex Nm.Nm. Ao.Ao. centum condemna, si non paret, absolve.' A *iudex* so instructed, having found that the defendant owed only 90, was held bound to dismiss the whole claim; he could not give judgment for 90 because the formula taken literally did not authorize him to do so—a piece of literalism adhered to throughout the classical period.[3] The formalistic interpretation of testamentary clauses ordering a *cretio*[4] has already been mentioned; it was corrected only by a constitution of Marcus Aurelius.[5] In the law of *fideicommissa* it is the same story. Thus: a testator institutes *A* as *heres*, charging him with a *fideicommissum* in favour of *F*, and, in the event of *A* failing to become *heres*, substitutes *B* for him. *A* does fail, and *B* becomes *heres*. Is *B* bound by the *fideicommissum*? No, reply the classical jurists, for the testator has not so directed, though he certainly would have, had the point

[1] Above, p. 75.

[2] Thus the traditional interpretation of the *l. Aquilia* was not given up: above, p. 77.

[3] Gaius, 4. 53a. On a similar rule in former English law see Blackstone, *Com.* iii, ch. 9, ii. 1.

[4] Above, p. 78.

[5] *Epit. Ulp.* 22. 34.

occurred to him. It required a constitution of Severus to break down this piece of literalism.[1] Since the classical writers nowhere enunciate general principles of interpretation, it is possible that they were not completely unanimous and that in some cases one jurist might be more liberal than others.[2] There are matters of detail which research has still to clear up: the materials are voluminous and have in many cases been tampered with by post-classical jurisprudence and the compilers of the *Digest*. For it was only in post-classical times that the phrase *semper vestigia voluntatis sequimur* was coined,[3] and it contradicts many classical decisions, which consequently had to be altered. There exists neither a full investigation of these interpolations nor even a preliminary study of the interpretation of statutes.[4] But it is safe to say that methods of interpretation continued to be highly formalistic; on the classical jurists, as on their predecessors, the rhetorical disputations on the topic *verba-voluntas*[5] produced little, if any, effect.[6] One illustration of the state of our texts must suffice.

D. (28. 5) 29: 'Pomponius libro quinto ad Sabinum. [Hoc articulo "quisque" omnes significantur: et ideo] Labeo scribit, si ita scriptum sit: "Titius et Seius quanta quisque eorum ex parte heredem me habuerit scriptum, heres mihi esto", nisi omnes habeant scriptum heredem testatorem, neutrum heredem esse posse, quoniam ad omnium factum sermo refertur: [in quo puto testatoris mentem respiciendam. sed humanius est eum quidem, qui testatorem suum heredem scripserit, in tantam partem ei heredem fore, qui autem eum non scripserit, nec ad hereditatem eius admitti.]'

Testator has instituted Titius and Seius his *heredes* to that fraction of his estate to which they themselves shall have instituted him (the testator) as their own *heres*. Titius has instituted the testator to a half, Seius has not instituted him at all. Labeo gives the incredibly formalistic

[1] *D.* (31) 61. 1; Arndts-Glück xl. 269. [2] See Note V, p. 339.

[3] *C.* (6. 27) 5. 1b.

[4] The title *D.* 1. 3 *De legibus*, &c., affords no basis, because it is composed of fragments torn from their contexts. One must study the interpretation of the individual statutes.

[5] Himmelschein, *Symb. Frib.* 398; Lanfranchi, *Il dir. nei retori romani* (1938), 136 ff. Above, p. 76.

[6] The considerable literature on this question is widely scattered and in many cases needs revising. Here are some samples: Suman. *Favor testamenti e voluntas testantium* (1916); Donatuti, 'Dal regime dei verba al regime della voluntas', *Bull.* xxxiv (1925), 185 ff.; Riccobono, *Mél. Cornil*, ii. 348 ff.; Dulckeit, 'Erblasserwille u. Erwerbswille bei Antretung der Erbsch.', *Beitr. z. Willensproblem im klass. röm. Erbrecht* (1934); Grosso, *Sulla falsa demonstratio, St. Bonfante*, ii. 185 ff.; Albertario, *St.* v (1937), 112 ff.; Maschi, *St. sull' interpretazione dei legati* (1938). Many valuable remarks are scattered about in Beseler's various works.

decision that in such case Titius too will not be *heres*, and Pomponius approves. The words *in quo . . . respiciendam* are a timid attempt made by some post-classical lawyer to admit the doctrine of intention to consideration. The compilers were more uncompromising, for it is from them, of course, that the words *sed humanius . . . admitti* come. The opening sentence, *hoc articulo . . . admitti* is post-classical 'regular' jurisprudence. The interpolations are certain.[1] The whole of the immense casuistical material requires to be similarly probed. From assured cases criteria must be extracted by which to determine how far classical formalism was carried.

(vi)

With but few exceptions, unimportant for our purposes, the limitations of legal science as conceived by the republican jurists[2] remained.

1. Legal history remained a closed book.[3] The non-historical attitude of the lawyers is well described by Gellius (16. 10).[4] He is sitting with others in the *forum*, and a line of Ennius is read which contains the word *proletarii*. Its meaning is discussed, and Gellius appeals to a learned friend (*ius civile callentem, familiarem meum*) who is present. The friend declines to answer, on the ground that he is a lawyer, not a philologist (*iuris, non rei grammaticae peritum*), to which Gellius replies that that is precisely why he must know the meaning of a word which occurs in the Twelve Tables. The lawyer retorts with some heat that this might be true if he were a student of primitive Italian laws, but as a practising lawyer he was not called on to cumber himself with the antiquated lumber of the Twelve Tables, which had long been abandoned in practice.

Interest in legal history is shown only by two academic jurists, Pomponius and Gaius.[5] Pomponius' *Enchiridion* contained a section dealing with the history of the sources, the magistrates, and the jurists (as far as Julian). What survives is unfortunately only a miserable post-classical abridgement.[6] The work was not imitated by others, and not even its list of jurists was brought up to date. Gaius, in the preface to his commentary on the Twelve Tables,[7] declares that one ought not to touch the law 'with unwashed hands',[8] i.e. without studying its history. In his *Institutes* also he betrays an interest in history, but only fitfully. And yet this obstinate aversion to history was a source of serious embar-

[1] Beseler, *Z* xlv (1925), 471 ff.; H. Krüger, *Z* xix (1898), 35.
[2] Above, p. 69.
[3] Above, p. 70.
[4] Schulz, 102.
[5] Above, p. 107.
[6] Below, p. 168.
[7] *D.* (1. 2) 1; Schulz, 105, and below, p. 187.
[8] 'Illotis, ut ita dixerim, manibus'; below, p. 187.

rassment to the classical writers. Their works, accumulating from generation to generation, could only have been methodically studied and preserved by their being arranged historically and expounded from the historical point of view. But the classical writers saw this mass of literature as a flat surface, without perspective or background;[1] so regarded, it soon became unmanageable, and there was nothing for it but to allow the older literature to sink into oblivion. No system can be discovered in the classical citations of older authors; there is none in those of Ulpian's *Ad edictum*. No doubt in this matter the compilers have worked even greater havoc than usual,[2] but the classical authors never attained to the historical point of view, from which alone it would have been possible to arrange and utilize the older literature methodically. National tradition proved too strong, the inspiration of Greek historiography too weak.[3] 'The catastrophe of oblivion', which in the post-classical period overtook pre-Hadrianic jurisprudence, was inevitable.[4]

2. Legal philosophy also continued[5] to lie outside the purview of the lawyers. For purposes of orientation the classical jurists, like the republican, occasionally availed themselves of Greek general philosophy, though here we must make considerable allowance for post-classical insertions. But Greek legal philosophy in the strict sense was taken no more seriously by them than by their predecessors. No doubt a section on the sources of law formed part of the introductions of classical elementary works, and here we find observations of a philosophical nature on justice and law, positive and natural law, jurisprudence, and so on. But some of these observations can be shown to have been added in the post-classical period,[6] and so far as they are classical, they are mere reminiscences of what the writer had been taught in his youth in the schools of rhetoric and philosophy; they show no signs of personal reflection. In short, Roman legal science was a professional science, which stuck to its last and left philosophy to the philosophers.

Justice. Jurisprudence. D. (1. 1) 10 (*Inst.* 1. 1 pr. 1. 3): 'Ulpianus libro primo regularum: Iustitia est constans et perpetua voluntas ius suum cuique tribuendi. s. 1. Iuris praecepta sunt haec: honeste vivere,

[1] Schulz, 101 ff. [2] Below, p. 200.

[3] v. Wilamowitz-Möllendorff, *Hellenist. Geschichtsschreibung* (*Reden u. Vorträge*, ed. 4, 1926), ii. 216 ff.; Ed. Schwartz, *Ges. Schr.* i (1938), 47 ff., 67 ff. Greek essays in literary history: below, p. 169.

[4] Seckel, *Das röm. Recht u. seine Wissensch.* (Berliner Rektoratsrede, 1920), 11.

[5] Above, p. 69. [6] Above, p. 84, and Schulz, 129 ff.

alterum non laedere, suum cuique tribuere. s. 2. Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia.'

That *suum cuique tribuere* is of the essence of justice is often stressed in Greek philosophy. Thus Cicero (*De inv.* 2. 53. 160) writes: 'Iustitia est habitus animi . . . suam cuique tribuens dignitatem', and in Stobaeus (*Eclog.* 2. 59. 4) we read: . . . δικαιοσύνην δὲ ἐπιστήμην ἀπονεμητικὴν τῆς ἀξίας ἑκάστῳ.[1] The Stoa is responsible for the three illogically combined[2] *praecepta iuris*. We have already mentioned *suum cuique tribuere*. On *honeste vivere* Cicero writes (*De fin.* 2. 11. 34): '. . . Stoicis consentire naturae, quod esse volunt "e virtute", id est "honeste vivere" ', and again (ibid. 3. 8. 29): 'ex quo intellegitur idem illud solum bonum esse quod honestum sit idque esse beate vivere: "honeste" id est "cum virtute vivere".' And on 'alterum non laedere' he has (ibid. 3. 21. 70): 'alienum esse a iustitia . . . detrahere quid de aliquo quod sibi adsumat.' The definition of jurisprudence likewise comes from the Greek storehouse;[3] it is quite valueless, particularly so as a characterization of Roman jurisprudence: if we had nothing else to go by, we should have to believe that the jurists wrote works in the style of Plato's *Laws*.

Law (*ius*). *D.* (1. 1) 1 pr.: 'Ulpianus libro primo institutionum: Iuri operam daturum prius nosse oportet, unde nomen "iuris" descendat. Est autem a "iustitia" appellatum, nam ut eleganter Celsus definit: ius est ars boni et aequi.' For all that Ulpian qualifies it as elegant, an empty rhetorical phrase. Yet it is the only definition of *ius* in our books.

Statute (*lex*). The definitions of *lex* and *plebiscitum* given by Gaius (1. 2) are clear and to the point. Marcian at the beginning of his *Institutiones*[4] appears as reproducing in Greek, from Demosthenes and Chrysippus, pompous flourishes about νόμος, a term by no means synonymous with *lex*. This may be authentic, but it is hard to credit Papinian with the clumsy translation of Demosthenes' empty rhetoric into Latin.[5]

Natural law (*ius naturae*). In Greek philosophy there is mention of a νόμος which applies to men and other animals alike: for example, the union of male and female, the rearing of the young, and so forth.[6]

[1] v. Arnim, *Stoic. vet. fragm.* i. 85, no. 374; iii. 63, nos. 262, 263; iii. 69, no. 280; Cic. *De leg.* 1. 6. 19. On the definition of justice: F. Senn, *De la justice et du droit* (1927); Schulz, 85, n. 5; Niedermeyer, *Festschr. Koschaker* 3, 157.

[2] The source is certainly Cic. *De leg.* 1. 6. 18: 'nunc iuris principia videamus' *rell.*

[3] Senn, *Les Origines de la notion de Jurisprudence* (1926); Stella Maranca, 'Intorno alla definizione della giurisprudenza', *Historia*, viii (1934), 640 ff.

[4] *D.* (1. 3) 2.

[5] The authenticity of this text (which should be set side by side with Marcian's) *D.* (1. 3) 1 has been already questioned by Pernice, 'Formelle Gesetze' (*Festg. f. R. v. Gneist*, 1888), n. 7, by Bekker, *Z* xxxiii (1912), 4 ff., and by Perozzi, *Ist.* i. 83. See further Albertario, *St.* v. 97; Peterlongo, 'Lex nel diritto Rom. class. e nella legislazione Giust.', *St. in mem. di R. Michels* (1937).

[6] Hesiod (*Erga*, 276), *Empedocles and the Pythagoreans* (Cic. *De re pub.* 3. 11. 19). Cf. Castelli, *St. Perozzi* (1923), 55 ff. (*Scritti giurid.* (1923), 199 ff.); Albertario, *Rend. Lomb.* lvii (1924), 170; Levy, *Z* xlvi (1926), 414 ff.; Maschi, *La concezione naturalistica del diritto* (1937), 162 ff.

Though rejected by the Stoa,[1] this idea is found at the beginning of Ulpian's *Institutiones*,[2] where it is probably a post-classical insertion.[3] Of some interest to the sociologist, it is of no value to the jurist.

Both the term and concept of *ius gentium* had penetrated into Roman rhetoric as early as the Republic.[4] Its first appearance in classical legal literature (meaning unchanged) occurs in the second half of the second century. By it was understood τὸ (φύσει) δίκαιον κοινόν, i.e. the *ius commune gentium*. The classical writers used it to denote those legal institutions which, so far as they knew, were to be found among all peoples; like the republican orators, they contrasted it with *ius civile*.[5] But even in classical times it was never used to denote that part of Roman law to which *peregrini* were admitted.[6] It was only in international law that it had a practical meaning; in private law it remained purely scholastic. It is thus no accident that we first meet with the term[7] in two academic jurists, Pomponius[8] and Gaius.[5]

'Natural law' does, however, play a considerable part in classical jurisprudence, but in the sense of Roman natural law, in other words the law resulting from the nature of things within the framework of the Roman legal system, for example from the nature of ownership, contract, and so on. But the term *natura* (including cognate terms) was sparingly used by the classical writers; *naturalis ratio*, *natura contractus*, and the like are frequently insertions of the post-classical age, when national limitations were first overstepped. In any case, *ius naturale* in this sense has nothing to do with legal philosophy, but is a thoroughly professional construction of lawyers; we need therefore spend no more words on it at this point.[9]

Unwritten law. Customary law. The Greek distinction between *ius scriptum* and *non scriptum*[10] is found in some classical isagogic works, but once more as the result of post-classical insertion.[11] It was entirely worthless in classical Roman law, which did not admit customary law.[12] Gaius, it is true, begins his *Institutes* with the words 'omnes populi qui legibus et *moribus* reguntur', but this is a mere echo of the Greek *cliché* νόμοις καὶ ἔθεσι,[13] and means so little to Gaius that in the disquisition on the sources that follows *mores* are not mentioned again.

[1] v. Arnim, *Fragm. Stoic. vet.* iii. 89.
[2] *D.* (1. 1) 1. 3.
[3] The literature is given by Maschi; his criticism of the critical views is hardly successful.
[4] Above, p. 73.
[5] Gaius, 1. 1.
[6] See ibid. 4. 37; Bruns–Lenel, 331; above, p. 73.
[7] Literature above, p. 73.
[8] *D.* (1. 1) 2.
[9] The evidence and literature are to be found in Maschi's study cited above, p. 136, n. 6.
[10] Above, p. 73.
[11] *Voc.* v. 271. 37 f. See the *Index Interp.* on the passages; especially Pernice, *Z* xx (1899), 162 ff.; Perozzi, *Ist.* i. 42.
[12] Literature given above, p. 24.
[13] Above, p. 74. The term *lex* is used here in an un-Roman way. See Peterlongo, op. cit. (above, p. 136, n. 5).

(vii)

1. The science of sacral law enjoyed a brief second spring under Augustus and Tiberius in consequence of Augustus' attempt to revive the old religion.[1] We know of works on the subject by Labeo,[2] Capito,[3] and Sabinus,[4] but they were the last. Though the *ius sacrum* remained in force for another 300 years, and though such leading lawyers as Iavolenus Priscus, Salvius Iulianus, and Aburnius Valens were pontiffs[5] and Pactumeius Clemens a member of the college of *Fetiales*,[6] further development of the *ius sacrum* had become impossible, so that there was no work for the jurists. The religion which speaks from the pages of M. Aurelius, and which was doubtless that of our leading men, was too far removed from the religion expressed by the *ius sacrum*. One might piously observe the ancient rites and forms, but one could not breathe life into them.

2. In the sphere of *ius publicum*, on the other hand, the stirrings of a new life are discernible, though modern scholars have been blinded to the fact by their one-sided absorption in private law.

(*a*) We are not here referring to constitutional law. Capito's work[7] was certainly nothing but an exposition of republican constitutional law, an epilogue, not a prologue, destined soon to interest none but historians and antiquaries.[8] The new constitutional law of the Principate belonged to the *arcana imperii* and was not to be exposed to scientific discussion and analysis. Moreover, throughout the first and second centuries, and even under the Severi, it was in constant flux.

(*b*) But from the second half of the second century we have to

[1] Wissowa, s. 15.

[2] *De iure pontificio*, in at least fifteen *libri*: Bremer, ii. 1. 74 ff.; Seckel–Kübler, i. 55. Cf. Pernice, *Labeo*, i. 40 ff.; Joers, *PW* i. 2550.

[3] *De iure pontificio*, in at least six *libri*. It is uncertain whether Capito also wrote *De iure sacrificiorum* and *De iure augurali*: Bremer, ii. 1. 268 ff.; Seckel–Kübler, i. 64. Cf. Joers, *PW* ii. 1908.

[4] *Memorialium libri* (at least 11): Bremer, ii. 1. 367 ff.; Seckel–Kübler, i. 75. *Fastorum libri*: Bremer, ii. 1. 363 ff.; Seckel–Kübler, i. 74. The date of Cincius' *liber de fastis* is uncertain: Wissowa, *PW* iii. 2555, no. 3: Bremer, i. 252; Seckel–Kübler, i. 24; Schanz–Hosius 1, 175. Probably Augustus' times.

[5] Above, p. 105. Also Groag, 'Das Pontifikalkollegium unter Trajan', *Wiener St.* xl (1918), 9 ff.

[6] Above, p. 106.

[7] *Coniectaneorum libri* (at least 9), of which the *liber de officio senatorio* may or may not have been merely a part: Bremer, ii. 1, 282 ff.; Seckel–Kübler, i. 62. Cf. Joers, *PW* ii. 1905. The works of Cincius on public law (*de comitiis, de consulum potestate*: Bremer, i. 253; Seckel–Kübler, i. 26) were of a similar character.

[8] F. Leo, *Die staatsrechtl. Exkurse in Tacitus Annalen* (Nachr. Göttingen Gesellsch., phil.-hist. Kl., 1896), 191 ff. See *Addenda*.

record the birth of a science of administrative law, the creation and elaboration of which is one of the great achievements of the Principate. It was the work of active emperors and the central bureaucracy. How far the bureaucrats were trained lawyers cannot, of course, be judged, but clearly the jurists, who from the reign of Hadrian were of the *consilium principis*, must have collaborated. Administrative law has no literature comparable to that of private law. It is a remarkable fact that such men as Iavolenus Priscus, endowed with decades of administrative experience,[1] seem never to have thought of publishing a connected account of the subject. But the explanation can be divined. Administrative law was based on multitudinous imperial ordinances and thus gave little scope for the kind of juristic rationalizing which since Mucius had come to be regarded as the only true jurisprudence. Merely to collect the imperial ordinances would seem to the jurists pure hack-work. Moreover, administrative law was not unitary, but consisted of individual enactments applicable to this or that locality; it was 'particular' law, for which the jurists had an incurable distaste. And lastly, the classical jurists were the legitimate descendants of the republican who, as we have seen, ostentatiously held public law at arm's length. All the same, the progressive bureaucratization of the State brought a literature of administrative law into being in the second half of the second century. The bureaucracy demanded a cognoscible, uniform, and definite administrative law, and the jurists, who belonged to the bureaucracy, met the demand. Too little of their productions survives for their value to be assessed,[2] but Ulpian's ten books *De officio proconsulis* must have been a respectable contribution. It was not merely an annotated collection of the numerous imperial constitutions, but an attempt to construct out of their locally varying regulations a common administrative law applicable to all senatorial provinces. Of this basic work, which certainly far surpassed Ulpian's works on private law in originality, we possess, unfortunately, only fragments.[3]

[1] *Cursus honorum*: above, p. 104.

[2] Military law: Cincius, *De re militari* (at least 6 books), seems to have been highly antiquarian: Bremer, i. 254; Seckel–Kübler, i. 28. On its date see above, p. 138, n. 4. The first work on the military law of the Empire was M. Aurelius Tarrutenius Paternus, *De re mil. libri iv*; next, under the Severi, Menander's *libri iv* and Macer's *libri ii*: Lenel, *Pal.* Financial law: not treated as a separate subject before Severus, when we have: *De iure fisci*, 4 books by Callistratus, 2 by Paul; *De censibus*, 2 books by Paul, 6 by Ulpian; *De muneribus, liber singularis* by Arcadius Charisius. Moreover, a number of works on the duties of this or that office belong to this period: below, p. 242.

[3] Below, p. 243.

(*c*) Jurisprudence now turned its attention to a department of law which republican jurisprudence had, so far as we can see, entirely neglected, namely that of criminal law and procedure.[1] Capito devoted only one book of his *Coniectanea* to it,[2] but from the time of Hadrian it excited a livelier interest.[3] But it was too late for the development of a jurisprudence of criminal law which might rank with that of private law.[4] At the end of the second century a pronounced decay of the *quaestiones* set in,[5] and the criminal law and procedure lying outside the *quaestiones* was so undefined, arbitrary, and authoritarian,[6] that any juristic construction of concepts and principles would have been devoid of practical significance.

[1] On what follows: Mommsen, *Strafr.* 534; Ferrini, *Dir. penale rom.* cap. 1; Schulz, 31; Brasiello, 'Sulle linee e i fattori dello sviluppo del dir. pen. rom.', *AG* cxx (1938).

[2] Bremer, ii. 1. 283; Seckel–Kübler, i. 63.

[3] In the various *Digesta* of the second century (below, pp. 226 ff.) moderate space was given to the *iudicia publica*: P. Krüger, *Z* vii. 2, 97 ff.

[4] Not even the terms *ius poenale* or *ius criminale* are known to the classics: Lauria, *St. Bonfante*, ii. 498; Brasiello, op. cit., offprint, p. 18, n. 4.

[5] Mommsen, *Strafr.* 219 ff.

[6] Levy, 'Gesetz u. Richter im kaiserl. Strafrecht I', *Bull.* xlv (1938), 57 ff.

IV

THE LITERATURE OF THE CLASSICAL AGE: ITS FORMS AND ITS TRANSMISSION

(i)

THE present chapter is perhaps the most important of this book. The classical juristic literature represents indeed the core of our sources of Roman law and every methodical inquiry depends on the true valuation of these texts as they have come down to us, a valuation which can only be achieved by a clear insight into the form and the fate of this literature. We begin with a general characterization of the tradition.

1. Leaving aside, for the present, the law-creating and declaring acts of State,[1] Gaius' *Institutiones* are the only classical work that has reached us anything like complete. Of the rest we possess only post-classical abridgements and fragments: these, however, are so extensive that it is possible to discern the structure of many of the works and to reconstruct large portions of text. This work of reconstruction, which goes by the name of *palingenesia*, was begun in the humanistic period, but after the first, relatively immature essays it was long before further progress was made.[2] It was left to Otto Lenel, in his *Edictum Perpetuum* (1883) and, building on that, in his *Palingenesia Iuris Civilis* (1889), to make a real advance. His *Palingenesia* is a serviceable instrument for further research, a basis from which fresh advance can be made,[3] but, as Lenel himself recognized, it does not exhaust the results that are obtainable from the evidence. Future progress will, however, depend on the detailed study of the whole of the surviving fragments of this or that individual work considered together. What has been accomplished by researches conducted on these lines since 1889 will be noted in our accounts of the individual works.

2. The immediate goal of this palingenetic research is necessarily the reconstruction of the works as they appeared in the editions from which our fragments were extracted. Now these editions were one and all post-classical, so that the further question arises

[1] Below, p. 147. [2] See Note W, p. 340.

[3] Lenel's work does not include sacral or constitutional law, for which one must therefore use the collections of fragments in Bremer, ii. 1 and ii. 2, and in Seckel–Kübler, i. But so far as Lenel is available, Bremer's work, which is seldom helpful, is better left aside.

whether and how far they were identical with those current in classical times or, for that matter, with the work as originally published. The critical school of the last quarter of the nineteenth century began by assuming as self-evident that the post-classical editions were, apart from copyists' errors and the intrusion of unimportant glosses, faithful copies of the classical. In particular it was believed that the editions from which the texts of Justinian's *Digest* were excerpted gave the classical text, and that, consequently, to detect the interpolations of Justinian's compilers was to re-establish the classical text. Conversely it was argued: 'this text is unclassical and therefore is due to the compilers.'[1] Consistently it was believed that the post-classical edition of Gaius' *Institutes* contained in the Veronese manuscript gave, apart from scribal errors and a few insignificant glosses, the classical text; that the *Epitome Ulpiani* was an abridgement of Ulpian's *Regulae* giving Ulpian's authentic text; that the abridgement of Paul's *Sententiae* contained in the *Lex Romana Visigothorum*, apart from certain Visigothic interpolations, presented the true Pauline text, and so on. These beliefs remained unshaken till the second decade of the twentieth century. But thereafter every serious research has led again and again to the same conclusion, namely that in post-classical times the classical texts were subjected to alteration, sometimes superficial, sometimes profound. To the later age the classical works seemed too long; they were therefore abridged, in some cases by combining two or more works into one. Besides this, additions of many kinds were made—of rubrics, supporting arguments, abstract summaries of the case law, and corrections of substance.[2] This work of re-editing continued right through the post-classical period, but it was most radical in the earlier part of it, at the end of the third and the beginning of the fourth centuries.[3] At that time the classical originals had not become consecrated as *ius*, and no scruple was felt in adapting them with the necessary freedom to present needs. This is no isolated phenomenon. Many examples could be cited from the textual history of Greek and Roman authors,[4] and most

[1] So expressly Gradenwitz, *Interpolationen*, 43.

[2] Galen., *Περὶ τῶν ἰδίων βιβλίων* (*Scripta min.* ii, 1891, Teubner), Praef. 9: *Πολυειδῶς ἐλωβήσαντο πολλοὶ τοῖς ἐμοῖς βιβλίοις, ἄλλοι κατ' ἄλλα τῶν ἐθνῶν ἀναγιγνώσκοντες ὡς ἴδια μετὰ τοῦ τὰ μὲν ἀφαιρεῖν, τὰ δὲ προστιθέναι, τὰ δ' ὑπαλλάττειν.*

[3] See below, p. 280.

[4] Dionysius of Corinth (about A.D. 171) complains (Euseb. *Hist. eccl.* iv. 23. 12): 'The apostles of the devil have filled them' (scil. Dionysius' works) 'with tares by leaving out some things and putting in others' (Engl. transl. taken from the edition in the Loeb Class.). Galenus, l.c. See further Jachmann, *Nachrichten der Gesellschaft*

obvious parallels may be found in the history of the transmission of medieval legal literature.[1] In the Middle Ages, as in the last centuries of antiquity, juristic literature was treated with no more respect than we nowadays show for cookery books,[2] travellers' guides, song-books, and similar literature. The revision of such books is hampered by no scruples; there is no question, or expectation, of fidelity to the original; no one regards their alteration as falsification. To-day there can be no further doubt that in post-classical times a more or less drastic revision of the classical juristic literature was carried out;[3] opinions can differ only as to the nature and extent of the revision of each individual work. It is here that further researches are needed. The history of the transmission of each work must be studied separately, so far as our evidence allows, since naturally that history is different in each case. But for the future not one of the classical works that have come down to us is exempt from the suspicion of having been revised in post-classical times. We must say good-bye to the dogmatic preconceptions of our predecessors, that if one can expunge Justinian's interpolations from a text one has recovered its classical form, that because a text is unclassical it is therefore Byzantine, that because a text cannot be Byzantine it must be classical, that because the language of a text reveals it to be unclassical it is therefore Byzantine and the law which it states must be unclassical. This basic change of view implies that the optimism with which the possibility of reconstructing the classical texts was regarded so long as Justinian was taken to be the sole source of interpolations was unjustifiable. On the contrary, it is only in a specially favourable case that the actual language of the classical text can be divined from its post-classical version. Often

der Wissensch. zu Göttingen, phil.-hist. Kl. Altertumswissenschaft, NF 1 (1936), 123 ff., 185 ff.; *Phil.* xc (1935), 331 ff.; *Rhein. Mus.* NF lxxxiv (1935), 193 ff.; Jülicher–Fascher, *Einleitung in das Neue Testament* (7th ed. 1931), 577 ff., 591 (Engl. ed. *An Introduction to the New Test.* 1904, pp. 588 ff., 599); Feine–Behm, *Einleitung in das Neue Testament* (1936), § 3, pp. 21 ff. See *Addenda*.

[1] See, for example, Kantorowicz, *Z* xliii (1922), 21 ff., on the unauthentic layers of text in Gandinus. By comparing the various editions everybody can see how Baldus' *Consilia* have been tampered with. On interpolations in Pillius' *Ordo iudiciorum* see Genzmer, *Berlin SB*, 1931, p. 402. On abbreviations and transformations of the *Decretum Gratiani* and the Decretals see St. Kuttner, *Repertorium der Kanonistik*, i (1937), 257 ff., 434.

[2] On antique cookery books see Bilabel, *PW* ii. 932 ff.

[3] See H. Krüger, *Die Herstellung der Dig. Justinians* (1922), s. 10; Schulz, *Epit. Ulp.* pp. 9 and 18 ff.; 'Ueberlieferungsgesch. d. Responsa des Cervidius Scaevola', *Symb. Friburg.*, 216 ff.; Niedermeyer, 'Vorjustinianische Glossen u. Interpolationen', &c., *ACI 1933, Roma*, i. 353 ff.; De Francisci, *Conferenze* (1931), 29. For the rest see the literature cited below on the individual classical works.

the post-classical editor will have abridged the original in his own language, but without altering the law stated: in such a case it is clearly impossible to reconstruct the original with any sort of certainty.[1] *Palingenesia* will in future have to be limited to the reconstruction of the post-classical but pre-Justinian version. From these texts we may hope to recover, not indeed the classical originals, but still their essential contents, i.e. the classical legal doctrine, and so to obtain a picture of classical jurisprudence both as a whole and with many details.[2] This after all is the essential point for the legal historian.

Reconstructions of the classical texts must be received with scepticism. Such value as they have is as restitutions of the classical author's substantial meaning, not of his words. The linguistic researches of recent years also retain value, but their results must to some extent be applied from a different point of view. A text shown on linguistic grounds to be post-classical, but prior to Justinian, must not simply be thrown aside. It may in substance be reproducing classical doctrine; in fact, unless its doctrine can be argued unclassical, the presumption is in favour of its being in substance classical in spite of its being expressed in unclassical form. But a text of this kind must be interpreted otherwise than one in its original classical form. The classical writers were capable of expressing their exact meaning clearly and definitely; their language can and must be taken literally, and there is no case for imputing to them meanings which they have not expressed. In the post-classical period, on the contrary, the power of expression was decaying, and the text worded in this period need not be taken literally. In such case the modern interpreter must make good the defective expression by reading into the text much that the incompetent or careless post-classical writer intended, but failed, to say.

3. A document of general importance for the literary history of the classical jurisprudence is the so-called *Index Florentinus*. Justinian had ordered that the compilers of the *Digest* should compose an index of all those books from which they had inserted extracts in the *Digest*, and that this index should be prefixed to the *Digest*. His order was carried out, and our main manuscript

[1] Compare the double versions of passages from Cervidius Scaevola's *Digesta* and *Responsa* (Schulz, op. cit. in last note, 228 ff.). Any attempt to reconstruct the text of the *Digesta* from the shorter version of the *Responsa* will at once be found to be hopeless.

[2] Only so will future research be able to rid itself of the 'cold fever of reactionary defence of the traditional texts', which at the present time threatens to follow the 'hot fever of the mania for interpolations'. Cf. v. Wilamowitz-Möllendorff, *Einl. in d. griech. Tragödie* (1910), 248 ff.

of the *Digest*, the *Codex Florentinus*, has preserved this index,[1] whereas the medieval Vulgate MSS. have omitted it.

The index is written in Greek, the Latin version, which must needs have existed, is lost. It begins with a Greek title: *Ἐξ ὅσων ἀρχαίων καὶ τῶν ὑπ' αὐτῶν γενομένων βιβλίων συνκεῖται τὸ παρὸν τῶν digeston ἤτοι πανδέκτου τοῦ εὐσεβεστάτου βασιλέως Ἰουστινιανοῦ σύνταγμα.*[2] This title makes it quite clear that the Index is a list of those books from which fragments have been inserted in the *Digest*, not of those which the compilers had also consulted but rejected as unfit for their purpose. The list begins with Julian and Papinian, i.e. with the two greatest jurists according to Justinian's evaluation. Then follow the other jurists in what the compilers believed to be their chronological order, beginning with Q. Mucius Scaevola and ending with Hermogenianus. The books of each jurist are arranged according to their size, the most bulky books coming first and the least voluminous last.[3] But the order is also influenced by the order in which the books followed within the four masses,[4] with which we shall deal later.[5] The names of the jurists are invariably given in the genitive case, formed after the Greek flexion even when the lettering is Roman. The titles of the books are mostly written with Roman letters, but sometimes Greek inflexions are used. Sometimes the original title has been abbreviated or completely transformed, probably according to the usage of the Byzantine law-school. The number of the *libri* of each book is always given in Greek words (not figures). This mixture of Greek and Latin is a well-known peculiarity of Byzantine law-Greek. It has long been observed that the contents of the Index do not quite agree with its title: books are mentioned in the Index of which no fragments are inserted in the *Digest*; on the other hand, the *Digest* contains fragments of books which are not mentioned in the Index. Of these discrepancies plausible explanations can be given.

These explanations cannot be adequately discussed here. Hence

[1] Ed. Mommsen, *Digesta*, i (1870), p. lii. Literature on the *Index*: Spangenberg, *Einleitung in das Römisch-Justinianeische Rechtsbuch* (1817), 24 ff.; Puchta, *Kleine Schriften* (1851), 216; Mommsen, *Digesta*, i (1870), Praefatio, p. xi; Lintelo de Geer, *Verslagen en Mededeelingen der Koninklijke Akademie van Wetenschappen 2. Reeks 6. Deel* (Amsterdam, 1877), 334 ff.; Buonamici, *Annali delle Univ. Toscane*, xxiii (1901); Joers, *PW* v (1905), 492; H. Peters, *Leipzig SB* lxv (1913), offprint, pp. 75 ff.; Ebrard, *Z* xl (1919), 124 ff.; G. Rotondi, *Scritti*, i (1922), 298 ff.

[2] = 'Ex quibus veteribus iurisconsultis librisque ab ipsis conscriptis constet praesens digestorum sive pandectarum piissimi imperatoris Iustiniani corpus.'

[3] There are, however, some unaccountable exceptions to this rule.

[4] Rotondi, l.c. 323.

[5] See below, p. 319.

we give only the two lists of books[1] with references to the pages on which they are discussed below.

I. *Books of which no fragments are inserted in the Digest but which are mentioned in the Index.*

1. Alfenus Varus, *Digestorum libri XL*, below, p. 205.
2. Massurius Sabinus, *Iuris civilis libri III*, below, p. 156.
3. Cervidius Scaevola, *De quaestione familiae liber singularis*, below, p. 233.
4. Gaius, *Dotalicion liber singularis*, below, p. 253.
5. Ulpianus, *Pandectarum liber singularis libri X*, below, p. 122.
6. Paulus, *De officio praetoris tutelaris liber singularis*, below, p. .
7. Paulus, *De extraordinariis criminibus liber singularis*, below, p. 257.
8. Paulus, *Ad formulam hypothecariam liber singularis*, below, p. 202.
9. Paulus, *Ad municipalem liber singularis*, below, p. 196.
10 Paulus, *Ad legem Velleam liber singularis*, below, p. 189.
11. Paulus, *De iure patronatus quod ex lege Iulia et Papia venit liber singularis*, below, p. 188.
12. Paulus, *De actionibus liber singularis*, below, p. 255.
13. Paulus, *De donationibus inter virum et uxorem liber singularis*, below, p. 253.
14. Paulus, *De legibus liber singularis*, below, p. 188.
15. Paulus, *De legitimis hereditatibus liber singularis*, below, p. 255.
16. Modestinus, *De legatis et fideicommissis liber singularis*, below, p. 255.
17. Modestinus, *De testamentis liber singularis*, below, p. 255.

II. *Books of which fragments are inserted in the Digest but which are not mentioned in the Index.*

1. Aelius Gallus, *De verborum quae ad ius pertinent significatione*, below, p. 283 n. 8.
2. Alfenus Varus, *Digestorum a Paulo epitomatorum libri*, below, p. 205.
3. Alfenus Varus, *Digestorum ab anonymo epitomatorum libri*, below, p. 206.
4. Gaius, *Ad legem Glitiam liber singularis*, below, p. 187.
5. Gaius, *Regularum libri III*, below, p. 174.
6. Gaius, *Ad s.c. Orfitianum liber singularis*, below, p. 189.
7. Gaius, *Ad s.c. Tertullianum liber singularis*, below, p. 189.
8. Gaius, *De tacitis fideicommissis liber singularis*, below, p. 255.
9. Maecianus, *Ex lege Rhodia*, below, p. 255.
10. Modestinus, *De praescriptionibus libri IV*, below, p. 256.
11. Paulus, *De adsignatione libertorum liber singularis*, below, p. 253.
12. Paulus, *De articulis liberalis causae liber singularis*, below, p. 253.
13. Paulus, *De cognitionibus liber singularis*, below, p. 256.

[1] The lists given by P. Krüger, Joers, Peters, and others are not quite exact.

14. Paulus, *De conceptione formularum liber singularis*, below, p. 255.
15. Paulus, *De dotis repetitione liber singularis*, below, p. 253.
16. Paulus, *Ad legem Fufiam Caniniam liber singularis*, below, p. 189.
17. Paulus, *De liberali causa liber singularis*, below, pp. 196, 253.
18. Paulus, *De officio adsessorum liber singularis*, below, p. 246.
19. Paulus, *Ad s.c. Turpillianum liber singularis*, below, p. 189.
20. Paulus, *De variis lectionibus liber singularis*, below, p. 222.
21. Pomponius, *Enchiridii liber singularis*, below, p. 170.
22. Proculus, *Ex posterioribus Labeonis*, below, p. 210.
23. Ulpianus, *Excusationum liber singularis*, below, p. 249.
24. Ulpianus, *Ad legem Aeliam Sentiam libri IV*, below, p. 189.
25. Ulpianus, *De officio consularium liber singularis*, below, p. 247.
26. Ulpianus, *Pandectarum liber singularis*, below, p. 222.

(ii)

Our next business is with the various forms taken by juristic literature and their specimens. Let us begin with considering the forms and transmission of the Roman acts of State which create new or declare existing law.[1]

1. *Leges* (*leges rogatae, plebiscita, leges datae*). There was no change in their literary form nor was any official or private collection published even in this period.[2] In the course of the first century *lex* as a form for creating new law receded into the background and practically disappeared.[3]

2. *Senatusconsulta.* Here, too, the literary form of the decree remained unaltered,[4] but we have now to take account of the fact that when a *senatusconsultum* was passed on the proposition of the *Princeps*[5] it was the introductory *oratio principis* that the jurists quoted from, not the *senatusconsultum* itself. As of *leges*, so of *senatusconsulta* and *orationes* no collection was made;[6]

[1] Above, p. 87. See for what follows v. Schwind, 'Zur Frage der Publikation im röm. Recht', Münchener *Beiträge zur Papyrusforschung u. antiken RG.* 1940 (inaccessible).

[2] Cass. Dio, 57. 16. 2, reports that Tiberius charged a committee of three senators to collect some old public documents (δημόσια γράμματα). This hardly means (as Gelzer, *PW* x. 525 believes) that Tiberius planned a collection of *leges*.

[3] Mommsen, *Staatsr.* iii. 345; *Schr.* i. 285. For the *leges* of this period see the literature cited above, p. 87. The two Spanish *leges municipales* (*leges datae*) from the time of Domitian show a similar stratification to that of the *lex Rubria* and the *lex Ursonensis*. Text: Bruns, no. 30. *ILS* 6088/9; *FIRA* i. 202 ff. Literature: Mommsen, *Schr.* i. 280 ff. and above, p. 88.

[4] Above, p. 87.

[5] Mommsen, *Staatsr.* ii. 898; Radin, *PW* xviii. 869 ff.

[6] There is no collection of known *senatusconsulta* similar to Rotondi's of *leges*. Wlassak, *Prozessgesetze*, ii. 173 ff., gives a list of those affecting private law under the Empire; Cuq, *Consilium principis*, 424, and Radin, *PW* xviii. 871 ff., give a list of *orationes principum*. See further, Stella Maranca, 'Di alcuni senatus consultis nelle iscrizioni latine', *Rend. Lincei* (Class. di Scienze Mor., Stor. e Philosoph. Ser. VI, vol. i, 1925), 504 ff., and above, p. 88.

Pomponius' *libri V de senatusconsultis* and Paul's *liber singularis de scis.* were only treatises on certain selected *senatusconsulta.*[1] It is from copies obtained from the *aerarium*[2] that the texts preserved in juristic literature ultimately derived. Such copies could naturally be obtained by a metropolitan jurist, but others might at times have difficulty in obtaining a proper text and have to rely on second-hand information.[3]

3. *Edicta.* The only feature known to us which is common to the Edicts of the Emperor and of the magistrates in general is the heading: name and office of the *edicens*, sometimes the date,[4] followed by *dicit* (in Greek versions λέγει). There was no literary collection of edicts, even imperial.[5] Only of the jurisdictional edicts, that is those of the praetors, governors of provinces, and curule aediles, is there anything more to say. As already mentioned,[6] these edicts were by Hadrian's order stabilized by a *senatusconsultum* in the forms settled by Julian. These codifications were transmitted in book form;[7] Justinian still knows of a 'little book'[8] containing the Edict, by which no doubt is meant that of the *praetor urbanus* along with that of the aediles. Our knowledge of this Edict depends entirely on the surviving fragments of the classical commentaries *Ad Edictum.* From these a reconstruction of the Edicts of the *praetor urbanus* and the *aediles* is possible and has been carried out in all essentials, finally by Lenel.[9] The edictal system is so important in the history of juristic systematization that we must at least exhibit it in outline[10] by giving the edictal titles in their order, as reconstructed by Lenel.[11]

[1] Lenel, *Pal.* ii. 148; i. 1294.

[2] On the archives: Mommsen, *Schr.* iii. 295 ff.; *Staatsr.* iii. 1010. On copies: ibid. 1013. Cf. the *SC. de nundinis* (Bruns, no. 61): 'SC. de nundinis saltus Beguensis in territorio Casensi, descriptum et recognitum ex libro sententiarum in senatu dictarum Kari Iuni Nigri, C. Pomponi Camerini cos.

[3] Gaius, i. 32*b*: 'postea dicitur (!) factum esse senatusconsultum. . . .'

[4] In the Edict of Claudius, *FIRA* i. 417, and the Cyrenean Edicts of Augustus, ibid. 403, the date is in the heading, whereas in the Edicts of provincial governors it is at the end: e.g. Mitteis, *Chrest.* no. 192; Wilcken, *Chrest.* no. 19.

[5] Some imperial edicts: Haenel, *Corpus Legum* (1857); Cuq, *Consil. princ.* 456; Orestano, *Bull.* xliv (N.S. iii, 1936–7), 241 ff.; provincial governors' edicts: Weiss, *St. z. d. röm. Rechtsquellen*, 71 ff.; Wilcken, *Z* xlii (1921), 137. Also *Voc.* ii. 425, 10 f.; Haberleitner, *Phil.* lxviii (1909), 271 ff.

[6] Above, p. 127.

[7] The jurisdictional edicts were current in book-form earlier: Gellius (11. 17; cf. Weiss, *Z* l (1930), 256) had read them in the Library.

[8] *Const.* Δέδωκεν, s. 18. Cf. *ILS* 8987: 'praetoris *volumen*'.

[9] Ed. 1, 1883; French ed. i (1901); ii (1903); ed. 2, 1907; ed. 3, 1927, to which our citations refer.

[10] Lenel, *Ed.* pp. xvi ff., 3 ff.

[11] We give the titles as in Lenel, though some are not authentic and some uncertain or disputed. We are not concerned here with their exact formulation. See Riccobono, *FIRA* i. 335 ff.

Pars I

De his qui in municipio colonia foro iure dicundo praesunt.
De iurisdictione.
De edendo.
De pactis conventis.[1]
De in ius vocando.
De postulando.
De vadimoniis.
De cognitoribus et procuratoribus et defensoribus.
De calumniatoribus.
De in integrum restitutionibus.
De receptis.
De satisdando.
Quibus causis praeiudicium fieri non oportet.

Pars IIa

De iudiciis.
De his quae cuiusque in bonis sunt.
De religiosis et sumptibus funerum.
De rebus creditis.
Quod cum magistro navis institore eove qui in aliena potestate erit negotium gestum erit.
De bonae fidei iudiciis.
De re uxoria.
De liberis et de ventre.
De tutelis.
De furtis.
De iure patronatus.

Pars IIb

De bonorum possessionibus.
De testamentis.
De legatis.
De operis novi nuntiatione.
De damno infecto.
De aqua et aquae pluviae arcendae.
De liberali causa.
De publicanis.
De praediatoribus.
De vi turba incendio ruina naufragio rate nave expugnata.
De iniuriis.

Pars III

De re iudicata.
De confessis et indefensis.

[1] Riccobono, *Bull.* xliv (N.S. iii, 1936–7), 9 ff. Lenel: 'De pactis et conventionibus.' Not quite correct Koschaker, *Festschrift Hanausek* (1925), 156.

Qui neque sequantur neque ducantur.
Quibus ex causis in possessionem eatur.
De bonis possidendis proscribendis vendundis.
Quemadmodum a bonorum emptore vel contra eum agatur.
De curatore bonis dando.
De sententia in duplum revocanda.

Pars IV
De interdictis.
De exceptionibus.
De stipulationibus praetoriis.

Appendix: Edictum aedilicium
De mancipiis vendundis.
De iumentis vendundis.
De feris.
Stipulatio ab aedilibus proposita.

The contents of the praetorian Edict[1] can be summed up as constituting the praetor's programme of office: he is announcing to the public, at the beginning of his term, how he intends to exercise his office. Its arrangement, which is in four main parts, is based on processual considerations. Part I orders and guarantees procedure in an action up to joinder of issue (*litis contestatio*), Part III regulates execution of judgment, Part IV is a collection of official formulae, interdicts, special defences (*exceptiones*), and praetorian stipulations. Part II, which is in two subdivisions, deals with the remedies not disposed of in Parts I and III, each remedy being accompanied by its appropriate *formula*, where this is not reserved for inclusion in the collection in Part IV.

Part I. An introductory part deals with the safeguards of the jurisdiction of praetor and municipal magistrates. Then follows the title *De edendo*. *Editio actionis* (notice of claim) is put first as being a duty incumbent on the plaintiff even before the issue of summons. To it is attracted the special duty of bankers to allow inspection of documents (also *edere*). *De pactis*, which comes next, owes its position to the pact of compromise (*transactio*), placed here owing to the consideration that where there has been compromise there will be no *in ius vocatio*. This particular pact attracts the subject of pacts in general.[2] Next come the titles on summons (*in ius vocatio*), demand before the magistrate (*postulatio*), securities for reappearance (*vadimonia*), and representatives before the magistrate (*cognitores*, &c.). This last title ends with a subhead *De negotiis gestis*, which is attracted by the case of a *procurator* appearing *in iure* on behalf of an absent party:[3] proceedings *in iure* are thus

[1] Cf. Lenel, *Ed.* pp. 14 ff.
[2] Lenel, ibid., p. 32.
[3] Partsch, 'St. z. negotiorum gestio', i (*Heidelberg SB*, Abh. 12), 13.

a *negotium*. The position of the title *De calumniatoribus* is determined similarly by its relevance to the prosecution of an action. Next comes the title *De in integrum restitutionibus*, because *i. i. r.* involves that the praetor reopens a remedy which has been barred *iure civili*. The title consisted originally of the rubric *De minoribus xxv annis* followed by *Ex quibus causis maiores*; later, it is not certain when,[1] *in integrum restitutio metus causa* was placed at the head of the title, though the rubric *Ex quibus causis maiores* was thereby rendered illogical;[2] *i. i. r. propter metum* attracted the *actio quod metus causa*, and this in turn the *actio de dolo*, in spite of there being no *i. i. r. propter dolum*.[3] Next comes the title *De receptis*, its position being due to *receptum arbitri*, i.e. agreement to act as an *arbiter*; *receptum cauponum*, &c., and *receptum argentarii* are attracted.

Part II. We can distinguish two main subdivisions. The first (II*a*) deals with the ordinary, the second (II*b*) with the summary, remedies; the latter are not confined to the ordinary terms of court-sittings (*actus rerum*, in the provinces *conventus*). II*a* divides into three main heads: property *in bonis*, property *extra bona* (*De religiosis*), and personal claims. The treatment of personal claims opens with the title *De rebus creditis*: the leading topic, which attracts the others, is loan for consumption, this suggesting loan for use (*commodatum*). Next come the *bonae fidei iudicia*, the *actio rei uxoriae* attracting the title *De liberis*. It is curious to find *De furtis* interposed between *De tutelis* and *De iure patronatus*.[4] II*b*, on summary remedies, deals with *bonorum possessio*, which introduces *De testamentis* and *De legatis*. With the title *De liberali causa* we reach the *iudicia* before *recuperatores*.

For further information we must refer the reader to Lenel and to Riccobono's footnotes in his edition of the *edictum*, *FIRA* i. 335 ff.

Mommsen called this edictal order a disorder,[5] and certainly it is anything but a masterpiece of systematization. An unsatisfactory feature is that some of the formulae are assembled in Part IV, while the rest are scattered over the Edict. The primitive practice of grouping topics by association still plays an important part.[6]

[1] Schulz, *Z* xliii (1923), 222 ff.

[2] Because *restitutio* of *maiores* would include *restitutio propter metum*.

[3] Originally *rest. propter fraudem creditorum* (Lenel, *Ed.* s. 225) came next after *rest. propter metum* and was itself followed by the *actio de dolo*, which it attracted. The placing of *rest. p. fr. cr.* in Part 3 seems to have come from Julian: Schulz, *Z* xliii (1923), 237, n. 5.

[4] Lenel, *Ed.* p. 36, attempts an explanation.

[5] *Schr.* i. 164.

[6] Specially clear in the title *De receptis*, where the word *recipere* is the only connexion between *rec. arbitri*, *cauponum*, &c., and *argentarii* (Lenel, *Ed.* p. 33). The *actio arborum furtim caesarum* is in the title *De furtis* merely because of the word *furtim*, since it is not a case of true *furtum* (Lenel, p. 42). The system recalls the connexion by catchwords in Theognis: Christ–Schmid–Stählin, *Gesch. d. griech. Lit.* i (1929), 376, and E. Diehl's edition (Teubner). On the order in the *Epistle of James*: Christ–Stählin, ii (ed. 6, 1924), 1155.

The scheme is visibly one that has grown up gradually from one generation to another. How far Julian's final redaction departs from the hitherto traditional arrangement we have not the means of judging save in some exceptional cases.[1] Before him all the formulae had been collected at the end; it was he who first reduced the last part to interdicts, special defences, and praetorian stipulations.[2] He seems also to have been responsible for moving *in integrum restitutio creditorum* far away from the title *De i. i. r.*[3] Neither of these changes is happy. But on the whole his alterations do not seem to have been important: any serious change of order would have made the older commentaries on the Edict difficult to use. No doubt this consideration ought not to have been decisive, but, in spite of Q. Mucius, the interest of the jurists in logical, Hellenistic systematization remained very mild. We shall speak below of the adoption of the edictal order of topics in juristic works.

4. *Imperial rescripts*,[4] i.e. the Emperor's answers to questions, memorials, and petitions addressed to him, took the form of either *epistula* or *subscriptio*. The former is a rescript in the form of a separate letter. It was headed in the usual epistolary style by a greeting (e.g. 'Imp. Caesar Vespasianus magistratibus et senatoribus Vanacinorum salutem dicit'), and ended with *vale* or the like, written in the Emperor's own hand, and the date and place.[5] Such rescripts issued from the office *ab epistulis*.[6] A *subscriptio* is a rescript written at the foot of the petition (*libellus*) itself. It began with the names of the Emperor (nominative) and the addressee (dative), but without greeting; at the end the head of the chancery added *recognovi* and the Emperor, in his own hand, *scripsi* or *rescripsi*, with date and place.[7] *Subscriptiones* issued from the office *a libellis*[8] and were publicly posted (*propositio*) with date and place noted on the *libellus*.[9] Rescripts were filed in their two

[1] E. Weiss, 'Vorjulianische Ediktsredaktionen', *Z* l (1930), 249; Girard, *Mél. de dr. civil rom.* (1912), 1, 177; Mommsen, *Schr.* i. 162 ff.; Ferrini, *Opere*, ii. 163 ff.

[2] Weiss, *Z* l. 258 ff. [3] Schulz, *Z* xliii. 237, n. 5.

[4] Wilcken, *Hermes*, lv (1920), 1 ff., giving the older literature. v. Premerstein, *PW* iv. 739, *FIRA* i. 396 ff.

[5] Our copies are abbreviated, especially in the formal clauses. There is no sufficient collection; Haenel, *Corpus Legum* (1857) is antiquated. Examples: Bruns, no. 80 f., 196; Mitteis, *Chrest.* no. 373; *Diz. Epigr.* ii. 3, 2131; Lafoscade, *De epistulis imperatorum* (Paris thesis, 1902); *Voc.* ii. 517. 17 f.; *FIRA* i. 419 ff.

[6] Hirschfeld, *Röm. Verwaltungsbeamten*, 318 ff.; Rostowzew, *PW* vi. 210.

[7] See Wilcken, op. cit. 6 ff. Here too the copies are often abbreviated. See Bruns, n. 84 f.; Mitteis, *Chrest.* no. 374 f.

[8] Hirschfeld, op. cit.; v. Premerstein, *PW* xiii. 15.

[9] There is no need here to enter into the question of *propositio*. Cf. Dessau, *Hermes* lxii (1927), 205 ff.; Wilcken, *AP* ix (1928), 15 ff.

classes by the Roman Chancery; literary collections giving full and exact texts were unknown in the classical period. The collection made by the younger Pliny of the letters addressed to him by Trajan had no juristic purpose nor, so far as we know, was it used by the jurists. Also non-juristic is the collection known as *Divi Hadriani sententiae et epistulae.*[1] There was, however, a collection of Marcus Aurelius' rescripts entitled *Semestria*, which seems to have been made anonymously from the imperial archives; it is cited four times in our sources.[2] Papirius Iustus' bulky *Constitutionum libri xx*,[3] though never cited by the jurists, is certainly classical, indeed pre-Severan. Its author may have been an official of the archives.[4] It does not give the rescripts verbatim, but only the archival minutes, which, however, at times preserve the wording of the originals.[5] The collector added no comments. No other collections are known and probably none existed. It was only after the complete victory of bureaucracy under Diocletian that rescripts began to be codified.[6] Faithful to its policy of compromise with the republican tradition[7] the Principate left the task of informing the public of rescripts to the jurists, whose leaders were from the time of Hadrian members of the imperial *consilium* and thus in a position to keep abreast with the rescripts issued. So far as they had not direct access to the archives the jurists must have relied on copies.[8] But at times they seem to have contented themselves with oral information.[9]

[1] Edited by Böcking in *Corpus iur. Rom. anteiustiniani* (1841), col. 201, and by Götz, *Corp. gloss. lat.* iii (1892), p. 30, 14; Krüger, 285, n. 5.

[2] Tryph. *D.* (18. 7) 10; Tryph. *D.* (2. 14) 46; Ulp. *D.* (29. 2) 12; *Inst.* 1. 25. 1 (from an indeterminable classical source). Cf. Krüger, 119.

[3] Lenel, *Pal.* i. 947; M. Scarlata Fazio, *SD.* v (1939), 414 ff.

[4] He is probably identical with M. Aurelius Veranius Papirius Dionysius who was *a libellis* and *a cognitionibus* and lived in the period in which Papirius Justus must have lived. See on Papirius Dionysius: *CIL* x. 6662 = *ILS* 1455; *Prosopogr.* (2nd ed.), no. 1567. A new inscription was published by Segrè, *Bulletin de la Société Royale d'Archéologie d'Alexandrie*, xxxii (1938), 138; see *L'Année épigr.* 1938, no. 60. Papirius Dionysius was killed by Commodus and therefore possibly was called 'Iustus' after his death. Before the discovery of the new inscription it was unknown that he had the name 'Veranius'.

[5] *D.* (18. 1) 71; (48. 12) 3.

[6] Below, p. 287.

[7] Niedermeyer, *ACI Roma*, i. 364–66.

[8] The inscription from Skaptopara (Bruns, no. 90; Wilcken, *Hermes*, lv (1920), 31, 37) is a copy from a rescript as posted up; the inscription from Smyrna (Bruns, no. 84; *FIRA* i. 435, Wilcken, 37) is a copy of a rescript kept in the archives, made by imperial permission.

[9] Gaius, 2. 221: 'quae sententia dicitur (!) divi Hadriani constitutione confirmata esse.' Marcellus, *D.* (23. 2) 50: *Proxime constitutum dicitur.* Paul, *D.* (35. 2) 1. 14: *divus Antoninus iudicasse dicitur. D.* (41. 4) 2. 8: *a divo Traiano constitutum dicitur.* Marcian, *D.* (49. 14) 18. 9: *ut et constitutum esse refertur. D.* (1. 22) 2: 'ut aliquo quoque decreto principali refertur constitutum' (probably interpolated: Gradenwitz, *Z* xxvi (1905), 347 ff.).

5. As in the republican period,[1] collections of decisions of the courts were unknown. None existed even of the decisions of the Emperor's high court, but minutes of its sittings were kept in the imperial archives, where, like the records of rescripts and edicts, they were open to the jurists. The jurists made occasional use of these decisions in their books,[2] and sometimes reproduced the minutes more or less verbatim.[3] But works dealing solely with such decisions were rare. An example must have been Titus Aristo's *Decreta Frontiniana*,[4] but the outstanding example is Paul's *Libri vi imperialium sententiarum in cognitionibus prolatarum*.[5] This, however, was no mere collection of decisions but a selection of cases in the imperial court at which Paul had assisted. A classical jurist would have considered the simple reproduction of official minutes as mere hack-work. Paul's work followed the order of the Edict (or of the *Digesta*).[6] Justinian's compilers did not possess the original work, but only two post-classical abridgements, one entitled *Imperialium sententiarum in cognitionibus prolatarum ex libris sex* and the other *Decretorum libri tres*.[7]

6. Naturally local collections of such materials as imperial edicts, rescripts, decrees, and *mandata* (to the provincial governor),[8] and of the governors' own edicts, rescripts, and decrees,[9] were kept in the offices of regional officials,[10] particularly in that of the governor, in Egypt that of the *praefectus Aegypti* and the *Idiologus*;[11] provincial practitioners also may well have made collections of their own.[12] We have some remains of this class of provincial literature, the authors being presumably provincial officials or

[1] Above, p. 92. [2] Evidence: *Voc.* ii. 107. 38 f.

[3] *D.* (28. 4) 3; (48. 7) 7. The minutes were made up from a shorthand note: v. Premerstein, *PW* iv. 743.

[4] Only *D.* (29. 2) 99. Cf. Mommsen, *Schr.* ii. 22.

[5] Lenel, *Pal.* i. 959, n. 1. Berger, *PW* x. 722, 725; Sanfilippo, *Pauli Decretorum libri tres* (1938), containing a valuable commentary on the fragments.

[6] On the *Digesta* see below, p. 226. [7] See Note X, p. 340.

[8] *Mandata*: Finkelstein, *T* xiii (1934), 150 ff. See further the κεφαλαῖον ἐκ τῶν Καίσαρος ἐντολῶν, *CIL* iii, Supplem. 7086, and Mommsen's commentary, no. 25. On Greek models see *P. Tebt.* 703. Justinian's *Nov.* 17 imitates a *liber mandatorum*.

[9] Governors' edicts: Weiss, *St. z. röm. Rechtsquellen*, 81 ff.; Wilcken, *Z* xlii (1921), 137 ff. Governors' rescripts: Wilcken, *Hermes*, lv (1920), 27 ff. Decree of the governor of Sardinia (*CIL* x. 7852; *ILS* 5947; Bruns, no. 71*a*; *FIRA* iv. 322): Mommsen, *Schr.* v. 325 ff.; v. Premerstein, *PW* iv. 733.

[10] See P. Krüger, 315; Mommsen, *Schr.* ii. 363.

[11] Plin. *Ad Trai.* 65; v. Premerstein, *PW* iv. 756. *P. Oxy.* xvii. 2104 is a copy of an imperial rescript. There is a note on the foot of the document: 'inserted in the *commentarii* of the prefect of Egypt by Annianus' (obviously a secretary of the prefect). See P. M. Meyer, *St. Bonfante*, ii. 341 ff.

[12] In the papyri we find in the minutes of court-proceedings repeated citations of enactments of the emperors and governors by the advocates.

practitioners, namely a work on the Augustan *forma idiologi*,[1] fragments of collections of authorities on soldiers' marriages[2] and on *longi temporis praescriptio*,[3] and of a collection of Caracalla's Edicts and the like.[4] There was thus in the provinces a minor juristic literature, which must have had its importance in provincial practice, but was, of course, ignored by the metropolitan jurists.

(iii)

Pure formularies, i.e. collections of precedents of contracts, testaments, actions, and defences, were no longer made by the classical jurisconsults; indeed, even in the last century of the Republic this class of work had already been left to the lower orders of lawyers.[5] Owing to the ample official collection of procedural *formulae* supplied by the fully developed Edict such collections were no longer needed for litigation in the classical period, but they were still required by contractors and testators. Nor were they lacking, but since they belong to the minor literature already mentioned their authors are unknown to us; they were perhaps anonymous. Evidence of the existence of such works is provided by the *formula Baetica*[6] and again by the Transylvanian triptych of A.D. 139,[7] in which, as Mommsen[8] has pointed out, the draftsman of the record of a mancipation of a female slave twice slips into the masculine gender, thus betraying that he is using a precedent in which the hypothetical sale was of a male.[9]

Though the jurists comment, as occasion arises, on documents or their individual clauses,[10] it is doubtful whether there were any classical works dealing exclusively or mainly with such matters. Venuleius' *Libri x actionum* may have been such a work, supposing the word *actio* to have been used in the old sense of the *Manilianae*

[1] Seckel–Schubart, 'Der Gnomon des Idios Logos' (*BGU* v. 1, 1919); Meyer, *Jur. Pap.*, appendix, no. 93. Commentaries: Meyer, *Berlin SB.* 1928, Abh. xxvi. 424 ff.; Lenel–Partsch, *SB. Heidelberg*, 1920, Abh. i; Carcopino, *Rev. des Ét. anciennes*, xxiv (1922), 101; Graf Uxküll–Gyllenband, *BGU* v. 2 (1934); *AP* ix (1930), 183. The form of the *prooemium* shows beyond question that it was a literary work: ibid. 187; *BGU* l.c., p. 8.

[2] Mitteis, *Chrest.* no. 372.

[3] Ibid. no. 374.

[4] P. Giess. 40; Mitteis, *Chrest.* nos. 377, 378; Wilcken, *Chrest.* no. 22. *P. Ryl.* iii. 476 contains a Greek summary of imperial constitutions. See further Taubenschlag 23.

[5] Above, p. 90.

[6] Bruns, no. 135; Gradenwitz, *SB Heidelberg*, 1915, Abh. ix. 12 ff.; *FIRA* iii. 295.

[7] Bruns, no. 131; *FIRA* iii. 283.

[8] *CIL* iii. 923.

[9] See further, Wessely, *Wien. St.* ix (1887), 235.

[10] e.g. *D.* (12. 1) 40; (46. 3) 94. 3. There are many examples in Cervidius Scaevola's *Digesta* and *Responsa*. A collection would be desirable.

actiones.[1] The treatment devoted to the procedural formulae was not merely incidental to more general themes, as we see from Gaius, book 4, and from such monographs as Paul's *De conceptione formularum*, his *De actionibus*, and his *De concurrentibus actionibus*.[2] We know little about this literature for the simple reason that it had lost all interest for Justinian's compilers.[3]

(iv)

Under the Republic, as we have seen,[4] there had been the first beginnings of an isagogic literature, but it was only in the classical period, especially from Hadrian onwards, when legal education became more academic,[5] that a true elementary legal literature came into existence. The growing activities of the bureaucracy created a demand for more thorough legal education, of the kind that could be imparted only in a law school. A series of school-books speedily resulted.

1. The earliest known to us comes from the first century of our era—the *Libri tres iuris civilis* of the celebrated law teacher Massurius Sabinus. Significantly its author abstained from labelling it as elementary (*institutiones*), but so bare an outline, couched in terse axiomatic sentences,[6] can have been nothing else.[7] Clear as is its derivation from the basic systematic work of Roman jurisprudence, Q. Mucius' *Ius civile*,[8] comparison of the sizes of the two works (Mucius 18 books, Sabinus 3) reveals at once their fundamental difference. The republican *pontifex* wrote a comprehensive work for ripe lawyers; the composition of an elementary text-book was as remote from his mind as teaching in a law school.[9] The imperial law teacher wrote a text-book for his pupils. Here and there he modified Mucius' arrangement of topics, but he accepted his conception of the matter to be dealt with: no more than Mucius did he confine himself to *ius civile* in the narrower sense, i.e. to the exclusion of *ius honorarium*;[10] but he left unexamined important topics which a comprehensive treatise of the

[1] So Sanio, *Rechtshist. Abh.* (1845), 96; Lenel, *Pal.* ii. 1207, 1201. Another view: Wlassak, *Röm. Prozessgesetze*, ii. 4, 6.

[2] We know the second work only from *Index Flor.* xxv. 64; it is perhaps identical with the first: Berger, *PW* x. 715, 717. Lenel, *Pal.* i. 958, 959. We can form no picture of Paul's *De iure libellorum* from the single fragment, *D.* (50. 7) 12.

[3] The works *ad formulam hypothecariam* are expositions of the law of *hypotheca*. We shall return to them.

[4] Above, p. 93. [5] Above, p. 101. [6] Joers, *PW* v. 1444.

[7] Hence it was known to laymen: Persius, 5. 90; Arrian, *Diss. Epict.* 4. 3.

[8] Above, pp. 72, 94. [9] Above, p. 57.

[10] Shown conclusively by the section on aedilician law; Lenel, *Pal.* II. 133.

time of Tiberius ought not to have passed over. Of the real contracts none, of the consensual only sale and partnership, were dealt with. No rational explanation of these omissions can be given, and it is out of the question that Sabinus himself should have published as a systematic work anything so fragmentary. Obviously what we are dealing with is not such a work, but a collection of lecture-notes made by the famous professor for his pupils and first published after his death.[1] It may be that he had not yet worked out his scheme in all its parts, or again that many of his notes were not forthcoming when the posthumous publication was prepared. But, for all these defects, the work remained the text-book of the Sabinian school[2] up to the reign of Hadrian and perhaps later. We find Pomponius, Paul, and Ulpian still devoting extensive commentaries to it.[3] After Ulpian all trace of it is lost; the *Interpretatio* of the *Law of Citations*[4] affirms its disappearance; Justinian's compilers possessed no copy. Though it is registered in the *Index Librorum*,[5] there is not one fragment from it in the *Digest*, and the compilers, had they possessed a copy, could hardly have failed to select one or two excerpts, if only *reverentiae antiquitatis causa*, from a work of such ancient renown. A few fragments are given textually by Gellius,[6] and a few more can be gleaned from the above-mentioned classical commentaries.[7] The frequent quotations from Sabinus elsewhere never cite his *Ius civile* as the source.[8] Its arrangement of topics can be reconstructed in outline from the classical commentaries *Ad Sabinum*:[9]

I. Law of inheritance. (1) Testaments: (*a*) execution, (*b*) institution of *heres*, (c) exheredation, (*d*) acceptance and refusal of *hereditas*. (2) Intestate succession. (3) *Legata*.

[1] Aristotle's *Metaphysics* are a collection of treatises designed for delivery in lectures, not for further publication: W. Jaeger, *Entstehungsgesch. d. Metaphysik des Aristoteles* (1912), 131 ff., 185 ff. On some works of Galenus not written for publication see below, p. 163. The *Institutiones* of Gaius and Marcian were of the same nature: below, 162, 172.

[2] Perhaps also of the Proculian, since no institutional work seems to have come from it.

[3] Below, p. 211.

[4] *C. Th.* (1. 4) 3.

[5] 'V. Sabinu iuris civilion *βιβλία τρία*.' Rightly, Dirksen, *Hinterlassene Schr.* i. 36 ff. Krüger, 164, is wrong.

[6] Seckel–Kübler, i. 72; *Pal.* ii. 187.

[7] Schulz, *Sabinus-Fragmente in Ulpians Sabinus-Commentar* (1906). But see below, p. 212.

[8] Lenel, *Pal.* ii. 187, 191 ff.

[9] Leist, *Versuch einer Gesch. d. röm. Rechtsysteme* (1850), 44. Lenel, *Das Sabinussystem* (offprint from *Festg. Strassburg f. Jhering*, 1892); *Pal.* ii. 1257; Frezza, 'Osservazioni sopra il sistema di Sabino' (*Estr. della Riv. it.*, N.S. viii, 1933). Voigt, 'Das Aelius- u. Sabinus-System' (*Abh. Sächs. Gesellsch.* vii, 1875), should be ignored.

II. Law of persons. The various forms of power over free men and slaves. Emancipation and manumission.
III. Law of obligations. (1) Sale, including mancipation. (2) *Societas*. (3) *Actio rei uxoriae*. (4) *Actio tutelae*. (5) Obligations *ex delicto*: (*a*) *furtum*, (*b*) *damnum iniuria datum* (*l. Aquilia*), including *damnum infectum*, (*c*) *iniuria*. (6) Unjustified enrichment. (7) The aedilician Edict. (8) The literal contract. (9) The verbal contract.
IV. Law of things. (1) Acquisition of ownership, including *donatio*. (2) Servitudes. (3) *Fiducia*. (4) *Postliminium*.

This arrangement, as comparison shows, is derived from Mucius.[1] In part I Sabinus' separation of *legata* from testamentary law is hardly an improvement. Another change is the placing of the law of things last; the subhead 'servitudes' is better placed than, as by Mucius, in connexion with *locatio conductio*. Under obligations the *actio rei uxoriae* (dotal law) is placed by Sabinus after *societas*, perhaps in conformity with the edictal order[2] or, it may be, because the form of *societas* known as *consortium* attracts matrimonial *consortium omnis vitae*. As in the Edict,[3] the *actio tutelae* (law of guardianship) follows the *actio rei uxoriae* and is itself followed[4] by *furtum*; in contrast to the Edict, *furtum* is followed by the other delicts. That obligations *ex delicto* should have led up to unjustified enrichment and the aedilician actions is understandable. The real contracts are absent, and so are *locatio conductio* and *mandatum*. Lenel's favourable judgment of this system taken as a whole is not readily intelligible.[5]

2. We know of no further elementary books till the second century. The first to be mentioned is Florentinus' *Institutiones*, an extensive work, in twelve books, the only known work of this author, of whom we know nothing more. He must, like Gaius, have been simply a law teacher;[6] like him he is never cited by the classical jurists. The position of his book in the *Index Librorum*,[7] after the works of Marcellus and before those of Gaius, in the absence of other evidence, fixes his date. At any rate there is no valid argument for putting him in the Severan period.[8] The work was thorough, well arranged, and written in classical style.

[1] Above, p. 95. [2] Above, p. 149. [3] Above, p. 149.
[4] Above, p. 149. Lenel, *Ed.* 36, n. 1.
[5] *Sabinussystem*, 104 (offprint). [6] Above, p. 107.
[7] 'XIX. *Φλωρεντίνου* instituton *βιβλία δεκαδύο*.'
[8] Krüger, 215; Brassloff, *PW* vi. 2755. The only jurist cited in our fragments is Trebatius, the only Emperor *divus Pius*, both in *D.* (41. 1) 16. The Florentinus in Alexander's rescript, *C.* (3. 28) 8, is not our jurist, as *C.* (6. 30) 2 shows. The notice in *SHA, Alex. Sev.* 68, is valueless: Mommsen, *Schr.* ii. 66. But Patzig, *Byz. Z.* xiii (1904), 44 ff., seems still to be misled. Cf. Hohl, *Klio*, xiii (1913), 420.

Its disposition was as follows:[1] I. Sources (book 1); II. Marriage and *Tutela* (books 3–5); III. Property (book 6); IV. Obligations (books 7–8); V. *De statu hominum* (book 9); VI. Inheritance (books 10–11).

This work survived for centuries[2] in spite of the competition of Gaius and, though not mentioned in the *Law of Citations*, was used in the compilation of the *Digest* and the *Institutes*. The excerpts from it in the *Institutes* can, however, be identified with complete certainty only when they recur in the *Digest*, which unfortunately is not often the case.[3] But these duplications suffice to reveal that the manuscript of the work used for the *Digest* was not the same as that used for the *Institutes*, and that in both manuscripts the work was in a post-classical state.[4] A notable point in our fragments is that with one exception all citations of jurists and imperial constitutions have been cut out: their excision must be the work of the post-classical editor, and the exception is due to his oversight.

3. Two elementary works by Gaius are known—the four books of *Institutiones* and the seven of *Res cottidianae*.

A. *The Institutiones*.[5] This is of the greatest importance, as being the only classical work which has reached us nearly complete. In its definition of its subject and its order of topics it shows once again the influence of Mucius' *Ius civile*.[6] It is not restricted to *ius civile* in the narrower sense, but takes account of *ius honorarium* also, though only in so far as this is closely implicated with *ius civile*. Thus *bonorum possessio*[7] is dealt with because of its connexion with *hereditas*, the *actio vi bonorum raptorum*[8] because allied to *furtum*, the *actio iniuriarum* in its praetorian form[9] because of *iniuria* in the Twelve Tables, while, on the other hand, the *actio de dolo*, for example, and the *actio quod metus causa* are simply omitted. The order of topics in the *Institutes* is too familiar

[1] *Pal.* i. 171, n. 1. We do not possess a fragment from books 2 and 12.

[2] Cited in *Schol. Sin.* (below, p. 325), xiii. 35.

[3] Brassloff, *PW* vi. 2758.

[4] See the duplicate passages *D.* (46. 4) 18 and *Inst.* (3. 29) 2. Small stylistic and other differences indicate the use of different manuscripts. In both the oral formula of the novating *stipulatio* has been confused with the narrative form in which it would be recorded in writing (cf. *D.* 45. 1. 122. 2). This contamination is due to the post-classical editor who, moreover, added the formula of the *acceptilatio*. See Wlassak, *Z* xlii (1921), 394 ff.; Perozzi, ii. 404; Solazzi, *L'estinzione della obbligazione* (1931), 251; *Index Interp.*

[5] See in general Kübler, *PW* vii. 494; Krüger, *Quellen*, 206, 276; Bizoukides (below, p. 166), i. 34 ff.

[6] Above, pp. 72, 156.

[7] *Bonorum possessio secundum* and *contra tabulas*: 2. 119–21, 125, 126, 129, 135–7, 147–50. *B. p. ab intestato*: 3. 25 f.

[8] 3. 209.

[9] 3. 220.

to need to be set out here. Its departures from the Mucian scheme, from which it is obviously derived, are not always happy. Inheritance is removed from the first place and put after property and before obligations, the three subjects being combined as *ius quod ad res pertinet*—a decidedly heterogeneous assemblage. There are many omissions, the most remarkable being the absence of dotal law and of the real contracts of *commodatum*, *depositum*, and *pignus*. These are points to which we shall return.

We must in the first place determine the literary genus of the work. The title, *Commentarii*,[1] applied to a work obviously intended for academic use, can only mean 'lecture-notes',[2] but we cannot decide whether we have before us the notes used by Gaius himself when lecturing or notes taken by pupils at his lectures ἀπὸ φωνῆς;[3] this, however, is of no importance. The implication of the title is confirmed by the whole style of exposition. Though the audience is not addressed in the second person,[4] the ever-recurring admonitions (*admonere*)[5] for the purpose of emphasis, the constant references to the scheme of topics,[6] and the fact that the author supposes himself to be speaking (*loqui*)[7] are in true lecturer's style.[8] A further, more important question is whether the work was published by Gaius himself or only by some pupil.[9] Its

[1] Gaius, 2. 1, 23, 145, 228; 3. 17, 33, 38, 81, 201; 4. 77, 85, 153. The name is also applied by Just. *Inst. Praef.* s. 6. [2] See Note Y, p. 340.

[3] Dernburg thought the latter: 'Die Inst. des Gaius ein Collegheft aus d. Jahre 161 n. C.' (*Festschr. f. Wächter*, Halle, 1869), 45 ff., 50, 58, 62, 65. On the publication of such notes: Quint. *Inst. praef.* s. 7 and 2. 11. 7; Galenus below, p. 163, n. 11.

[4] Frequent in the Autun *Hypomnema*, on which below, p. 301.

[5] See *admonere* meaning *commonefacere* in *Thes.* 1. 764. 77 f. In Gaius: 1. 133, 141, 188; 2. 27, 40, 80, 97, 206; 3. 17, 33*a*, 56, 163; 4. 69, 82, 110, 136, 169. Very rare in other jurists (Kübler, *PW* vii. 499 is mistaken): the only cases given by *Voc.* i. 237 are Ulp. (49. 2) 1. 1 and (36. 3) 6. 1, the first certainly and the second probably not classical.

[6] Dernburg, op. cit. 45 ff. e.g. Gaius, 2. 97: 'Hactenus tantisper admonuisse sufficit, quemadmodum singulae res nobis adquirantur . . . videamus itaque nunc, quibus modis per universitatem res nobis adquirantur.' 3. 54: 'Hactenus omnia iura quasi per indicem tetigisse satis est. . . . Sequitur ut de bonis Latinorum libertinorum dispiciamus.'

[7] Ibid. 1. 39, 76, 145; 2. 94, 122, 191; 3. 154, 194; 4. 10, 57. How far the jurists used *loqui* metaphorically (Forcellini, *Lex.* iii. 798, no. 10) will be ascertainable only when the *Vocab. Iur. Rom.* reaches *loqui*; *lex, rescriptum, edictum loquitur* seem to be classical: *D.* (24. 3) 64. 9; (2. 14) 10; (4. 6) 14.

[8] Compare what Christ–Schmid–Stählin, *Gesch. der griech. Lit.* ii. 2 (6th ed. 1925), p. 923, say about the style of Galenus (a contemporary of Gaius): 'Great lucidity though shallow; cumbrous prolixity and even loquacity which does not shrink from repetitions; very clear arrangement of the discussion.' This might be said of Gaius' style.

[9] Dernburg, op. cit. 34, contemplated, but expressly rejected, the supposition of posthumous publication of an unfinished work, thereby rendering his study entirely ineffective.

numerous defects, some of which cut deep, suggest the hypothesis that Gaius left his lectures imperfect and unfinished and that they were first published after his death. Gaius' *Institutes*, like Sabinus' *Ius civile*,[1] resemble Aristotle's *Metaphysics*[2] in this respect.[3]

For nearly a century Romanistic scholarship treated the text of the *Institutes* as sacrosanct,[4] admitting only some relatively few and unimportant glosses. But in the twentieth century criticism has become ever more radical. Kniep[5] tried to distinguish four strata of text—a pre-Gaian work used by Gaius, Gaius' own elaborations of it, post-Gaian additions, and, within the pre-Gaian work, an original text and later modifications and additions. Such a thesis was doomed to failure, even if it had been carried out with greater insight and caution than it was. No doubt Gaius made use of older literature, but whether he took one work as a model is a question that cannot be settled. In any case, the mysterious 'Sabinian school-book' which Gaius is supposed to have used and elaborated is pure fantasy. The only such book that ever existed was Sabinus' *Iuris civilis libri iii*. It is possible, of course, that Gaius made use of lecture-notes taken by himself in his own student days. Be that as it may, Gaius did not simply copy and adapt a previous work; and it is therefore impossible by analysis to distinguish such a work from Gaius' own additions. The still more radical view that the *Institutes* are not classical at all, but belong to the fourth or fifth century,[6] has been taken seriously by no one of any judgment and has been disproved[7] by the modern discoveries of manuscript remains. For the rest research has been focused on individual passages. Attempts have been made to prove, on linguistic or substantial grounds, that this or that passage of our text is unauthentic, non-Gaian, post-Gaian, or post-classical.[8] The inherent defect of this procedure has been that it

[1] Above, p. 157. [2] Above, p. 157.

[3] On Bracton see Schulz, *LQR* lix (1943), 172.

[4] 'Error et errantium claritate et errati incredibilitate pariter insignis', one might say with Mommsen, *Digesta*, i. (1870), Additamenta, p. 36.

[5] Even before his edition, in *Der Rechtsgelehrte Gaius u. d. Ediktskommentare* (1910), 36 ff. [6] Ebrard, *Z* xlv (1925), 144.

[7] So, rightly, Hunt, *P. Oxy.* vol. xvii, p. 175. Cf. Ciapessoni, *St. Bonfante*, iii. 665.

[8] These criticisms of individual passages are widely scattered over many studies and will not be easily accessible till Volterra's *Indice delle glosse*, &c., has appeared. The pioneers were Beseler (see particularly *T* x, 1930, 161; *St. Albertoni*, i. 428) and Albertario (see *Studi*, v (1937), 441 ff.). There is also much in Solazzi, 'Glosse a Gaio', i (*St. Riccobono*, i, 1931), ii (*Per il xiv centenario delle Pandette*, &c., Pavia, 1933), and in his papers published in the *SD* vol., i ff. See further, Bizoukides's commentary (below, p. 166); Felgenträger, *Symb. Frib.* (1933), 364; Pringsheim, *St. Besta*, i (1938), 325; Riccobono, *Festschr. Koschaker*, ii. 381; Appleton, *RH* viii. 197.

studies passages in isolation instead of applying critical analysis to the work as a whole.[1] The ultimate result of bringing each section and each sentence one by one under the microscope, of striking out every imperfection, of regarding every word that is not strictly necessary as superfluous, everything that is superfluous as objectionable, and everything that is objectionable as unauthentic,[2] is that hardly anything is left. Hence the conclusion to which certain critics have been driven is that our actual text was composed in the main in the course of the third and at the beginning of the fourth century, this being the only period in which such radical alterations of a classical text would have been ventured.[3] This conclusion has not been refuted, as has sometimes been thought, by the newly discovered manuscript remains, but it is nevertheless improbable. It is improbable that a later editor would have deformed an originally faultless classical work into that which we have. The impression one has is rather of a work which its author had revised again and again, but had never brought to a final form.

This impression could only be verified by a minute analytical interpretation of the whole work. Here we must be content to draw attention to a few significant points.

(i) Of the real contracts only *mutuum* is mentioned; *commodatum*, *depositum*, and *pignus* are omitted.[4] The explanation has been proposed that Gaius was following an ancient book written before these contracts had become actionable.[5] But even granted that Gaius followed so old a model, he would necessarily have amplified it in this matter, since these contracts had become actionable, and that *iure civili*, long before his time, and he himself mentions *depositum* and *commodatum* under the law of actions.[6] He simply cannot have omitted them in his lectures, because if in giving an outline of the Roman law of contract he had mentioned all four of the consensual, but omitted three of the real, contracts, he would simply have been misleading the beginner. Nor can the omission of these three contracts be due to their having been deleted by a later editor; they must have been absent from the beginning. Thus the only conclusion left is that Gaius for some reason had not yet written up this topic in his own manuscript or else that this part of his lecture could not be found when it came to posthumous publication. (ii) Precisely the same considerations apply to his silence as to the law of *dos*.[7] (iii) There are places where Gaius promises future treatment of some

[1] *D.* (1. 3) 24.
[2] v. Wilamowitz-Möllendorff, *Einl. in d. griech. Tragödie*, 250.
[3] Above, p. 142.
[4] Gaius, 3. 90.
[5] e.g. by Krüger, 210, n. 57.
[6] Gaius, 3. 207; 4. 47, 60, 62, 182.
[7] Ibid. 1. 178, 180; 2. 63; 3. 95*a*, 125; 4. 44, 62, 151.

question (*videbimus*), a promise that is not kept,[1] and others where he raises a question (*quaeritur, quaesitum est*), but contrary to his custom of proceeding to discussion, with citation of jurists,[2] leaves it unexplored.[3] Here again we cannot hold a later editor responsible; the impression left is that of a book not finished and published by its author. (iv) He introduces the work with a conspectus of the sources of Roman law in general,[4] and then passes abruptly to *ius privatum*, as though there were no such thing as *ius publicum*. A transitional passage remained to be supplied. (v) In the introduction *ius civile* is contrasted, as being the law peculiar to Roman citizens, with *ius gentium*, or law common to all peoples,[5] and the author promises that the exposition which follows will tell us to which of the two the several legal institutions belong.[6] He keeps his promise in book 1 and the first part of book 2, but seems to forget it when he reaches the law of inheritance; here *ius civile* becomes antithetical to *ius honorarium*.[7] He returns to his original intention in the treatment of obligations, but carries it out carelessly:[8] one would have expected to be told at least that sale, barter, and hire belonged to the *ius gentium*. In book 4 the promise is once more completely forgotten; *ius civile* is simply private law which is not *ius honorarium*.[9] Once again one has the impression of a book not finally revised by its author.[10]

It follows that the supposed authentic text, perfect in expression, absolutely correct in law, and conforming to the strict classical standards, is pure fantasy; it never existed any more than a well-ordered, carefully expressed and consistent Aristotelian *Metaphysics*. Criticisms, correct in themselves, have led in part to false conclusions. It is true enough that there are post-classical alterations in our text—this can be and has been proved—but merely formal defects, such as departures from classical juristic idiom, bad arrangement, unskilful transitions, inexact formulations, and the like, do not properly justify the conclusion that here is post-classical work. In rough lecture-notes, not written *πρὸς ἔκδοσιν*,[11] one cannot count on complete legal accuracy or the highest

[1] Ibid. 2. 120, 121; 3. 116, 202.
[2] e.g. ibid. 2. 79, 200, 244.
[3] Ibid. 2. 90, 94, 95; 3. 119, 143, 144, 145, 172, 189; 4. 125.
[4] Ibid. 1. 2: 'Constant autem iura populi Romani. . . .'
[5] Ibid. 1. 1; cf. above, p. 137.
[6] Ibid.: 'quae singula qualia sint, suis locis proponemus.'
[7] Ibid. 2. 114, 115, 118, 135, 136, 149, 151, 170, 197, 198, 206, 218, 220, 241, 253, 255; 3. 34, 36, 37, 66, 71.
[8] Ibid. 3. 93, 132.
[9] Ibid. 4. 38, 45, 107, 116.
[10] Its frequent repetitions have long been noted: Dernburg, op. cit. 40 ff.; Krüger, 209, n. 55. Moreover, the book has no preface.
[11] Galenus, *Περὶ τῶν ἰδίων βιβλίων* (*Scripta minora*, ii, 1891, Teubner), Praef. 10: *φίλοις γὰρ ἢ μαθηταῖς ἐδίδοτο χωρὶς ἐπιγραφῆς ὡς ἂν οὐδὲν πρὸς ἔκδοσιν, ἀλλ' αὐτοῖς ἐκείνοις γεγονότα δεηθεῖσιν ὧν ἤκουσαν ἔχειν ὑπομνήματα.*

linguistic polish. Also some responsibility may be attributed to whoever published the notes. It is proper to expose these defects, but to do so only completes in detail the proof of our thesis that the *Institutes* are a work which was left unfinished by its author and was first put together and published by some pupil.

That publication must have been soon after the death of the Emperor Pius.[1] A second edition, but without considerable changes,[2] may have been produced in the third century; in essentials the text was stabilized early, at the end of that century.[3] Commentaries on it took the form of separate works,[4] not that of a continuous gloss.[5] Of course marginal glosses were entered by readers,[6] and some of these eventually got into the text;[7] in one case, which seems to be exceptional, a passage was struck out.[8] But in essentials the text was left unaltered,[9] for the law schools of the fourth and fifth centuries, unlike the bureaucracy, tended to classicize the law.[10] Even book 4, which the disappearance of the formulary system had rendered completely out of date, was laboriously preserved;[11] even the polytheism which Justinian expunged from his compilations[12] was left untouched.[13] Though used

[1] No constitutions of Marcus Aurelius are cited; Pius is cited as living except in 2. 195 (*divi Pii constitutione*). But on various grounds this passage ('sed hodie' *rell.*) cannot be Gaian. But neither can it be post-classical, since the victory of the Sabinian doctrine in the full classical period is certain. It must therefore be an addition made by the first editor, and thus is important evidence as to the date of publication. On Gaius, 2. 195: Beseler, *Beitr.* ii. 105; *Z* xliii (1922), 536; Ciapessoni, *St. Bonfante*, iii. 664; Voci, *Teoria dell' acquisto del legato* (Milan, 1936), 49 ff., 62 ff.

[2] It is significant that Marcus' constitution (*Epit. Ulp.* 22. 34) was not quoted against the severe, formalistic decision in Gaius, 2. 177.

[3] So Schulz, *Epit. Ulp.* p. 13, before the discovery of the new texts of Gaius, which confirm the early stabilization of the text.

[4] e.g. the Autun lecture-notes, on which see below, p. 301.

[5] Below, p. 184.

[6] Thus the Greek marginal and interlinear glosses in the Antinoite Gaius: below, p. 166.

[7] In three cases—Gaius, 1. 53; 3. 113, 126—a reader had noted *regula* in the margin, and the word has passed into the text. Schulz, *Z* 1 (1930), 227. Again, in 4. 16, 'adversarius quoque dicebat similiter: et ego te' is a gloss which has got into the Veronese text, as its absence from the Antinoite text shows: Arangio-Ruiz, *Bull.* i (N.S.), 607.

[8] That the Veronese version has shortened the text of 3. 154 is now proved by the Antinoite version.

[9] Even in the late post-classical period Marcus' constitution (*Epit. Ulp.* 23. 34) was not quoted against Gaius, 2. 177.

[10] Below, p. 281.

[11] Preserved by both the Veronese and the Antinoite manuscripts and lectured on still, as the Autun lecture-notes show.

[12] *Voc.* s.v. 'deus', 2. 204. 49; *D.* (1. 3) 2 (θεοῦ for θεῶν); *Inst.* 2. 1. 8 and 1. 8. 2, compared with the corresponding passages of Gaius; Joers, *PW* v. 538, l. 65.

[13] Gaius, 1. 53; 2. 4; 1. 112.

for centuries as a school manual the text, like that of Euclid's *Elements*, remained relatively pure. It was not superseded either by an epitome or a Greek translation: our chief manuscript dates from the fifth or sixth century. Justinian's compilers possessed the work and made it the basis of their own *Institutes*, besides taking some excerpts from it for the *Digest*. After Justinian the existing copies gradually perished; thus the Veronese manuscript was overwritten, and thereby practically destroyed, as early as the seventh century. Gaius' *Institutes* were superseded by Justinian's in the East and in Italy, and by the *Epitome Gai* of the Visigothic *Breviarium* in Spain and France.

A scientific edition of Gaius' *Institutes* ought to establish, as far as may be, the text of the first edition in all its incompleteness and with all its defects. It ought further to exhibit the transformations through which the text passed up to the time of Justinian, since the work is an important authority for post-classical as well as classical jurisprudence. The existing materials for such an edition are: I. remains of ancient copies of the *Institutes*, and II. ancient excerpts from the works derived from the *Institutes*.

I. (1) *Codex Veronensis*.[1] This our chief manuscript is a parchment codex written in Italy in the fifth or early sixth century, and overwritten partly in the seventh and partly in the eighth centuries.[2] Only one of the surviving leaves is not palimpsest. The manuscript is almost complete, only four folios (the last blank) having been lost. It was discovered at Verona in 1816 by Niebuhr[3] and has been gradually deciphered, in the greater part, but not completely, by various scholars. The standard reading is that of Studemund and P. Krüger, which is to be found in Studemund's *Apographum*;[4] the photographic reproduction[5] is of little service. (2) In 1927 A. S. Hunt published (*P. Oxy.* xvii. 2103) three fragments, discovered at Oxyrhynchus in Egypt, of a copy written on papyrus rolls in the third century, perhaps even as early as the middle of that century. It is thus our earliest evidence. It has been re-edited several times, partly with the aid of further study of the papyrus by Hunt.[6] (3) Two and a half folios of a parchment codex written at the end of the fourth or the beginning of the fifth century. The

[1] Described by Studemund, *Apographum*, 5 f.

[2] On the superimposed text of St. Jerome: Studemund, l.c. in last note.

[3] Savigny, *Vermischte Schr.* iii. 155 ff. Studemund, *Apogr.* p. viii.

[4] *Gai institutionum commentarii IV. Codicis Veronensis denuo collati apographum*, 1874; additions in the edition of Krüger and Studemund (below, p. 166), p. xvii f., and by Capocci, *Bull.* xxxvi (1928), 139 ff.

[5] *Gai Codex rescriptus . . . phototypice expressus*, Leipzig, 1909; Krüger, *Z* xxxi (1910), 2 ff.

[6] Collinet, *RH* vii (s. 4, 1928), 92 ff.; Levy, *Z* xlviii (1928), 532 ff.; *St. Bonfante*, ii (1930), 277 ff.; De Zulueta, *LQR* 1928, 198 ff.

fragments were bought by Medea Korsa from a dealer at Cairo in 1933, but where they were discovered is not known; the presumption is in favour of Antinoe. They were identified as coming from a copy of Gaius' *Institutes* and first edited by Arangio–Ruiz (*PSI* xi. 1182, Florence, 1933) with photographs of the two complete folios. It has been re-edited by him and others.[1]

II. (1) Excerpts from ancient copies are found chiefly in Justinian's *Digest* and the *Collatio*.[2] (2) Derived works: (*a*) Gaius' *Res Cottidianae*,[3] (*b*) the so-called *Epitome Ulpiani*,[4] (*c*) the 'Autun Lecture-notes',[5] (*d*) the Visigothic *Epitome Gai*,[6] (*e*) the Greek translation on which Theophilus' so-called *Paraphrase of the Institutes*[7] was based, (*f*) Justinian's *Institutes*.

The best edition is still that by P. Krüger and Studemund in the *Collectio librorum iuris anteiustiniani*.[8] It is out of date, if for no other reason because it was made before the new discoveries of texts, but it remains indispensable to the researcher because it is the only edition which gives full information as to the readings of the *Codex Veronensis*. Kübler's edition[9] incorporates all the new fragments and has a full and valuable apparatus of parallel passages, but owing to the insufficiency of its critical apparatus it is scarcely an advance on Krüger and Studemund. F. Kniep's uncompleted edition[10] must be condemned, its text being on wrong principles and its commentary too capricious and unsatisfactory. Bizoukides's edition[11] is valuable on account of its notes and other accessories, but its text is open to objection.

The other modern editions[12] are simply school-books. The student should accustom himself to checking the text by continual reference at least to Krüger and Studemund, and, where possible, to Studemund's *Apographum* or, when the occasion arises, to the photographs of the new fragments. Zanzucchi's *Vocabolario di Gaio*[13] is indispensable.

[1] *Bull.* i (N.S., 1935), 571 ff.; Collinet, *RH* xiii (1934), 96 ff.; Levy, *Z* liv (1934), 258 ff.; Monier, *Les Nouveaux Fragments des Institutes de Gaius*, 1935; Zulueta, *JRS* xxiv (1934), 168 ff.; xxv. 21 ff.; xxvi. 174 ff.; Albertario, *Studi*, v. 463.

[2] Rudorff, *Die lexicalen Exzerpte aus d. Inst. des Gaius*, Abh. Berlin. Ak. 1865 (1866). Bizoukides, ii. 195 ff., gives the passages.

[3] Below, p. 167. [4] Below, p. 180. [5] Below, p. 301.

[6] Below, p. 302. [7] Below, p. 305.

[8] Vol. i, ed. 6, 1912.

[9] Teubner, ed. 7, 1935.

[10] *Gai institutionum commentarius primus*, Jena, 1911; *comm. secundus*, ss. 1–96, 1912; *comm. secundus*, ss. 97–289, 1913; *comm. tertius*, ss. 1–87, 1914; *comm. tertius*, ss. 88–225, 1917.

[11] Gaius, I. *Prolegomena and Text of the Institutes*, Salonica, 1937; II. *Adnotationes. Indices*, 1938; III. 1 *Fragmenta Gaiana* (*Gaius ad edictum provinciale*), 1939; III. 2 *Fragmenta Gaiana*, 1939.

[12] English ed.: *Gai Inst. with a translation and commentary* by the late E. Poste, ed. 4, E. Whittuck, 1904, 1925. Supplements to same: De Zulueta, 1935. French ed.: in Girard's *Textes de dr. rom.*, ed. 6, 1937, by F. Senn. Italian ed.: in *FIRA* ii (1940).

[13] Milan, n.d. Elvers's *Promptuarium Gaianum* (Göttingen, 1824) is out of date. Bizoukides's edition is to include a vocabulary.

B. *The Res cottidianae.*[1] Our knowledge of this second elementary work ascribed to Gaius is much smaller, depending entirely on the excerpts taken from it by the compilers of the *Digest* and *Institutes*. In the copies used by them the work was entitled *Gai rerum cottidianarum sive aureorum libri vii*, which was naturally shortened in citations.[2] The description *aurea* (*dicta*, no doubt) must have been coined by some editor; it cannot come from Gaius himself.[3] *Res cottidianae* does not, it seems, mean 'law in everyday life';[4] *cottidianus* means here rather 'usual', 'familiar', 'common',[5] and *res cottidianae* are thus the elementary topics of the traditional academic curriculum. The work comprises what is obviously a version or elaboration of Gaius' *Institutes*, though the order of topics is altered. Our fragments show that book 1 dealt with manumission, from which it may be inferred that it covered much the same ground as book 1 of the *Institutes*, namely persons *in potestate manu mancipiove* and *tutela*. Book 2 began, like *Inst.* 2, with property, but went on to contracts. Book 3 began with delicts (*Inst.* 3. 88–225); inheritance (*Inst.* 2. 97–3. 87) must have followed. The text of the *Institutes* is sometimes reduced, sometimes amplified; thus, under the real contract, *commodatum*, *depositum*, and *pignus*, which, as already observed,[6] are absent from the *Institutes*, follow *mutuum*.[7] It may be that the whole work, by which we mean the first three books,[8] belongs to the beginning of the post-classical period (the end of the third century),[9] but it may be that it represents lecture-notes[10] composed, if not by Gaius himself, at any rate by some law teacher of the classical period, though not by a jurist of the front rank, and in places revised in post-classical times.[11] Our evidence makes it impossible to be more precise.

[1] On what follows: Göschen, *Z. f. Geschichtl. R.W.* i (1815), 54 ff.; Buchholtz, *Hugos Civilist. Magazin*, vi (1830), 228 ff.; Dirksen, *Hinterlassene Schr.* ii. 397; Krüger, *Quellen*, 203, 210; Albertario, *Rend. Lomb.* lix (1926), 409 ff. (*Studi*, iii. 95 ff.); Arangio-Ruiz, *Mél. Cornil*, i (1926), 93; *St. Bonfante*, i (1930), 493 ff., 509; Felgenträger, *Symb. Frib.* 365; Lenel, *Pal.* i. 251.

[2] See Note Z, p. 341.

[3] The verses containing the Pythagorean ethics were called χρυσᾶ ἔπη by Jamblichus. Cf. *Anthol. lyr.*, ed. Diehl (ed. 2), ii. 87; Schmid-Stählin, *Gesch. d. griech. Lit.* i (1929), 741. Lucret. 3. 12: *aurea dicta* (Epicuri). *Thes.* 1. 1491. 61 f.

[4] Still held by Kniep, *Der Rechtsgelehrte Gaius*, 104. But the *specificatio* of another's materials, or writing and painting on his property (*D.* 41. 1. 7. 7; 9. 1), were not daily occurrences even at Rome.

[5] *Thes.* 4. 1090, 48 f.

[6] Above, p. 162.

[7] *D.* (44. 7) 1.

[8] On books 4–7 see immediately below.

[9] And in the western Empire, not, as is often hastily assumed, at Byzantium. See above, p. 142.

[10] Justinian calls the work *commentarii*. See above, p. 160, n. 1.

[11] In the western Empire.

We must explain why so far we have accounted for only three of the seven books of the *Res cottidianae*. Book 2 cannot like *Inst.* 2 have reached the law of inheritance, for it contained, besides the law of property (at somewhat greater length than in *Inst.* 2), the law of contracts. Delicts must have come next; all the *Digest* fragments from book 3 are on that subject. But delicts cannot have occupied the whole of book 3; hence at least part of the law of inheritance must have been in that book, after the law of delicts, in contrast to the order of the *Institutes*. Now part of book 3 and the whole of books 4–7 would be far too much for inheritance and actions, assuming the exposition to have been on the same scale as in the rest of the work. One is thus driven to the conclusion, already suggested by Mommsen,[1] that the *Res cottidianae* were a composite work, of which the first three books were a version of Gaius' *Institutes* carried up to the end of the law of inheritance, but omitting the law of actions. The remaining four books were just Gaius' *Institutes*. The *Digest* excerpts from books 1–3 are inscribed as coming from this composite work, but those from books 4–7 are inscribed as coming from the *Institutes*, because copies of that work independent of the composite work were still in use in the law schools and were in the hands of the compilers.

Further research into the questions of origin and transmission must take the form of a critical examination of the fragments considered as a whole; the study of individual passages can throw no light. Three problems must be distinguished more clearly than they have been hitherto, namely (1) how much of our texts is due to the compilers, (2) how much is in all probability post-classical (western) work, and (3) what passages can, in spite of their falling below the highest classical standards, be supposed to represent the lecture-notes of a classical law teacher of the second rank?

4. *Pomponius'*[2] elementary work, called by the compilers briefly *Enchiridion* (the exact title is unknown),[3] is absolutely unique. Our knowledge of it depends entirely on the few excerpts in the *Digest*. It appears to have been in only two books and to have given a sketch, necessarily summary and elementary, of private law. Pomponius evidently shared with his contemporary and fellow law teacher Gaius[4] an interest in legal history, for the

[1] In Krüger's edition of Gaius, p. lxviii; but the view cannot be accepted as there expressed.

[2] Osann, *Pomponii de origine iuris fragm.* (1848); Sanio, *Varroniana in den Schriften d. röm. Juristen* (1867); Schulin, *Ad Pandectarum tit. de orig. iur. comment.* (1876); Joers, 8 ff.; Lenel, *Pal.* ii. 44; Ebrard, *Z* xlvi (1925), 117 ff.; Felgenträger, *Symb. Frib.* 369.

[3] The full title must have been *enchiridion iuris civilis* or the like. On *enchiridion* as a book-title (i.e. *brevis libellus, manuale*) see *Thes.* 5. 2. 557. 52; Liddell and Scott, s.v. *ἐγχειρέω*; Gell. *praef.* s. 7.

[4] Above, p. 134.

work began with an historical introduction in three parts: I. *De origine et processu iuris*,[1] on the sources from prehistoric times to that of Pomponius, II. *De magistratuum nominibus et origine*,[2] and III. *De auctorum successione*,[3] a survey of the jurists from the beginning of the Republic up to Julian, excluding mere orators and jurists whose literary activity had been confined to *ius sacrum* and *ius publicum*. Literary precursors of parts I and II are the republican works on public law, Varro's antiquarian works, in particular his lost *Libri xv de iure civili*,[4] and Capito's *Coniectanea*.[5] Part III belongs to another literary genus, that of the διαδοχαί, which were lists of the heads and members of the various schools, particularly the philosophical, accompanied by more or less extensive accounts of their lives and writings.[6] Of this type of literature the outstanding Roman examples are Cicero's *Brutus*, which gives a survey of the Roman orators, and Suetonius' *De rhetoribus et grammaticis*;[7] similar sketches are given by Vitruvius, Cornelius Celsus, and Quintilian.[8] No exact opinion can be formed of Pomponius' sources of information. Possibly, indeed probably, he drew on Varro's *De iure civili*;[9] directly or indirectly he also used Cicero's *Brutus*, *De oratore*, and *De re publica*.[10] This historical introduction belongs to a literary genus previously unknown in Roman legal literature, Roman legal science being held not to include legal history.[11] It is therefore written not in the true juristic style affected by the classical jurists,[12] but rather in that of Cicero and of historical works,[13] especially those on literary history.[14]

[1] *D.* (1. 2) 2 pr. 13. [2] *D.* (1. 2) 2. 13.
[3] *D.* (1. 2) 2. 13, 35 f. [4] Schanz–Hosius, i, ss. 182 ff., 189.
[5] Above, p. 158; below, p. 227.
[6] Schmid–Stählin, *Gesch. d. griech. Lit.* i (1929), 724; F. Leo, *Die griech.-röm. Biographie* (1901), 35 ff.; *P. Oxy.* x. 1241 (list of Alexandrian librarians); Schubart, *Papyruskunde*, 168.
[7] In general the literature *De illustribus viris*: Schanz–Hosius, i, s. 126; Leo, op. cit. ii ff.
[8] Vitruv. 2. 1. 5 f.; Celsus, *De medicina, praef.*; Quint. *Inst.* 3. 1.
[9] So Sanio, *Varroniana*, but his arguments are not convincing. But more recently Täubler, *Untersuch. z. Gesch. des Decemvirats u. Zwölftafeln* (Hist. St. herausg. v. Ebering, 148, 1921), p. 40, takes the same view.
[10] A careful comparison of Cic. *De re pub.* 2. 36. 61 with Pomp. *D.* (1. 2) 2. 24 shows that Pomponius did not obtain the idea of making the power of legislation a part of the *summum imperium* from Cicero: Täubler (op. cit., last note) 40.
[11] Above, p. 134. [12] Beseler, *SD* i (1935), 280.
[13] *D.* (1. 2) 2. 24: '. . . captumque amore virginis omne fas ac nefas miscuisse. . . .' Again, s. 46: 'Tubero, qui Ofilio operam dedit' compared with Cic. *Brut.* 42. 154: 'Cumque discendi causa duobus peritissimis operam dedisset, L. Lucilio Balbo C. Aquilio Gallo. . . .'
[14] The nearest parallel is the style of Suetonius, *De rhet. et gramm.* Leo, op. cit. 14.

After Pomponius, perhaps before the end of the classical period, this already brief work was epitomized in a single book; later still this epitome was enlarged, perhaps from the original complete work. The compilers possessed both the original and the epitome,[1] and took a few excerpts from each.[2] Unfortunately it was from the epitome that they took the historical introduction; the fuller version probably seemed too prolix. The extensive fragment in the second title of the *Digest* (*D.* 1. 2, *De origine iuris et omnium magistratuum et successione prudentium*, *L.* 2) is one of the most corrupt texts in the *Digest*, being full of scribal errors, careless abbreviations, and intruded glosses.[3] The chief blame perhaps lies with the author of the epitome, since the compilers, though they may have made matters worse by further abridgements, cannot conceivably be responsible for the additions which disfigure the text. Clearly the copyists of classical or post-classical times took very little trouble about the text of this historical part, which for jurists was an *ἀλλότριον*.

Pomponius found no imitators, no one even to carry his list of jurists beyond Julian. Yet this excerpt, for all its faults, remains of great value, provided that one bears these faults constantly in mind.[4] Much of it is based on excellent sources. One writer has indeed denied that Pomponius wrote the *Enchiridion* or, at any rate, its historical introduction; he would attribute the work to some post-classical law teacher.[5] But this view (a veritable will o' the wisp)[6] is disposed of by the simple fact that the list of jurists ends with Julian, that is at Pomponius' own date. A post-classical writer would have been bound to make some mention of Gaius, Scaevola, Papinian, Paul, and Ulpian, and the compilers would have been only too pleased to preserve any information about the men from whose works the bulk of the *Digest* extracts are derived. The conclusion is inescapable that our fragments, corrupt as they are, must come ultimately from Pomponius. Of the merits of his original work we have not the materials for

[1] The *Index Flor.* xi mentions only the larger work: *ἐγχειριδίου βιβλία δύο*.

[2] From the *libri duo D.* (38. 10) 8; (26. 1) 13; (46. 3) 107. From the *liber sing. D.* (1. 1) 2; (1. 2) 2; (50. 16) 239. Lenel, *Pal.* ii. 44.

[3] See the notes in Lenel, *Pal.* ii. 44, and the literature noted in the *Index Interp.* and the index-volume to *Z* i–l.

[4] The text should therefore not be interpreted as a correct classical text, nor its exact phraseology be unduly relied on: a point often overlooked.

[5] So Ebrard, *Z* xlv (1925), 120: 'Traktat der spätantiken vorjustinianischen Gerichtsrhetorik.'

[6] Cf. v. Wilamowitz-Möllendorff, *Einl. in d. griech. Tragödie*, 245 ff. Ebrard considers the *Institutes* of Gaius also to be a product of post-classical jurisprudence.

judging, but so industrious a man as Pomponius cannot have produced anything thoroughly worthless. It was in any case a pioneer work in juristic literature, but it remained an isolated phenomenon, legal history being a meal that Roman jurisprudence could not swallow.[1]

The *Liber singularis enchiridii* must be an epitome made by a post-classical *anonymus*.[2] Not that it never happened in antiquity that an author abridged or expanded his own earlier work, but simply because the work is too bad to be either an epitome executed by Pomponius or a first edition of the book. Moreover, it is hardly conceivable that he should have abridged what was already a very brief outline. It is, however, possible that the *libri duo enchiridii* were, like the *liber singularis*, only an epitome of a larger work, and that Pomponius' original *Enchiridion* was in more than two books; if so, it did not reach the compilers.

A fresh edition and a critical analysis of this interesting fragment (*D.* 1. 2. 2) would be welcome. The edition could aim only at establishing the text which the compilers had before them, obvious scribal errors being corrected; the text of the fuller original is no longer recoverable. The aim of the critical analysis would be to distinguish the strata of the text,[3] and to determine what sources were directly or indirectly used and (equally important) what sources were not used.[4] In dealing with the questions of authenticity and interpolation the fashionable linguistic tests will be out of place, because this historical *opusculum* does not belong to the juristic literary genus to which these tests are applicable: to each genus its own style.[5]

5. Coming to the Severan period, we must mention first three short works, the *Institutiones* of Paul, Callistratus, and Ulpian, in two, three, and two books respectively. The authenticity of the *Institutiones* of Paul and Ulpian may well be doubted, but our evidence does not enable the doubts to be resolved. It is certainly difficult to believe that these two great and high-placed jurists wrote short and necessarily very elementary school-books of this character, or that, if they did so, their books would not

[1] Above, p. 134.

[2] Pernice (at p. 15 of a lecture programme, summer 1899): 'The sections are of various value; the second contains a number of gross errors along with undoubtedly correct information. Implicit trust therefore cannot be placed in the information given by the other sections, where we are not in a position in all cases to check it. The exposition is often, though by no means always, confused and in very bad Latin. The fragment is perhaps only a defective extract from a work by Pomponius.'

[3] An example above, p. 115.

[4] See, e.g., Täubler, op. cit. 40.

[5] Above, p. 169.

have displaced Gaius' out-of-date and defective work in the law schools.[1]

Paul's *Institutiones*. Our remains consist of (1) excerpts, of which there are three in the *Digest*;[2] any that there may be in Justinian's *Institutes* are unidentifiable; (2) a small fragment in Boethius' commentary on Cicero's *Topica*; and (3) three fragments in an unpublished commentary on Cicero's *De inventione*, from which perhaps more may prove to be obtainable.[3]

Of Callistratus' *Institutiones* we have only the five short excerpts in the *Digest*.[4]

Of Ulpian's[5] we have (1) a few fragments in the *Digest*, some of which recur in the *Institutes*; (2) those preserved in *Coll.* 16. 5–9; (3) Vienna fragments of a fifth- or sixth-century parchment codex;[6] and (4) a fragment in Boethius' above-mentioned commentary, which, however, does not preserve the original wording.

6. The *Institutiones* of Marcian[7] are a strange work. We know it only from the fragments incorporated in the *Digest* and *Institutes*, but these are sufficiently numerous to allow of a clear picture of the work being drawn. It embodies two distinct writings: Marcian's uncompleted preparatory studies for a book of *Institutes*, and his preparatory studies for a systematic *Digest*. They were composed under Caracalla or shortly after his death;[8] the date of publication (not, of course, by Marcian himself) is unknown. The work is never cited, not even by Ulpian.[9] It is characterized by the abundance of its citations of imperial rescripts, showing that its author must have had access to the imperial archives.

[1] The conjecture that Ulpian's *Institutes* are a later compilation from other works was already advanced by Hugo, *Lehrb. d. Gesch. d. röm. Rechts* (ed. 11, 1832), ii. 849. This would mean western post-classical work, not Byzantine, as Steinwenter, *St. Bonfante*, ii. 432 ff., and others assume. See further Solazzi, 'Glosse a Gaio I', *St. Riccobono*, i. 93.

[2] *Pal.* i. 111–14; Berger, *PW* x. 726.

[3] The fragment from Boethius will be found in *Collect. libr. iuris anteiust.* ii. 160; the same and no. 3 in Seckel–Kübler, ii. 162, and in Girard–Senn, *Textes*, 453; also in *FIRA* ii (1940), 421. On the *Digest* passages: *Index Interp.*

[4] Lenel, *Pal.* i. 97; v. Kotz, *PW* Suppl. iii. 228.

[5] *Pal.* ii. 928; Joers, *PW* v. 1447; Krüger, *Kritische Versuche* (1870), should be rejected.

[6] These can be found in the collections cited in the last note but two. Facsimile in Krüger, *Krit. Versuche*. On the *Digest* passages: *Index Interp.*; also Steinwenter, *St. Bonfante*, ii. 433. On the *Fragm. Vindobon.*: Solazzi, *St. Bonfante*, i. 93.

[7] Lenel, *Pal.* i. 652 ff.; Pernice, *Festg. f. Dernburg* (1900), 3 ff.; Ferrini, ii. 277 ff., 285 ff.; Buckland, *St. Riccobono*, i. 275 ff.; Krüger, *Quellen*, 251; Joers, *PW* i. 524.

[8] Fitting, *Alter u. Folge*, 122. The rescript in *D.* (37. 14) 5. 1 may be a later addition.

[9] Marcian's *Institutes* seem to be cited by Paul, *D.* (7. 9) 8 pr., and by Ulpian, *D.* (28. 1) 5. But either these citations have been added later, or the name is corrupt. Krüger, 251; Fitting, *Alter*, 118; Ferrini, ii. 317, n. 1; Albertario, *Bull.* xxxiii (1923), 26, n. 1.

Books 1 and 2 dealt with the sources and the law of persons, including marriage and *tutela*; book 3 with the law of property; the next six books gave a relatively full exposition of the law of inheritance; books 10–14 treated of various *leges* and the *iudicia publica*, precisely like the second part of the so-called *Digesta*, the system of which we shall explain below. The contents of the remaining books 15 and 16 cannot be determined. There is no trace of any treatment of the law of obligations. It is clear that this *opus* is neither 'something halfway between a compendium for novices and a commentary'[1] nor 'a book which junior imperial officials might learn their law from and use for reference',[2] but is just a literary monstrosity. If we are right to credit the classical writers with a sense of language and style, we can safely claim that their sense of form would not have permitted the publication of such a work as this; in fact, Marcian himself cannot have published it. Books 1–9 seem clearly to have been composed in preparation for an *Institutiones*; it is unfinished work, since the law of obligations is absent and the treatment of the law of inheritance is far too long and would have had to be compressed later. Books 10–14 are beyond doubt the second part of a systematic *Digesta*, unaccompanied by the first part.

'The style of the exposition is always elegant and sometimes elevated; the composition strikes me as exceptionally pure and carefully executed': so wrote Pernice (1900). Only a close study of the whole of the remains could decide whether this verdict is justified.

(v)

Closely akin to the isagogic works we have just described is a group of writings entitled *regulae*, *definitiones*, *differentiae*, or *sententiae*. In juristic usage *regulae* and *definitiones* are synonymous, meaning, like ὅροι,[3] abstract statements of law, juristic principles, in antithesis to case law.[4] *Differentia* means the same as διαιρέσις.[5] By *sententiae*, as the title of a book, it is indicated that its contents are in the nature of maxims.[6] The common

[1] So Krüger, 251, a thoroughly opportunist way out of the difficulty.

[2] So Pernice, *Festg. f. Dernburg*, 3 ff. Ferrini's conjecture, that we are dealing with a work intended for jurists in the provinces, is unproven and unprovable.

[3] See, e.g., the pseudo-Platonic ὅροι, *Plat. Opp.*, ed. Burnet, vol. v; *Pseudo-Galen.* (ed. Kühn), xix. 346: ὅροι ἰατρικοί; v. Arnim, *Fragm. Stoic. Veter.* i. 140. 8; ii. 8. 33–9. 6; iii. 247. 28, on book-titles περὶ ὅρων. We have already (above, p. 94) spoken of the *liber sing.* ὅρων doubtfully attributed to Q. Mucius.

[4] Krüger, *Quellen*, 141, n. 11, and above, p. 66.

[5] Book-titles περὶ διαιρέσεων, see v. Arnim, *Fragm. Stoic. Veter.* ii. 9, and above, p. 63. On rhetor. *differentiae* Goetz, *PW* v. 481.

[6] *Ad Herenn.* 4. 17. 24; Quint. 8. 5. 1; Isid. *Etym.* 2. 11. Cf., e.g., Appius Claudius' *Sententiae* (Schanz–Hosius, i, s. 20), Cato the Elder's *Ad filium* (Schanz–Hosius, i, s. 66), and the *sententiae Varronis* (Schanz–Hosius, i, s. 194, p. 577).

characteristic of works of this group is that they contain abstract statements of principle, approximating at times to the rules of school grammar. Case law is absent or very much in the background; they are not commentaries; they embrace the whole field of private law, in part also that of criminal law. Many, but not all, of them are isagogic in character and resemble the *Institutiones* in form and contents. Not all of them are authentic, for the post-classical age sorely needed works of this kind and in some cases manufactured them out of classical materials and labelled them with the names of classical authors. But so little remains of many of these writings that conclusions cannot be drawn with certainty.[1]

1. Neratius Priscus, *Regularum libri xv.*[2] The *Digest* yields only seven fragments. The work seems authentic, but the copy used by the compilers contained post-classical glosses.

2. Pomponius, *Regularum liber singularis*. Authenticity doubtful. One passage of the *Regulae* is taken almost word for word from Pomponius *Ad Plautium* (*D.* 44. 7. 24 compared with 12. 1. 12).[3] It may be that the *Regulae* were collected from Pomponius' writings by a later writer. The fact that the work contains *notae* by Marcellus does not exclude this possibility, for these *notae* may also have been inserted later from Marcellus' writings. Our remains are unfortunately no more than the seven fragments in the *Digest*.[4]

3. Gaius, *Regularum libri iii*, and *Regularum liber singularis*. The compilers, who possessed both works,[5] took two fragments from the first and only one from the second. We find neither anywhere else; they were not used for the *l. Romana Burgundionum*.[6] Their authenticity is doubtful, especially that of the *liber singularis*. The single fragment from it (*D.* 1. 7. 21) is certainly spurious, though not invented by the compilers.[7]

4. Cervidius Scaevola, *Regularum libri iv*. Only the *Digest* extracts

[1] See the fragments in Lenel's *Pal.*

[2] Grosso, 'Congetture di glossemi pregiustinianei nei frammenti dei Libri regularum di Nerazio', &c., *Atti Torino*, lxvii (1932), 155 ff.

[3] On the question of the origins of the interpolations in these texts: Beseler, *Z* xlvii (1927), 364.

[4] It is quite uncertain whether the small fragment given by *Collect. Libr.* ii. 148 and the other collections of authors comes from the *libri regularum*. Cf. Maschi, *La concezione naturalistica*, &c. (1937), 78.

[5] Though the *Index Flor.* has only: 'XX *Γαΐου* regularion *βιβλίον ἕν.*'

[6] *Leges Burgundionum* (ed. De Salis, 1892), p. 169. Krüger, 360, is mistaken.

[7] *Adrogatio* of women was not known to Gaius (1. 101); it dates from Diocletian at the earliest, perhaps from even later: Castelli, 'Intorno all' origine dell' arrogazione delle donne', *Rend. Lomb.* xlviii (1915), *Scritti giur.* 165 ff. The fragment cannot come from the compilers, since they would have added a short phrase to the previous fragment, and would not have manufactured a Gaian fragment.

survive. If the work is authentic, it seems to contain later additions. Did any classical *liber regularum* really contain the text of the *l. Iulia maiestatis*?[1]

5. The so-called *Fragmentum Dositheanum*.[2] In a late Roman collection of passages for translation from Latin into Greek and from Greek into Latin we find amongst other things a juristic passage dealing with *manumissio*. The Latin text, as commonly in such cases,[3] is written one word below the other, in a vertical column, and the Greek translation by its side in a similar column. The Latin is in part not the original text but a retranslation from the Greek. The collection has nothing to do with the fourth-century grammarian, *magister* Dositheus, and the traditional name of the fragment is therefore misleading. The Latin text is very corrupt and its reconstruction uncertain. The anonymous collector drew on some classical elementary work (*regulae*[4] or *institutiones*) or on an epitome of such a work; the classical work itself seems to have come from as early as the second century; its text had already been corrupted by glosses.[5] The modern juristic editions of this fragment[6] are unsatisfactory because they do not give the Greek text.[7]

6. Papinianus, *Definitionum libri ii*.[8] The work is known only from excerpts in the *Digest* and a passage of the *Collatio*, the latter a later addition.[9] If Papinian really wrote a book of *Definitiones*, it has been defaced by a later hand, for many of the passages exhibit the same bombastic, rhetorical, and thoroughly unlawyer-like style which we find repeatedly in Papinian's *Quaestiones*,[10] a style for which neither Papinian nor Justinian's compilers can be responsible. The post-classical parentage of the work is shown by other signs also.[11]

[1] *D.* (48. 4) 4 pr. [2] Goetz, *PW* v. 1606; Joers, *PW* v. 1603.

[3] Vergil also underwent similar revision: Publications de la Soc. Fouad I de Papyrologie. Textes et documents, III. *Les Papyrus Fouad I* (1939), no. 5, and similar texts, p. 8. [4] *Fr. Dos.* 3: 'regulas enim exsequenti mihi. . . .'

[5] Schulz, *Z* xlviii (1928), 283.

[6] Krüger, *Collect. Libr.* ii. 149; Seckel–Kübler, i. 419; Girard–Senn, *Textes*, 505; *FIRA* ii (1940), 615.

[7] The Greek text is in Böcking's, &c., *Corpus iur. Rom. anteiust.* i (1841), 213, and in Götz, *Corpus glossariorum lat.* iii (1882).

[8] Costa, *Papiniano*, i (1894), 233; Joers, *PW* i. 574.

[9] *Coll.* 2. 3; Schulz, *ACI Roma*, ii. 13. [10] Below, p. 234.

[11] (1) *D.* (23. 4) 27: cf. Levy, *Ehescheidung* (1925), 14, n. 4, contemplating, as was then the practice, only Byzantine interpolations. (2) *D.* 2. 15. 5: cf. *Index Interp.* (3) *D.* (23. 2) 63: the sentence *quae species* . . . est is too compressed, and the usage of *potentatus* unexampled in juristic Latin. Cf. Beseler, *Beitr.* v. 39. (4) *Coll.* 2. 3, the only extract in that work, is unclassical: Solazzi, 'Per la data della Collatio', *Atti Napoli*, lvii (1936), 13, n. 5 (offprint).

7. Paulus, *Regularum libri vii* and *Regularum liber singularis.*[1] Only *Digest* fragments. The *liber singularis* must be a post-classical abridgement of the larger work.

8. Paulus, *Sententiarum ad filium libri v.*[2] Of all the works in the present group this was the most influential. It is arranged on the system of the classical *Digesta,*[3] that is, in two parts, of which the first follows the Edictal order, with appendixes and excursus added in the traditional manner, and the second deals with *leges, senatusconsulta,* and imperial constitutions. But it was a pocket-*Digesta,* so short relatively to the matters treated of that, though not pronouncedly educational, it was necessarily elementary and for that very reason acquired speedy popularity with practitioners.[4] Whether Paul was its author is doubtful. The prevailing modern opinion is that he was not, but that it was composed chiefly from Paul's writings by some post-classical jurist.[5] This is likely enough, but in the present state of the evidence unprovable. It is, in any case, of no great importance, because, even if Paul did write some such work, it was radically revised early in the post-classical period (in the third century), and the revised work superseded the original so completely that it alone survived. It can no longer be disputed that our present text exhibits, both in form and substance, clear signs of a post-classical, though not Byzantine or Visigothic, origin.

As early as the third century it was used and valued as a convenient handbook by practitioners, though even then there were

[1] Berger, *PW* x. 729.

[2] See in general: ibid. 731 ff. Also: Max Conrat, *Der westgothische Paulus* (offprint Amsterdam Ak. viii, no. 4, 1907); Beseler, *Das Edictum de eo quod certo loco* (1907), 2, n. 1; *Beitr.* i (1910), 99; Schulz, *Einführung* (1916), 38; *Z* xxxviii (1917), 118; xliii (1922), 203; xlvii (1927), 39; Lauria, *Ricerche su Pauli Sententiarum Libri* (Annali Macerata, vi, 1930); Levy, *Z* l (1930), 272; Scherillo, 'L'ordinamento delle Sentt. di Paolo', *St. Riccobono,* i (1931), 41; Niedermeyer, *St. Bonfante,* ii. 399; *ACI Roma,* i (1934), 367; Buckland, *LQR* lx (1944), 361; lxi (1945), 34; Volterra, *Indice delle Glosse,* &c., 1 (extr. *RSDI* viii, 1935); *ACI 1933, Bologna,* i. 35 ff. E. Levy, *Pauli Sententiae* (1945).

[3] See below, p. 226.

[4] The title included the words *ad filium*: Krüger, *Collect. libr.* ii. 45; their omission by the *Index Flor.* xxv is insignificant. Inside the books there was division into titles, with headings, and at least in some editions titles and *sententiae* were numbered, as we see from *Consult.* 6. 5 and 6. 6, and the Antinoite gloss on Gaius, 3. 173: '*ὡς ὁ* Paul. *βιβλίῳ β' τίτλῳ κ̄θ̄ ἐν τῇ ν'* sententiarum', i.e. bk. 2, tit. 19, *sent.* 50.

[5] Even the cautious Mitteis wrote (*Antike Rechtsgesch. u. romanistisches Rechtsstudium,* Vienna, 1917, offprint p. 16; Ital. trans. Riccobono, *Ann. Palermo,* xii (1928), 491): 'To-day no one doubts that Paul's *Sententiae* are the work of a late and unskilful compiler, containing a veritable flood of interpolations.' Recently Volterra, *ACI 1933, Bologna,* i. 161 ff., has dissented, but his arguments are unconvincing. On Paul's supposed self-citation in the *Sententiae* (*D.* 38. 10. 9) see below, p. 254.

jurists who rejected it as spurious. But the central bureaucracy declared in favour of its authenticity and value. In an enactment of 327 or 328[1] Constantine extolled its clarity and legal correctitude and set at rest all doubt as to its authenticity and adducibility before the law courts. Moreover, the *Law of Citations* of 426, not content with confirming the authority of *scripta universa Pauli*, affirmed once more specifically the validity of the *Sententiae*[2]—evidently for the confutation of past and present doubts. The authority of the work being thus finally established, we can see that it was widely used. It is cited by a marginal gloss in the Antinoite Gaius[3] and by the *interpretatio* of the *Codex Theodosianus*.[4] It was used by the Byzantines for the *Digest*, though not, it seems, for the *Institutes*.[5] In what had formerly been the western Empire the compilers of the Visigothic *Breviarium* made an epitome of it, which they appended, along with an *interpretatio*, to the *Breviarium*.[6] In France, where the *Breviarium* counted as an authority, though not as statute,[7] later editors added further passages from the complete *Sententiae* by inserting them both into the text of the epitome[8] and in appendix.[9] The *Sententiae* also contributed to the *Lex Romana Burgundionum* and to the *Edictum Theodorici*.[10] Besides the epitome in the *Breviarium*, which goes by the name of the Visigothic Paul, there survive only the fragments contained in the above-mentioned collections.[11]

At the beginning of the twentieth century the attitude of scholars in regard to our text of the *Sententiae* was still highly conservative. It was not doubted that substantially it was a genuine Pauline work. However, P. Krüger's edition of 1878 had recognized that it contained isolated Visigothic interpolations,[12] a view accepted, though grudgingly, by Mommsen.[13] In 1895

[1] *C. Th.* (1. 4) 2. Date: Levy, *Z* l (1930), 293.

[2] *C. Th.* (1. 4) 3, from which Conrat (*Westgoth. Paulus*, 7, n. 16) inferred that doubts as to the authenticity of the text existed.

[3] Above, p. 176, n. 4.

[4] *Interpretatio ad C. Th.* (3. 13) 2.

[5] *Digest*: Lenel, *Pal.* i. 1297. *Institutes*: Zocco-Rosa, *Ann. Catania*, xi/xii (1911), 279.

[6] On the *Breviarium*: below, p. 302.

[7] Conrat, *Gesch. d. Quellen u. Lit. d. röm. Rechts im früheren Mittelalter*, i (1891), 41 ff.

[8] Ibid. 143.

[9] Ibid. 141; Krüger, *Collect. libr.* iii. 249 ff.

[10] List of the passages in the *Lex Burg.* in De Salis's edition, p. 169; on the *Edictum* see Bluhme's edition. Cf. *FIRA* 2. 683. 713.

[11] See Note AA, p. 341.

[12] *Praef.* 42.

[13] *Strafr.* 480, n. 1; 497, n. 2; 801, n. 1. These passages bear out Mitteis's account (*Antike Rechtsgesch.* &c., above, p. 176, n. 5) of a conversation in which Mommsen pronounced: 'Interpolations in Paul's *Sentences*? No, there are none.' Our citations show that Mommsen's view was not quite so absolute, but he certainly considered the text to be in all essentials classical.

Pernice[1] stated, as a fact long since observed and no longer disputable, that our epitome of the *Sententiae* no longer recognized the formulary procedure, from which he inferred that the classical text had undergone a thorough revision; but he left all further questions at large. It was in 1907 that Max Conrat propounded the correct view,[2] that the Visigoths, though they cut down their original severely, made no other substantial change,[3] but that this original was itself 'not infrequently' of post-classical manufacture. At first Conrat's book passed unnoticed.[4] Thus Seckel and Kübler[5] were apparently unaware of it when, in their edition of 1911, they maintained that the Visigothic epitome was far more interpolated than had previously been supposed, but attributed the interpolations to the Visigoths. Modern criticism of the *Sententiae* really begins with Gerhard Beseler, whose view that the work was a post-classical collection from Paul's *opera* has met with ever-growing acceptance. Again and again studies of special questions have confirmed the unclassical character of our *Sententiae*.[6] Criticism has not, however, said its last word,[7] since it has not been applied to the evidence as a whole. Conrat's book, apart from its being primarily concerned with the *interpretatio*, is out of date. Future inquirers will do well to leave the question of authorship aside. Whether Paul wrote *Sententiae* which later, in the third century, underwent a thorough revision in the western Empire, or whether the *Sententiae* were a compilation made in the western Empire out of Pauline materials by some post-classical writer, does not greatly matter to us.[8] Similarly, pseudo-philological reconstruction of the 'authentic' text ought to be abandoned.[9] Either Paul wrote the original *Sententiae*, in which case the post-classical revision of his text has rendered it impossible to reconstruct his work with any sort of certainty, or else the *Sententiae* were from the beginning a post-classical compilation of Pauline materials, in which case, though the attempt may reasonably be made to reconstruct the (post-classical) text of the work,

[1] *Labeo*, ii. 1 (1895), 281.

[2] *Der westgoth. Paulus*, 7 ff.; misunderstood by Kantorowicz, *Z* xxxiii (1912), 460.

[3] An exception: Conrat, *Z* xxxiv (1913), 53. But see Levy, *Paulus* 50.

[4] Kantorowicz, *Z* xxxiii. 465.

[5] *Praef.* 3.

[6] Studies up till 1935 are noted at the passages in question in Volterra's *Indice* (above, p. 176, n. 2).

[7] One has to seek out the monographs, e.g. De Dominicis, 'L'origine postclassica del s. 12 P. Sent. V, 4' (*Ann. Ferrara*, 1937).

[8] That our text existed as early as the end of the third century is shown by Constantine's enactment of 327 or 328. Above, p. 177; Levy, *Z* l (1930), 293.

[9] Above, p. 144.

we shall not thereby recover the original Pauline texts. The following are the questions on which research should be concentrated: (1) how serious are the Byzantine interpolations? and (2) how far was the version of the work upon which the Byzantines and Visigoths worked unclassical in form and substance, and what light do the unclassical elements in it throw on the legal history of the western or eastern Empire in the fourth and fifth centuries? From the Visigoths the only sort of alterations that one should expect are abbreviations.

Neither P. Krüger's[1] nor Seckel and Kübler's[2] edition is satisfactory. The edition that is needed should confine itself to presenting the text in its various phases of development: if a passage exists in more than one version, the various versions should be exhibited side by side.[3] Nor should passages coming from Byzantine sources be omitted, since any light on the methods of the compilers is of value. Lastly, the edition must include the Visigothic *interpretatio*, which Krüger omitted, as, less excusably in view of the example set by Mommsen in his edition of the *Codex Theodosianus*, did Seckel and Kübler.[4] What we demand from an edition is a clear conspectus of the textual tradition. All further questions can be left to subsequent criticism, including such reconstruction as may be possible of the text upon which the Visigoths and Byzantines worked, in other words the text current in the fourth and fifth centuries.

9. Paulus, *Manualium libri iii*.[5] This work closely resembled the *Sententiae*; like it, it was a pocket *Digesta*, only sensibly shorter—by two books. Part 1 was based on the Edictal order; part 2 dealt with individual *leges*, *senatusconsulta*, and imperial constitutions. Fortunately fifteen fragments of it are preserved in the *Fragmenta Vaticana*,[6] independently of those in the *Digest*, and these show that by the date of the composition of the *F.V.* numerous unclassical elements had been added to the work. The basis, however, is classical. Whether Paul never wrote *Manualia*, but the work is just a post-classical compilation made from Paul's works,[7] or whether an authentic *Manualia* by Paul was merely revised in post-classical times, can be decided no more than the similar question as to the *Sententiae*, and is of equally little interest.

[1] *Collect. libr.* 2. [2] *Jurispr. anteiust.* 2.

[3] Mommsen's edition of the *Theodosianus* is a model, but it has not yet been followed by the lawyers.

[4] At present the *Interpretatio* must be sought in Haenel's old and clumsy edition of the *Breviarium*: *Lex Romana Visigothorum* (1849).

[5] Berger, *PW* x. 726. On *manuale* as the title of a book see *Thes.* 8. 335; Beseler, *Bull.* xlv (1938), 184. [6] *F.V.* 45–58.

[7] Beseler, l.c., thinks that the *libri manuales* were a post-classical epitome of the *libri ad edictum*.

Very clear examples of post-classical revision can be seen in *F.V.*[1] They afford an instructive parallel to the *Sententiae.*

10. Licinnius Rufinus, *Regularum libri xii* or *xiii.*[2] We possess only a few *Digest* fragments, the unclassical elements in which may well be due to the Byzantines.[3]

11. Ulpianus, *Regularum libri vii*[4] and *Regularum liber singularis.* The few *Digest* fragments,[5] which are all that we possess of the *libri vii,* do not enable a judgment of the work as a whole to be formed. But the famous definition,[6] 'Lata culpa est nimia neglegentia, id est non intellegere quod omnes intellegunt', can hardly have been devised by the compilers of the *Digest.* Since it is certainly unclassical,[7] it proves that our text of this work contains post-classical elements.

The *liber singularis.*[8] More is known of this: a Vatican manuscript preserves a large portion of an epitome of it made in the first half of the fourth century. It is a mere epitome which abbreviates, but does not otherwise alter, the text; consequently it gives a clear picture of the general scheme of the *liber singularis,* which was as follows:

Introduction: The sources of law.

I. Law of persons: (1) Manumission. (2) Persons *in potestate manu mancipio.* The discussion of the law of marriage included the topics of *dos* and *donatio inter virum et uxorem.* (3) *Tutela* and *cura.* (4) *Lex Iulia et Papia Poppaea.*

II. Law of property: (1) Kinds of things. (2) Ownership.

[1] A few notes must suffice here. (1) *F.V.* 47 [*non-transferri*]. (2) *F.V.* 47*a* [*nec-tradatur*]. (3) *F.V.* 50. See Riccobono, *St. Perozzi,* 367, n. 1; *Ann. Palermo,* xii (1928), 569. (4) *F.V.* 55. See *Index Interp. ad D.* (45. 3) 26; Beseler, *T* x (1930), 234; *Bull.* xlv (1938), 184. (5) *F.V.* 57 [*si-legatis*]. (6) *F.V.* 49. See Riccobono, *St. Perozzi,* 367.

[2] *Index Flor.*: 'XXXV. regularion *βιβλία δεκαδύο.*' But the inscription of *D.* (42. 1) 34 mentions a book 13.

[3] *D.* (5. 1) 38 for certain, 40. 5. 16 probably—see *Index Interp.*

[4] Joers, *PW* v. 1448.

[5] Whether they were used by the compilers of the *Institutes* is doubtful; below, p. 305.

[6] *D.* (50. 16) 213. 2.

[7] Kunkel, *Z* xlv (1925), 315; *Röm. Recht.* s. 110, 3; Lenel, *Z* xxxviii (1917), 288; Mitteis, *RP* i. 333; Arangio-Ruiz, *Responsabilità contrattuale* (1933), 251 ff.

[8] Mommsen, *Schr.* ii. 47 ff.; Conrat, *Gesch. d. Quellen,* &c., i (1891), 85; *Pal.* ii. 1016; Joers, *PW* v. 1448; Arangio-Ruiz, *Bull.* xxx (1920/1), 178 ff.; xxxv (1927), 191 ff.; *PSI* 1182, p. 34 (*Frammenti di Gaio*); *Rev. Al Qanoun wal Iqtisad,* iv (1934), 65 ff.; Albertario, *Bull.* xxxii (1922), 73 ff. (*Studi,* v. 493 ff.); Buckland, *LQR* xxxviii (1922), 38 ff.; xl (1924), 185; liii (1937), 508 ff.; Niedermeyer, *Z* xlvi (1926), 486; *Atti Congr. internaz. 1933, Roma,* i. 369; Schulz, *Die Epitome Ulpiani des Cod. Vat. Reg. 1128* (1926); Lenel, *Z* xlvii (1927), 414; Felgenträger, *Symb. Frib.* 372; Volterra, *Indice delle glosse,* &c., ii, *RSDI* viii (1935).

III. Law of inheritance: (1) Wills. (*a*) *Hereditas* and *bonorum possessio*. (*b*) *Legata* and *fideicommissa*. (2) Intestacy.[1]
IV. Law of obligations.[2]
V. Law of actions.[3]

The author of the *liber singularis* was certainly not Ulpian but an unknown lawyer of the third or the beginning of the fourth century. His main source was the *Institutes* of Gaius in the form in which they have reached us.[4] He used other classical sources also, but our evidence only seldom enables us to identify them.[5] We cannot say whether the epitome superseded the full *liber singularis*, nor whether the three fragments in the *Collatio* and the two in the *Digest*[6] come from the full work or only from the epitome. The *Institutes* of Justinian appear to have made use of neither work.[7]

The epitome, which at my suggestion has come to be known as *Epitome Ulpiani*, figures in the unique manuscript, Vat. Reg. 1128,[8] as an appendix to the Visigothic *Breviarium*. Whoever first made this connexion possessed only an incomplete copy of the *Epitome*, from which the beginning, the law of obligations, and the law of actions were missing. What we have is thus only a fragment of the *Epitome*. It bears no title, but at the beginning is a list of the chapter-titles, with the superscription: *Incipiunt tituli ex corpore Ulpiani*, which means 'titles from the following work by Ulpian', *corpus* here having the literary sense of the whole as opposed to its parts.[9] The title of the *Epitome* cannot have been *Corpus Ulpiani*, still less *Tituli ex corpore Ulpiani*. Whoever first connected the *Epitome* with the *Breviarium* knew that it was ascribed to Ulpian, but either did not know, or did not trouble to give, its title. In any case, this *Epitome* is an extract from the *Liber singularis regularum* which was attributed to Ulpian. Of the five fragments (three in the *Collatio*, two in the *Digest*) which, according to their inscriptions, are taken from the *liber singularis*, three recur in our *Epitome*; the other two, being concerned with the law of obligations and the law of actions, do not recur in the *Epitome*, which is deficient in these topics.

The primary source of the *liber singularis* was the *Institutes* of Gaius, whose order of topics it follows, though with occasional alterations of

[1] The *Cod. Vat.* ends here. [2] *Coll.* 2. 2 is from the section on delicts.
[3] *D.* (44. 7) 25.
[4] Arangio-Ruiz dissents, still holding that the version of the *Institutes* used was a second edition prepared by Gaius himself. Such an edition never existed; there was only one version, which became stabilized relatively early (above, p. 164). A second edition would have superseded the first, as always happens with works serving a practical purpose. Only bibliophiles preserve the first edition.
[5] Schulz, *Epit. Ulp.* p. 17. [6] *Coll.* 2. 2; 6. 2; 16. 4; *D.* (22. 5) 17; (44. 7) 25.
[7] The cases where Justinian's *Inst.* agree with *Epit. Ulp.* against Gaius can be otherwise explained. [8] Description and history: Schulz, *Epit. Ulp.* 1 ff.
[9] Schulz, p. 20.

detail; also, from other sources, it inserts various topics omitted by the *Institutes*, such as *dos* and the *Lex Iulia et Papia*. The text is at times taken word for word from the *Institutes*, and that slavishly, with all the faults of the original; but frequently it is recast: there are not very happy condensations and purposeless paraphrases. One cannot credit Ulpian with so inferior a revision of Gaius' text.[1] He was not the author of the *Liber singularis*.

The standard edition is still that given by P. Krüger in the second volume of the *Collect. libr. anteiust.* (1878), where alone the readings of the manuscript are fully registered. The editions in the other collections are suitable only for scholastic use. Schulz's edition shows in detail that the author cannot be Ulpian. In any future edition the process of deformation by the post-classical author ought to be exhibited by continuous juxtaposition of the independent texts.

12. Ulpianus, *Opinionum libri vi.*[2] This work also is wrongly ascribed to Ulpian. Its form and contents point to a post-classical author,[3] who no doubt worked on Ulpian's *libri ad edictum*. The order is obviously that of the Edict. Book 6 deals with Tit. xv of the Edict (in Lenel's reconstruction), which is reached by book 24 of Ulpian's commentary on the Edict. Justinian's compilers possessed no more than the first six books of the *Opiniones*: either its unknown author never finished the work or the later part had been lost. Assuming the work to have been finished, it must have comprised at least twenty books, and more than that if it was a *Digesta*.

13. Marcianus, *Regularum libri v.* We possess only the *Digest* fragments, but these are fairly numerous. Although a comprehensive study of them has still to be made, it is already clear that the text used by the compilers contained post-classical passages.[4]

14. Modestinus, *Regularum libri x.*[5] Here again we possess only the *Digest* fragments, and these need a comprehensive critical study. The edition used by the compilers contained an interpolated text.[6]

[1] Schulz, pp. 12 ff. Volterra's *Indice*, ii (above, p. 180, n. 8), cites the literature on these faults at the individual passages.

[2] Joers, *PW* v. 1450; Rotondi, *Scritti*, i. 453, giving a full vocabulary.

[3] Already recognized by Jacob. Gothofredus, *Novus in tit. Pandect. de diversis regulis iuris antiquis commentarius* (Genevae, 1553) ad l. 61, p. 259. Now the generally accepted view: Lenel, *Pal.* ii. 1001; G. Rotondi, *Scritti*, i. 453; Felgenträger, *Symb. Frib.* 371.

[4] *D.* (15. 1) 40. [*Quomodo . . . nascitur peculium.*] Beseler's criticism, *Z* liii (1933), 25, goes much too far.

[5] Brassloff, *PW* viii. 670.

[6] Did Ulpian's pupil really write 'Licet "capitalis" Latine loquentibus (!) omnis causa existimationis videatur' (*D* 50. 16. 103)? Cf. Levy, *Die röm. Kapitalstrafe* (*Heidelb. SB*, 1930/1), 44. It was not the compilers who wrote *Latine loquentibus*. See further, Beseler, *Z* lii (1932), 61; *St. Albertoni*, i. 436; Solazzi, *Rend. Lomb.* lxix (1936), 986, n.; *Bull.* xliv (1937), 404, n. 1.

15. Modestinus, *Differentiarum libri ix. De differentia dotis liber singularis.*[1] Of the *libri ix* we fortunately possess two fragments in the *Collatio*[2] in addition to those in the *Digest*. The latter contain much that is objectionable from the linguistic and substantial points of view,[3] but the fragments in the *Collatio* also show undeniable post-classical characteristics.[4] Hence, either the *Differentiae* were not written by Ulpian's famous pupil, or else his authentic work has been thoroughly overlaid by later work.

Of the *liber singularis* all that we possess is one *Digest* passage,[5] which is certainly unclassical, but hardly Byzantine.

(vi)

The most important category of legal literature in the classical period is the commentary, including under that term the commenting epitome. The form taken by the commentary in non-juristic literature during the first three centuries of our era is well known.[6] Regularly, one may perhaps say universally, it is that of the lemmatic commentary. The text commented on and the commentary are separate works, written on separate rolls, and the reader of the commentary is informed of what particular passage of the text is being commented on by means of lemmata, that is to say by words of the text being used as headings or captions. The lemma may be the passage in question, or its initial words, and it is made easy to find by being written outside the text (ἔκθεσις) or by symbols or special spacing and the like.[7] Then follows the commentary. Sometimes, where part of the text needs no commentary, the reader is warned to skip so many lines. Sometimes, however, the lemmata give the full text. Accordingly, such a book contained both an edition of the text and a commentary.[8]

[1] Brassloff, l.c.

[2] *Coll.* 1. 12 and 10. 2. See *Pal.* i. 702, for the citations in the *Schol. Sin.* and Isidore's *Differentiae.*

[3] e.g. *D.* (50. 16) 101. 1, unclassical, but hardly due to the compilers: *Index Interp. D.* (21. 1) 62: *etenim . . . patiatur* is certainly unclassical (*Index Interp.*), but not the compilers'; rather the style of the *Autun Commentary*, s. 34. Again, *D.* (1. 7) 40 pr., with Beseler, *St. Riccobono*, i. 305; *Z* liii (1933), 48.

[4] On *Coll.* 1. 12 see Beseler, *T* x (1930), 208; *Z* li (1931), 198. *Coll.* 10. 2 is a passage of ill repute which has frequently been dealt with in modern discussion. See Volterra's *Indice.*

[5] *D.* (23. 3) 13. See *Index Interp.*

[6] On what follows see especially G. Zuntz, 'Die Aristophanes-Scholien der Papyri', *Byzantion*, xiii (1938), 631 ff.; xiv (1939), 545 ff. Faulhaber, *BZ* xviii. (1909) 383.

[7] See Note BB, p. 341.

[8] *P. Fay.* 3 contains an edition of Aristotle's *Topica* with a paraphrase following each paragraph of the text: Crönert, *AP* ii (1903), 367. See further Galen's commentaries on Hippocrates, e.g. *Corp. Med. Graec.* v. 10. 1 (1934), 178.

The *marginal commentary*, on the other hand, was as yet unknown. The margins were used for noting variant readings and for signifying by means of symbols doubts as to the soundness of the text—in short for what we should call a critical apparatus; also, of course, for readers' own notes, but these belong to another category, since they are not part of the original copying. Unknown in the classical period were the extensive *catenae* of stereotyped marginal glosses which we find in the Byzantine period.

The *epitome* is found in all branches of non-juristic literature.[1] No fixed form was developed. The purpose of an epitomist is to shorten a more extensive work by extracting from it what seems to him essential. This can be done in ways varying from simple reproduction of select passages to independent summarization of contents. When, as may well happen, the epitomist adds observations of his own, we have what we may call the *commenting epitome*.[2]

Classical *juristic commentaries* took the same forms as those of contemporary non-juristic literature.[3] There were no marginal commentaries, no editions of statutes, the Edict, or Sabinus' *Ius civile*, whether in the style of older editions of the *Corpus Iuris*, in which the text was surrounded by the Accursian Gloss, or in that of modern texts with footnotes; readers' marginal notes are another matter.[4] Commentaries were regularly, perhaps always, in the separate lemmatic form described above. This form naturally admitted of many variations. A commentator on the Edict might use as lemmata simply the titles and rubrics of the Edict, each of which would permit of a considerable range of discussion. Or one might use for the purpose not merely the edictal titles and rubrics, but also the clauses of particular edicts and formulae, interpreting clause by clause and word by word. Or one might take a middle course.

It is possible that the form of *commentary combined with text* was also used in classical times. Of such, a juristic work combined with the *notae* of a later jurist would be an example, and we do in fact possess fragments from a fourth- or fifth-century edition of Papinian's *Responsa* combined with *notae* by Paul and Ulpian,[5]

[1] Th. Birt, *Kritik u. Hermeneutik nebst Abriss d. antiken Buchwesens* (1913), 34; Peter M. Galdi, *L'epitome nella letteratura lat.* (Naples, 1922).

[2] A commenting epitome on Callimachus: P. Maas, *Papiri d. R. Università di Milano*, ed. Vogliano, i (1937), 155 ff.

[3] Thus the so-called *Schol. Sin.* (below, p. 325), though of a later period.

[4] e.g. the glosses in the Antinoite Gaius (above, p. 176).

[5] Below, p. 220.

in which the *notae* are not in the margin but inserted into the text immediately after the relevant *responsa*. It is possible, though an edition of so late a date does not prove the fact, that such combinations of commentaries with text were already known in the classical period. But in any case they presuppose a previous stage in which the commentary contained only selected lemmata Let us put a case. Cervidius Scaevola is writing *notae* on Julian's *Digesta*. He may begin by entering them in the margin of his own copy of Julian, and then order the issue of an edition of Julian with his own *notae* inserted in the text. This would be a possible proceeding, but most unpractical. The many lawyers who already possessed a copy of the famous *Digesta* would hardly be tempted to buy another copy of this extensive and therefore costly work for the sake of the comparatively unimportant *notae*. A far more practical way of reaching a wide public would be to publish the *notae* separately, as a lemmatic commentary. If and when a new edition of the *Digesta* was called for, Scaevola's *notae* could be inserted into the text, but this would never happen at all except where there was a sufficient demand for a new edition of the work commented on. Otherwise the *notae* would remain in the form of a separate lemmatic commentary, as happened in the case of Julian's commentary *Ad Urseium Ferocem*.[1] Another possibility is that the notes incorporated in the text of a new edition of a work might be derived from sources other than a lemmatic commentary on it. For instance, an editor of Papinian's *Responsa* might construct a note out of a discussion of one of Papinian's *responsa* occurring in Ulpian's commentary on the Edict and incorporate this note in the text of his edition. Such a procedure would explain why Justinian refers to the various notes on Papinian as 'ea quae in notis Aemilii Papiniani ex Ulpiano et Paulo nec non Marciano adscripta sunt'.[2]

Bare epitomes do not figure among the classical works: they were obviously regarded as hack-work. But we do meet with the commenting epitome, in which the epitomist, after quoting some passage more or less literally, adds his own observations. Here also the passages excerpted from the original work were taken as lemmata for the epitomist's notes, but nevertheless the basic difference between a lemmatic commentary and a commenting epitome is obvious: in the former only the words to be commented are quoted; in the latter also other passages of the original which seemed remarkable to the epitomist. Since we only possess

[1] *D.* (23. 3) 48. 1; below, p. 216.

[2] *Const. Deo Auct.* s. 6.

fragments, it is obviously impossible in some cases to determine whether a given fragment is from a lemmatic commentary or a commenting epitome. Consequently in what follows we cannot treat these two forms apart.

Works of either kind were specially exposed to corruption and suffered greatly in the course of being transmitted. Sometimes, as the result of later abbreviation, the distinction between lemma and comment disappeared; short notes simply assenting to the lemma might be cut out; notes completing or correcting the lemma might be fused with the lemma. Or the confusion of lemma and commentary may sometimes be due to a copyist.[1] On the other hand, notes gave rise to further notes, and citations of literature to fuller citations. Corruptions of this kind come from the third and early fourth centuries.[2] Doubtless the excisions and insertions of Justinian's compilers made things considerably worse, but on the whole they injured the texts far less than scholars in the last thirty years have been apt to assume.

We proceed now to the individual specimens of this class of literature, grouping them according to the work commented on; for example, we shall keep the *libri ad edictum* together. The catalogues of works attached by the handbooks to the biographies of their authors are of no value to the historian of legal science.[3]

A. *Commentaries on leges and senatusconsulta.*

The classical writers frequently comment on the *leges* and *senatusconsulta* in the course of their great general works, especially in the second part of their *Digesta*.[4] Such comments sometimes developed into large treatises occupying several *libri*, and ended by becoming distinct literary entities. We shall speak only of commentaries which were or developed into separate books, though this means that we cannot give a picture of the full extent of classical commentative work on *leges* and *senatusconsulta*. Some of the works to be mentioned appear to be only detached portions of the larger works.

1. *The Twelve Tables.* At the beginning of our period Labeo wrote a commentary on them,[5] of which all that we know is the three fragments preserved by Gellius.[6] Often as Labeo is cited, this work is never cited.

[1] A case in the commentary on the *Theaetetus*, *Berliner Klassikertexte*, ii, p. x.
[2] Above, p. 142.
[3] Our Index gives the works arranged according to authors.
[4] Below, p. 226.
[5] *Pal.* i. 501; Pernice, *Labeo*, i. 51; Joers, *PW* i. 2250.
[6] Gell. 1. 12. 18; 6. 15. 1; 20. 1. 13.

No extract from it was included in the *Digest*; doubtless it did not come down to the Byzantine compilers. To the unhistorically minded classical jurists[1] it was, indeed, of no interest, the Twelve Tables being for the most part obsolete. After Labeo the only writer who dedicated an independent commentary to them was Gaius; it was in six books[2] and illustrates his personal interest in history. As he puts it in his highly rhetorical *praefatio*, which the compilers have preserved (*D.* 1. 2. 1),[3] a man who comes to the task of *interpretatio* without knowing the origins and beginnings is like a man who comes to dinner with unwashed hands. The passage is of interest to the historian of science and should be read; the idea that one ought to begin at the beginning is expressed by others,[4] and the phrase *illotis manibus* is proverbial.[5] The survival of this work in the post-classical period is due to Gaius' great popularity in that period and to the historical leanings of the post-classical law school.[6]

2. *Classical commentaries on republican leges.*[7] Of such we know very little. From Paul we have a small fragment of his *Ad l. Cinciam liber sing.*[8] and some fragments of his *Ad l. Falcidiam*, the latter containing unclassical matter.[9] Of Rutilius Maximus' *Ad l. Falcidiam liber sing.*[10] we have only one small fragment, while the one fragment of Gaius' *Ad l. Glitiam liber sing.* is certainly not authentic.[11]

3. *Commentaries on leges of the Augustan period.* The *l. Iulia et Papia Poppaea*, in particular, provoked a number of separate commentaries[12] —thus Gaius' in fifteen books[13] and Mauricianus' in six. Marcellus' five or six books appear to be merely a separate edition of the portions of the author's *Digesta* (books 26–30; probably also 31) treating of the *l. Iulia et Papia*, since he can hardly have also written an independent

[1] Above, p. 135.

[2] *Pal.* i. 242; *Index Flor.*: 'XX. δυοδεκαδέλτου βιβλία ἑξ.' It does not follow (Mommsen, *Schr.* ii. 143, is mistaken) that this is what Gaius called it. The *Digest* inscriptions run: *ad legem duodecim tabularum.*

[3] In antiquity these *praefationes* are sometimes written in a highly rhetorical style distinct from that of the work. Even Diocletian's Edict *de pretiis* has a rhetorical preface: *ILS* 642; Norden, *Kunstprosa*, 249. This tradition was inherited by the Middle Ages: thus Azo got Boncompagno to compose the preface to his *Summa Codicis*. Cf. Schulz, 105. The point has been overlooked in considering the authenticity of Gaius' *praefatio*, e.g. Ebrard, *Z* xlv (1925), 121 (entirely wrong), and *Index Interp.*

[4] Quint. *Inst. praef.* 5; Hierocles, *Ἠθικὴ στοιχείωσις* (cent. 1 or 2), *Berlin Klassikertexte*, iv, p. 7; cf. v. Arnim, *Fragm. Stoic. vet.* iii. 43 ff.

[5] *Thes.* vii. 1, col. 400, 28; Otto, *Sprichwörter*, 212, 274 ff.

[6] Below, p. 281.

[7] On the following works see in general Lenel's *Palingenesia.*

[8] *D.* (1. 3) 29.

[9] In *D.* (35. 2) 3 pr. *vix . . . ratione* is not authentic, but certainly does not come from the compilers: Schulz, *Z* xlviii (1928), 214; Beseler, *Z* l (1930), 20.

[10] *D.* (30) 125.

[11] *D.* (5. 2) 4. On the interpolation: *Pal.* i. 246; *Index Interp.* There is no question of the delicate psychological annotation of which Kübler, *Gesch.* 193, speaks.

[12] In the *Index Flor.* the titles of the works about to be mentioned are abbreviated to *libri ad leges, Iuliam et Papiam Poppaeam* being understood.

[13] Ferrini, ii. 261 ff.

commentary on the same scale. Besides these, there are Terentius Clemens' commentary in 20 books[1] and Paul's in 10.[2] The latter's *Liber sing. de legibus* (viz. *Iulia et Papia Poppaea*) was doubtless a post-classical extract from the larger work, as likewise his *Liber sing. de iure patronatus quod ex lege Iulia et Papia venit.*[3] Ulpian's commentary in 20 books[4] gave a painstaking interpretation of the wording of the *lex*, after the manner of his commentary on the Edict.[5]

Of the *leges* belonging to the province of the ordinary criminal courts (*quaestiones*) the only one commented on separately[6] was the *l. Iulia de adulteriis*. Papinian's *De adulteriis libri ii* were, in a wide sense, a commentary on this *lex*,[7] but the *Liber sing. de adulteriis*[8] attributed to him was merely a collection of *quaestiones*.[9] If such a work ever existed, it has come down to us in an altered form. The six fragments of it preserved in the *Collatio*[10] are characterized by the same rhetorical style[11] that we have already remarked in Papinian's *Definitiones*.[12] Of Paul's *De adulteriis libri iii*, also a commentary in a wide sense on the *l. Iulia*, we possess only a few *Digest* fragments.[13] The *Liber singularis de adulteriis* ascribed to Paul, of which the *Digest* preserves one fragment[14] and the *Collatio* three,[15] was doubtless a post-classical production.[16] Ulpian, *Ad l. Iuliam de adulteriis libri v*,[17] is an authentic work; of the *Digest* fragments, which are all we have, we lack a comprehensive study.[18]

[1] Ferrini, ii. 251.

[2] Ibid. 237; Berger, *PW* x. 708.

[3] The titles are given by *Index Flor.* xxv. 63 and 68. But nothing survives of either work. Ferrini, ii. 237.

[4] Joers, *PW* v. 1445.

[5] The small fragment, *P. Oxy.* xvii. 2089, certainly is part of a discussion of the *l. Iulia et Papia*, but whether it comes from a separate commentary on that statute or from the *Digesta* of some jurist is naturally an unanswerable question. Levy, *Z* xlviii (1928), 555, is mistaken.

[6] Works *de iudiciis publicis*: below, p. 256.

[7] Joers, *PW* i. 571; Costa, *Papiniano*, i. 234.

[8] Joers, *PW*, l.c.; Krüger, 224.

[9] *Coll.* 4. 8 is at any rate not a *responsum* in the technical sense, but an answer to a purely theoretical question.

[10] *Coll.* 4. 7–11; 6. 6.

[11] e.g. *Coll.* 4. 10: 'quare aperte contra legem fecisse eum non ambigitur. sed si de poena tractas, non inique aliquid eius honestissimo calori permittitur . . .'; cf. Beseler, *Beitr.* ii. 21. On *Coll.* 4. 8: Beseler, *Z* xlv (1925), 453; lvi (1936), 58. On *Coll.* 4. 9: H. Krüger, *Z* xlviii (1928), 668; Beseler, *Z* li (1931), 65; liii (1933), 11. On *Coll.* 4. 10: Beseler, *Beitr.* v. 13; *T* x (1930), 195. On *Coll.* 6. 6: Albertario, *Rend. Lomb.* lviii (1925). For the *Digest* passages see *Index Interp.* Also in favour of a post-classical abridgement: Solazzi, *Bull.* xxxvii (1929), 96; *AG* civ (1930), p. 22 offprint; Beseler, *Z* liii (1933), 9; *ACII* i. 341.

[12] Above, p. 175.

[13] Berger, *PW* x. 716.

[14] *D.* (48. 16) 16.

[15] *Coll.* 4. 2–4; 4. 6. *Pal.* i. 593; Berger, *PW* x. 715.

[16] So also Solazzi, *Bull.* xxxvii. 96; *AG* civ (1930), p. 22 offprint. Literature on the passages of the *Collatio*: Volterra, *Indice III* (*RSDI* ix, 1936).

[17] Joers, *PW* v. 1446.

[18] Ulpian's text appears to have been shortened in post-classical times. Its citations of literature are few; the non-mention of Papinian's work is remarkable. From the citations a commentary by Sex. Caecilius Africanus can be inferred: Joers, *PW* v. 1446.

In addition we know of commentaries on the *l. Iulia vicesimaria*, the *l. Fufia Caninia*, and above all on the *l. Aelia Sentia*. We possess just a few fragments[1] of Aemilius Macer, *Ad l. vicesimam hereditatium*, of Paul, *Liber singularis ad l. Fufiam Caniniam* and *Ad l. Aeliam Sentiam libri iv*, and of Ulpian, *Ad l. Aeliam Sentiam libri iv*.

4. Among *commentaries on post-Augustan leges* we know of Paul's on the *l. Vellaea* and on the *l. Iunia*. Of his *Liber singularis ad l. Vellaeam* nothing survives;[2] of his *Ad l. Iuniam libri ii* only one fragment.[3]

5. The only known separate commentaries on *senatusconsulta* are by Gaius, Paul, and Marcian; the Pauline commentaries appear to be merely separate editions of the relevant parts of his commentary on the Edict. Gaius' known commentaries are a *Liber singularis ad SC. Orfitianum* and a *Liber singularis ad SC. Tertullianum*, a single fragment of both surviving;[4] Paul's are *libri singulares* on the following *senatusconsulta*, or rather *orationes principum*:[5] *Ad orationem divorum Marci Antonini et Commodi* (two fragments showing signs of post-classical revision),[6] *Ad orationem divi Severi* (three fragments, two showing post-classical revision),[7] *Ad SC. Claudianum*, *Ad SC. Libonianum*, *Ad SC. Orfitianum*, *Ad SC. Silanianum* (probably merely a separate edition of book 46 of his *Ad Edictum*), *Ad SC. Tertullianum*, *Ad SC. Turpillianum*, *Ad SC. Vellaeanum* (doubtless identical with his *Liber singularis de intercessionibus feminarum*). The two last-mentioned are probably only separate editions of book 30 of his *Ad Edictum*. The few surviving fragments of these works can be found in Lenel's *Palingenesia*. Of Marcian's *Liber singularis ad SC. Turpillianum* we have but one fragment, though that a rather long one: *D.* 48. 16. 1, which has a post-classical appearance.[8]

B. *Commentaries on the Edicts of the praetors, the aediles, and the provincial governors*

Cicero's early complaint[9] that most lawyers derived their *disciplina iuris* from the praetorian Edict was at the time it was uttered a rhetorical exaggeration, since the practice of commenting on the Edict was only just beginning;[10] but it came to represent the truth in classical times. Not only in their edictal commentaries, but also in other works, particularly in their *Digesta* and in their collections of *responsa*, *quaestiones*, and *disputationes*, the jurists

[1] They can be read in Lenel's *Palingenesia*.
[2] Mentioned by *Index Flor.* xxv. 51. Date of *lex*: Rotondi, *Leges pub.* 466.
[3] *D.* (40. 9) 15, with *Iuliam* by mistake for *Iuniam* in the inscription: Mitteis, *Z* xxi (1900), 204; Berger, *PW* x. 708.
[4] *D.* (38. 17) 9 and 8.
[5] On these works see Lenel's *Palingenesia*.
[6] *D.* (23. 2) 60; cf. *Index Interp.*
[7] *D.* (27. 9) 2, 13; cf. *Index Interp.*
[8] Beseler, *Beitr.* iii. 165, iv. 191; *Index Interp.*
[9] *De leg.* 1. 5. 7.
[10] Above, p. 91.

based themselves on the Edict by adopting its order of topics. Hence all such works may be termed, more or less strictly, 'commentaries on the Edict'. Nevertheless here we must confine ourselves to those works which expressly styled themselves *libri ad edictum*, since the other works adopting the edictal order possess special characteristics which require separate treatment.

1. First in date is Labeo's commentary,[1] in at least thirty *libri* (book-rolls),[2] on the urban praetor's Edict, with that of the peregrine praetor in appendix. We have evidence of its being in use right through the classical period, as late as Ulpian.[3] But the compilers took no extracts from it; doubtless they did not possess it. There survives only one short fragment of text; for the rest we have only citations. On the aedilician Edict Labeo commented in a separate work, of which we have only citations.[4]

2. Massurius Sabinus' *Ad edictum pr. urb.*, like his *Ius civile*, was very brief: by book 5 he had already reached the title *De operis libertorum*,[5] which Paul reached only in book 40 and Gaius in book 14. We possess only one certain citation of the work;[6] it was not used by the compilers.

3. Caelius Sabinus wrote a commentary on the aedilician Edict,[7] which the compilers did not use and of which we possess but two fragments of text.[8] We have also a number of citations, in which the writer's name has frequently been shortened by the compilers to Caelius or Sabinus alone, with the result that some of them have been wrongly referred to Massurius instead of to Caelius, Sabinus. For example, the interpretation of *morbus* in the aedilician Edict attributed in the *Digest* to Sabinus is proved by Gellius to come from Caelius, and not, as is generally supposed,[9] from Massurius.

4. Vivianus must also have written on the praetorian and aedilician Edicts, but we have only citations, and these never give the title of the work.[10]

5. On the same Edicts Sex. Pedius wrote an extensive com-

[1] Pernice, *Labeo*, i. 55; Joers, *PW* i. 2550. [2] *D.* (4. 3) 9. 4*a*.

[3] Joers, *PW* v. 1479.

[4] Fabius Mela, a contemporary of Labeo, seems also to have written a commentary on the *edictum*. We possess only some citations in which the title of the work is never mentioned. See Ferrini, ii. 11 ff.; Brassloff, *PW* vi. 1830.

[5] *D.* (38. 1) 18. [6] The collection in Bremer, ii. 1. 568 ff., is unsupported.

[7] Joers, *PW* iii. 1272, v. 1484.

[8] Gell. 4. 2. 3–5; 6. 4. 1–3. Also 4. 2. 1–13, though probably not taken verbally from Caelius. See Seckel–Kübler, i. 92; Dirksen, *Hinterlass. Schr.* i. 39 ff.

[9] So *Pal.* ii. 200, no. 98; Bremer, ii. 1, 545; Joers, *PW* v. 1481; Dirksen, l.c. The texts are *D.* (21. 1) 1. 7; Gell. 4. 2.

[10] *Pal.* ii. 1225. In the second century there was an *epitome ex Viviano*: Joers, *PW* v. 1485.

mentary, not utilized by the compilers, of which we possess (through the *Digest*) some citations.[1] Unfortunately it cannot be determined whether it was written before or after Hadrian's codification of the Edict.[2]

6. The compilers possessed two distinct edictal commentaries by Gaius.

(*a*). The first was a collection of commentaries on particular titles of the urban praetor's Edict.[3] It ran to ten books and covered the edictal titles 26–33 and 36–37.[4] The *libri* possessed by the compilers[5] were not numbered progressively in one series;[6] consequently they were not fragments of a single complete commentary on the whole Edict, but rather distinct commentaries on the ten edictal titles, which were later combined into a collection. It may be that Gaius never wrote a complete *Ad edictum praetoris urbani*.[7]

(*b*) The second commentary was entitled *Ad edictum provinciale libri xxxii*.[8] The two last books were on the aedilician Edict and must therefore have been joined to the commentary on the provincial Edict, as its books 31 and 32, by some post-classical editor; for in the provinces there was in general no aedilician Edict.[9] The

[1] Ferrini, *Opere*, ii. 391; Girard, *Mél.* i (1912), 214, 299; Berger, *PW* xix. 41. The scale of the work can be judged from the fact that the subject of Pedius, book 25 (*D.* 37. 1. 6. 2), namely *Ed. Tit.* xxv (Lenel), is the same as that of Paul, *Ad ed.* 41, and Ulpian, 39, and of Julian, *Dig.* 23 (order of Edict followed).

[2] Girard, *Mél.* i. 214, 299, thinks before.

[3] *Pal.* i. 182; Bizoukides, *Gaius*, ii. 1; Kniep, *Der Rechtsgelehrte Gaius* (1910), 314 ff.; Kübler, *PW* vii. 492. *Index Flor.*: 'XX. ad edictum urbicum *τὰ μόνα εὑρεθέντα βιβλία δέκα*.' The *Digest* inscriptions vary between *ad ed. pr. urbani*, *ad ed. pr.*, and *ad ed. urbicum*.

[4] According to Lenel's reckoning in the 3rd ed. of his *Edictum perp.*

[5] Two *de testamentis*, three *de legatis*, one on *operis novi nuntiatio*, *damnum infectum* and *de aqua* (*Ed.* xxviii–xxx); two *de liberali causa* (xxxi), one *de publicanis* and *de praediatoribus* (xxxii, xxxiii), one *de re iudicata* and on the title *qui neque sequantur* (xxxvi, xxxvii). In all 10 *libri*, which happen to cover 10 edictal titles. Krüger, 202.

[6] If they had been, the inscriptions would invariably have given the number in question. In fact they give simply the title, and when the title was commented on in more than one book they added the number: e.g. 'libro secundo de testamentis', 'libro ad ed. pr. urb. tit. de damno infecto'.

[7] Possibly a complete commentary may have existed at one time, in which case the editor must have expunged the serial number, as being meaningless after the loss of a part of the work. He did not renumber. Some of even Gaius' works disappeared, e.g. his commentary on Q. Mucius (Gaius, 1. 188). His reference (ibid.) to his *edicti interpretatio* may be to lectures, since the word *libri* is avoided.

[8] Bizoukides, *Gaius*, ii. 1; Kniep, *Der Rechtsgelehrte Gaius*, 149 ff.; Kübler, *PW* vii. 492; Beseler, *St. Albertoni*, i. 428. Recent discoveries have disposed of v. Velsen, *Z* xxi (1900), 73, and *Beitr. z. Gesch. d. Edictum pr. urbani* (1909), 105.

[9] In the senatorial provinces, with which alone Gaius' commentary was concerned, the governor's *quaestor* had the aedilician jurisdiction (Gaius, 1. 6). The aediles at

first thirty books were a commentary on the *edictum provinciale*, in the stereotyped form, which every governor was obliged by Hadrian to issue.[1] Gaius' motives for commenting at such length on the provincial Edict, which in all essentials agreed with the praetorian, are a matter of pure conjecture; perhaps the work represents lectures given by Gaius in some provincial city. Throughout the commentary the magistrate named as having jurisdiction is the proconsul;[2] the occasional mentions[3] of the praetor are due to corruption[4] or to interpolation.[5] Possibly the work, like the same author's *Institutes*,[6] was no more than lecture-notes, in which case many things in it can be accepted as authentic which, if found in a finished work by a great classical writer, or even by Gaius himself, would have to be regarded as later depravations. Our text is, however, not free from post-classical pre-Justinian elements.[7] What is needed is a critical study not merely of particular passages but of all our fragments as a whole. The complete work was in the hands of the compilers.

7. The longest commentary on the praetorian and aedilician Edicts was that of Pomponius. It was in far more than eighty-three books,[8] which sufficed for Ulpian, amounting in fact to some 150 *libri* (book-rolls). It certainly contained an imposing assemblage of the existing literature; it was a sort of codification, a

Cirta (Numidia) are anomalous: *CIL* viii. 7986, *ILS* 6862: *aedilis habens iurisdictionem quaestoris*. Cf. Mommsen, *Schr.* v. 484, 490; Weiss, *Z* 37 (1916) 167.

[1] Above, p. 127.

[2] Passages with 'proconsul': Rudorff, *Z. f. RG.* iii (1864), 18, n. 15; Kniep, *Der Rechtsgel.* p. vi. Thus Gaius wrote for the senatorial provinces or one of them. In the imperial the Emperor was proconsul, but not the propounder of the Edict. Egypt was an imperial province, but the Edict propounded was that of the *praefectus Aegypti*, as *P. Giess.* 40 (*Z* xxxii. 378; Meyer, *Jur. Papyri*, no. 27) shows beyond doubt. Thus Ermann-Krüger, in Kroll, *Zur Gaius-Frage* (Diss. Münster, 1917), 13, are wrong.

[3] Passages in Kniep, *Der Rechtsgel.* pp. vii and 245 ff.

[4] Some copyist, or even the compilers, may have misread the *siglum* for *proconsul* as *praetor*.

[5] The passages have till now been handled with astonishingly little critical sense. Thus: *D.* (2. 11) 1—when putting the fragment at the head of the title the compilers must have substituted *praetor*. *D.* (4. 7) 3. 1—*quia . . . libertatibus* has long been recognized as interpolated: see *Index Interp.* *D.* (6. 2) 8—*unde . . . pretium* is certainly interpolated: Pringsheim, *Z* 1 (1930), 416, gives the literature, but himself goes astray. *D.* (15. 1) 27. 2—text suspicious: Beseler, *Z* 1 (1930), 62. *D.* (29. 5) 25. 2—not genuine: *Index Interp.* *D.* (29. 3) 1 pr.—same procedure as in the case of *D.* (2. 11) 1, mentioned above. In the same title, *D.* (29. 3) 7, the original *proconsul* has been allowed to stand. Cf. Endrich, *St. Cagliari*, ix (1917), 155.

[6] Above, p. 160.

[7] Take *D.* (35. 2) 73. 5: one cannot credit Gaius with its pointless and indeed misleading arithmetic: Jensius, *Stricturae ad Pandd.* 343 ff. The text was used in a strange manner for *Inst.* (2. 22) 3. On *D.* (4. 7) 3. 1: *Index Interp.*, it is certainly not compilers' work. *D.* (4. 4) 27 pr.: Beseler *Beitr.* i. 57. *D.* (29. 5) 25. 2: Lenel, *Ed.* 365; Beseler, *T* x (1930), 185.

[8] See *Pal.* ii. 44.

supplement to Hadrian's codification of the Edict itself. But it came too soon: the Severan period had still much to say. Hence it was already out of date in the third century. After the appearance of the more modern and sensibly shorter commentaries of Paul and Ulpian the impressive work of our industrious author fell into oblivion. The composer of the *Fragmenta Vaticana* did not use it; nor did the compilers take excerpts from it, clearly because they possessed no copy. We know it only through the citations of Paul and Ulpian; its loss is one of the heaviest for our science.

Book 83, as is shown by *D.* 38. 5. 1, 14, and 27, dealt with the edictal title *Si quid in fraudem patroni* (Lenel, *Ed.* xxv, s. 151), which Ulpian had reached in his book 44 and Paul in his book 42.

8. A commentary by Q. Saturninus is once cited by Ulpian. The citation is taken from the tenth book of the work, in which the author apparently dealt with the aedilician Edict.[1]

9. The compilers possessed an edictal commentary by Callistratus in only six books,[2] entitled apparently *Edicti monitorii libri vi.*[3] No certain explanation of the title can be given; the work in all probability was a commentary on the provincial Edict. What the compilers possessed was perhaps a post-classical epitome of a larger work; at any rate our fragments (all from the *Digest*) betray post-classical workmanship.

The latest explanation of the title, by H. Krüger,[4] is the most unlikely that has been proposed. He believes that the so-called referential Edicts (i.e. the Edicts which referred to other sources—*leges, senatusconsulta,* and imperial constitutions)[5] were termed *edicta monitoria,* and that Callistratus commented on these. But there is no proof that the classical jurists ever treated these Edicts as a special group or termed them *edicta monitoria.* One does not see any motive that could have led them to comment on them separately. Moreover, if the explanation were correct, the title would have been *Edicta monitoria* or *Ad edicta monitoria.* True the *Index Florentinus* has the plural *edicta,* but that can carry no weight against the constant singular of the inscriptions

[1] *D.* (34. 2) 19. 7. Cf. *D.* (50. 16) 74; *Pal.* ii. 1178 f. On the personality of Q. Saturninus see Krüger, 200.

[2] v. Kotz, *PW* Suppl. iii. 226.

[3] *Index Flor.*: 'XXVII. edicton monitorion *βιβλία ἑξ.*' The inscriptions of the *Digest* fragments are as a rule: *libro . . . edicti monitorii*; once only (*D.* 2. 6. 2): *libro primo ad edictum monitorium.*

[4] *Z* xxxvii (1916), 230 ff., 301 ff. Older views: Rudorff, *Z. f. RG.* iii (1864), 28 (*monitorium edictum* means *edictum perpetuum*); H. Pernice, *Misc. z. Rechtsgesch. u. Texteskritik* (1870), 102 (*monitorium* (substantive) *edicti,* i.e. *monitorium ad edictum*), followed by Karlowa, *RRG* i. 635; Buonamici, *AG* lxv (1900), 68 ff.

[5] e.g. *Ed.* s. 10 *De pactis.*

of the *Digest* fragments.[1] Probably *monitorium* means *commonitorium*,[2] and *edictum (com)monitorium* is just an artificial and isolated description of the Edict, coined before the expression *edictum perpetuum* had become established.[3] Since its codification by Hadrian the Edict had become 'of precept', i.e. a form which, by the instructions of the Emperor and Senate, the praetors, aediles, and provincial governors were obliged to publish and to act under.[4] In favour of the work having been on the provincial Edict is the only surviving fragment from 4, which cannot refer to *missio legatorum servandorum causa*, but must be on the Edict *de sumptibus funerum*.[5] This means that Callistratus dealt with this Edict in the same place as Gaius in his *Ad edictum provinciale*, i.e. after *legata*, which must have been its position in the provincial Edict, though not in the urban.[6] Some of the fragments show post-classical revision.[7]

10. Paul's *Libri ad Edictum* ran to eighty book-rolls, the last two of which were on the aedilician Edict.[8] Besides numerous *Digest* fragments we have thirteen extracts in the *Fragm. Vaticana*[9] and a fragment from an Egyptian parchment codex of the fourth to sixth centuries.[10] In all probability we can also claim for the work the two considerable fragments which go by the unfortunate names of *Fragm. de formula Fabiana*[11] and *Fragm. Berolinense de bonorum possessione*.[12] The question cannot be dis-

[1] In principle one should trust the inscriptions of the *Digest* fragments against the *Index Flor.*: see, e.g., the plural in *Index*, v, xxxii, xxxiii, where the title clearly had the singular.

[2] On *commonitorium* meaning 'litterae quibus ab imperatore magistratibus peculiaria mandantur': *Thes.* iii. 1934, 81; Seeck, *PW* iv. 775.

[3] Cf. Pringsheim, 'Zur Bezeichnung des Hadrianischen Edikts als edictum perpetuum', *Symb. Frib.* 1 ff.

[4] Above, p. 127.

[5] So already Lenel, *Pal.* i. 96, n. 4.

[6] Lenel, *Ed.* pp. 9 ff.

[7] e.g. *D.* (4. 6) 9, where *vel potentiore vi* refers to the *potentiores* (the socially powerful: *D.* 48. 19. 28. 7; Mitteis, *Mél. Girard*, ii. 225 ff.): interpolated, but not by the compilers. *D.* (11. 1) 1, where the interpolation comes at most only in part from the compilers: *Index Interp.* With *minus frequentantur* compare *minus frequentatur* in *D.* (4. 6) 2; the expression cannot come from even a provincial jurist of the Severan age.

[8] Berger, *PW* x. 705.

[9] *F.V.* 298–309, 319.

[10] The so-called *Oxford Fragment*, *ed. princeps* by Grenfell and Hunt, *New Class. Frs.* ii (1897), no. cvii. Re-edited by Scialoja, *Rend. Lincei*, 1897, 236, and (with photograph) Krüger, *Z* xviii (1897), 224. But now one should use Girard–Senn, *Textes*, 460, or Seckel–Kübler, ii. 163, which rest on a new collation by Seymour de Ricci. *FIRA* ii, 423. Wrong: Collinet, *Conferenze* 42; Albertario, *St.* 1, 304.

[11] *Ed. princeps* by Pfaff and Hofmann, *Mitteil. aus d. Papyrus Rainer*, iv (1888); later (with apograph) by P. Krüger, *Z* ix (1888), 144 ff. Also *Collect. libr.* iii. 299; Seckel–Kübler, ii. 165. Scholastic editions: Girard–Senn, *Textes*, 457; *FIRA* ii (ed. 2), 427. Photographs in the *ed. princeps*, Wessely's *Schrifttafeln z. älteren lat. Palaeogr.*, Tab. 19, no. 42, and Steffens's *Lat. Palaeogr.* 14.

[12] Berlin Museum *Pap.* 11753. *Ed. princeps*: P. M. Meyer, *Z* xlii (1921), 42 ff.; thereafter Girard–Senn, *Textes*, 454, and *FIRA* ii, 427. Photo.: Mallon 48.

cussed here. In the texts outside the *Digest* the work of one or several post-classical hands is particularly clear; in the *Digest* fragments the original has been considerably shortened, especially in the citations of literature.[1]

Besides the eighty *libri ad Edictum* the compilers possessed a shorter commentary (23 books) on the Edict bearing Paul's name.[2] Its title is uncertain, since the *Index Flor.* and the inscriptions of the fragments vary. In fact the work was not a simple edictal commentary, but a short *Digesta*,[3] the second part of which occupied only the last book,[4] the Edict occupying the first twenty-two. It seems to be a post-classical epitome of the larger commentary. Besides the scanty *Digest* fragments there are two in the *Fragm. Vat.*[5] The work is cited in the *Collectio definitionum.*[6]

As to the title: *Index Flor.* xxv. 4 has *'brebion βιβλία εἴκοσι τρία'*, meaning *brevium libri xxiii.* The *Digest*, up to book 26, calls it *libri brevium*, and from book 27 *libri brevis edicti. F.V.* has *libri ad edictum de brevibus*; the *Collectio definitionum, libri brevium.* After *brevium, brevibus*, we should understand *libellorum, libellis.*[7] H. Krüger[8] would understand a work commenting on the so-called referential Edicts only; he gives *edicta brevia* the same meaning as *edicta monitoria.* It cannot be proved, even with a show of probability, that *edicta brevia* was a classical name for these edicts, and still less that they were collected into a separate group and commented on together. In *D.* (50. 16) 55 *qui . . . creditori* is post-classical,[9] but not from the compilers.

Some of Paul's minor works have all the appearance of being portions of his edictal commentary which have become distinct by having been separately edited in post-classical times and, incidentally, more or less thoroughly revised. The materials are, however, too slight to permit of more than conjectures. Only of the *Liber sing. de iniuriis* can it be stated positively that it is a post-classical extract from book 55 of his *Ad edictum* or from a post-classical edition of that book.

In his *Ad edictum* Paul devoted the whole of book 55 to the title *De iniuriis* (*Ed.* xxxv). He is not likely to have written another special work of exactly the same length on the same title. The two passages of the *Liber sing. de iniuriis* which we possess (*Coll.* 2. 5; 2. 6) show it to

[1] Cf. the *Oxford Fragment.*
[2] Berger, *PW* x. 714; Beseler, *Bull.* xlv (1938), 167.
[3] Like Paul's *Sententiae*: above, p. 176; on the scheme of *Digesta*: below, p. 226.
[4] According to *F.V.* 310, 311, the *l. Cincia* came in book 23, and the second part of *Digesta* regularly begins with this *lex*: Schulz, *Z* xlvii (1927), 52, n. 6, and below, p. 226.
[5] *F.V.* 310, 311.
[6] Below, p. 308.
[7] *Thes.* ii. 2179, 14 f.
[8] *Z* xxxvii (1916), 231, 301 ff.
[9] Beseler, *Beitr.* ii. 62; *Z* liii (1933), 45.

have been a commentary on the said title. The smaller work was not used by the compilers of the *Digest*, but the makers of Justinian's *Institutes* (4. 4 pr.) probably drew on it, perhaps only at second hand. The texts in the *Collatio* show unmistakably that Paul's text had been revised in post-classical times. On the edictal clause (*Ed.* s. 190): 'certum dicat quid iniuriae factum sit', *Coll.* 2. 6 has: 'demonstrat autem hoc loco praetor non vocem agentis, sed qualem formulam edat . . . illud non cogitur dicere, dextra an sinistra, nec qua manu percussa sit.' Quite true, but too trivial to come from Paul; *dextra an sinistra* may be a marginal gloss on *qua manu*, which it ought to follow. The whole treatment of *certum dicere* (*Coll.* 2. 6. 2–5) smacks of the post-classical law school.[1] The other passage, *Coll.* 2. 5, was composed by some post-classical writer out of classical materials.[2]

Liber sing. de liberali causa. This is probably a post-classical extract from books 50 and 51 of the *Ad edictum*. All we have of it is *D.* 40. 12. 33; it is absent from the *Index Flor.*, and is perhaps identical with the *Liber sing. de articulis liberalis causae* (only *D.* 40. 12. 41),[3] which is similarly absent.

Liber sing. ad municipalem. This is probably an extract from book 1 *Ad edictum*; we have *F.V.* 237 and 243 only.

Liber sing. de inofficioso testamento: *Index Flor.* xxv. 45; fragments (few) in *Pal.* 1. 1113. Doubtless an extract from book 13 *Ad edictum.*

11. Ulpian's *Ad Edictum* was in eighty-three books,[4] about the same length as Paul's, but only about half as long as Pomponius'. Evidence of its wide diffusion in post-classical times is abundant: the composers of the *Fragm. Vat.* and the *Collatio* drew on it, the Sinai *Scholia* cite it;[5] it was read in Egypt;[6] and finally it served the compilers of the *Digest* as the leading commentary, not merely because it was the latest of the great commentaries, but assuredly also on account of its intrinsic merits. Consequently the remains that have reached us are particularly extensive. We have, besides the numerous *Digest* fragments, (i) *F.V.* 120, 266, 318, 320–4, 339–46; (ii) *Coll.* 2. 4; 7. 3; 12. 7; (iii) *P. Ryl.* iii. 474;[7] (iv) two

[1] Beseler, *Beitr.* ii. 117; *SD* i (1935), 286; *Daube, Essays presented to J. H. Hertz* (1944), 111.

[2] Kunkel, *Z* xlix (1929), 170, who, however, wrongly rejects the text of the *liber sing.* as given by the *Inst.* The post-classical editor adapted even the enactment of the Twelve Tables, substituting in particular sesterces: cf. Gaius, 3. 223.

[3] On the title (*articulus*): Beseler, *Beitr.* iii. 35.

[4] A. Pernice, *Ulpian als Schriftsteller*, SB. Berlin Ak., phil.-hist. Kl., 1885, 443 ff.; Joers, *PW* v. 1439, 1455 ff.

[5] *Schol. Sin.* 13.

[6] As *P. Ryl.* iii. 474 (immediately below) shows.

[7] From a fourth-century papyrus codex. *Ed. princeps P. Ryl.* iii (1938); Zulueta, *St. Besta*, i (1938), 139 ff.; *FIRA* ii, 313–14; Koschaker, *Z* lviii (1938), 447, n. 1; Albertario, *SD* v (1939), 205.

small pieces in Priscian and Pacatus;[1] (v) a citation by Justinian in *C.* 6. 28. 4. 3–5, of 531; (vi) probably the so-called *Fragm. de iudiciis*;[2] and (vii) possibly the very fragmentary *P. Fay.* x.[3]

Following classical tradition, Ulpian treated first of the Edict of the *praetor urbanus* and in the last two books of that of the aediles. The commentary keeps strictly to the order of the Edict, except that the rubrics inside the titles *de iudiciis* and *de his quae cuiusque in bonis sunt* (Lenel xiv and xv) are, after the example of Julian's *Digesta,* arranged in a different and more practical order.[4] We find some excursus: thus, the commentary on the edictal title *Ad legem Aquiliam* gives the text of the statute, with a careful interpretation;[5] in connexion with *hereditatis petitio* the *SC. Iuventianum* is reproduced and thoroughly examined;[6] similarly the text of important rescripts is given and interpreted.[7] Nevertheless, more seriously than his predecessors, Ulpian attempted to disregard any law that was not *ius honorarium,* but *ius civile* in the narrower sense. He deals with the latter only so far as was unavoidable in expounding the praetorian law. For example, it was impossible to give an account of the *actiones legis Aquiliae utiles* without setting out the statute itself and its *actiones directae.* A strict scheme of exposition is adhered to. The commentary on each title begins with a general consideration of its heading which provides an introductory orientation in regard to the individual Edicts of the title.[8] The commentary on an individual Edict gives (1) the text of the Edict; (2) a close interpretation of its clauses, in which the clauses serve as lemmata or captions, and the commentary follows;[9] (3) the text of the *formula* offered by the Edict; (4) any necessary interpretation of the

[1] *Collect. libr.* ii. 160; iii. 298; Seckel–Kübler, i. 502; Girard–Senn, *Textes,* 497; Riccobono–Baviera, *Fontes,* ii (ed. 2), 313.

[2] *Ed. princeps* by Mommsen and Krüger, *Monatsberichte Berlin Ak.,* phil.-hist. Kl., 1879, 501 ff. (Mommsen, *Schr.* ii. 68) with apograph. Photographs in Mommsen–Krüger and in Wessely, *Schriftafeln z. älteren lat. Palaeogr.,* tab. xix, no. 43. *Collect. libr.* iii. 298; Seckel–Kübler, ii. 171; Girard–Senn, *Textes,* 498; *FIRA* ii, 625. Lenel, *Ed.* 144, attributes the fragment to Ulp. *Ad ed.* 16.

[3] *Ed. princeps P. Fay.* (1900), no. X, with photograph. Corrections: Plassberg, *Wochenschr. f. klass. Philol.* xviii (1901), 141. The attribution to Ulp. *Ad ed.* is unfortunately only a possibility. Ferrini, i. 454.

[4] See the conspectus in Lenel, *Ed.* p. xvii; cf. pp. 11 ff.

[5] Lenel, *Pal.* ii. 522.

[6] *Pal.* ii. 501; cf. ii. 640, no. 981.

[7] e.g. Lenel, *Pal.* ii. 650, no. 983.

[8] Many of the introductions are unauthentic: below, p. 200. But that to the title *De iniuriis* (*Ed.* Tit. xxxv), in which the *l. Cornelia de iniuriis* is also interpreted, is authentic: *Pal.* ii. 766, nos. 1335–8.

[9] e.g. Lenel, *Pal.* ii. 765, no. 1330 f., or ii. 771, no. 1350.

formula, also in the lemmatic form.[1] Of course where the Edict contained nothing but a formula,[2] there was nothing but this and its commentary. It is not possible to say whether the earlier commentators used so consistent and perspicuous a method, but it may be that Ulpian's thorough-going application of the scheme above described constituted a considerable superiority of his commentary.

Ulpian's general purpose is plain. Himself a member of the central ministry of justice,[3] he shared the bureaucratic tendency towards codification.[4] This end had not been attained by Hadrian's codification of the Edict:[5] the classical interpretation of the Edict remained to be standardized. What Pomponius had essayed Ulpian was to achieve, and achieve without departing from the classical tradition, that is, not by virtue of a senatusconsult or imperial constitution, but by his private enterprise as an authoritative jurist, a codification in the form of a restatement. By means of a copious, but judicious, selection from the classical literature, accompanied by precise citation of the works referred to, the classical interpretation was to be resumed so completely that the practitioner would have no further need to look up the literature for himself, or at any rate not that of the Republic and the first century of the Empire.

The basis of Ulpian's work was naturally Pomponius' colossal commentary. This may be assumed as self-evident, though it must be admitted that it is not always demonstrable from our evidence, which in this respect is untrustworthy. No doubt before embarking on his commentary Ulpian must have read the literature of the second century and the most important works of the first for himself. The assessor of the *praefectus praetorio*, Papinian, can have done no less. But to what extent Ulpian in the execution of his work simply took over Pomponius' citations, and to what extent in that case he checked them in the originals,[6] or to what extent he derived them from materials amassed during his own preliminary studies, is a question which our evidence enables us to decide only in exceptional cases; happily the answer is a matter of complete indifference. The only important point is that Ulpian had mastered the whole intricate complex of problems raised by the classical edictal interpretation down to the smallest detail,

[1] e.g. Lenel, *Pal.* ii. 578, and *Ed.* 250 ff., on the *formula de pecunia constituta*.
[2] e.g. in the titles *De rei vindicatione, empti venditi, locati conducti*, &c.
[3] Above, p. 107. [4] Above, p. 100. [5] Above, p. 127.
[6] As we know Gellius did.

and that his selection of literature was thus based on a complete knowledge of the subject. A whole world separates him from the facile compilers and epitomists, from the half-learned sciolists, of post-classical times. He had in view not legal reform but the well-justified aim of codification. His object was to sift the existing materials and to make them cognoscible, to crystallize accepted opinions, and by his authority to lay still outstanding controversies to rest. His guarded quietism preserves the true classical spirit;[1] his style, equally, breathes the classical tradition. He does not, like Papinian, affect the manner of an old-time Roman, but expounds his enormous materials in an easy, but never slovenly style, in language that is at once clear, unaffected, businesslike, and completely unrhetorical. His commentary, if he ever succeeded in properly finishing it (which is uncertain), must have been one of the great works of Roman jurisprudence. It stands in the same rank as Q. Mucius' *Ius civile*, except that Mucius is the beginning and Ulpian the end.

During the early post-classical period, at the end of the third and the beginning of the fourth centuries, this commentary, like so many other classical works,[2] underwent revision in many respects. We are not in a position to determine how far the revisers shortened the work, in particular by cutting out literary citations and especially the exact references, but we can recognize the numerous post-classical additions. Where an introduction to a title was lacking in Ulpian it was supplied; where Ulpian had neglected to abstract a general principle from the case law, rules or maxims were formulated; objections to views stated by Ulpian were noted and divergent solutions suggested; literary citations and other matters were added. Even in the *Digest* fragments we find passages which neither Ulpian nor the compilers can have written. The pre-Justinian remains complete the proof of the fact that even before Justinian Ulpian's text had undergone far-reaching alterations. There are passages in the *Fragm. Vat.* and the *Collatio* which cannot possibly be authentic; these, since it is common ground that the compilers of these collections did not themselves indulge in interpolation, prove beyond contradiction that Ulpian's text came to these compilers already altered. The *Fragm. Vat.* were composed at latest between 372 and 438, but probably much earlier;[3] thus the corruption of Ulpian's text must have taken place in the first half of the fourth century or at the end of the third. Justinian's compilers in making their excerpts

[1] Above, p. 129. [2] Above, p. 142. [3] About A.D. 320. Below, p. 311.

and arranging them under their titles naturally deformed the text still further, especially by abridgement and merciless excision and telescoping of the literary citations,[1] which in the eyes of men devoid of any real interest in the historical development of legal doctrine were purely ornamental.

The pioneer in the literary criticism of Ulpian's *Ad Edictum* was Pernice (1885). But his work, though meritorious, came too soon, before the necessary preparatory studies and lexicographical apparatus existed. His acceptance of the substantial authenticity of our text led him to take a false view of Ulpian and his methods. Joers (1903) dissented, but even he put too much faith in the traditional text. The most important result reached by later research is that Ulpian's commentary was subjected to a very thorough revision in early post-classical times, the extent of which will only be measurable after a complete critical examination of the work. Such an examination is urgently required. Up to the present interpolations due to Justinian have not been distinguished sufficiently from those made before his time; also, interpolations which have been recognized to be pre-Justinian have often been attributed to the Byzantine law school, whereas in reality they originate from the western Empire.[2] On such questions the texts preserved by pre-Justinian sources are naturally of decisive weight. To-day there should be no further doubt as to the interpolation of those in the *Fragm. Vat.* and the *Collatio*, but the texts are too difficult for a demonstration to be given here. The literature for the *Collatio* is given by Volterra[3] and Niedermeyer.[4] Whoever still denies the fact of a pre-Justinian revision of the texts in the *Collatio* must prove the authenticity of the words in *Coll.* 12. 7. 8: *sed non . . . cautionem*, which is simply impossible.[5] As to the *Fragm. Vat.*, *F.V.* 266 cannot be Ulpian's text;[6] we have already shown that the words *ut Proculeiani contra Sabinianos putant* are out of place.[7] In *F.V.* 321 *quamquam . . . legerit* is clearly spurious: the comment on the opinion of Papinian cited, *quod nescio ubi legerit*, is really delicious. Of pre-Justinian interpolation in the *Digest* fragments particularly good examples are furnished by the numerous introductions to the edictal titles.[8] A specially clear case is *D.* (4. 8) 3. 1; this loose, rhetorical passage, which says nothing of juristic import, cannot be the work of either Ulpian or the compilers.[9] In *D.* (21. 2) 55 the style of 'quid ergo' *rell.* recalls the Autun commentary.[10] A case of post-classical addition of citations occurs in *D.* (17. 2) 52. 6–10. These examples could

[1] e.g. *D.* (9. 2) 27. 10, where the compilers have changed *putat* to *puto*. But such proceedings on the part of the compilers stand out more clearly in Ulp. *Ad Sabinum*. Below, p. 214. [2] Above, p. 143. [3] *RSDI* ix (1936).
[4] *ACI, 1933, Roma*, i. 353 ff., 371 ff. [5] Schulz, *Einf.* 22.
[6] Beseler, *Juristische Miniaturen* (1929), 124; *Z* lvii (1937), 124; Albertario, *St.* iv. 10.
[7] Above, p. 123. [8] Schulz, *Einf.* 35 ff. Steinwenter, Festschr. Koschaker 1. 97.
[9] So rightly Beseler, *Beitr.* ii. 91; iii. 35.
[10] Schulz, *Einf.* 24; *Autun Gaius*, s. 34.

be multiplied[1] by any reader of recent literature. In such circumstances it is erroneous to claim that *P. Ryl.* iii. 474 disproves the post-classical authorship of *D.* (12. 1) 1.[2]

Joers made the correct observation[3] that the literary citations from book 53 onwards differ from those of the previous books in omitting the title of the work and number of the book cited and in giving less prominence to the jurists of the second than to those of the first century and the Republic. Joers's explanation was that Ulpian had revised and completed the citations of books 1–52, but that his revision never reached the last thirty books. This will not do. The procedure attributed to Ulpian is highly improbable. One would have expected, on the contrary, that he would have begun by citing the jurists of the second century, with exact references, and that the addition of citations of the earlier jurists and the simplification of references would have been made later; but neither is this probable. Nor are we entitled to ascribe the difference between the citations of the earlier and the later books to post-classical revision. We must fall back on Justinian's compilers. Joers can see no motive for them to have treated the citations differently from book 53 onwards. But it is possible that at book 53 another compiler took over the work, or again that by then the compilers had begun to realize that their *Digest* would be too long, if they continued to reproduce citations so fully. One can understand their allowing the second-century jurists to fall into the background in the citations, because they were precisely the authors who were specially well represented in the *Digest* by actual excerpts. Also, it suited contemporary taste to make a brave show of citations from the 'jurists of olden times', that is of the Republic and the first century A.D.: 'ut altius videantur iura callere, Trebatium loquuntur et Cascellium et Alfenum.'[4]

12. Ulpian is the last classical writer on the Edict. The commentary of Furius Anthianus[5] is a post-classical work, of which the compilers, on their own showing,[6] possessed only a part, namely five books (including the first), the rest being lost. Book 1 deals with topics discussed by Ulpian only in his book 14, so that Anthianus' work cannot have comprised more than six or seven books. The work attained no importance in practice; it is never cited, and the compilers themselves took only three excerpts from it.[7] All three are substantially unclassical, but only in part Byzantine.[8]

[1] Another good example is *D.* (2. 11) 2. 8, certainly pre-Justinian on account of *nonne*. Cf. Beseler, *Beitr.* iii. 111.

[2] As Zulueta, *St. Besta*, i. 139 ff., thinks.

[3] Joers, *PW* v. 1501.

[4] Ammian. Marc. 30. 4. 12.

[5] *Pal.* i. 179; Brassloff, *PW* vii. 319.

[6] *Index Flor.*: 'XXXVI, Ἄνθου ἤτοι Φωρίου Ἀνθιανοῦ μέρος edictu βιβλία πέντε.'

[7] *D.* (2. 14) 62; (4. 3) 40; (6. 1) 80.

[8] On the fragments cited in the last note see *Index Interp.* The end of the first fragment is not Byzantine: *extorquere* is not in Longo's *Vocabulary* of Justinian's

13. We have, finally, to mention the commentaries on particular edictal titles. Some of Paul's *libri singulares* fall into this category; we have already conjectured[1] that all or some of them are merely post-classical editions or abridgements of portions of Paul's full commentary. Besides these, three commentaries *ad formulam hypothecariam* are known to us which require to be discussed together. The compilers possessed three *libri singulares*: (1) Gaius, *De formula hypothecaria* or *Ad formulam hypothecariam*;[2] (2) Paul, a work with similar title,[3] (3) Marcian, *Ad formulam hypothecariam*.[4] Paul's work, though included in the *Index Florentinus*, was not used in the *Digest*. The two other works are represented by *Digest* fragments, and Marcian's is cited once in the *Schol. Sinaitica*.[5] Too little survives of Gaius' work for a judgment to be formed as to its structure, but we can see that Marcian's commented closely, probably in lemmatic form, on the clauses of the formula, one by one, and that it ended[6] with general questions of the law of *hypotheca*. It may be that Gaius' and Paul's treatises were only post-classical editions or abridgements taken from their general edictal commentaries, but this cannot be true of Marcian's, so that there is no doubt that he did compose such a work. All three works were, however, revised in post-classical times and the compilers possessed only the post-classical texts. One of the revisers (supposing there to have been several, which is a point that we cannot decide) introduced the word *hypotheca* into the title and text. The classical title had been *Ad formulam Servianam* or *De formula Serviana*. The person who made this change must have belonged to the eastern Empire, since the post-classical west-Roman sources never use the word *hypotheca* or its adjective,[7] except in a single passage of the *lex Romana Visigothorum* which is a constitution from the (east-Roman) *Codex Theodosianus*.[8] Whether the other post-classical

Latin (*Bull.* x (1987/8), 186). On the word: Beseler, *Z* lvii (1937), 39. Also in *D.* (4. 3) 40 the clause *nisi rell.* is probably of western origin.

[1] Above, p. 195.

[2] *Index Flor.* xx. 13, gives the title popular in the Byzantine law school: '*ὑποθηκαρίας βιβλίον ἕν*.' The *Digest* inscriptions have generally *de formula hypoth.*; only *D.* (20. 6) 7 has *ad formulam hypoth.*

[3] *Index Flor.* xxv. 42, records among Paul's *μονόβιβλα*: '*ὑποθηκάρια*', from which no safe inference as to the Latin title can be drawn.

[4] *Index Flor.*: 'XXIX, *ὑποθηκαρίας μονόβιβλον*.'

[5] *Schol. Sin.* v. 11: '*τοῦτό φησι καὶ ὁ* Marcianus *ἐν τῇ ὑποθηκαρίᾳ*.'

[6] Cf. *Pal.* i. 649.

[7] As can now be proved simply and surely. Look up *hypotheca* in Levy, *Ergänzungsindex zu ius u. leges* (1930); it is a blank.

[8] *C. Th.* (4. 14) 1 pr. (*Brev.* 4. 12. 1): *qui pignus vel hypothecam . . .*; law of 424.

elements in our texts are due to this eastern reviser or to some west-Roman cannot be determined; the latter is the more probable.

In classical speech pledge is always *pignus*, whether or not the creditor obtained possession. Even if, as is not to be assumed, the classical writers here and there used the word *hypotheca*, they would never have spoken in the book-titles of the *formula hypoth.*, but would have used the technical edictal name *formula Serviana*.[1] It is now certain that the word *hypothecaria* did not occur in the Edict.[2] The titles *De formula hypoth.* and *Ad form. hypoth.* cannot have been invented by Justinian's compilers—such a title was already known to the author of the *Schol. Sinaitica*—and must therefore come from a post-classical editor. That being the case, it is also certain that this editor would not confine this interpolation to the title. But seeing that the interpolations of *hypotheca* in the text were hastily and inconsistently carried out, and that the compilers also, as is notorious, introduced the word at times, it is impossible in individual cases to pronounce whether the word is pre-Justinian or not. The only thing certain is that the word *hypotheca*, which as we have said never occurs in the post-classical texts of the western Empire, was not in the classical original. The following are specially clear examples:

D. (20. 4) 11 pr. Gaius: 'Potior est in *pignore*, qui prius credidit pecuniam et accepit *hypothecam*. . . .'

D. (20. 6) 7. 4 Gaius: 'Illud tenendum est, si quis communis rei partem pro indiviso dederit *hypothecae*, divisione facta cum socio non utique eam partem creditori obligatam esse, quae ei obtingit, qui *pignori* dedit. . . .'

D. (41. 2) 37 Marcian: 'Re *pignoris* nomine data et possessione tradita deinde a creditore conducta convenit, ut is qui *hypothecam* dedisset. . . .'

The pioneer in this matter was Martin Fehr in his admirable *Beitr. z. Lehre vom röm. Pfandrecht in d. klass. Zeit* (Upsala, 1910). Naturally Fehr could only follow the then universal view[3] that all interpolations came from Justinian. So far his critics were right, but in other respects the attacks on his book[4] were mistaken and are now quite out of date. His one mistake was as to the origin of the interpolations: that part of them (in particular those in the book-titles) do not come from the compilers, but from the post-classical revision, is to-day quite beyond dispute.[5]

[1] The name still used by s. 5 of the pre-Justinian tract *De actionibus* (*Z* xiv (1893), 89). [2] Lenel, *Ed.* s. 267, p. 493, n. 13. [3] Above, p. 142.

[4] Erman, *Mél. Girard*, i (1912), 419 ff.; Manigk, *PW* ix. 343, 364; Kunkel, s. 94; Berger, *KVJ* xvi (1914), 101.

[5] The right view is already taken by Beseler, *Beitr.* iii (1913), 48. The commentary on the two works of Gaius and Marcian given by Ebrard, *Die Digestenfragmente ad formulam hypoth.* (1917), 75 ff., is serviceable, though it carries its conclusions too far. Recently Rabel, *Seminar*, i (1943), 32.

C. Commentaries, Epitomae, and Notae on juristic works.

1. *Works on Q. Mucius' Ius civile.* This, the fundamental work of Roman jurisprudence, continued to be read throughout the classical period; the first commentary on it is of the second century.

(*a*) A quotation by Gellius (15. 27. 1) makes us certain of the existence of a work *Ad Q. Mucium* by one Laelius Felix[1] in at least two books, but it remains doubtful whether it was juristic in character or antiquarian and anecdotal. The jurists appear hardly to have noticed it. Two passages from Paul's *Ad Plautium* (*D.* 5. 3. 43 and 5. 4. 3) citing a certain Laelius are commonly taken to refer to it, and in fact the work referred to by fr. 3 does appear to be that quoted by Gellius. But the reference occurs in the middle of a long passage which certainly does not come from the pen of a classical writer.[2] Laelius is there appealed to, not on a point of law, but as recording a case of five children being born at one birth. But in fr. 43 *Laelius* is perhaps a mis-writing of *Caelius*. The commentary is not mentioned elsewhere by the jurists.

(*b*) In his *Institutes*[3] Gaius mentions *libri quos ex Q. Mucio fecimus*, which must have been a lemmatic commentary on Mucius' *Ius civile*. There is no other mention of the work, nor was it used by the compilers; probably it disappeared early.

(*c*) Pomponius[4] wrote a commentary entitled, apparently, *Ad Q. Mucium lectionum libri xxxix*.[5] Its arrangement was the same as Mucius'.[6] Its method was lemmatic: the passage to be commented on was given in full, introduced by *Q. Mucius ait* or *scribit* or perhaps just *Q. Mucius*; the comment was headed *Pomponius*. In the *Digest* fragments, which are all we have, the distinction between lemma and comment has become blurred,[7] perhaps only by Justinian's compilers. The texts contain many things which

[1] Berger, *PW* xii. 416; Seckel–Kübler, i. 94.

[2] Cf. *Index Interp.* and below, p. 216.

[3] i. 188. Beseler, *T* x (1930), 180, but see above p. 163.

[4] Di Marzo, *Saggi critici sui libri di Pomponio ad Q. Mucium* (1899).

[5] *Index Flor.*: 'XI, ad Quintum Mucium lectionum βιβλία τριάκοντα ἐννέα.' The *Digest inscriptions* omit *lectionum*, obviously for brevity.

[6] Above, p. 95.

[7] We still have *Q. Mucius scribit* (or the like) . . . *Pomponius* in the following fragments: *D.* (9. 2) 39; (19. 1) 40; (33. 1) 7; (34. 2) 10; (34. 2) 34. In contrast, in *D.* (40. 7) 29. 1 the signature *Pomponius* has been excised before *Labeo*. In *D.* (47. 2) 77. 1 the signatures of Mucius and Pomponius are both lacking. Here the classical text ran: 'Q. Mucius: Si quis . . . esset. Pomponius: Haec vera sunt: nam' *rell.* The reviser cut out both signatures and was thus led to rewrite the first clause: 'Haec [Q. Mucius refert et] vera sunt.'

can come neither from classical times nor the compilers,[1] showing that the work was revised in the intermediate period.

2. *Works on Alfenus Varus' Digesta.*[2] The *Index Florentinus* registers a large collection of *responsa* by Alfenus Varus in forty books,[3] but it is doubtful whether the compilers really possessed a copy of it. At any rate they were content to take their excerpts from two abridgements, from which, however, they could probably see how many books the original work contained. If they did possess the original work, which is not impossible, they may have preferred to avail themselves of the abridgements instead of working through the extensive original.

(*a*) One of the abridgements stands under the name of Paul. We know neither its exact title nor the number of its books. It is not in the *Index Florentinus*, and in the inscriptions of the fragments in the *Digest* the title varies.[4] The compilers took excerpts from it only as far as book 8; but whether that was the last we cannot say. Paul evidently kept to Alfenus' order and, following classical practice, seems to have quoted passages from Alfenus more or less word for word and added any observations of his own that he deemed necessary, for Paul is the very last man whom one would credit with a work of pure epitomization. It must be admitted, however, that in our *Digest* fragments the line between Servius' *responsa* and the notes thereon of Alfenus and Paul has become obliterated, with the result that a unitary text devoid of authors' names has been produced; only twice, obviously by oversight, *Servius respondit* has not been deleted.[5] Whether this revision is due to the compilers or to some pre-Justinian post-classical editor must remain doubtful; the extracts are so few that

[1] For example, in *D.* (24. 1) 51 the misogynistic *ratio* given for the celebrated *praesumptio Muciana* is not classical, at any rate not Mucian, but also was not inserted by the compilers. The words *et verius . . . habeat* are evidently outside the construction of the sentence. On *evitandi . . . probasse* (before *evitandi* there had been *Pomponius*) see Beseler, *Beitr.* iii. 50. Mucius was reporting a court practice, and Pomponius observed that Mucius seemed to have approved it.

[2] Joers, *PW* i. 1472; Berger, *PW* x. 723; Ferrini, *Opere*, ii. 169; Peters, *Z* xxxii (1911), 464.

[3] On Alfenus see above, p. 92.

[4] Down to *D.* (19. 1) always 'Paulus libro . . . epitomarum Alfeni digestorum'. From 19. 2 onwards either the same or 'Alfenus' (or 'Alfenus Varus') 'libro . . . digestorum a Paulo epitomatorum'. But this is not due to two different abridgements having been used, but to pure caprice and carelessness of the compilers or their clerks.

[5] *D.* (28. 5) 46 and (33. 7) 16. 1. It is established that Alfenus did not simply report Servius' decisions: above, p. 92. The variation between *respondi* and *respondit* means nothing; both were expressed by a *siglum*, which the copyists extended at their pleasure.

the former is quite likely. But in any case there appear to be pre-Justinian interpolations in our texts.[1]

(*b*) There is in the *Digest* a second set of excerpts invariably inscribed *Alfenus* (or *Alfenus Varus*) *libro . . . digestorum*. This does not disclose that the excerpts come from an abridgement; on the contrary, taken in conjunction with the entry in the *Index Florentinus*, it indicates that they are taken from the original work. Yet in truth they too come from an abridgement, as the following considerations show conclusively.[2] Alfenus' original was in forty books. The work from which the *Digest* fragments were taken followed the edictal order and in its book 7 dealt with the title *De liberali causa* (Tit. xxxi of the Edict, according to Lenel). A writer who disposed of thirty-one titles in seven books cannot possibly have devoted thirty-three books to the remaining fourteen (Titt. xxxii–xlv). Thus the work extracted from must have been in far less than forty books and have been an abridgement of Alfenus' original. The epitomist's name is unknown. He must have lived later than Paul, doubtless in early post-classical times. In this series of fragments Servius' name does not occur, so that one cannot tell where it is Servius and where Alfenus that is speaking. Nor can we say whether this feature is due to the epitomist or to Justinian's compilers.[3] The edictal order in any case is due to the former; the order of the original was different, as is shown by Paul's epitome. This group of fragments once more shows pre-Justinian interpolations.[4]

3. *Works on Labeo's Pithana.*[5] Here, too, the *Index Florentinus* would lead one to suppose that the compilers excerpted from an

[1] See *D.* (10. 4) 19, the text of which cannot be classical, but does not smack of the compilers. Beseler, *Beitr.* v. 25; *Z* lvii (1937), 5, is right. The interpolation in *D.* (19. 2) 31 is also probably pre-Justinian: Beseler, *Z* xlv (1925), 467, whose reconstruction of the text is, however, unwarranted.

[2] *D.* (28. 1) 25 is not decisive. Here Iavolenus cites book 1 of the complete work in such a way as to oblige one to infer that Alfenus dealt with testamentary law in this book. But our fragments put the topic in book 5. It may be that in Iavolenus' citation *libro U* (*V*) has been miscopied to *libro I*.

[3] In regard to several fragments Dorotheus assumes Servius to be the author, though the text of the *Digest* gives no clue. So on *D.* (9. 1) 5: *Bas.* (ed. Heimbach), v. 262; on (40. 1) 6: *Bas.* iv. 618. Likewise Stephanus on (19. 2) 27, 1: *Bas.* ii. 354. The easiest explanation is that the Byzantine jurists still possessed the anonymous epitome used by the compilers, and that this gave more exact information as to who was speaking. Or else the Byzantines may have, rightly or wrongly, inferred Servius' authorship from such passages as *D.* (28. 1) 25; (32) 29. 2; (33. 4) 6 pr.; (46. 3) 67; (3. 5) 20 pr.; (50. 16) 77. So also Ferrini, *Opere*, ii. 175, n. 2.

[4] *D.* (5. 1) 76, the interpolation of which has been shown above, p. 84, is a certain example. In *D.* (38. 1) 26 pr. *hoc est . . . sineret* is also neither genuine nor from the compilers: Beseler, *Beitr.* v. 63, 65.

[5] On the Pithana, below, p. 226.

original work by Labeo in eight books. But the *Digest* fragments prove to be excerpts from an epitome by Paul[1] in eight books. The textual extracts began: *Labeo libro . . .* or *Labeo eodem libro*, and were separated from Paul's comments by *Paulus*. Some editor has cut out *Labeo* everywhere, except by oversight in one case,[2] but has left *Paulus*. He may have been either some pre-Justinian lawyer or one of the compilers. The text contains pre-Justinian interpolations.[3]

4. *Works on Labeo's Libri posteriores.*[4] (*a*) Once more the *Index Florentinus* gives the impression that the compilers extracted from Labeo's genuine 'posthumous works', but so small a number of books as ten indicates that what they actually used was not the original work, which is known to have comprised at least forty.[5] The inscriptions of the *Digest* fragments show that they derived their extracts from an epitome by Iavolenus Priscus, a work which conformed with the traditional classical design as exhibited by Paul's epitome of Labeo's *Pithana* described above. Labeo's own words were given and Iavolenus' comments followed, the two being carefully distinguished by the authors' names. Of this epitome, which seems to have been in ten books, the compilers possessed two versions (here referred to as A and B), from both of which they took excerpts. This should cause no surprise, in spite of the fact that, in the organization of the work of excerpting, both versions were placed in the same group (the 'Appendix group'),[6] for we have just seen[7] that excerpts were taken from two epitomes of Alfenus' *Digesta*, though both were in the 'Sabinus group'. The texts of versions A and B are very dissimilar.

From A came all those *Digest* fragments the inscriptions of which mention Labeo's *Posteriores* first, e.g. 'Labeo libro . . .

[1] Pernice, *Labeo*, i. 35 ff., 38; Joers, *PW* i. 2551; Berger, *PW* x. 723. The ordinary inscription in the *Digest* runs: 'Labeo libro . . . pithanon' (sometimes *πιθανῶν*) 'a Paulo epitomatorum.' Occasionally *a Paulo epitomatorum* is omitted. But these variants are the result of mere caprice on the part of the compilers or their clerks. Cf. Krüger, 156.

[2] *D.* (41. 1) 65. 4.

[3] A clear example is *D.* (22. 3) 28, where *et hoc . . . exstaret* is not genuine however one reconstructs the original. This insipid scholasticism is neither classical nor from the compilers. Cf. Beseler, *Z* liii (1933), 54; Schulting–Smallenburg, *Notae ad Pandd., ad h. l.*

[4] On the *Libri posteriores* themselves see below, p. 227. On what follows: Pernice, *Labeo*, i. 69 ff.; H. Krüger, *St. Bonfante*, ii. 329; Berger, *Bull.* xliv (N.S. iii, 1936/7), 91 ff.; *PW* xvii. 1836 ff.

[5] Below, p. 227.

[6] Below, p. 320.

[7] Above, p. 205.

posteriorum a Iavoleno epitomatorum.'[1] In this version, as the fragments show, the general design of Iavolenus' epitome had not been tampered with: Labeo speaks in the first person and is not reported in the third. But in other respects the classical text has been revised: the signatures *Labeo* and *Iavolenus* have disappeared, except in one case where, by oversight, *Iavolenus* has been left;[2] Iavolenus' comments have been excised or rendered unrecognizable; the numerous citations, which version B shows the original epitome to have contained, have been expunged.[3] There can be no certainty as to the authorship of this revision, but it is so thoroughly in the manner of the compilers that we may assign it provisionally to them, and assume that version A gave them the text substantially in its classical form. Pre-Justinian additions appear to be present in these fragments only to a small degree.[4] Since the fragments come from books 1–6 only, it is possible that the compilers did not possess books 7–10.

Version B, from which are to be presumed to come all fragments whose inscriptions mention Iavolenus first and Labeo second (e.g. 'Iavolenus libro . . . posteriorum Labeonis'),[5] was in a quite different state. Labeo does not speak in the first person, but is reported by Iavolenus, except only[6] in *D.* (7. 4) 24. 2, where the intended alteration was overlooked. Iavolenus' notes are appended, but without the signature which, of course, they no longer needed. The citations of literature are fuller than those of version A. It is thus clear that in this version the original classical text of the epitome had been revised, a piece of work which we cannot ascribe to the compilers, since it would have taken longer to do than the insignificant resulting reduction of text would have been worth. Hence B was a post-classical version of Iavolenus' *Epitome*,

[1] Lenel, *Pal.* i. 299 ff., marks these fragments [*Labeo*]. The inscription of *D.* (32) 29 is incorrect; it therefore does not belong to version A. The inscription of the next passage: *Labeo*, not *Idem*, shows that the original inscription of fr. 29 began *Iavolenus*. *D.* (33. 1) 17 is also wrongly inscribed and belongs to version B. The citation of Labeo in *D.* (19. 2) 60. 5 did not occur in the original text. On the passages: Bluhme, *Z. f. geschichtl. RW.* iv (1818), 321; Krüger, 178. [2] *D.* (40. 12) 42.

[3] Sometimes in our fragments an accusative and infinitive without governing verb shows that a citation has been excised: *D.* (28. 6) 9; (17. 2) 84; (19. 2) 60. Verb without subject in *D.* (19. 2) 28. The citations survive in *D.* (32) 30; (33. 2) 31; (33. 4) 6; (33. 8) 22; (23. 3) 79. 1.

[4] Minute points: *D.* (28. 7) 20. 2, *dummodo . . . probes* is a clumsy gloss: Beseler, *Z* xlvii (1927), 62. In *D.* (33. 8) 22. 1 the same is true of the second *quartam*: Schulz, *Einführung*, 20. On *D.* (23. 3) 79 see Bonfante, *Corso*, i. 299, n. 1; Beseler, *Z* xlv (1925), 443.

[5] Also the two wrongly inscribed fragments noted above, p. 208, n. 1.

[6] *D.* (24. 1) 64 is corrupt.

in which the classical text had been altered in the ways mentioned. This revision was unskilful: in particular, it has made it at times impossible to decide whether an opinion is Labeo's or Iavolenus'. Pre-Justinian interpolations are present to a greater extent[1] than in version A. The compilers possessed all its ten books.

The existence of two versions is disputed: some writers hold that all the fragments the inscriptions of which mention Labeo's *Libri posteriores* come from a single source, the authentic *Epitome* by Iavolenus. This view, which unfortunately Lenel shared and applied in his *Palingenesia*, has recently been defended by Berger, but unsuccessfully. All that he shows is that one argument, which was previously taken to be decisive in favour of two versions, cannot be *proved*. The probability now is that the two versions did not, for purposes of excerption, belong A to the 'Appendix group' and B to the 'Sabinus group', but were both in the 'Appendix group'. But this does not prove that they do not come from two sources: we have seen that excerpts were taken from both abridgements of Alfenus' *Digesta*, though both were in the 'Sabinus group'. The decisive arguments against the existence of only one version are the following: (1) The difference in the inscriptions of the two sets of fragments, though not in itself decisive, corresponds to internal differences in the texts. In A Labeo speaks in the first person, in B he is reported by Iavolenus. Berger's explanation is that the compilers varied their inscriptions precisely in accordance with this difference, a procedure which, though not inconceivable, is not exactly probable. But why should Iavolenus himself have thus varied his method of giving Labeo's opinions? (2) No fragment from books later than book 6 makes Labeo speak in the first person. Why is this? If the compilers possessed only one version, how is it that no such fragments occur in books 7–10? The only possible explanation is that the compilers possessed two versions, but the version in which Labeo was made to speak in the first person only as far as its book 6. (3) In the fragments in which Labeo so speaks (version A) we find neither citations of other jurists nor *notae* by Iavolenus, whereas in the other group of fragments (version B) both are found. Here again the simple explanation is that the two groups of fragments come from two different versions.

(*b*) In just one fragment from version B we find a *nota* by Paul.[2] This does not justify the inference, which has been drawn, that there were *Notae Pauli* on Labeo's *Libri posteriores*; any reader might make a marginal entry from any of Paul's works in his copy. The evidence for *Notae Aristonis* on the *Libri Posteriores*[3] is

[1] This cannot be demonstrated here.

[2] *D.* (29. 2) 60.

[3] Conjectured by Mommsen, *Schr.* ii. 21 ff., and Krüger, 158. Also by others.

likewise bad.[1] Again, Proculus wrote neither *Notae*[2] on nor an *Epitome*[3] of that work.

5. *Works ad Vitellium.* (*a*) Massurius Sabinus' *Libri ad Vitellium*[4] are known only by a few citations, which give no indication of the character of the work; the title must mean 'on (some work of) Vitellius', not 'dedicated to Vitellius'.[5] No jurist of the name is known.

(*b*) Paulus, *Ad Vitellium libri iv.*[6] We possess a number of fragments in the *Digest.* They show that the work was really a lemmatic commentary on Sabinus' *Ad Vitellium*, but the lemmatic form has been so spoilt that it is only occasionally recognizable.[7] It is a case of post-classical revision, in the course of which quite a number of citations from Cervidius Scaevola's *Responsa*,[8] and much besides, were inserted. A good sample is *D.* (32) 78. 4, which is in the style of neither Paul nor the compilers,[9] but might well come from Cassiodorus' *Variae.*

(*c*) For *Notae* by Cassius and Aristo *ad Vitellium* the evidence is poor.[10]

6. *Works on Massurius Sabinus' Ius civile.* Sabinus' *Iuris civilis libri iii* were read and cited by the jurists throughout the classical period. Works dealing exclusively with it are first met with in the second century, probably not before its second half.

(*a*) *Notae ad Sabinum* (doubtless his *Ius civile*) by Aristo are mentioned, but we cannot tell whether the work referred to was written in the form of a lemmatic commentary.[11]

[1] Sole evidence: *D.* (28. 5) 17. 5, where, however, *nec . . . notant* is certainly interpolated: Pernice, *Labeo*, i. 87. The mysterious *Aulus* should be read *Iavolenus* —confusion of *IAUL* and *AUL*, as already rightly observed by *Pal.* ii. 1036.

[2] Conjectured by Pernice, *Labeo*, i. 84; Krüger, 158, and others. But see Berger, *Bull.* xliv. 127 ff.

[3] Again conjectured by *Pal.* ii. 166; but see Berger, *Bull.* xliv. 120 ff.

[4] Di Marzo, *Di una recente congettura sull' indole dei libri ad Vitellium di Massurio Sabino* (Palermo, 1899); Baviera, *Scritti giurid.* i (1909), 123 ff.

[5] The jurists do not cite by the name in the dedication. *D.* (33. 7) 12. 27 (below, n. 10) is decisive on the point.

[6] Baviera, *Scritti giurid.* i. 123; Berger, *PW* x. 713; Schulz, 'Ueberlieferungsgesch. d. Responsa des Cervidius Scaevola', *Symb. Frib.* 218 ff., 235 ff.

[7] Signatures *Sabinus* and *Paulus* left, obviously by mistake, in *D.* (28. 5) 18, and *Sabinus* alone in *D.* (33. 7) 18. 12.

[8] See Schulz, l.c. in last note but one.

[9] Cf. Beseler, *Beitr.* iii. 87; iv. 215, 236; v. 12.

[10] The reference to Cassius in *D.* (33. 7) 12. 27 is probably a gloss of a reader who had looked up Paul, *Ad Vitellium*, and found *D.* (33. 7) 18. 10, 11. On Aristo's *Notae*: Mommsen, *Schr.* ii. 22; Baviera, *Scritti giurid.* i. 142.

[11] *D.* (7. 8) 6; *F.V.* 88.

(*b*) The earliest extensive commentary comes from Pomponius. It was a counterpart, though on a smaller scale (only 35 books), to his *Ad edictum*, its main purpose being to expound the *ius civile* as distinct from the *ius honorarium*. As in his *Ad edictum* Pomponius here industriously collected the older literature. It was certainly a strange idea to choose as the groundwork of such an exposition Sabinus' *opusculum*. The Edict, now codified, had become *lex perpetua* and a proper subject for a detailed commentary, but it was simply grotesque to expound the literature of the civil, non-praetorian, law in thirty-five books in the form of a commentary on Sabinus' work, which was brief—indeed that was its chief merit—unfinished, glaringly faulty in arrangement,[1] and by no means exclusively confined to the non-praetorian civil law.[2] This choice shows Pomponius to have been of the *epigoni* and to have possessed a truly classical insensibility to faults of arrangement. In this respect and in its industrious assemblage of literature Pomponius' work provokes comparison with the voluminous *Ausführliche Erläuterung der Pandekten* of the laborious Glück who 'without the least need and one may fairly say unfortunately'[3] adopted the order of topics of Hellfeld's *Iurisprudentia forensis* (1764).

The *Index Florentinus* and the *Digest* inscriptions give the title as *Libri ad Sabinum*, whereas Ulpian ordinarily cites it as *Libri ex Sabino* and only exceptionally as *Libri ad Sabinum*. The variation is readily comprehensible, since the work was a lemmatic commentary, in which the lemmata were *ex Sabino* and the commentary *ad Sabinum*. In the *Digest* the line of division between lemmata and commentary has been everywhere erased, but can sometimes still be discerned,[4] for example in *D.* (17. 2) 59 pr., (34. 2) 1. 1, also (41. 3) 29 and (41. 4) 6. 2.

Although Pomponius' commentary, being overshadowed by Paul's and Ulpian's, is never mentioned in the post-classical period, it nevertheless was added to then. Our knowledge of it depends entirely on the excerpts taken by Justinian's compilers from the copy which they possessed, and on citations of it by Paul and Ulpian, mostly to be found in *Digest* fragments. A clear example of post-classical, but pre-Justinian, interpolation is furnished by

[1] Above, p. 156.

[2] It dealt, in particular, with the aedilician Edict: above, p. 158.

[3] So Arndts, *Die Lehre von d. Vermächtnissen*, i (1869), s. 1517*a init.* (Glücks Pandekten, vol. xlvi).

[4] Scialoja, *Bull.* ii (1889), 176 ff.; Riccobono, *Bull.* vi (1893), 153, n. 2; Schulz, *Sabinus-Fragmente in Ulpians Sabinus-Commentar* (1906), 93 f.

D. (28. 5) 29, of which we have spoken above.[1] Another example is *D.* (33. 5) 6.[2]

(*c*) Paul's *Ad Sabinum* was considerably shorter than Pomponius', being in only sixteen books.[3] It too was lemmatic in plan, but this is only occasionally discernible in the *Digest* fragments, which are our only source of information.[4] Thus *D.* (13. 7) 36[5] clearly shows that *D.* (47. 2) 20 pr. is a lemma *ex Sabino*, and *D.* (45. 1) 22 preserves a part of Paul's commentary on it.

The *Scholia Sinaitica*[6] show that Paul's commentary was still used in post-classical times, but it was overshadowed by Ulpian's: it is the latter, not the former, that is commented on by the *Schol. Sinaitica*, while the *Fragm. Vaticana* use only the latter. Moreover, Justinian's compilers took Ulpian's as the leading commentary.

(*d*) Thus we know most about Ulpian's commentary;[7] we possess not only numerous and extensive fragments of it in the *Digest*, but also considerable passages in the *Fragm. Vaticana*; the latter throw very important light on the history of the text. Outside the *Digest* we have (1) *F.V.* 59–64, 70–2, 74–89, 269; (2) a small piece in Priscian,[8] (3) the citations of the *Schol. Sinaitica*[9] and the *Collectio definitionum*,[10] and (4) a citation by *C.* 6. 40. 3. 2 (A.D. 531).

The work, like Ulpian's *Ad edictum*, was consistently lemmatic. In the *Digest* the signatures *Sabinus* and *Ulpianus* have been cancelled, so that the distinction between lemmata and commentary is blurred, but at times one can make out the classical form of the text;[11] a clear example is *D.* (47. 2) 43. 4, where we have the assistance of Gellius (11. 18. 21). In *F.V.* 269 the signature *Ulpianus* survives.

The purpose of this commentary was the same as that of the commentary on the Edict:[12] Ulpian intended in it to restate the

[1] Above, p. 133.

[2] [*quid ergo . . . sint.*] *Nonne* in our juristic texts is never genuine, but does not come from the compilers. Not in Longo's *Vocabulary* (of Justinian's Latin constitutions), *Bull.* x (1898), nor indeed in Levy's *Ergänzungsindex*. Cf. Stolz–Schmalz, *Lat. Grammatik, Syntax*, s. 222. Also Beseler, *Beitr.* iii. 112; *Subsiciva*, 11.

[3] Berger, *PW* x. 711.

[4] Schulz, *Sabinus-Fragmente*, 94.

[5] This text was not written in its present form by Ulpian, but substantially it is classical.

[6] *Schol. Sin.* 12. 34; 13. 35.

[7] Joers, *PW* v. 1441, 1459, 1507; Fitting, *Alter u. Folge*, 111.

[8] *Collect. libr.* iii. 298; Seckel–Kübler, i. 503; Girard–Senn, *Textes*, 497; *FIRA* ii (ed. 2), 314.

[9] Below, p. 325.

[10] Below, p. 308.

[11] So Joers, *PW* v. 1442, and, following him, Schulz, *Sabinus-Fragmente* (above, p. 211 n. 4), but to-day one could make many improvements in the last, in which too much trust was placed in the traditional text; also preliminary studies and vocabularies were then deficient.

[12] Above, p. 198.

interpretation of the *ius civile*, as in his *Ad edictum* he restated the interpretation of the Edict. Here again he took Pomponius as his basis, but amplified considerably. As our remains show, he reported the older literature so exhaustively that his commentary was more than sufficient for the purposes of the practitioner and dispensed with any need to go back to the older books. We do not know the exact length of the commentary. The compilers possessed an edition in fifty-one books, but this does not cover the whole of Sabinus' system, the entire law of property being absent.[1] Book 51 treats of the same matters as Pomponius' book 20 and Paul's book 13. If Ulpian completed his work on the scale thus indicated, it must have comprised about sixty-two books. Thus, either Ulpian never finished his work, or its later books did not reach the compilers.

Early in the post-classical period Ulpian's work underwent radical changes, and this revision completely displaced the classical original. Tribonian was well aware that his own copy was a second edition, a revision;[2] that is why, as a bibliophile and classicist, on the occasion of the publication of the *Codex repetitae praelectionis* he recalls Ulpian's *Libri ad Sabinum* as a classical precedent for a *repetita praelectio*.[3] It is antecedently improbable that this second edition was made by Ulpian himself; his literary production was too great and was accomplished in too short a time to allow of this. But the fact that Ulpian *Ad Sabinum* was indeed revised in post-classical times is beyond question; it is flagrant in the *Fragm. Vaticana*. There the fragments contain sentences which can on no supposition be authentic; they cannot have been penned by Ulpian even as a rough draft. They are not only unclassical in expression, but, what is decisive, they exhibit that uncertainty, that ignorance and half-knowledge in matters of law, which, while characteristic of the post-classical law school, are simply impossible in one who was *assessor* to Papinian and later *a libellis* and *praefectus praetorio*. The text was in this depraved condition as early as the fourth century; such was its *secunda editio repetitae praelectionis*. If from its beginning the modern study of interpolations had been conducted methodically, as unfortunately it was not, it would have started from these

[1] Above, p. 158.

[2] He learnt this no doubt from its preface.

[3] *Const. Cordi*, s. 3: 'In antiquis etenim libris non solum primas editiones, sed etiam secundas quas "repetitae praelectionis" veteres nominabant, subsecutas esse invenimus, quod ex libris Ulpiani viri prudentissimi ad Sabinum scriptis promptum erat quaerentibus reperire.' Cf. Joers, *PW* v. 1441.

Vatican texts. Instead, they were overlooked, and even now no complete study of them exists. The present work is, however, not the place in which to provide one.[1]

Justinian's compilers made the already depraved text of their copy even worse, but mostly by compression and excision, less often by other kinds of interpolation. In this respect also the passages in the *Fragm. Vaticana*, which recur in part in the *Digest*, are instructive. Comparison of the two versions[2] shows the kind of alteration that may or may not be attributed to Justinian's compilers. They were specially ruthless in cutting out citations and running several citations into one, with the result that the views of one jurist are without scruple attributed to another.[3]

7. *Works on Cassius' Ius civile.*

(*a*) The *Notae* of Aristo survive only in a few citations, from which no conclusions as to their literary form[4] can be drawn.

(*b*) Iavolenus, *Ex Cassio libri xv.*[5] This was either a lemmatic commentary or a commenting epitome.[6] Iavolenus quoted portions of Cassius more or less textually and appended his own remarks, text and comment being distinguished by the signatures *Cassius* or *Idem* and *Iavolenus*. This lemmatic scheme has been obliterated in the *Digest* fragments, which are all that survive. Not only are the signatures erased, but Cassius no longer speaks in the first person, but is reported by Iavolenus;[7] there is only one passage[8] in which by an oversight the signature *Idem* (meaning Cassius) has been allowed to stand, so that the original scheme is revealed. Thus the revision was on the same lines as the post-classical revision of Iavolenus' epitome of Labeo's *Posteriora*.[9] Possibly the same hand was at work in both cases. In any case the surviving fragments, scanty as they are, give other indications of pre-Justinian revision.[10]

8. *An abridgement of Vivianus* is referred to by a single citation in Ulpian's commentary on the Edict.[11]

[1] A few references must suffice here: Schulz, *Einf.* 28; Beseler, *Beitr.* iv. 170, v. 9; *Z* xliii (1922), 538; xlv (1925), 442; xlvi (1926), 270; l (1930), 73; liii (1933), 11; lvii (1937), 15; *T* x (1930), 222; *St. Riccobono*, i. 311; Wolff, *Z* liii (1933), 297, 301; *Index Interp.* ad *D.* (23. 3) 34. [2] Joers, *PW* v. 1459, is far too superficial.

[3] Compare *F.V.* 71 and *D.* (7. 1) 12 pr.: the compilers have put a doctrine of Neratius into Labeo's mouth.

[4] *D.* (7. 1) 7. 3, 17. 1; (39. 2) 28. Below, p. 228. [5] Berger, *PW* xvii. 1833.

[6] Above, p. 186. [7] *D.* (35. 1) 54; (40. 7) 28. 1; (46. 3) 78.

[8] *D.* (4. 8) 39 pr. [9] Above, p. 207.

[10] In *D.* (17. 1) 36. 1 *quid enim fiet . . . cognoveris* cannot be authentic; the remark is trivial and its reference to the maxim *mandatum gratuitum esse debet* misplaced. The style is that of the post-classical law school. Beseler, *Beitr.* ii. 86, iii. 69; *Z* liii (1933), 25; lvii (1937), 10. [11] *Coll.* 12. 7. 8; Joers, *PW* v. 1485.

9. *Plautius* was more than once commented on, but we do not know whether the subject of comment was a definite work by Plautius or a selection from a number of his writings.[1]

(*a*) A single citation by Ulpian[2] informs us of *Libri ex Plautio* by Neratius.

(*b*) The title of Iavolenus' commentary[3] is given by the *Index Florentinus*[4] as *Ad Plautium βιβλία ἑπτά*, by the inscriptions of the *Digest* fragments as *libri ex Plautio*.[5] This leaves us once more doubting whether we have to deal with a commenting epitome or a lemmatic commentary. In the few *Digest* fragments the lemmatic scheme has been completely obliterated.[6] Paul cites the work once in his *Libri ad Plautium*.[7]

(*c*) The commentary of Pomponius is described by the *Index Florentinus*[8] as *Ad Plautium βιβλία ἑπτά*, as also (probably by a copyist's oversight) in the inscription of one of the *Digest* fragments.[9] Otherwise the inscriptions have always *libri ex Plautio*, which is the title under which Ulpian's commentary cites the work. Our scanty remains give no exact idea of its literary character; a lemmatic scheme, which is probable, is no longer recognizable.

(*d*) Paul, *Ad Plautium libri xviii*.[10] Our *Digest* fragments clearly show that the commentary was lemmatic, Paul quoting a passage from Plautius, who speaks in the first person, and marking it *Plautius* or occasionally *Plautius ait*, and then appending his own remarks, signed *Paulus*. In a number of texts the signatures are preserved,[11] but in most they have been excised, though at times it is still possible to distinguish Plautius' text from Paul's commentary. Whether the destruction of the lemmatic scheme is due to some pre-Justinian editor or to the compilers cannot be stated with certainty, but in any case the copy used by the compilers already contained profound interpolations and depravations of

[1] *Pal.* i. 1147, n. 1.
[2] *D.* (8. 3) 5. 1.
[3] Berger, *PW* xvii. 1835.
[4] ix. 3.
[5] In the inscription of *D.* (45. 3) 34 *ad Plautio* is a copyist's slip for *ex Plautio*, due to the preceding inscription being *Paulus . . . ad Plautium*; the correction to *Plautium* is wrong.
[6] The reference of *ait* in *D.* (12. 6) 46 is uncertain.
[7] *D.* (34. 2) 8.
[8] xi. 5.
[9] *D.* (7. 1) 49; the preceding inscription has *Paulus . . . ad Plautium*.
[10] Ferrini, 'I libri ad Plautium di Paolo' (1894), *Opere*, ii. 205 ff.; Riccobono, 'St. critici sui libri XVIII di Paulus ad Plautium', *Bull.* vi (1893), 119 ff., unfinished (cf. Baviera, *St. Riccobono*, i, p. xxxv); Berger, *PW* x. 710.
[11] *D.* (3. 3) 61; (20. 4) 13; (34. 2) 8; (35. 1) 43 pr.; (35. 1) 44. 10; (35. 2) 49 pr.; (39. 2) 22.

the classical original. The best and clearest examples will be found in *D.* (5. 4) 3,[1] (22. 1) 38[2] and (40. 4) 39.[3]

10. Julian, *Ad Urseium Ferocem libri iv.*[4] This work, of which we possess only some *Digest* fragments, was a lemmatic commentary, not some kind of edition with *notae* by Julian of an otherwise unknown work of Urseius.[5] This follows from the title[6] and from the number of *libri*, since we know that Urseius' work contained at least ten.[7] The original scheme, which survives in three passages,[8] but has been obliterated everywhere else, was that a passage of Urseius was given textually and then Julian's observations introduced by *Iulianus notat.*[9] A reviser has turned Julian's *oratio directa* into a report of his view.[10] This can hardly be the work of the compilers; they found things so in their copy, along with other profound alterations and interpolations of the classical original.[11]

11. Julian, *Ex Minicio libri vi.*[12] The compilers' copy comprised six books.[13] Ulpian cites book 10,[14] but apparently this is the result of *x* having been miswritten for *v*,[15] since the opinion cited

[1] Neither classical nor Byzantine. Albertario, *St.* v. 365, 393; Beseler, *Beitr.* iv. 44; *Z* xlv (1925), 460; *T* x (1930), 182; *St. Riccobono*, i. 312.

[2] A post-classical tract. Observe the introduction: *Videamus . . . veniant.* See *Index Interp.*; Beseler, *Beitr.* v. 39.

[3] Only *eo modo* is Byzantine instead of *per vindicationem.* Schulz, *Einf.* 41; Ciapessoni, *St. Bonfante*, iii. 675, giving literature; Beseler, *Beitr.* iv. 219, v. 69; *Index Interp.* Another good example is *D.* (23. 3) 56. 3, where *quid ergo . . . videbitur* is a pre-Justinian interpolation: *Index Interp.*

[4] Ferrini, *Opere*, ii. 505; Baviera, *Scritti giurid.* i. 99. Ulpian cites the work in *D.* (10. 3) 6. 12.

[5] Krüger, 174, assumes an edition with *notae Iuliani*; but this is because he has not thought of the lemmatic commentary of juristic and other literature.

[6] An edition of Urseius with notes would naturally name Urseius first in its title.

[7] *Coll.* 12. 7. 9.

[8] *D.* (46. 3) 36; (30) 104. 1; (23. 3) 48. 1.

[9] Beseler, *Beitr.* v. 50: '*Iulianus notat* in a work by Julian can only be an intrusion.' This is not so; even if Julian had written merely *Iulianus, notat* would have to be understood. The division between lemma and commentary by the name of the commentator was very practical: *ego* would have left a reader who was unfamiliar with the work in doubt, unless he had book 1 with the title handy.

[10] *Iulianus autem* [*recte*] *putat*, with acc. and infin., in *D.* (16. 1) 16. Parallels to this kind of revision: above, pp. 208, 214.

[11] See Note CC, p. 341.

[12] *Index Flor.*: 'I. ad Minicium βιβλία ἑξ.' All the *Digest* inscriptions have *libri ex Minicio*, and they are to be preferred to the *Index*, except when it is a question of abbreviating a title. The copyist of the *Index* made it *ad Minicium* because of *ad Urseium* in the next line.

[13] Riccobono, *Bull.* vii (1894), 225 ff.; viii (1895), 169 ff., excellent work, but after 50 years of intensive researches now needing revision. Steinwenter, *PW* xv. 1809.

[14] *D.* (19. 1) 11. 15.

[15] So Haloander; also Krüger, 175.

would suit book 5.[1] Once again we have a lemmatic commentary,[2] not an edition with notes by Julian of an otherwise unknown writing by Minicius.[3] The lemmatic character of the work has been expunged from all our fragments except one.[4] In some places the reviser has fused Minicius' text with Julian's note; in others Julian's note, in either *oratio directa* or *oratio obliqua*, is introduced by *Iulianus respondit*;[5] and there are other changes.[6] The compilers cannot be supposed to have wasted time over such purposeless changes; they must be the work of a post-classical writer, who not only altered the expression, but in places also the law stated. Illustrations will be found in *D.* (6. 1) 61[7] and *D.* (40. 12) 30.[8]

12. Paul, *Ad Neratium libri iv.*[9] This was another lemmatic commentary, but whether on a particular work of Neratius or on selected passages from various of his works we do not know.[10] The textual quotation from Neratius was perhaps preceded by *Neratius*; Paul's comments were introduced by *Paulus* or *Paulus notat*. Though in our *Digest* fragments an introductory *Neratius* is found only once,[11] *Paulus* is so frequent that we must assume that in the compilers' copy the lemmatic division was preserved. There seem, nevertheless, to be pre-Justinian interpolations and depravations.[12]

13. Paul's commentary on Neratius was the only classical commentary on a work of the second century possessed by the compilers. But they had *annotated editions* of the later classics, with the notes written not in the margins,[13] but in the text immediately after the relevant portion of text, and introduced by the name of the annotating jurist.[14] When such annotated texts

[1] It concerns the *stipulatio duplae*, and it is in book 5 that Julian deals with *stipulationes praetoriae*.

[2] Whence the title *libri ex Minicio*, the lemmata being *ex Minicio*; above, p. 211.

[3] Riccobono, *Bull.* vii. 226, viii. 225, and Krüger, 175, assume an edition of Minicius with notes by Julian; the idea of a lemmatic commentary did not occur to them; cf. above, p. 216.

[4] *D.* (33. 3) 1, with Riccobono, *Bull.* vii. 228.

[5] *D.* (3. 3) 76; (17. 1) 33; (46. 8) 23. Similar reviser's work: above, p. 216.

[6] Riccobono, l.c. [7] On which see ibid. 228 ff.; viii. 248 ff.

[8] The words *commodissimum ... contingat* cannot be classical; neither are they the compilers', whose own solution is *commodius ... praestare* at the end. Cf. Lenel, *Ed.* s. 17, n. 6; Beseler, *Beitr.* iii. 153; *Z* lvii (1937), 12; *Index Interp.*

[9] Landucci, *St. F. Serafini* (1892), 403 ff.; Ferrini, *Opere*, ii. 229 ff.; Berger, *PW* x. 709. [10] Krüger, *Quellen*, 188.

[11] *D.* (7. 8) 23.

[12] Thus in *D.* (24. 1) 63 *De eo ... essent* cannot have been written by the compilers. On the passage: Beseler, *Z* lvii (1937), 22; *Index Interp.* [13] Above, p. 184.

[14] Whereas the Bolognese Glossators signed at the end.

first appeared cannot now be determined;[1] our earliest example, an edition of Papinian's *Responsa*, is of the fourth or fifth century;[2] that such editions were already known in classical times is possible, but probably, as already suggested,[3] the original publication of the annotations was in some other literary form, and only later were they inserted into the texts of the works commented on. Thus, in all probability, Ulpian's *notae* on Marcellus' *Digesta* were first published in the same form as Paul's on Neratius and Julian's on Minicius and on Urseius Ferox, that is as independent lemmatic commentaries, and were only later inserted into Marcellus' text, after which the independent commentary ceased to be of interest and disappeared. Why did not the same fate befall Julian's and Paul's similar commentaries? No doubt simply because even in the second century there was not sufficient interest in the works of Urseius and Minicius to justify new editions of them enriched with notes taken from Julian's and Paul's commentaries, and because by the third century the same fate had overtaken the writings of Neratius. The result was that the commentaries retained an independent existence.

In considering the ultimate origin of the *notae* which the Byzantines, in their editions, found combined with texts, we have to reckon with three distinct sources.

(i) In part the *notae* are derived, as we have just indicated, from lemmatic commentaries. In the process of their transformation from independent commentaries into annotations appended to texts, their wording was changed, especially by compression, and now and then there was interpolation.

(ii) In part, however, the *notae* were derived from other classical writings of all kinds. Thus, an editor of Papinian's *Responsa* might charge some subordinate with the task of reading through Ulpian, or maybe his *Ad edictum*, and extracting the passages in which Ulpian had pronounced on this or that *responsum* of Papinian. The extracts would then be worked up into *notae*. Such was the exact process by which the summarizing notes were composed by the editors of the *Corpus Iuris* from the commentaries of Bartolus and Paul de Castro. During the process the expressions of the classical texts were frequently altered, and at times their substance as well, especially when the adapter did not fully understand his original.

(iii) In part, finally, the *notae* come from marginal glosses made by readers which the editor for some reason took as coming from

[1] Above, p. 184. [2] Below, p. 220. [3] Above, p. 185.

some classical jurist and therefore included in his edition. Such notes are substantially as well as formally unauthentic. The result is that, though we are sometimes unable to say from which of these three sources a given *nota* is derived, *notae* must always be read with a specially critical eye. This, however, is not our present affair. Our only task is to assemble what survives of the signed *notae* found by the Byzantines in their copies of the texts.

(*a*) *Notae* on Julian's *Digesta*. As our fragments show, the Byzantine edition of the *Digesta* contained *notae* by Marcellus, Scaevola, and Paul.[1] That Marcellus wrote *notae* on Julian's *Digesta*[2] is rendered certain by their being cited by Paul and Ulpian. But such citations as *inveni Marcellum apud Iulianum adnotasse*[3] do not justify the conclusion that Paul had read the note in question in an edition of Julian's *Digesta*; he may have taken it from an apparatus of notes in lemmatic form. And, as has just been pointed out, the fact that Marcellus wrote such notes does not entitle us to infer that every one of the notes that has reached us is authentic. Quite apart from the possibility of interpolations by the compilers, some of them may be entirely spurious. We have only two *notae* by Cervidius Scaevola;[4] they may have been extracted from any of Scaevola's writings.[5] The same is true of *notae* by Paul,[6] of which we have not a large number.

(*b*) *Notae* on Pomponius' *Liber singularis regularum*. The Byzantine edition contained *notae* by Marcellus.[7]

(*c*) *Notae* on Marcellus' *Digesta*. The Byzantine edition contained *notae* by Cervidius Scaevola and Ulpian.[8] That Scaevola and Ulpian wrote *notae* on Marcellus is proved by the fact that Ulpian cites them both.[9]

(*d*) *Notae* on the *Digesta* and the *Responsa* of Cervidius Scaevola. In the Byzantine editions there were *notae* of Tryphoninus[10] on the *Digesta*, and of Tryphoninus and Paul[11] on the *Responsa*. Both apparatus have been shown to be unauthentic.[12]

(*e*) *Notae* on writings of Papinian.[13] *Notae* by Paul and Ulpian

[1] *Pal.* i. 318. Mauricianus also may have written *notae* on Julian's *Digesta* (ibid. 692), but they do not seem to have been incorporated in the editions of the *Digesta*.
[2] Very numerous: ibid. 663. [3] *D.* (48. 10) 14. 1. [4] *Pal.* ii. 270.
[5] *D.* (2. 14) 54 is perhaps an excerpt from Scaevola's *Quaestiones*: *D.* (38. 1) 44; *Pal.* i. 379. [6] Collected ibid. 1143.
[7] Ibid. ii. 85. [8] Ibid. i. 589; ii. 270, 950.
[9] Scaevola's, e.g., in *F.V.* 82, his own in *D.* (9. 2) 41 pr.; (47. 10) 11. 7.
[10] *Pal.* ii. 215, 378. [11] Ibid. 287, 378; i. 1143. [12] Schulz, *Symb. Frib.* 178 ff.
[13] Goudsmit, *Notae Pauli et Ulpiani ad Papinianum*, Lugd. Bat. 1842; Costa, *Papiniano*, i (1894), 330; H. Krüger, *St. Bonfante*, ii. 203 ff.; Balog, *Ét. Girard*, ii (1913), 422 ff.; E. Levy, *Z* li (1931), 548; *Medievalia et Humanistica*, i (1943), 19.

figured in the Byzantine edition of Papinian's *Responsa*, but hardly *notae* by Marcian.[1] The former, but not the latter, are found in the Berlin and Paris fragments (fourth or fifth century) of the *Responsa*, and the same is true of the *Digest* fragments. It is certain that Paul wrote *notae* on the *Responsa*: he cites them himself.[2] The combination of his *notae* with those of Ulpian must be the work of some later editor, since the latent opposition between the two great men precludes the supposition that they co-operated in an edition of Papinian's *Responsa*, or that, when editing Papinian, one of them combined the *notae* of the other with his own.

The Byzantine editions of Papinian's *Quaestiones* contained *notae* by Paul,[3] but their authenticity is doubtful.[4]

The Byzantine edition of the *Libri ii de adulteriis* contained *notae* by Marcian.[5] Possessing only two of them, we cannot pronounce on their authenticity.

The *notae* of Paul and Ulpian on Papinian were declared invalid by a constitution of Constantine, which was confirmed by the *Law of Citations* of 426. Both laws were included in the *Codex Theodosianus*[6] and remained in force till the issue of the *Digest*, except that for the purposes of the compilation of the *Digest* they had been repealed by Justinian in 530.[7] Marcian's *notae* remained valid at first, not being mentioned in either Constantine's constitution or the *Law of Citations*, both of which were inserted unaltered in the *Codex Theodosianus*. But *Const. Deo Auctore* of 530 says expressly that Marcian's *notae* had also been invalidated,[7] and this must be true, since Tribonian cannot have made the Emperor state what to the knowledge of contemporary jurists was manifestly untrue.[8] Therefore between 438 and 530 some imperial constitution must have added Marcian's *notae* to those condemned;[9] we should have possessed it, had the *Codex Justinianus* of 529

[1] H. Krüger, l.c. 313, is in error. For the *notae* of Paul and Ulpian see *Pal.* i. 1143; ii. 950.

[2] *D.* (27. 9) 13. 1.

[3] *Pal.* i. 813, 1143.

[4] H. Krüger, *St. Bonfante*, ii. 311.

[5] *Pal.* i. 803.

[6] *C.Th.* (1. 4) 1; 3.

[7] *Const. Deo auctore*, s. 6.

[8] H. Krüger, *St. Bonfante*, ii. 312, is in error.

[9] Krüger, 299, explains that Constantine's ban was applied by implication to Marcian's *notae*, but this seems hardly possible. Balog, *Ét. Girard*, ii. 524, and H. Krüger, l.c. 312, suppose that the *Law of Citations* invalidated *all* Marcian's writings, including his *notae*, but this is improbable. True, the *Law of Citations* does not mention Marcian's works, but he seems to be cited (though only owing to a copyist's mistake) by Ulpian and Paul (*D.* 28. 1. 5; 7. 9. 8), which would suffice to make him citable. *Schol. Sin.* (5, 11) cite Marcian's *Ad formulam hypoth.*, but this proves nothing: below, p. 282, n. 4.

survived;[1] from the *Codex repetitae praelectionis* of 534 it was naturally excluded, just as was the *Law of Citations*,[2] because the issue of the *Digest* had made it inapplicable. The condemnation of these various *notae* did not cause the ancient editors of Papinian to expunge them, for the compilers found them still in their copies.[3] One need not be surprised, seeing that the condemnation of polytheism did not result in the alteration of the classical texts.[4] Constantine's motive for condemning the *notae* cannot have been the outstanding authority of Papinian.[5] Such an assumption is forbidden not only by the terms of his constitution[6] but also by the fact that the criticisms of Papinian which were to be found in Paul's and Ulpian's works generally were not invalidated. That leaves only one possible motive, namely that the imperial chancery knew that the *notae* of Paul and Ulpian commonly read in the editions of Papinian were in part apocryphal and in part depraved reproductions of what the classical writers had really written. Thus Constantine's constitution is a further proof of the depravation of classical texts in early post-classical times.[7]

14. We come lastly to works which contained a number of excerpts from the writings of *various* jurists.

(*a*) The most extensive work of the kind was Pomponius' *Lectiones* or *Variae lectiones*,[8] a title which reveals the nature of the contents. In the first and second centuries *lectiones* was the title bestowed on books containing the fruits of reading, collections

[1] We now know from *P. Oxy.* xv. 1814 that tit. 1. 15 *De auct. iuris prudentium* of the *Codex* of 529 contained after the *Law of Citations* only one constitution of Justinian's, of 527–9, which may have been that invalidating Marcian's *notae*. Or again, Justinian may by interpolation have incorporated an earlier constitution in the *Law of Citations*.

[2] Contained in the *Codex* of 529: see the preceding note.

[3] The *notae* were still also to be found in the fourth- or fifth-century edition of Papinian's *Responsa* of which we have the Berlin and Paris fragments (below, p. 237). Hence no conclusion as to the date of *F.V.* can be drawn from Ulpian's *nota* in *F.V.* 66, in spite of Mommsen, *Collect. libr.* iii. 12, n. 1.

[4] Below, p. 281. Similarly the jurists did not carry out *damnatio memoriae* strictly: Mommsen, *Schr.* vi. 312.

[5] This, however, was Justinian's view. According to *Const. Deo auct.* s. 6, the *notae* had been invalidated *propter honorem splendidissimi Papiniani*. This was in keeping with his romantic veneration of Papinian. Below, p. 290, n. 5.

[6] *C. Th.* (1. 4) 1. In the time of Constantine Ulpian and Paul were in high esteem, as (1. 4) 2 shows.

[7] Above, p. 142.

[8] Pringsheim, 'Beryt u. Bologna' (*Festschr. Lenel*, 1921), 282; *Z* lii (1932), 140, n. 2. Paul (*D.* 20. 5. 9. 1) and Ulpian (*D.* 6. 1. 1. 3; 8. 5. 8. 6) make it *lectiones*, but Paul (*D.* 6. 1. 21), Ulpian (*D.* 24. 1. 7. 5), Marcian (*D.* 41. 2. 43. 1; 20. 2. 5 pr.; 20. 2. 2), the *Index Flor.*, and the *Digest* inscriptions all have *variae lectiones*, which must therefore be the correct title, though in citation it might occasionally be shortened.

of excerpts or *florilegia*.[1] Thus Pomponius' work gave extracts from legal literature, which he may have collected in the course of preparing his large commentaries *Ad edictum* and *Ad Sabinum*; naturally he added remarks of his own. Since it is cited by Paul, Ulpian, and Marcian, there can be no doubt that Pomponius did write such a work,[2] but whether or not the copy of it used by the compilers contained pre-Justinian interpolations cannot be established from our scanty fragments. It was in at least forty-one books,[3] but the compilers possessed only the first fifteen. In post-classical times an epitome was made of the *Lectiones* and the *Epistulae* of Pomponius, to which we shall attend later.[4]

(*b*) Paul, *De variis lectionibus liber singularis*.[5] This was a work of the same literary character. Whether it was authentic cannot be determined from the three short fragments that we possess.

(*c*) Ulpian, *Pandectarum libri x*.[6] This, to judge by the title,[7] was a similar collection of excerpts, with comments by Ulpian. Though the compilers knew of and perhaps possessed it, they did not draw on it for their *Digest*. They possessed a small abridgement of the full work, from which they inserted two short excerpts in the *Digest*.[8]

(*d*) Modestinus, *Pandectarum libri xii*. This was perhaps yet another collection of extracts, possibly merely a new edition of Ulpian's *Pandectae* by his pupil Modestinus.[9] Its arrangement is peculiar.

(*e*) Hermogenianus, *Iuris epitomarum libri vi*. As the title indicates, this work also contained excerpts from older works, which, however, are never expressly named in the surviving fragments. We learn from the author himself[10] that the topics were arranged in the edictal order, that there was an introduction on the sources and some appendixes at the end. The style of our *Digest* fragments is post-classical throughout.[11] Possibly the com-

[1] Gell. *praef*. 6.

[2] Pringsheim's doubt (l.c. in n. 8, p. 221) is misplaced in view of such a citation as Ulpian's in *D*. (8. 5) 8. 6.

[3] Lenel, *Pal*. 2. 154.

[4] Below, p. 231.

[5] *Pal*. i. 1301 (title wrong); Berger, *PW* x. 722. Not in *Index Flor*. A post-classical work according to Guarino, *SD* v (1939), 468.

[6] Joers, *PW* v. 1447.

[7] On *πανδέκται* as book-title: Gell. *praef*. 7; Pliny, *Hist. nat*., *praef*. 24.

[8] The inscriptions of both give the title as *liber sing. pandectarum*. Omitted by *Index Flor*.

[9] A number of the excerpts from Modestinus' *Pandectae* agree word for word with *Epit. Ulp*.: Ferrini, ii. 418; Schulz, *Epit. Ulp*. p. 17. I took it that the author of the pseudo-Ulpian had used Modestinus' *Pandd*., but it may be that both he and Modestinus used Ulpian's *Pandd*.

[10] *D*. (1. 5) 2.

[11] See Pringsheim, *Symb. Frib*. 31, and the literature given by Felgenträger, ibid. 365.

pilers had only a post-classical abridgement, but Hermogenian is so late a classic—one should perhaps rate him as post-classical—that it is also possible that our text is really his own. Here it would be a mistake to attempt to purge our actual texts and reconstruct a classical original which may never have existed.

(vii)

We proceed now to the consideration of a group of works which we will style the *Problematic Literature*, i.e. the works devoted exclusively to problems, to the most difficult and perplexing questions of law. Their titles vary—*Digesta*, *Responsa*, *Quaestiones*, *Disputationes*, and so on—and some are not free from affectation. The problems are discussed individually, at varying length; they are not interconnected by any text, and though they are sometimes arranged on a plan (oftenest the so-called system of the *Digesta*),[1] the connexion of a given problem with the rubric under which it is placed is frequently loose and at times artificial, and the discussion diverges into disparate departments of law. In contrast to the isagogic literature and the large commentaries *Ad edictum* and *Ad Sabinum* this problematic literature is definitely esoteric.[2] The isagogic works hardly touch upon the harder problems; the great commentaries occasionally deal with them, but as arising out of basic doctrines expounded by a continuous text. Some of the commentaries, abridgements, and *notae* we have just been discussing fall within our present problematic group; this is, of course, specially true of epitomes of works which themselves were problematic.

The inspiration of this form of literature was undoubtedly Hellenistic. Since the time of Aristotle Greek literature had known books of προβλήματα or ζητήματα,[3] in Latin *quaestiones* or *disputationes*.[4] No doubt the simple republican collections of *responsa* are native Roman products, but the casuistic collections of Servius and his school already bear another stamp: their problems are derived from juristic speculation as well as from practice, a characteristic feature of the Greek collections. Still, granted its Hellenistic inspiration, this form of literature also corresponded to profound and deeply rooted tendencies of the classical lawyers

[1] Below, p. 226.

[2] Cic. *De fin.* 5. 5. 12; Gell. 20. 5; Augustine, *ep.* 135. 1; Seckel, 'Die Haftung de peculio', *Festschr. Bekker* (1907), 349 (offprint 27); Mommsen, *Schr.* ii. 8.

[3] See Note DD, p. 342.

[4] *Thes.* v. 1, col. 1437. 46 and 81, 1440. 36: *disputatio* meaning *pervestigatio quaestio.*

themselves—their truly Roman predilection for a fully comprehensible concrete case, their professional taste for detail, and their very modest interest in systematization. It is thus no accident that the most important works of the most important jurists belong precisely to the literature of problems.

We cannot, with the materials at our command, break this group of writings into sub-groups. The obvious course of classifying them according to the origin and character of the problems dealt with proves on examination to be impracticable.

1. It is not always possible to distinguish between problems suggested by the writer's own speculations and those propounded to him by others. It matters nothing whether the question is introduced by *quaero* or *quaesitum est*. In the first place these stock phrases were often abbreviated in ancient manuscripts, and the abbreviations were later expanded indiscriminately. Further, even if we knew that the classical author wrote *quaero*, he might well have repeated in this form a question put to him by someone else. Again, no conclusion can be drawn from the fact that a question is raised in a collection entitled *Responsa*, since such works included questions suggested by speculation as well as those occurring in practice.[1]

2. When a question is put to a jurist by someone else, there are still three possibilities.

(*a*) Question and answer may have been by letter, and the letters may later have been included by the jurist in his *Problemata*, either in their original form or with modifications. The jurist's answer was not always a *responsum* in the technical sense, even supposing it to have related to a case that had arisen in practice; moreover, a purely theoretical question might be raised in a letter from a friend or pupil. Many of the *responsa* in our collections may thus have been given by letter, though the epistolary form has been expunged.

(*b*) The problematic literature undoubtedly does contain a large number of *responsa* in the strict technical sense, but they are distinguishable by no sure criterion. *Respondere* is not decisive,

[1] The traditional view is that works entitled *Responsa* are collections of *responsa* in the strict technical sense, as described in *D.* (1. 2) 2. 49; many would even confine them to *responsa* given in the exercise of the *ius publice respondendi*, in spite of the known fact that Labeo never possessed this right. e.g. Pernice, *Labeo*, i. 61 ff.; Costa, *Papiniano*, i. 178 ff.; most recently Jolowicz, *Introd.* 383: '*Responsa* are collections of actual answers, given in the course of the writer's practice.' This doctrine is unprovable and antecedently improbable. Krüger, 146, is nearer the truth.

since the word might be used of a letter answering a theoretical question; indeed a jurist might use it of his answer to a question raised by himself. Even the collections entitled *Responsa* are not composed exclusively of *responsa* in the technical sense. Whether a text has *respondeo*, *respondi*, or *respondit* is completely insignificant, since these words were all represented by a symbol (*R*), which later would be expanded at pleasure.

(*c*) The question may have been put to and answered by the jurist in oral disputation. Here too *respondere* was applicable. Many of our *responsa* may have come from this source; they may even be presumed to have done so when the jurist introduces his answer by 'dixi'.[1] The words *disputatio* and *disputare* have been pronounced spurious in classical legal literature.[2] This is an error, but the point is devoid of interest for the historian of legal science, seeing that it cannot be doubted that the classical jurists did in fact take part in legal disputations and record them in their problematic works. The use of the word *dixi* is proof enough, since it would have been sheer affectation for a jurist to use the past tense in reference to an opinion which he was reaching at the moment of writing. Indeed, even in the absence of positive proofs,[3] disputations of one kind or another would have to be presumed in the classical law schools, for otherwise teachers and pupils would simply not have been lawyers! Even leading jurists must have taken part in such disputations, though doubtless only occasionally and before select audiences. In another category of disputations they certainly took part, those namely which occurred in the *consilium* of a praetor or judge, or especially in that of the Emperor or the *praefectus praetorio*. Paul in his *Decreta* mentions such disputations.[4] A *disputatio* described as having taken place *in auditorio*[5] is sometimes one which had taken place in court, not in the lecture-room.[6] Such disputations also were recorded in the problematic literature; many a so-called *responsum*, the origin of which is undisclosed, may thus have been given in the course of a disputation.

For these reasons it is impossible to subdivide the group of problematic works, and we are obliged to take them simply in their historical order, without regard to their titles. But before doing this we must say a few words on two general questions, namely

[1] See *Vocab.* ii. 212. 50 f. *Dicere* = *declamare*: *Thes.* v. 970. 26.
[2] Beseler, *T* x (1930), 190. [3] Krüger, 151 ff.
[4] *D.* (29. 2) 97; (49. 14) 50; Marcellus, *D.* (28. 4) 3.
[5] *Vocab. Iur. Rom.* i. 520. 21; *Thes.* ii. 1295. 78, 1296. 54; Kubitschek, *PW* ii. 2278.
[6] e.g. *D.* (12. 1) 40; Berger, *PW* x. 691, is right.

that of the order of topics in these works and that of the transmission (speaking generally) of their texts.

As to system: in many of the works none is now discernible and none perhaps ever existed. But from Celsus and Julian onwards it became usual to follow a customary order, which we call that of the *Digesta*:[1] there was a first part following the edictal order and a second treating of a traditional series of *leges*, *senatusconsulta*, and imperial constitutions in a traditional order.

In the matter of transmission the problematic literature fared particularly ill in the post-classical period. On the one hand abridgement and epitomization led to the statements of the facts of cases being pruned of the colourful actual details which enlivened the classical original; they were stripped of all that was legally irrelevant and made merely typical; the epistolary form was expunged;[2] sometimes the statement of facts was even struck out altogether and the discussion thus reduced to naked abstract rules. This process, begun by the classical writers themselves, was energetically prosecuted by their successors and carried to its conclusion by the compilers. On the other hand, this very same literature lent itself very readily to amplification. Its problems were the materials of the post-classical scholastic disputations, and manifold depravations and interpolations were the consequence. The result is that the critical study of this group of works presents special difficulties: the *Quaestiones* of Africanus, Paul, and Papinian are among the most perplexing texts that we possess. They still await a critical analysis. Each work needs to be studied critically from beginning to end as a whole, a task which, since Cujas, has been neglected.

We have now to treat of the specimens of this literary group one by one.

1. *Labeo*

(*a*) *Epistolae*.[3] Only one certain citation, by Pomponius.[4] (*b*) *Responsa*,[5] in at least fifteen *libri*. Again, only one certain citation, by Ulpian.[6] (*c*) *Pithana*.[7] Apart from a couple of citations by Pomponius and Ulpian, our knowledge of this work is confined to the *Epitome* by

[1] P. Krüger, *Z* vii (1886), 2, 94 ff.; *Quellen*, 143; Joers, *PW* v. 487; *Pal.* ii. 1255; H. Krüger, *Z* xxxvii (1916), 311 ff.

[2] Cf. O. Foerster, *Handschr. Untersuch. zu Senecas epist. mor.* (1936), 44.

[3] Pernice, *Labeo*, i. 60; Joers, *PW* i. 2252.

[4] *D.* (41. 3) 30. 1. Many citations of Labeo in which the work is not named may be from the *Epistulae*.

[5] Pernice and Joers, l.c.

[6] *Coll.* 12. 7. 3.

[7] Pernice, *Labeo*, i. 35 ff.; Joers, *PW* i. 2551.

Paul mentioned above.[1] The title, a piece of preciosity inspired by Greek philosophy,[2] is no guide to the contents. The surviving fragments show it to have been casuistic in character.[3] (*d*) *Libri posteriores.*[4] At least forty *libri*, posthumously published by an unknown editor. In addition to some citations we have the epitomes already mentioned.[5] Another collection of *quaestiones*.

2. *Capito*

(*a*) *Coniectanea.*[6] A collection of problems chiefly concerned with *ius publicum* in at least nine *libri*. We have, besides citations, some fragments in Gellius.[7] (*b*) Gellius gives a letter of Capito's,[8] which is probably from a collection, but whether a juristic collection is not certain.

3. *Massurius Sabinus*

(*a*) *Responsa*, in a least two *libri*. All that we have is a single certain citation by Callistratus,[9] but many citations of Sabinus not specifying the work referred to may be references to this work. (*b*) *Memorialia.*[10] A collection of problems in at least eleven *libri*, the subjects being sacral law and antiquarian questions of public law. A few fragments and citations.[11] (*c*) The *libri ad Vitellium* mentioned above[12] also belong to the problematic literature.

4. *Proculus*[13]

The compilers possessed an edition of Proculus' *Epistulae* and took a few fragments from it for the *Digest*.[14] In some of the fragments the epistolary forms (letter raising the question and that answering it, with the customary initial greetings) are preserved, but in others they have been expunged, probably by the compilers and not before them.[15] But the Byzantine edition already contained post-classical depravations and interpolations.[16]

[1] Above, p. 206.

[2] *Πιθανόν* means 'probable', 'plausible': Pernice, *Labeo*, i. 36. On Chrysippus' *Πιθανά* see v. Arnim, *Fragm. vet. Stoic.* ii. 5. 3; ii. 8. 32; ii. 9. 6 and 10.

[3] So also Krüger, 157, though at p. 142 he wrongly classes *Pithana* among works on *definitiones*, *regulae*, and *sententiae*.

[4] Pernice, *Labeo*, i. 69 ff.; Joers, *PW* i. 2551.

[5] Above, p. 207.

[6] *Coniectanea* means 'collection' (from *conicere*). As book-title in non-juristic literature: Gell. *praef.* 9; in juristic (the *Coniectanea* of Alfenus Varus): Gell. 7. 5. 1.

[7] Seckel–Kübler, i. 62–4; Joers, *PW* ii. 1905.

[8] Gell. 13. 12. 2 (Seckel–Kübler, i. 68).

[9] *D.* (14. 2) 4; *Pal.* ii. 189.

[10] Mentioned as a book-title by Gell. *praef.* 8.

[11] Seckel–Kübler, i. 75.

[12] Above, p. 210.

[13] The work of Atilicinus, Proculus' contemporary, was, perhaps, also a collection of *responsa*: Ferrini, ii. 87 ff.

[14] *Index Flor.*: 'VI, *ἐπιστολῶν βιβλία ὀκτώ.*' But we have in the *Digest* three extracts from book 11; the scribe must therefore have mistaken *xii* for *iix*.

[15] The same occurs in Seneca's *Epistulae*: ed. Hense, p. 7, and above, p. 226, n. 2.

[16] *D.* (50. 16) 124 is a clear example; it comes from neither Proculus nor the compilers, but from some academic person. v. Arnim, *Fr. Stoic.* ii. 68. 20; 71. 26.

5. *Fufidius*

Of his *Quaestiones* in at least two *libri* we have nothing but a single sure citation by Africanus.[1]

6. *Plautius*

His work, which survives only in the fragments of the above-mentioned commentary by Paul,[2] appears to have been a collection of *problemata.*

7. *Urseius Ferox*

His work, in at least ten *libri*, was a casuistic collection. Apart from a few citations all that survives is the above-mentioned commentary by Julian.[3]

8. *Minicius*

A collection of *problemata*, surviving only in the above-mentioned commentary by Julian.[4]

9. *Aristo*

He seems to have written *Digesta* in at least five *libri*, which, like all works so entitled, was casuistic in contents.[5]

10. *Iavolenus Priscus*

The compilers possessed a version of his *Epistolae*, in fourteen *libri*, from which numerous extracts passed into the *Digest.* In these the epistolary forms have been radically impaired, so that only occasional glimpses of them are left.[6] Whether this is due to some post-classical editor or only to the compilers cannot be said. The compilers' copy already contained post-classical depravations and interpolations.[7]

Iavolenus' commentaries on Labeo, Cassius, and Plautius, of which accounts have already[8] been given, all come under the category of problematic literature.

11. *Neratius Priscus*

(*a*) Of his *Epistolae*, in at least four *libri*, all that we have are two certain citations, by Ulpian.[9] (*b*) From his *Responsorum libri iii* the compilers took just a few excerpts, but not enough to show how the work was arranged. Besides the fragments there are a few citations by Paul and Ulpian.[10] (*c*) His *Membranarum libri vii* were a collection of *quaestiones* and *responsa*.[11] The stilted and unique title (*membranae*=parchments) does not indicate a book in the form of a parchment codex, but

[1] *D.* (34. 2) 5. [2] Above, p. 215. [3] Above, p. 216.
[4] Above, p. 216. [5] Krüger, 180; Mommsen, *Schr.* ii. 23.
[6] *D.* (41. 3) 21; (39. 5) 25; *Pal.* i. 285.
[7] *D.* (38. 2) 36 is interpolated from *quia solvendo* onwards: Beseler, *Beitr.* iii. 32. See also *D.* (45. 1) 108, with Beseler, *Beitr.* v. 12; *D.* (50. 17) 200, with Beseler, *St. Bonfante*, ii. 72. [8] Above, p. 206 ff., 214 f.
[9] *Pal.* i. 763. [10] *Pal.* i. 775. [11] *Pal.* i. 765.

simply 'sketches'—the sort of thing commonly written on parchment.[1] The Byzantine edition contained post-classical additions.[2]

12. *Celsus*

His *Digest* was a large collection, in thirty-nine *libri*, of *problemata*, arranged in the accustomed order of works so entitled.[3] It incorporated collections of *problemata* previously made by Celsus under the titles *Commentarii*, *Epistolae*, and *Quaestiones*. It appears that the *Digesta* noted the earlier work from which a *quaestio* was derived, since in Ulpian's citations of the *Digesta* we sometimes find, e.g., 'Celsus libro . . . digestorum, commentariorum (epistularum, quaestionum) libro . . .' (*D.* 34. 2. 19. 6; 4. 4. 3. 1; 28. 5. 9. 2; 12. 1. 1. 1). The ordinary meaning, in antiquity, of such double references[4] would be that book and title of a work as a whole and book and title of a subordinate part were being given side by side.[5] But this cannot be the meaning here, for Celsus' older collections must have been broken up and distributed according to the scheme of the *Digesta*,[6] either by Celsus himself or some later writer. That the double citations are not more numerous is due to the compilers. It is hardly probable that Ulpian himself verified his citations both in the *Digesta* and the earlier work; he must have found the latter already noted in the *Digesta*. The compilers excerpted relatively few passages from this important work; these fragments show that their copy was seriously corrupt.[7]

13. *Julian*

(*a*) *Digestorum libri xc.*[8] This outstanding work also belongs to the category of problematic literature.[9] It contains a collection

[1] *Thes.* viii. 630. 50 f.; Birt, *Das antike Buchwesen* (1882), 57 ff., 93; *Kritik u. Hermeneutik nebst Abriss des antiken Buchwesens* (1913), 289, 345; W. Schubart, *Das Buch bei den Griechen u. Römern* (ed. 2, 1921), 115, 185, is incorrect.

[2] Thus in *D.* (41. 1) 14 pr. *nam . . . fiunt* is not genuine, but not from the compilers: Perozzi, *Ist.* i. 599, n. 1. Cf. Beseler, *Z* liii (1933), 16; *Index Interp.*

[3] F. Stella Maranca, *Intorno ai frammenti di Celso* (1915).

[4] It is not true that they are entirely unknown in ancient literature, as Mommsen, *Schr.* ii. 91, says.

[5] Thus in the conspectus of the titles of Justinian's *Digest* one reads, e.g.: 'ex ordine digestorum liber quintus, de iudiciis liber primus.' Again in Didymus on Demosthenes: '*Διδύμου περὶ Δημοσθένους κη′, Φιλιππικῶν γ′*,' indicating Didymus on Demosthenes, book 28, otherwise on the *Philippica*, book 3. F. Leo, *Nachr. d. Gesellsch. Göttingen, phil.-hist. Kl.*, 1904, p. 260; Diels–Schubart (ed. Teubn.) p. vi.

[6] To this extent Mommsen, *Schr.* ii. 92, is right.

[7] In *D.* (19. 1) 38. 2 'quid ergo' *rell.* is interpolated (cf. *Index Interp.*), but *nonne* alone suffices to show that this is not due to the compilers: cf. Beseler, *Beitr.* iv. 218; *Z* xlv (1925), 454; above, p. 212, n. 2.

[8] Mommsen, *Schr.* ii. 7 ff.; Buhl, *Salvius Iulianus*, i (1886), 82 ff.

[9] So Mommsen, l.c. in last note, rightly; Krüger, 185, goes astray.

of *responsa* of the most various kinds: answers by letter, answers in disputations (to be inferred when the answer is introduced by *dixi*), true *responsa* in the technical sense, and answers to questions which had occurred to the author in the course of theoretical speculation. As is usual in *Digesta*, the first part followed the edictal order, but was not a commentary on the Edict. The assumption that it contained interpretations of the words of the Edict, but that the compilers did not choose to include them in their *Digest*, lacks both evidence and probability. The text available to the compilers was already deeply interpolated.[1]

(*b*) *De ambiguitatibus liber singularis.*[2] This work belongs to the same category, but the fragments of it that we possess show clear signs of post-classical workmanship. It is probably a post-classical abridgement of Julian's *Digesta*, with comments by the epitomist. If in fact Julian did write such a work, it reached the compilers profoundly altered by post-classical revision.

(*c*) Finally, Julian's commentaries on Urseius Ferox and Minicius, already spoken of,[3] belong to the problematic group.

14. *Africanus*

(*a*) At least twenty *libri Epistularum*, of which we have nothing except a single sure citation by Ulpian.[4]

(*b*) *Quaestionum libri ix.*[5] A collection of *responsa* of various kinds, the arrangement of which cannot be made out. Its connexion with Julian and Julian's *Digesta* is very close. Julian is sometimes named, and in some cases where we have simply *ait*, *respondit*, and the like, it can be shown that we should understand *Iulianus*. The Byzantine jurist Dorotheus attributes to Julian the opinions stated in a number of passages in the *Digest* which do not themselves mention him.[6] This does not prove that Dorotheus possessed a copy of Africanus' *Quaestiones* in which Julian's name still stood.[7] In short, though much of what we find in the *Quaestiones* indubitably comes from Julian, we lack the means of dis-

[1] See Note EE, p. 342.

[2] Himmelschein, *Symb. Frib.* 409 ff.

[3] Above, p. 216.

[4] *D.* (30) 39 pr.; *Pal.* i. 1.

[5] Ibid. 1. 2 should be discarded for Lenel's new edition in *Z* li (1931), 1 ff. Older literature: Mommsen, *Schr.* ii. 14 ff.; Buhl, *Z* ii (1881), 180 ff.; *Salvius Iulianus*, i. 78 ff.; W. Kalb, *Roms Juristen nach ihrer Sprache dargestellt* (1880), 66; Schulze, *Z* xii (1892), 114. The once celebrated commentaries of Cujas and Scipio Gentilis (Spangenberg, *Einl. in das römisch-justinianeische Rechtsbuch*, 1817, p. 204) are now out of date, but still useful. The later literature is given by Lenel, *Z* li (1931), 1 ff., and, for the individual passages, by the *Index Interp.* and by the *Index* to *Z* i–l. The discussion is not yet closed.

[6] Mommsen, *Schr.* ii. 16; Buhl, *Z* ii. 197.

[7] Mommsen, *Schr.* ii. 17; above, p. 206, n. 3.

tinguishing between his and Africanus' own contributions.[1] Clearly the text used by the compilers was already in a deplorable state and the disorder of our present text is due to them in only a small degree. In particular, they had no motive for deleting the name of the *conditor edicti* whom they esteemed so highly.[2] The text obviously contains a quantity of pre-Justinian corruptions and interpolations, and if Africanus really did write *Quaestiones*, his work must have undergone far-reaching transformation in the post-classical period.[3] But the whole work may be spurious; it may be some sort of post-classical hotchpotch composed from Africanus' *Epistulae* and Julian's *Digesta*.[4] The older attempts to distinguish with certainty between the work of the two men are now out of date, because not sufficiently critical; even Lenel's revised edition of his *palingenesia* of the *Quaestiones*, from which all future research must start, is far too conservative. But without fresh evidence a definitive analysis, a complete clarification of the genesis of the text, is impossible. It is one of those cases in which no more can be attempted than to recover the text as the compilers found it. Line by line the signs of post-classical workmanship must be marked down, and the question must be considered how far matter which is clothed in post-classical forms is nevertheless classical in substance.

15. *Pomponius*

(*a*) *Epistulae*.[5] Citations by later classical writers show the existence of a collection of letters in at least twelve books. The *Index Florentinus* registers such a collection, in twenty *libri*.[6] The inscriptions of four *Digest* fragments[7] give the title as *Epistularum et variarum lectionum libri*; this must be the correct title, the *Index* and the remaining inscriptions having merely abbreviated. It is thus clear that what the compilers possessed was a post-classical work combining extracts from the *Epistulae* and the *Variae lectiones*.[8] That in the authentic *Epistulae* the epistolary forms were invariably preserved is shown by those of our fragments[9]

[1] No stress should be laid on the variation *respondi respondit*: above, p. 225.
[2] The *Index Flor.* puts him first, in defiance of the historical order.
[3] First remarked by Kalb, *Roms Juristen*, &c., 66.
[4] The work is never cited by the later classics.
[5] *Pal.* ii. 52, 53, n. 3; for older literature see Krüger, 193.
[6] *Index Flor.*: 'XI, ἐπιστολῶν βιβλία εἴκοσι.'
[7] *D.* (4. 4) 50; (4. 8) 18; (40. 13) 3; (50. 12) 14.
[8] Above, p. 221.
[9] Specially clearly by *D.* (40. 5) 20, where an old lawyer, at the age of 78, 'with one foot in the grave', as he himself, quoting a Greek saying (cf. Lucian, *Hermotimus*,

from which the compilers or the pre-Justinian editor have failed to expunge them completely. The text available to the compilers contained post-classical interpolations.[1]

(*b*) *Fideicommissorum libri v.* Also in the nature of a collection of *quaestiones.*

16. *Gaius*

De casibus liber singularis. We possess only seven short fragments, in Justinian's *Digest.*[2]

17. *Marcellus*

(*a*) *Digestorum libri xxxi.* A collection of *problemata* derived from various sources, arranged in the order of *Digesta,* and obviously thoroughly in Julian's manner. The compilers' copy contained post-classical interpolations.[3]

(*b*) *Responsorum liber singularis.* This may have been merely a post-classical abridgement of Marcellus' *Digesta*; at any rate our fragments contain a number of post-classical interpolations.[4]

18. *Maecianus*

To judge by its title, Maecianus' *Quaestionum de fideicommissis libri*[5] *xvi* belonged to the category of problematic literature, though in our *Digest* fragments its character has been in part obscured: a pre-Justinian hand is unmistakable.[6] Further study is needed.

19. *Cervidius Scaevola*

(*a*) *Digestorum libri xl. Responsorum libri vi.*[7] The transmission of the text is in both cases complicated. Both works are collections of *responsa,* all of which apparently deal with cases that had arisen in practice. These *responsa,* to all appearance, were never published by Scaevola himself, but only in the third century, later

78), puts it, raises a question of law out of pure love of his science. The greetings of the two letters have been struck out by some editor.

[1] A clear illustration: in *D.* (46. 3) 92 pr. *haec manumissio . . . tenearis* cannot have been written by Pomponius: Beseler, *Z* liii (1933), 44. Nor had the compilers time for such child's-play. Beseler's reconstruction cannot be accepted. Probably the whole pr. is a marginal summary (whence *sit* and *tenearis*), which has got into the text.

[2] *Pal.* i. 181.

[3] Of considerable extent. e.g.: *D.* (9. 2) 36 *nam sane . . . exstitit* (Beseler, *Beitr.* iii. 27; *Index Interp.*) is interpolated, but not by the compilers; *D.* (34. 5) 24, the whole interpolated, but not by the compilers (Beseler, *Z* lvii (1937), 22; *Index Interp.*).

[4] Schulz, *Ueberlieferungsgesch. d. Responsa des Cervidius Scaevola, Symb. Frib.* 236.

[5] Full title: Ulpian, *D.* (7. 1) 72; abbreviated to *libro quaestionum* in Papinian, *D.* (29. 2) 86 pr., probably by the compilers. *Index Flor.*: 'XIII fideicommisson *βιβλία δεκαέξ*'; in the *Digest* inscriptions: *libri fideicommissorum.*

[6] e.g. in the two long fragments *D.* (35. 2) 30, 32; cf. *Index Interp.*

[7] R. Samter, 'Das Verhältnis zwischen Scaevolas Digesten u. Responsen', *Z* xxvii (1906), 151; Schulz, *Symb. Frib.* 143 ff.

than Ulpian, by an unknown editor, and presumably under the title *Digesta*. Later still, but not later than the first half of the fourth century, this *editio princeps* was abridged: the text in the compilers' copy was abbreviated, though only moderately. But they also possessed a far more radical abridgement of the *Digesta* made by an unknown epitomist: *Responsorum libri vi*. Among our fragments we find eighteen passages in which one and the same *responsum* appears in both versions, that of the abbreviated *Digesta* and that of the *Responsa*.[1] Comparing the two one obtains an exceptionally good picture of the process of abbreviation; we see that the abbreviators had no intention of altering the law stated. There is nothing to show that they belonged to the eastern Empire. A few glosses have got into the text, especially the apocryphal *notae* of Tryphoninus and Paul of which we have spoken above.[2] These are the premisses on which a comprehensive critical study of this large and perplexing mass of materials must proceed.[3]

(*b*) *Quaestionum libri xx*.[4] A work arranged in the order of the *Digesta* and authenticated by Ulpian and Marcian.[5] The compilers' copy contained serious alterations and interpolations.[6]

(*c*) *Quaestionum publice tractatarum liber singularis*.[7] A work known only from a few extracts in the *Digest*; these seem to come from a post-classical epitome, the author of which has added remarks of his own.[8] They certainly contain considerable post-classical, pre-Justinian, work.[9]

(*d*) *De quaestione familiae liber singularis*. This little work, of which we possess only the title as given by the *Index Florentinus* (xviii. 6), may also be presumed to have been a post-classical abridgement.

[1] Synoptic table: Schulz, l.c. in last note, 228.

[2] p. 219.

[3] Cujas's lectures unfortunately treat only of the *Responsa*; Schirmer, 'Beitr. z. Interpretation von Scaevolas Responsen', *Arch. f. d. civ. Praxis*, lxxviii (1892), 30; lxxix (1892), 224; lxxx (1893), 103; lxxxi (1893), 128; lxxxii (1894), 12; lxxxiv (1895), 32; *Z* xv (1894), 352, and 'Beitr. z. Interpretation v. Scaevolas Digesten', *Z* xi (1890), 84; xii (1891), 15, are of little service, but Kübler, *Z* xxviii (1907), 174; xxix (1908), 183, is helpful. See also *Index Interp.* and *Z Index* to vols. i–l.

[4] Older comments given by Spangenberg, *Einleitung*, 176; Schirmer, *Z* xxi (1900), 355.

[5] Marcian, *D.* (20. 3) 1. 2, has *variae quaestiones*.

[6] It suffices here to refer to *D.* (28. 2) 29 (the *lex Gallus* of evil fame), in which Lenel, *Pal.* ii. 276, n. 1, finds far-reaching pre-Justinian interpolation; cf. *Index Interp.* and *Z* i–l *Index*; also (but not satisfactory) La Pira, *La successione ered.* 73, and Robbe, *I postumi* (1937). The appearance of *D.* (3. 5) 34 and (29. 7) 14 is suspicious.

[7] Beseler, *Z* xliv (1924), 359.

[8] So Beseler, l.c., with a short critical study of the passages.

[9] Specially evident in *D.* (42. 8) 24 (see *Index Interp.* and Beseler, *Z* lvii (1937), 39); at the end we have *extorqueri*, which is not found in Justinian's own constitutions.

20. *Tryphoninus*

Disputationum libri xxi, a collection of *quaestiones* arranged in the edictal order, the *quaestiones* being derived[1] from disputations in school or *consilium*.[2] Throughout, the remains show post-classical workmanship;[3] indeed one may well doubt the authenticity of the whole work[4]—it is never cited by the later classical writers, not even by Ulpian. But if the basis is a real work by Tryphoninus, that work was certainly seriously overlaid and enlarged in the post-classical period.

21. *Papinianus*

(*a*) *Quaestionum libri xxxvii*.[5] This, too, is a collection of *problemata* in the style of Julian's *Digesta*, with which its contents show it to be closely connected. There are letters, answers given in disputations in lecture-room or *consilium*[6] (always recognizable by *dixi*),[7] and *responsa* elicited by actual or supposed cases. The order is that of the *Digesta*. There are many excerpts in the *Digest* owing to Papinian's great reputation at Byzantium, and there are also citations both in the *Digest* and the *Fragm. Vaticana* and by Justinian himself, as well as an isolated citation by Julian of Ascalon;[8] lastly there are three important fragments in the *Fragm. Vaticana*.[9] Careful study of this difficult work shows that what the compilers had before them was not the true classical text but the original text intensively worked upon, altered, abbreviated, and added to in the early post-classical period. Almost every surviving fragment exhibits the ravages of the post-classical editor, who is constantly recognizable by his uncertain grasp of classical law, and often betrays himself by a pompous and sentimental rhetoric which is quite unsuitable for precise legal statement and serves

[1] The decision is sometimes introduced by *dixi* (above, p. 225): *D.* (20. 4) 20; (28. 2) 28 pr.; (29. 1) 41. 3; (34. 5) 9 pr.; (37. 4) 20; (46. 1) 69. Once we have *dixi in auditorio*, i.e. in the lecture-room or in court (above, p. 225): *D.* (23. 3) 78. 5.

[2] Above, p. 225.

[3] See on the passages *Index Interp.* and *Z* i–l *Index*. Specially clear signs in *D.* (34. 3) 27; (26. 7) 55. 4 (*eandem faciem patrimonii, ex temporis intercapedine*); (49. 17) 19. 5. A thorough critical study of the whole evidence has not yet been made.

[4] So Beseler on many occasions, e.g. *Z* xlv (1925), 255; *T* x (1930), 190. Cf. Felgenträger, *Symb. Frib.* 370. But the word *disputatio* in the title is no ground for suspicion (above, p. 225); to that extent Beseler, *T* l.c., is wrong and Lenel, *Z* l (1930), 15, right.

[5] Costa, *Papiniano*, i (1894), 222. Cujas's commentary (*Opp. T.* 4) is still a valuable aid, though naturally out of date.

[6] Above, p. 225.

[7] Above, p. 225.

[8] Harmenopulos, *Manuale*, ii. 4. 51; Zachariae v. Lingenthal, *Z* x (1899), 252; Ferrini, *Opere*, i. 444, 446; Riccobono, 'La citazione del l. III quaest. di Papiniano in Armenopulo', *St. Fadda*, i (1906), 289; Scheltema, *T* XVII, 424 f.

[9] *F.V.* 224–6.

only to darken counsel—in short the sort of thing that cannot possibly have come from Papinian's pen. This verdict is based on a close study of the whole evidence.[1] What follows is intended merely as illustration.

D. (5. 2) 15 pr.: 'Nam etsi parentibus non debetur filiorum hereditas propter votum parentium et naturalem erga filios caritatem, turbato tamen ordine mortalitatis non minus parentibus quam liberis pie relinqui debet.' This piece of sentimentalism is given as a justification for allowing the *querella inofficiosi testamenti* to be brought by parents. The sense is this: 'although in view of their desire (that their children should survive them) and of their natural love for their children parents are not owed the inheritance to their children, nevertheless, if the natural order of mortality is broken (i.e. if their children predecease them), piety requires that something be left to parents as much as that (in the converse case) something be left to children.' This is the language of a late Roman rhetorician, not a classical lawyer. The clause *etsi . . . caritatem* is not only irrelevant from the legal point of view, but misleading;[2] the next phrase *turbato ordine mortalitatis*, reads like a sepulchral inscription erected by sorrowing parents.[3] The style is that of neither Papinian nor the compilers.

An even better illustration is *D.* (35. 1) 72 pr.: 'Cum tale legatum esset relictum Titiae "si a liberis non discesserit", negaverunt eam recte cavere, quia vel mortuis liberis legati condicio possit existere. Sed displicuit sententia: non enim voto matris opponi tam ominosa non interponendae cautionis interpretatio debuit.' The argument is: the *cautio Muciana*[4] is not applicable, because the condition might be realized in the legatee's lifetime, i.e. if the children predeceased her. But, says the closing sentence, this interpretation, that no *cautio* can be entered into must not be opposed to the mother's desire (to enter into it), because it is of evil omen (for the mother's wish is to die first): it is of evil omen to mention the possibility that the children may die before their mother. This again is obviously late rhetorical twaddle, not the utterance of the greatest of the Severan jurists.

D. (28. 7) 15: 'Filius, qui fuit in potestate, sub condicione scriptus heres, quam senatus aut princeps improbant, testamentum infirmet patris, ac si condicio non esset in eius potestate: nam quae facta laedunt pietatem existimationem verecundiam nostram et, ut generaliter dixerim, contra bonos mores fiunt, nec facere nos posse credendum est.' Let

[1] Only present unpropitious circumstances have prevented me from publishing my critical commentary on Papinian's *Quaestiones*. To derive one's conception of Papinian's style from the traditional text of the *Quaestiones* (Kübler, *Z* xlii. 528) is to court error.

[2] On *caritas*: Albertario, *Rend. Lomb.* lxiv (1931), = *Studi*, v. 23 ff.

[3] See the collection of such inscriptions given by Lier, *Phil.* lxii (1903), 456 ff.; cf. Münzer, *Röm. Adelsparteien*, 381.

[4] H. Krüger, *Mél. Girard*, ii (1912), 1 ff.; Buckland, *Textbook*, 289.

us pass over the interpretation of this difficult text as a whole and consider its last sentence, which ranks as Papinian's most celebrated pronouncement, Cujas observing: *vox est Christiano digna.* (In fact it is un-Christian, since human sinfulness is a basic principle of Christianity.) Papinian never made it. The grotesque presumption that what ought not to be cannot be destroys the whole point of the decision: it would mean that a condition which the son cannot satisfy is an impossible condition, and therefore must be struck out as a nullity. The ancient schools of rhetoric taught the following argument for the case where the interpretation of a document was disputed: 'according to the interpretation of the other side this document offends against statute or morals. Now it is not to be presumed that the party from whom the document comes intended anything illegal or immoral. Therefore the interpretation is false.'[1] Thus this famous dictum is a mere reminiscence of a lesson in rhetoric.[2]

We cannot discuss here the important, but difficult, *F.V.* 224–6.[3]

(*b*) *Responsorum libri xix.*[4] This famous work also was a collection of *problemata* arranged in the *Digesta* order. In it Papinian seems to have included principally cases that had arisen in practice. We cannot say whether this is true of every case, for Papinian subjected his decisions to a thorough-going revision when he incorporated them into this collection. The cases are reduced to their juristic minimum, the facts, the question, and the answer being no longer kept separate.[5] Unlike Scaevola's *Digesta*, Papinian's *Responsa* are case law reduced to abstract terms. Everything extraneous is excluded and the bare legal problem is isolated from the manifold and legally irrelevant details of the actual case. Problem and answer are formulated with great, perhaps excessive, elegance and the utmost compression. At times the brevity of expression borders on the baroque.[6] Even a contemporary student

[1] *Auct. ad Heren.* ii. 10, 14: 'Deinde id quod scriptum sit, aut non posse fieri aut non lege, non more, non natura, non aequo et bono posse fieri; quae omnia noluisse scriptorem quam rectissime fieri nemo dicet.' The words of the pseudo-Papinian are probably a reminiscence of the well-known utterance of Solon: 'is cum interrogaretur, cur nullum supplicium constituisset in eum, qui parentem necasset, respondit se id neminem facturum putasse' (Cic. *p. Roscio Amer.* 25. 70).

[2] In 1889 Ferrini, *Teoria gen. dei legati*, 706, rightly pronounced the principle as extremely elevated, but hardly juridical. Cf. De Ruggiero, *Bull.* xvi (1904), 168.

[3] Cf. Leist–Glück, *Serie der Bücher*, xxxvii/xxxviii. 5 (1879), s. 1622, no. 154, pp. 197 ff.; Bonfante, *Corso*, i (1925), 176, n. 12; Albertario, *AG* c (1928), 236; H. Krüger, *St. Bonfante*, ii. 307; Beseler, *Z* xliii (1922), 539; liii (1933), 11; *T* x (1930), 222.

[4] Costa, *Papiniano*, i. 196; Joers, *PW* i. 573.

[5] Pernice's remark (*Labeo*, i. 62, n. 9), that from book 8 onwards the decision is regularly introduced by *respondi* or *respondit*, is incorrect: Krüger, 222, n. 74.

[6] 'For me Papinian is too subtle' said Pernice in a lecture in the summer of 1899; toward Mommsen he has obviously uttered an even sharper verdict: cf. Mommsen's

must have found the work difficult reading: often one is obliged to begin by making up one's mind as to the facts underlying the decision. They are correctly and completely stated by the author, but with extreme brevity. Papinian is evidently aiming at the laconic lapidary style of the jurists of old, at which long ago Horace had laughed,[1] and which in the time of the Severi was something of an archaistic affectation. The legend portraying Papinian as meeting death like a true Roman[2] is faithful to an essential characteristic of this exceptional man.

Our information as to the *Responsa* is relatively good. Besides the numerous fragments in the *Digest* and some citations we have fragments in pre-Justinian sources.

(1) *F.V.* 2.17, 64*a*–66, 121, 122, 250–65, 294, 296, 327–33.
(2) Fragments from a parchment codex of the fourth or fifth century, which contained an edition of the *Responsa*. They were found in Egypt, and some passed to Berlin, others to Paris.[3] Both are in a very bad state.
(3) A small fragment standing at the end of the *Lex Romana Visigothorum*.[4] In its place a tenth-century manuscript of the *Breviarium* has another fragment from the *Responsa*.[5]

The work did not escape thorough-going revision in early post-classical times. The reviser was either the same man as the reviser of the *Quaestiones* or was closely connected with and imitated him. For we find in the *Responsa*, in places, the same inflated rhetoric and the same signs of lack of juristic competence. How far this revision was carried will only be determinable when all surviving texts have been thoroughly examined,[6] and as a whole. Naturally the post-classical, but pre-Justinian, elements are most clearly identifiable in those fragments which we have independently of the *Digest*, or not through the *Digest* alone, because in such cases

obituary notice of Pernice (*Schr.* iii. 579): 'to him Papinianism was repugnant, and so he caught at Labeo'.

[1] Above, p. 62.

[2] *SHA, Carac.*, 4 and 8; Costa, *Papiniano*, i (1894), 14, 34.

[3] *Berlin fragments*: *ed. princeps* by P. Krüger, *Monatsber. Ak. Berlin*, 1879, 509; 1880, 363, with an apograph. Numerous *addenda*: Krüger, *Z* i (1880), 99; ii (1881), 83. Definitive edition: *Collect. libr.* iii. 287, followed by Seckel–Kübler, i. 430; Girard–Senn, *Textes*, 372; and *FIRA*, ii (ed. 2), 437. *Paris fragments*: *ed. princeps* by Dareste, *NRH* vii (1883), 361, with photograph. Fresh collation by Esmein, *NRH* x (1886), 219. Apograph: Krüger, *Z* v (1884), 166. Definitive edition: *Collect. libr.* iii. 291, followed in the other collections.

[4] *Collect.* ii. 157; Seckel–Kübler, i. 429; Girard–Senn, *Textes*, 372; *FIRA* ii (ed. 2), 437.

[5] *Collect. libr.* iii. 296; below, p. 291, n. 9.

[6] Cujas's commentary (*Opp. T.* 4), though naturally quite out of date, is still a valuable aid.

there is no question of interpolation by the compilers. But we cannot discuss the difficult texts here.[1]

(*c*) *De adulteriis liber singularis.* A collection of *quaestiones.* *Coll.* 4. 8 shows that the cases are derived by no means solely from practice. As demonstrated above,[2] the classical text has been overlaid with post-classical work.

22. *Callistratus*

Quaestionum libri ii: only *Digest* fragments, showing signs of post-classical work.[3]

23. *Tertullianus*

Quaestionum libri viii: cited by Ulpian; two fragments in the *Digest.*

24. *Papirius Fronto*

Responsa: in at least three books. Only a few citations, by Callistratus and Marcian.

25. *Paulus*

(*a*) *Quaestionum libri xxvi.*[4] This was a collection of *problemata* in the usual order of *Digesta*, the cases coming from practice, disputations, and letters to Nasennius Apollinaris,[5] Latinus Largus,[6] Licinnius Rufinus,[7] Nymphidius,[8] and some *anonymi*.[9] The text was heavily edited in the post-classical period,[10] but how far altered could be determined only by a critical study of the whole evidence.[11] The fact of alteration is clearly shown by *F.V.* 227, our only fragment outside the *Digest.*

F.V. 227.[12] 'Apollinaris Paulo. Duo sunt Titii, pater et filius; datus est tutor "Titius" nec apparet de quo sensit testator: quaero, quid sit juris. Respondit: [is datus est, quem dare se testator sensit; si id non

[1] A few references must suffice here. See in particular *F.V.* 294 with Beseler, *Beitr.* v. 10; *Z* li (1931), 71. See further *F.V.* 6 with Beseler, *Z* l (1930), 21; *F.V.* 14 with Beseler, *Beitr.* v. 58; *F.V.* 262 with Beseler, *Z* xliii (1922), 539; *F.V.* 263 with Beseler, *Beitr.* ii. 35, iii. 2, iv. 116; *Z* xliii (1922), 539; *F.V.* 296 with Beseler, *St. Riccobono*, i. 311; *T* x (1939), 222. Lastly one should study the *Paris. Fragm.* 7. 17 with Beseler, *Z* xlvii (1927), 359; his reconstruction is unacceptable.

[2] p. 188. [3] See the lengthy *D.* (14. 2) 4, with *Index Interp.*

[4] Berger, *PW* x. 728. The work is cited in the *Collectio definitionum*; below, p. 308.

[5] Always 'Nesennius' in the *Digest*, but see *Prosopogr. imp. rom.* ii. 398; *PW* xvi. 1779; also Berger, *PW* xvii. 67. Letters from and to him: *D.* (3. 5) 33; (27. 1) 32; (26. 2) 30 (*F.V.* 227); (42. 1) 41; (35. 2) 22.

[6] *D.* (21. 1) 56; (40. 8) 9; (31) 83; (44. 2) 30. 1.

[7] *D.* (40. 13) 4. Above, p. 107. [8] *D.* (35. 1) 81.

[9] *D.* (23. 4) 28; (34. 3) 25; (19. 1) 43.

[10] Those familiar with the literature of the *ius commune* will recall what *cruces* these passages have provided.

[11] Cujas's commentary (*Opp. T.* 5) still gives valuable help.

[12] *Digest* version: *D.* (26. 2) 30. Cf. Beseler, *Z* xlvii (1927), 361.

apparet, non ius deficit, sed probatio, ergo] neuter est tutor. [Hoc rescriptum est in Sticho manumisso, si duo sint Stichi et incertum de quo testator senserit, vel si Erotem legaverit qui plures eodem nomine habuit servos. Quod in nummis legatis non ita placuit: si non adparet voluntas, id acceptum est quod minus est.]'

In Paul's day, if it were clear which Titius was meant by the testator, his appointment might well be held valid. But if it were not clear, the appointment must necessarily have been void, and void *iure civili*. But the editor, obsessed by the doctrine of *voluntas*, declares for *is quem dare se testator sensit*, which is false, or true only *si apparet de quo sensit*. But our editor is consistent: he goes on to say that *si id non apparet*, it is not the law, but the evidence of fact, that is defective. The parallel cases subjoined are very badly formulated: one can only guess the meaning of 'Quod in nummis' *rell.*[1] Even non-juristic details throw light on the history of the text. Our editor found still preserved in his text the greeting of the questioner's letter, but in corrupt form; in other letters we find *Nesennius* (properly Nasennius) *Apollinaris*. But the greeting of the answer had already been reduced to a bare *Respondit*. As far as *neuter est tutor* we have the same text in the *Digest*, but with the remains of the greeting excised and *igitur* instead of *ergo*. The compilers doubtless found *igitur* in their copy. In any case the text shows how mistaken it is to condemn a passage *solely* on account of initial *igitur*.[2]

(*b*) *Responsorum libri xxiii*.[3] A collection, in the *Digesta* order, of numerous *responsa*, largely, though probably not entirely, derived from practice. Outside the *Digest* we have: (1) *F.V.* 94–112, 114–18, (2) *Coll.* 10. 9, (3) two citations in the *Schol. Sinaitica*: 2. 4 and 11. 31. In the original each case was probably presented according to a fixed scheme: facts, question (introduced by *quaero* or *quaesitum est*),[4] answer (introduced by *Paulus respondit*). This work, as usual, underwent post-classical revision, including probably considerable abbreviation. Sometimes the question has been struck out, sometimes the statement of facts as well, and the *responsum* is thus left to stand alone.[5] The text has been condensed in other ways also, and it has been added to.

[1] Cf. *D.* (32) 75; (30) 14. 1; (50. 17) 9.

[2] Beseler, *Beitr.* iii. 105; *T* x (1930). On the other hand, the text is a warning to our conservatives, who think they have refuted the supposed interpolation of a passage by the question: 'why should just this word' (e.g. *ergo* here) 'have been replaced by *igitur*?' As Wotan says in the *Walküre*: 'Heut hast du 's erlebt'.

[3] Berger, *PW* x. 730.

[4] Insignificant: above, p. 224.

[5] This cannot be illustrated in detail here. It remains possible, though not probable, that the author of *F.V.* abbreviated in precisely the same way as the compilers. As regards Ulpian's *Responsa*, *F.V.* 44 = *D.* (30) 120. 2 shows that the author of *F.V.* had before him an already abbreviated text.

A comparison of *F.V.* 94 and *D.* (24. 3) 49. 1, representing the same passage of Paul, is highly instructive.[1]

26. *Ulpianus.*

(*a*) *Disputationum libri x*,[2] a collection of disputations in school and court,[3] and possibly of *quaestiones* derived from other sources. At any rate the author often refers to his decision in the past tense: *dicebam* or *dixi*.[4] The existence of such a work is vouched for by a citation in a rescript of Diocletian,[5] and there is no sufficient ground for doubting its authenticity;[6] but the classical text reached the compilers much altered by post-classical editing. The extensive *Digest* fragments teem with signs of post-classical work, which deserve a comprehensive critical study. We must be content to illustrate from *D.* (15. 1) 32 pr.,[7] which is duplicated by a fragment of a fifth-century parchment codex, discovered in Egypt and acquired by Strasbourg:[8] '[sed licet hoc iure con]tingat, tamen [aequitas] dictat resc[issorium iudi]cium in [eos dari].' Except that the *Digest* omits *rescissorium* the texts are identical, so far as the Strasbourg fragment goes.[9] The passage cannot be genuine: apart from the sentimental *aequitas dictat*[10] the whole antithesis of *ius* and *aequitas* belongs to Aristotelian rhetoric,[11] not to Roman jurisprudence. *Aequitas*, if accepted by the law, *is* the law and can no longer be contraposed to *ius*.[12] A substantially

[1] Beseler, *Z* xliii (1922), 538; xlvii (1927), 360. *F.V.* 102 also shows obvious post-classical workmanship: see Albertario, *St.* v. 561; Beseler, *Z* xliii (1922), 539; xlv (1925), 457.

[2] Joers, *PW* v. 1446.

[3] Above, p. 225.

[4] *Dicebam*: e.g. *D.* (27. 8) 2; (28. 4) 2; (28. 5) 35; (33. 4) 2; (35. 2) 82; (36. 1) 23 pr.; (44. 3) 5; (49. 17) 9. *Dicebamus*: *D.* (29. 2) 42. 3. *Dixi*: *D.* (26. 1) 7; (28. 5) 35. 5; (36. 1) 23. 4. See above, p. 225.

[5] *C.* (9. 41) 11. 1. Beseler's doubt as to the authenticity of the citation (*Z* l (1930), 45) is unjustified.

[6] This in spite of Beseler's dogmatic pronouncements: *St. Riccobono*, i. 313, 'we know now that Ulpian's *Disputationes* are not by Ulpian'; cf. *T* x (1930), 190; also *Z* xlv (1925), 255, n. 1; l (1930), 45. The fact is that Beseler's thesis is unproven and, with the existing evidence, unprovable; *disputationes* is no argument against authenticity—neither the word nor the thing: above, p. 225. What is true is that the work, like many other classical writings, was heavily edited in post-classical times, and this for practical purposes comes to much the same for the legal historian.

[7] Beseler, *Z* l (1930), 45, giving the literature on this passage.

[8] *Ed. princeps*, with photographs, by Lenel, *SB. Berlin. Ak., phil.-hist. Kl.* 1903, 922; 1156. Later, Lenel, *Z* xxiv (1903), 416; xxv (1904), 368. Followed by Seckel–Kübler, i. 496; Girard–Senn, *Textes*, 494; *FIRA* ii (ed. 2), 308.

[9] Its lacunae, supplied from the *Digest*, are given in square brackets.

[10] Cf. Ammian. Marcell. 22. 6. 5: 'unde velut aequitate ipsa dictante lex est promulgata.' According to *Thes.* v. 1011. 38, 1012. 84, this is the only text with *aequitas dictat* besides *D.* (15. 1) 32.

[11] Above, p. 74.

[12] Above, p. 75.

correct statement would have been: 'licet hoc iure civili[1] contingat, tamen aequitas dictat rescissorium iudicium dari', i.e. relief must be sought from the *ius praetorium*. Lenel regarded the Strasbourg text as disposing of previous doubts as to the authenticity of the *Digest* version. That was because, when he wrote (1904), scholars contemplated interpolation only by Justinian's compilers: what did not come from them was necessarily classical.[2]

(*b*) *Responsorum libri ii*.[3] Just a poor post-classical abridgement of Ulpian's *Responsa*, but one which is shown by *F.V.* 44, the only fragment preserved independently of the *Digest*, to have been already in existence in the fourth century. The abridgement was radical: the statement of facts and the question were cut out, and only the *responsum* proper was left. Each *responsum* began with the name of the addressee followed by *respondit* governing the decision in the accusative and infinitive, from which it may be inferred that originally the work had been a collection of letters on legal subjects. Where our fragments lack this beginning it must have been excised by the compilers. The editor seems not to have altered the substance of the law stated.

27. *Iulius Aquila*

Responsa, of which we have only two short fragments.[4]

28. *Modestinus*

(*a*) *Responsorum libri xix*. This collection, arranged on the *Digesta* plan, dealt chiefly, if not exclusively, with real cases from practice. The *Digest* fragments, which are all we have, show a relatively pure classical text. Clearly the original arrangement—facts, question, *responsum*—was preserved in the compilers' copy. The question was given in full and the answer, which followed, was no doubt always introduced by the stock *Herennius Modestinus respondit*, with the decision in direct or oblique speech indifferently. The abridgements to be found in the *Digest* fragments are probably the work of the compilers. In other respects also the text is comparatively genuine, though not entirely free from pre-Justinian interpolation.[5]

(*b*) *De enucleatis casibus liber singularis*. To judge by its title[6]

[1] Although *sed licet hoc iure contingat* cannot be read in the Strasbourg fragments, there would not be room in the line for *iure civili*.

[2] Above, p. 142. [3] Joers, *PW* v. 1446. [4] Berger, *PW* x. 167.

[5] Thus in *D* (20. 1) 26. 2 *hoc est in hypothecis* is interpolated: M. Fehr, *Beitr.* (above, p. 203), 74. Again the rhetorical pompousness of *D* (1. 3) 25 shows it to be spurious beyond doubt: Beseler, *Beitr.* v. 13; *Index Interp.*

[6] What is meant by 'shelled' cases is obscure; 'abridged cases'? See *Thes.* v. 616.

this little work also belongs to the problematic group. The five *Digest* fragments make an unfavourable impression:[1] we seem to be dealing with a post-classical work.

(*c*) ***De heurematicis liber singularis.*** The paucity of the remains allows us only to assign this work to the problematic group. Its title is an enigma. No Greek word εὑρηματικός exists, and *heurematicus* is found nowhere else in Latin literature.[2] There is, however, a Greek literature περὶ εὑρημάτων, i.e. *de heurematibus*, which may have been the original title. This literature dealt with discoveries of all kinds, including legal;[3] Modestinus may have been inspired by it.[4] At any rate the fragments admit of being interpreted as coming from a work on 'legal discoveries', i.e. on the remedies to be prescribed in given cases of difficulty. But too much stress should not be laid on the title: the ancients had a predilection for 'precious' titles,[5] which the jurists did not entirely escape.[6]

(viii)

As we have seen,[7] programmes of procedure for priests and magistrates were among the productions of early Roman jurisprudence. In the Severan age this class of literature made a fresh appearance: we come upon a number of works describing the procedure to be observed by this or that magistrate. Little is left of them, and that little has never yet been properly explored, though it deserves a thorough critical examination, if for no other reason because of the light it throws on the history of legal language and of the classical juristic texts. It must not be forgotten that this is a special literary genus, possessing a style of its own.[8] The Severan authors had here no classical literary precedents and inherited no tradition, and the bulk of the materials consisted of imperial constitutions. It is thus not surprising that the style of these works approximates to that of the constitutions and is in general remote from the traditional juristic style. Criticism based

[1] e.g. *D* (23. 1) 15 and (49. 1) 19: *Index Interp.*

[2] *Thes.* vi. 2674. By εὑρηματικός only 'discoverer' could be meant, but the Greek for this is of course εὑρετής.

[3] Plin. *Hist. nat.* 7. 191 f.; Gell. *praef.* 6. See P. Eichholtz, *De scriptoribus* περὶ εὑρημάτων, phil. diss. Halle, 1867; Kleingünther, Πρῶτος εὑρετής, *Phil. Suppl.* xxvi, Heft 1; F. Leo, *Die griech.-röm. Biographie* (1901), 46 ff.; also Heineccius, 'De iurisprudentia heuretica', *Opp.* iii (Geneva, 1738), *Sylloge*, iii, p. 187.

[4] See, e.g., *Nov. Theod.* 1. 5: 'revelatis legibus *inventa* maiorum obscuritatis iniuria vindicasse.' *Const. Deo auctore*, 6: 'nam qui non suptiliter factum emendat, laudabilior est eo, qui primus *invenit*.'

[5] See Gell. *praef.*

[6] Thus Labeo's *Pithana* and Neratius' *Membranae.*

[7] Above, pp. 33 ff.

[8] Above, p. 98.

on stylistic grounds must therefore be applied to the surviving texts with great caution; they must not be treated in the same way as the commentaries on the Edict and Sabinus or as the problematic literature. Designed for a wider, unprofessional circle of readers, they belong to the exoteric literature. But they did not escape the hand of the post-classical editor; indeed, books on administrative law are always apt to fall out of date rapidly. We proceed to review summarily the most important works of this class.

1. *De officio consulis*
   (*a*) *Marcellus*, at least five *libri*; there survive just three citations.
   (*b*) *Ulpianus, libri v.*[1]

2. *De officio proconsulis*
   (*a*) *Venuleius, libri iv.* Only a few fragments.
   (*b*) *Paulus, libri ii.* Five fragments.[2]

(*c*) *Ulpianus, libri x.*[3] Besides numerous *Digest* fragments: (1) *F.V.* 119, (2) *Coll.* 1. 3; 1. 6; 1. 11; 3. 3; 7. 4; 8. 7; 9. 2; 11. 7; 11. 8; 12. 5; 12. 7; 13. 3; 14. 3; 15. 2. (3) a citation in Lactantius, *Div. inst.* 5. 11. In this work, as is implied by the title, Ulpian described the duties of the governor of a senatorial province, only governors of such provinces being proconsuls under the Principate.[4] Ulpian's main purpose was to collect and make available for such governors the juristic materials, of which a complete review could only be given by a jurist who like himself was employed in the central administration and had access to the imperial archives. The governors themselves would have direct knowledge only of the relevant general legal principles and of the imperial rescripts and mandates addressed to their respective provinces. Other rescripts would as a rule be out of their reach;[5] yet in practice the question must have constantly arisen whether a rescript addressed to, say, a governor of Achaia was to be applied also by the governor of Asia.[6] But though Ulpian's work quoted the constitutions on a generous scale, it was no mere compilation of enactments like the *Codex Gregorianus*. Its endeavour was, out of the rescripts and mandates addressed to individual provinces,

[1] *PW* v. 1452; Solazzi, 'Leggendo i libri de officio consulis', *Rend. Lomb.* lv (1922).
[2] Berger, *PW* x. 720.
[3] Joers, *PW* v. 1452; A. F. Rudorff, 'Ueber den liber de officio proconsulis', *Abh. Berlin. Ak., phil.-hist. Kl.*, 1865, no. 5, 233, and separately published in 1866.
[4] Mommsen, *Staatsr.* ii. 244; above, p. 192.
[5] Unless supplied to them by the advocates: Plin. *Epp. ad Trai.* 65. Another exception: above, p. 154, n. 11.
[6] On this problem see Volterra, *St. Besta*, i. 449 ff.; Lauria, *Festschr. f. Koschaker*, i. 263, n. 43.

to evolve general principles applicable to all, and thus to build up a common system of provincial administrative law. Ulpian took account also of constitutions addressed to governors of imperial provinces[1] and to urban magistrates such as the *praefectus urbi*,[2] when he considered that they affected the administration of the proconsular governors. It would, indeed, have been highly unpractical to expound only the law special to the senatorial provinces, and to omit the law common to them and the imperial provinces. What naturally was excluded from a work entitled 'De officio *proconsulis*' was the law special to imperial provinces. Ulpian's reason for confining himself to the senatorial provinces was doubtless that the law of the imperial provinces still differed so greatly from province to province that it could not be reduced to a uniform system. At any rate the works of Venuleius and Paul were similarly limited.

The plan of the work is plain from our fragments. Book 1 dealt with a proconsul's earliest activities: his journey to his province and his appointment of legates to certain duties. There was certainly a preliminary section on the appointment of a proconsul, but whether there was also an introductory section on the sources of law in general is uncertain: *D.* (1. 3) 33 may have been written in some special context. Book 2 completed the initial phase of the administration; we possess a passage dealing with the proconsul's tour of inspection on taking up office. It also contained the second part of the work, which was devoted to the proconsular *iurisdictio*. Part 3, on *tutela* and *cura*, came in book 3. Part 4, on the law of municipalities, extended from book 3 to book 6. In book 6 the subject of *collegia illicita* led up to Part 5, on penal law, which extended into book 10, the last. A concluding section dealt with the end of the proconsul's office and his departure from his province.

Thus, as in his commentaries on the Edict and on Sabinus,[3] Ulpian in this work was aiming at a codification in the form of a 'restatement'; the after-history of the work proves that he was successful. Thorough and, like all Ulpian's writings, lucidly arranged, his work was an important contribution to legal learning, certainly superior in originality to the great commentaries on the Edict and Sabinus, though the conception of Ulpian as nothing but a voluminous compiler must in any case be abandoned. To work through the extensive materials, and of each individual enactment to judge whether it had general or only particular application, was a thoroughly scientific performance. Although rendered in part out of date by the drastic legal changes of the

[1] *Coll.* 15. 2. 4. [2] *D.* (48. 22) 6. [3] Above, pp. 198, 212.

period of Diocletian, the work remained in use during the following centuries: it was cited by Lactantius at the beginning of the fourth century and it contributed to the *Fragm. Vaticana* and the *Collatio*; moreover, the anonymous *liber de officio proconsulis*[1] referred to in the *Lexicon* of the pseudo-Philoxenus[2] is probably Ulpian's work or an abridgement of it. Finally, there are some fairly long extracts from it in the *Digest*. Comparison of the passages which occur both in the *Collatio* and in the *Digest* shows that the text, apart from small variants, remained unchanged in the intervening period and that the interpolations of the compilers were, as usual, confined to modest limits. But the text used for the *Collatio* was not in all respects the classical. Diocletian's reorganization had abolished the distinction between imperial and senatorial provinces; though there were still 'proconsuls',[3] this was merely a title given to governors who had the distinction of being subject *directly* to the Emperor.[4] Thus by *proconsul* a fourth-century reader would understand *praeses provinciae* and it was not necessary to change *proconsul* in the text to *praeses provinciae*. But other changes were made, which marred the plan and character of the classical original.

D. (47. 11) 9 speaks of the crime of *scopelismus*, which, as the text expressly says, was confined to the province of Arabia. Again *D.* (47. 11) 10 speaks of the destruction of the dams of the Nile. Since Arabia and Egypt were not senatorial provinces neither text can have been written by Ulpian, who, if he had wished to mention crimes confined to particular provinces, would have sought his examples in some senatorial province or, finding none, would have said nothing. Laws special to this or that imperial province would have been no subject for a work *de officio proconsulis*. A later hand is likewise revealed when a text of the *Collatio* has *praeses* for *proconsul*,[5] and *praeses* in the *Digest* passages is equally spurious, though we cannot tell whether the change was made before Justinian or, contrary to their usual practice of allowing *proconsul* to stand, by Justinian's compilers. We cannot deal here with the post-classical additions of other kinds.[6]

Though the style of the work departs considerably from the classical,[7] severe post-classical revision is scarcely probable, since in that case *proconsul* would have been systematically changed to *praeses*. The work belongs to a literary genus apart: writing for

[1] See Rudorff's treatise. [2] Goetz, *PW* vii. 1439. [3] *C.Th.* 1. 12; *C. Just.* 1. 35.
[4] Karlowa, *RRG* 856 ff.; Kübler, *Gesch.* 323 ff. [5] *Coll.* 3. 3. 1; 14. 3. 1 and 2.
[6] See first the fragments preserved by the *Collatio* in Volterra's *Indice* (*RSDI* 9, 1936), and then the *Digest* passages in *Index Interpol.* and *Z Index* i–l.
[7] So, rightly, Beseler, *Beitr.* iii. 39; v. 25. Also *Z* li (1931), 188, and elsewhere; Felgentträger, *Symb. Frib.* 371.

a wide, unprofessional circle of readers Ulpian would naturally use a more popular style than the strictly traditional classical juristic style of works on civil law.

3. *De officio praesidis*
Macer, libri ii.[1] Only a few *Digest* fragments.

4. *De officio praefecti urbi*
Libri singulares by Paul (one short fragment) and Ulpian (one fairly long fragment).[2]

5. *De officio praefecti vigilum*
Libri singulares by Paul and Ulpian; seven fragments of the former, one small piece of the latter.

6. *De officio praefecti praetorio*
Of the *liber singularis* of Arcadius Charisius we have only one fragment (the beginning of the work), but that in two versions: *D.* (1. 11) 1 and Joh. Lydus (age of Justinian), *De magistrat.* 1. 14. Lydus' version, which is in Greek, is probably not derived from the *Digest* but from the same edition of the work as that used by the compilers.[3] The language of the *Digest* version departs from classical juristic usage. This in itself, as has been pointed out above,[4] is no sign of unauthenticity, even if Charisius be regarded as a classical jurist.[5]

7. *De officio quaestoris*
We have of Ulpian's *liber singularis* two fragments: *D.* (1. 13) 1, which corresponds with Joh. Lydus, *De magistrat.* 1. 24. 28, giving an historical introduction. The language departs from classical usage:[6] again no proof of unauthenticity.[7] *D.* (2. 1) 3 seems to be a post-classical *distinctio*.[8]

8. *De officio curatoris rei publicae*[9]
Six fragments of Ulpian's *liber singularis*.

9. *De officio assessorum*
Ulpian once cites a book of Massurius Sabinus called *assessorium* and a book of Puteolanus called *assessoria*. The character of these works remains problematic.[10]

Four *Digest* fragments of Paul's *liber singularis de officio assessorum*,[11] of which *D.* (1. 18) 21 and (3. 3) 73 show post-classical workmanship.[8]

[1] Joers, *PW* v. 1454. [2] On *D.* (1. 12) 1 see *Index Interp.*
[3] On this problem see P. Krüger, *Quellen*, 424, n. 9.
[4] Above, p. 242.
[5] Charisius' date is disputed: Krüger, *Quellen*, 254, n. 31; Kübler, *Gesch.* 376, n. 1.
[6] On *D.* (1. 13) 1 see *Index Interp.* [7] Above, p. 242. [8] See *Index Interp.*
[9] On this office: Mommsen, *Staatsr.* ii. 1082; Liebenam, *Phil.* lvi (1897), 290; Kübler, *Gesch.* 221. [10] *Pal.* ii. 185, 189.
[11] Not in *Index Flor.*; *Pal.* i. 1143.

10. *De officio consularium*[1]

One small fragment from Ulpian's *liber singularis*.[2]

11. The compilers possessed a work in Greek entitled *Παπινιανοῦ Ἀστυνομικὸς μονόβιβλος*,[3] but took only one passage from it for the *Digest*.[4] One can hardly believe that that 'true Roman' Papinian[5] would have written on law in Greek, still less that he would have written on the *astynomi* of Greek cities, a subject of not the slightest importance to a man in his position. If an authentic work by Papinian did form the basis of the Greek work, it must have been in Latin and have been concerned with Roman officials; these, as Mommsen has shown, can only have been the *quattuorviri viis in urbe purgandis*.[6] On this view, what the compilers used must have been a Greek epitome.

12. A specially interesting group is formed by the programmatic works for the *praetor tutelarius*, a magistrate created by M. Aurelius and from the fourth century called *praetor tutelaris*.[7]

(*a*) *Paulus, De excusationibus tutelarum liber singularis*.[8] The title is variously given: in the *Index Florentinus* (xxv. 31) it is *de excusationibus tutelarum*, in *D.* (27. 1) 26 and *F.V.* 231 *de excusationibus*, in *D.* (27. 1) 11 and *F.V.* 246 *de excusatione tutorum*, and in *D.* (27. 1) 7 *excusationes*.

(*b*) *Paulus, De officio praetoris tutelaris liber singularis*.[9]

(*c*) *Paulus, De iurisdictione tutelaris*.[10] More than one book.

Our fragments of these three works, which are few, are of special interest for the history of classical juristic texts. Of (*a*) we possess *D.* (26. 3) 4 and (27. 1) 11, and *F.V.* 231 and 246. Of (*b*), which is registered by the *Index Florentinus* (xxv. 40), but was not used by the compilers, we have only *F.V.* 244 (cited *D.* (27. 1) 6. 19) and 245. Of (*c*) (not in the *Index Florentinus*) all we know is *F.V.* 247.

Scanty as this evidence is, a judgment on the authenticity of the three works is nevertheless permissible. We have no reason to doubt the authenticity of (*b*), the classical title of which was of course *de officio praetoris tutelarii*. The versions of *D.* (27. 1) 6. 19 and *F.V.* 244

[1] On *consularis*: Kübler, *PW* iv. 1140.

[2] Not in *Index Flor.*; *Pal.* ii. 950.

[3] Joers, *PW* i. 574; Kübler, *Gesch.* 277; H. Krüger, *St. Bonfante*, ii. 315; Costa, *Papiniano*, i. 237.

[4] *D.* (43. 10) 1.

[5] Above, p. 237.

[6] Mommsen, *Staatsr.* ii. 498, 603. These magistrates, mentioned by Pomp. *D.* (1. 2) 2. 30, still existed in Papinian's time; see also Liebenam, *PW* v. 1803. Thus Kübler's (l.c.) objection to Mommsen seems to be disposed of.

[7] The terminology results from the inscriptions, as to which see the index to *ILS* III. i. 396; also Joers, *Untersuch. z. Gerichtsverfassung d. röm. Kaiserzeit* (1892), 35.

[8] Berger, *PW* x. 717.

[9] Ibid. 720.

[10] Ibid. 719.

differ, but for this abbreviation by Justinian's compilers is mainly responsible;[1] however, the interpolation *ex epistula divorum* [*Hadriani et Antonini et*] *fratrum* shows that the edition used for the *Fragm. Vaticana* was already interpolated in places.

Work (*c*) can only be another edition of work (*b*), as may be seen from the only surviving fragment, *F.V.* 247. The inscription is: 'Paulus libro i editionis secundae de iurisdictione tutelaris.' The classical title would have been *de iurisdictione praetoris tutelarii*, which would mean precisely the same as *de officio praetoris tutelarii*. We must therefore refer the inscription to a second edition of work (*b*). This second edition was not by Paul himself, but, like the second edition of Ulpian *Ad Sabinum*, by some post-classical editor,[2] as is shown by the following consideration. If Paul had written a second edition, enlarged to more than one book, this would have entirely superseded, or at least have overshadowed, the *liber singularis* of the first edition, whereas it was obviously quite unknown to the compilers: the *Index Florentinus* mentions only the *liber sing. de off. praet. tut.* Moreover, the text of the second edition shows signs of post-classical workmanship. A decisive point is that it refers (*F.V.* 247) to Severus and Caracalla as *domini nostri*. This is the only juristic passage which so refers to the Emperors;[3] during the Principate one addressed the Emperor orally[4] and by letter[5] as *dominus*, but otherwise scrupulously avoided a title which would have been a breach of the 'republican' manners affected by the Principate.[6] And there are other post-classical stigmata in the passage.

Finally, work (*a*), *De excusationibus*, was in all probability merely a post-classical abridgement of work (*b*), *De off. praet. tut.* The latter must necessarily have dealt with the law of *excusationes*, and it is unlikely that Paul returned to it in a separate work. Be that as it may, the text of the *De excusationibus* (*a*) used for the *Fragm. Vaticana* was largely of post-classical making. The post-classical equation of *cura* with *tutela*[7] occurs in one of our two passages, *F.V.* 231:[8] the addition of *curatio* is clear from the fact that the editor has neglected to complete it at the end of the passage. Moreover, the words *vel permixto . . . separa-*

[1] To them may also be due *excusationem praebent* for *excusationes merentur* of *F.V.*, and *secundum epistulas* for *ex epistula*.

[2] Solazzi, *AG* xcviii (1927), 43.

[3] *Voc.* ii. 372. 50.

[4] e.g. *D.* (28. 4) 3.

[5] Plin. *Ep. ad Trai.* pass.

[6] Schulz, 141; Carcopino, *Syria*, xiv (1933), 46 ff.; Hüttl, *Antoninus Pius*, i (1936), 66; K. Scott, *The Imperial Cult under the Flavians* (1936), 102 ff., with literature.

[7] The discovery is Albertario's, in *Lo sviluppo delle excusationes nella tutela e nella cura dei minori*, Pavia, 1912. His only error lay in assuming that interpolations of this nature came simply from some reviser of the collection in the *Fragm. Vaticana*. The correct view is stated by Partsch, *St. z. negotiorum gestio*, i (Sb. Heidelberg Ak., phil. hist. Kl., 1913, Abh. 12), 93. See further, Solazzi, *Minore età* (1912) and *Curator impuberis* (1917), and Albertario, *Studi* i. 429, giving literature.

[8] On this passage see Albertario, *Lo sviluppo*, 11, 17; Solazzi, *Minore età*, 109; *Curator impuberis*, 113. Lenel, *Z* xxxv (1914), 190, is out of date. One glance at *F.V.* 186 will convince a modern Romanist of the interpolation of *F.V.* 231.

tas are spurious, and the final clause has been rendered unintelligible by abridgement.[1]

(*d*) *Ulpianus, De officio praetoris tutelaris.*[2]

(*e*) *Ulpianus, De excusationibus liber singularis.*[3] The *Index Florentinus* (xxiv. 22) shows that the compilers possessed work (*d*); from it they took *D.* (27. 1) 3, 5, 9.[4] It is cited once, title given, in a post-classical addition to Modestinus' work[5] (*D.* 27. 1. 6. 13), and we have the long series of fragments: *F.V.* 173–223; 232–6; 238–42.

Work (*e*) is not in the *Index*. Apparently the compilers had no copy of it, but obtained the single *Digest* fragment (*D.* 27. 1. 7) from the post-classical additions to Modestinus, which refer to it as *Ulpianus libro singulari de excusationibus*[6]—an incontestable proof of the existence, though not of the authenticity, of the work.[7] Then, too, there is *F.V.* 123–70: the beginning of the first fragment, which would have given author and work, has perished, but Mommsen has shown that the whole series should be ascribed to Ulpian's *liber de excusationibus*.[8] (i) *F.V.* 145 and 151 recur in 222 and 223, which come from Ulpian's *liber de off. praet. tut.* Again, two passages ascribed in the *Digest* to Ulpian's *liber de excus.* (*D.* 27. 1. 7; 15. 16) recur as *F.V.* 185, 240, and 189, which are given as coming from Ulpian's *liber de off. praet. tut.* Thus it is certain that *F.V.* 123–70 come from a work bearing Ulpian's name. (ii) That work can only be the *liber de excus.*; the extracts from the *liber de off. praet. tut.* begin only at no. 173.

The relation between the two works is that work (*e*), *De excus.*, is a post-classical abridgement of work (*d*), *De off.* The latter must necessarily have dealt with the law of *excusationes*,[9] and in fact we find four of our fragments of (*e*) in a more extended form as fragments of (*d*): *F.V.* 145 = 222; 151 = 223; *D.* (27. 1) 7 = *F.V.* 185, 240; *D.* (27. 1) 15. 16 = *F.V.* 189. Thus the *liber de excus.* is an abridgement of the *liber de off. praet. tut.* Mommsen held the converse, namely that the *liber de off.* was an enlarged edition, by Ulpian himself, of the *De excus.*, but this cannot be accepted. The passages from the *liber de excusationibus* are typical epitomist's work; in their shortened form they cannot possibly have been written by Ulpian. Mommsen was led to his opinion by his having observed that in the *liber de officio* Septimius Severus is always referred to as dead (*divus*), but not in the *liber de excusationibus*.

[1] What the epitomist meant to say is shown by *F.V.* 186. On *permixto modo* see *D.* (27. 1) 2. 9, with the *Index Interp.*

[2] Joers, *PW* v. 1452.

[3] Ibid. x. 1451.

[4] The dominant view, that the compilers obtained these fragments from Modestinus' work, is wrong.

[5] Below, p. 252.

[6] *D.* (27. 1) 15. 16.

[7] H. Krüger, *St. Bonfante*, ii. 323, denies its existence!

[8] In his edition of the *apographum* of the *Fragm. Vaticana* (below, p. 344), p. 394; Joers, *PW* x. 1454. Krüger's objections (*Quellen*, 247, n. 191) cannot be allowed; *F.V.* 233 and 235 are by Paul: see Mommsen in his edition of the *Fragm. Vaticana* (*Collectio libr.* iii. 72).

[9] But not that only: Joers, *PW* x. 1454.

But the evidence in the latter work is very slight—only five passages: *F.V.* 158 *pars orationis imperatoris Severi*; and 125, 147, and 159 (probably also 149) *imperatores nostri*. Mommsen's observation is correct, but it does not justify us in concluding that the *liber de excusationibus* was written while Septimius Severus was still alive. The epitomist shirked the long title *imperator noster et divus Severus* and so wrote simply *imperatores nostri*.[1] Thus we read *F.V.* 246, 'Paulus libro singulari de excusatione tutorum. Imperatores nostri Aelio Diodoto suo salutem', where obviously the abbreviator (see above, p. 248) is responsible for *imperatores nostri*, since Severus and Caracalla cannot have referred to themselves in these words.

The *liber singularis de officio praetoris tutelarii* was a genuine work of Ulpian's, but in the version used for the *Fragm. Vaticana* the classical text had already undergone alteration by a later hand. In particular, as in the *liber de excusationibus*, *cura* is put on the same footing as *tutela*.[2]

(*f*) *Modestinus, De excusationibus*.[3] This work, written in Greek, is of special interest. We possess a considerable number of rather long extracts in the *Digest* and among them, what is rare in our juristic remains,[4] the beginning of the work.[5] This consists of a dedicatory epistle addressed to an otherwise unknown Egnatius Dexter[6] and giving the title of the work (*Παραίτησις ἐπιτροπῆς*) and, as was the literary custom, an outline of its scheme. It is explained that the work is in Greek, though the author well knows that it is considered difficult to expound Roman law (*τὰ νόμιμα*) in that language; that statutes are quoted textually in order that it may be easy for advocates to quote them in court; and that it is believed that a very useful book has resulted. This epistle is no forgery. It is written throughout in the style of Greek dedicatory epistles and is governed by their topology, as may be seen by those interested in such matters if they will compare it with the prefaces of the Pseudo-Skymnus and of the anonymous *Stadiasmus*.[7] The remark on the difficulty of translating Roman jurisprudence into Greek reminds one of Lucretius' lines[8] on the similar difficulty of translating Greek philosophy into Latin.

[1] Cf. Riccobono junior, *Misc.* 48. [2] See the literature cited above, p. 248, n. 7.

[3] Older literature: Ant. Augustinus, *Lib. sing. ad Modestinum sive de excusationibus* (Venice, 1543, and in Otto's *Thesaurus*, iv. 1559). Modern: Peters, *Z* xxxiii (1912), 511; Ebrard, *Die Digestenfragmente ad formulam hypothecariam* (1917), 144; H. Krüger, *St. Bonfante*, ii. 315; Brassloff, *PW* viii. 670.

[4] There seem to be only the beginning of Gaius on the Twelve Tables (above, p. 187), that of the work *de adulteriis* ascribed to Paul (above, p. 188) and that of Arcadius Charisius' *De officio praefecti praetorio* (above, p. 246).

[5] *D.* (27. 1) 1 pr. [6] See *Prosopogr. Imp. Rom.*

[7] *Geogr. gr. min.* 1.196, 427. [8] 1. 136 ff. Against him Cic. *De fin.* 1. 3. 10.

(i) There is no doubt either that Modestinus is the author or that he himself wrote the work in Greek. It is the only classical juristic work so written,[1] but Modestinus is the latest of the classical writers. His exact motives for writing in Greek can only be conjectured. He certainly had connexions with the East:[2] he writes to his teacher Ulpian from Dalmatia,[3] and we find questions put in Greek among his *responsa*. He may have been induced by Egnatius Dexter to write in Greek, just as Eike von Repgow was induced by Graf Hoyer von Falkenstein to write the *Sachsenspiegel* in German. The *Constitutio Antoniniana* had made the need of books on Roman law in Greek specially urgent. Gregorius Thaumaturgus, a contemporary of Modestinus, who had learnt Latin and was an advocate, declares that the marvellous Roman law, which (since the *Constitutio Antoniniana*) applied to all subjects of the Empire, is difficult to learn, because, for all its excellence, it is in Latin and very difficult for him to read.[4] It is obviously erroneous to suppose that the work is a translation of Modestinus' Latin by 'some Byzantine';[5] in view of the fact that the Byzantines had long learnt how to translate Roman jurisprudence into Greek, no Byzantine would have remarked on the difficulty of so doing. The remark suits Modestinus, but not a Byzantine.

(ii) The title is given by the dedication as *Παραίτησις ἐπιτροπῆς*,[6] by the *Index Florentinus* (xxxi. 5) as *excusationum βιβλία ἕξ*, and by the *Digest* inscriptions as *libri excusationum*. A Greek work, however, would naturally have a Greek title.

(iii) The dedication promises to quote the actual words of the statutes (*νόμοι*), so far as necessary. This means the imperial constitutions.[7] Our fragments do at times give the texts of constitutions, and as a rule in Latin.[8] Where the text is given in Greek, this was presumably the language of the original constitution. An example is Antoninus Pius' *epistula* to the *κοινόν* of Asia.[9] Otherwise the Latin text is given because, as the dedication

[1] On Papinian's *ἀστυνομικός*: above, p. 247; Maecian: below, p. 255.

[2] Peters, *Z* xxxiii (1912), 513.

[3] *D.* (47. 2) 52. 20.

[4] *Paneg. ad Originem*, 1. 7: '*οἱ θαυμαστοὶ ἡμῶν νόμοι, οἷς νῦν τὰ πάντων τῶν ὑπὸ τὴν Ρωμαίων ἀρχὴν ἀνθρώπων κατευθύνεται πράγματα, οὔτε συγκείμενοι οὔτε καὶ ἐκμανθανόμενοι ἀταλαιπώρως· ὄντες μὲν αὐτοὶ σοφοί τε καὶ ἀκριβεῖς καὶ θαυμαστοὶ καὶ συνελόντα εἰπεῖν 'Ελληνικώτατοι· ἐκφρασθέντες δὲ καὶ παραδοθέντες τῇ Ρωμαίων φωνῇ . . . φορτικῇ δὲ ὅμως ἐμοί.*'

[5] So H. Krüger, *St. Bonfante*, ii. 323.

[6] Modestinus' translation of *excusatio tutelae*; Liddell and Scott give 'excuse, declining' for *παραίτησις*.

[7] *D.* (27. 1) 6. 9.

[8] *D.* (27. 1) 10. 4; 13. 12; 15 17; (26. 6) 2. 2.

[9] *D.* (27. 1) 6. 2.

says, the intention was that the constitutions should be readable in court straight out of this book; it seems, therefore, that even in the provinces Latin constitutions were read out in Latin.[1]

(iv) There are citations of Paul and Ulpian; quotations from them are usually in the original Latin. Every one of these Latin texts must have been inserted in post-classical times: it is not credible that so early as Modestinus classical juristic writings should have been put on the same footing as imperial constitutions. Modestinus had no reason for not translating into Greek any juristic text that he wished to quote. It does not seem to have been classical practice to read out in court passages from the jurists; this became established later, when the classical literature had been elevated to the rank of *ius*.

The quotations from Paul and Ulpian fall into two groups. In the first everything is in Latin—name of jurist, title of work, book-number, and text. The citations of the second group begin with a clause in Greek, giving the jurist's name, but not the title of the work; then follows (though not always) the text in Latin. About the first group there is no difficulty: the quotations must, as has long been recognized, all have been inserted after Modestinus, who, if he desired to quote a text in Latin, would surely have introduced it by a Greek phrase. But they cannot have been inserted by the compilers, so that they constitute a proof that Modestinus' work underwent a post-classical revision. The second group is less straightforward; but here too it may be claimed that the quotations in Latin are not due to Modestinus.

(v) There are other indications of a post-classical revision which cannot be dealt with here. An example is the equation throughout of *tutela* and *cura*.[2]

(ix)

We are left with a considerable number of works which we cannot fit into our classification, partly because we know very little about them. Of many we possess but a few fragments, of some only the title registered by the *Index Florentinus*. The *libri singulares* among them are in part merely classical or post-classical separate editions or post-classical abridgements taken from portions of larger works; this holds in particular of Paul's numerous *libri singulares*. Here it is sufficient to give a summary conspectus of the works in question, with short remarks on notable points.[3]

[1] See the report: Bruns, no. 69 (Wilcken, *Chrest.* 462) and E. Weiss, *Z* xxxiii (1912), 223. It may be that there have been fresh discoveries later.

[2] Above p. 248, n. 7.

[3] See for the fragments Lenel, *Pal.*

(1) LAW OF PERSONS

De manumissionibus: Gaius, *libri iii*; Modestinus, *lib. sing.*

Paulus, *De liberali causa lib. sing.* and *De articulis liberalis causae lib. sing.* are probably one and the same: Beseler, *Beitr.* iii. 202; Berger, *PW* x. 716 *contra*. See above, p. 196.

Paulus, *De adsignatione libertorum lib. sing.* and *De libertatibus dandis lib. sing.*, both probably consisting of extracts from larger works.

Paulus, *De iure patronatus lib. sing.* and *De iure patronatus quod ex lege Iulia et Papia venit* (known only from the *Index*) are probably identical and consisted of extracts from larger works. Above, p. 188.

Ulpianus, *De sponsalibus lib. sing.* Presumably extracted from a larger work.

Neratius, *De nuptiis*. Known only from a citation by Gellius 4. 4.

Modestinus, *De ritu nuptiarum lib. sing.*

Gaius, *Dotalicion*. Only in the *Index*.

Paulus, *De dotis repetitione lib. sing.* Doubtless only an extract.

Paulus, *De donationibus inter virum et uxorem lib. sing.* Only in the *Index*. Doubtless only an extract.

Tertullianus, *De castrensi peculio lib. sing.*

Paulus, De gradibus et adfinibus et nominibus eorum lib. sing.[1] This is of special interest, both as providing a good example of a post-classical forgery and as being connected with the pseudo-Pauline *Sententiae*. We have only one, very long, fragment (*D.* 38. 10. 10). In Cujas's day a complete copy of the work existed; its owner assured Cujas that the *Digest* fragment contained nearly the whole of the text given by the manuscript.[2] The work is assuredly not by Paul: it is a piece of professorial triviality, devoid of any juristic value and unmistakably post-classical in style.

The fragment begins by telling us that a jurisconsult (no less!) ought to know the grades of consanguinity and affinity; no classical writer could have penned this. Then s. 5: 'non parcimus (!) his nominibus, id est cognatorum, etiam in servis', and s. 7: 'Parentes usque ad tritavum apud Romanos (!) proprio vocabulo nominantur', and lastly s. 10: 'Gradus autem dicti sunt a similitudine scalarum locorumve proclivium, quos ita ingredimur, ut a proximo in proximum, id est in eum, qui quasi ex eo nascitur, transeamus' —these passages speak for themselves, especially the last, which is typical of the would-be learned post-classical schoolmaster. In

[1] *Index Flor.* xxv. 29; *Pal.* i. 1103; Pringsheim, 'Beryt u. Bologna' (*Festschr. Lenel*, 1921), 279; Scherillo, 'Sul tractatus de gradibus cognationum' (*St. Cagliari*, xviii. 1931). We will not here dwell on the anonymous *Tractatus de gradibus cognationum* (*Collect. libr.* ii. 166; Seckel–Kübler, ii. 182; Girard–Senn, 502; *FIRA* ii. 631): see Krüger, *Quellen*, 286. On the *Stemmata cogn.*: Alberti, 'Lo stemma cognationum', *RSDI* v (1934).

[2] *Observ.* vi. 40.

the classical age the term *gradus* was current coin. This, we submit, is proof enough.

In the *Digest* our passage (*D.* 38. 10. 10) is preceded by a fragment from Paul's *Sententiae*, which, after a short remark about ascending and descending lines, ends: 'quas omnes latiore tractatu habito in librum singularem contexiimus.'[1] This sentence cannot come from Paul.[2] Equally clearly it cannot come from the compilers, such a transition from one fragment to another being foreign to their manner. More likely the sentence was already in the post-classical version of the *Sententiae* from which the compilers took the extract; it was also in the version used by the Visigoths, though they did not include the text known to us as *D.* (38. 10) 9 in their *Breviarium*, 4. 10. This reference by the *Sententiae* to a post-classical *lib. sing. de gradibus* must have been inserted by a post-classical hand. It is therefore a mistake to regard it as a proof of Paul's authorship of the *Sententiae*.[3]

(2) LAW OF PROPERTY

Nerva, *De usucapionibus*; *Pal.* i. 791. Only citations.

Paulus, *Περὶ δυσαποσπάστων* (i.e. on things difficult to separate) in at least two books. All we have is a Greek gloss. *Pal.* i. 966.

(3) LAW OF OBLIGATIONS

De verborum obligationibus.

Pedius, *De stipulationibus*; *Pal.* ii. 8, where more than one book is rightly assumed; Ferrini, *Opere*, ii. 42, is wrong. Only one citation.

Gaius, *De verborum obligationibus libri iii.*

Pomponius, *De stipulationibus*, in at least eight books. Only a citation.

Venuleius, *De stipulationibus libri xix.*

Paulus, *De intercessionibus feminarum lib. sing.* Doubtless identical with the *lib. sing. ad senatusconsultum Vellaeanum.* Above, p. 189.

Massurius Sabinus, *De furtis.* Cited only by Gellius, who is presumably referring to the title *De furtis* in Sabinus' *Ius civile.*[4]

[1] Scherillo's view, op. cit. pp. 25 ff., is untenable.

[2] This is the only case where a juristic work uses 'contexere' metaphorically: *Voc.* i. 981. 52; *Thes.* iv. 692. 72. Incomprehensibly Volterra, 'Sull' uso delle sententiae di Paolo', *Atti Congresso 1933, Bologna*, i (1934), 164, takes the passage as genuinely Pauline: 'Nelle Sententiae Paolo cita sè stesso in prima persona. È questo un indizio che non trovò ancora preso in esame dall' opinione dominante (!).' But the right view had already been taken by Pringsheim, *Beryt u. Bologna*, 279.

[3] As Volterra (last note) does.

[4] Observe Gellius' manner in citing. In 10. 6 he says: 'id factum esse dicit Capito Ateius in commentario de iudiciis publicis . . .'; but he himself informs us in 4. 14 that Capito's book 'qui inscriptus est de iudiciis publicis' is nothing more than book 8 of his *Coniectanea.*

Paulus, *De iniuriis lib. sing.* Just a post-classical extract. Above, p. 795.

Paulus, *De usuris lib. sing.*

Maecianus, *Ex lege Rhodia.*[1] We have only *D.* (14. 2) 9, in Greek. Not in the *Index.* The contents show that either Maecianus is in no sense the author or else that the compilers derived the fragment from a Greek paraphrase of his work or somehow otherwise at second hand. It is unlikely that Maecianus wrote the work in Greek. The text runs: 'Antoninus said to Eudaemon: "I am lord of the world, but the law is lord of the sea." ' Impossible, from either Antoninus Pius or M. Aurelius; nor is interpolation by the compilers a possible explanation.[2]

(4) Law of Inheritance

Paulus, *De testamentis lib. sing.* and *De forma testamenti lib. sing.* are doubtless identical.

Modestinus, *De testamentis lib. sing.* Only in the *Index.*

Paulus, *De secundis tabulis lib. sing.*

Paulus, *De inofficioso testamento lib. sing.*

Modestinus, *De inofficioso testamento lib. sing.*

Paulus, *De septemviralibus iudiciis lib. sing.* So the *Index* (xxv. 46) and the inscriptions of our four *Digest* fragments, all of which deal with the *querella inoff. test.* There is a natural inclination to alter this unknown tribunal to *centumviralibus* throughout, *Pal.* i. 957, but the emendation cannot be accepted: Eisele, *Z* xv. 283; xxxv. 320, giving the literature.

Paulus, *De iure codicillorum lib. sing.*; M. Scarlata Fazio, *La successione codicillare* (1939), 215.

De legatis et fideicommissis.

Valens, *De fideicommissis libri vii.*

Gaius, *De fideicommissis libri ii*; *De tacitis fideicommissis lib. sing.*

Pomponius, *De fideicommissis libri v.*

Paulus, *De fideicommissis libri iii. De tacitis fideicommissis lib. sing.*

Ulpianus, *De fideicommissis libri* vi.

Modestinus, *De legatis et fideicommissis lib. sing.* Only in *Index.*

Paulus, *Ad regulam Catonianam lib. sing.*

Paulus, *De instrumenti significatione lib. sing.* In the *Index* (xxv. 58) described as *de instructo et instrumento.*

Paulus, *De legitimis hereditatibus lib. sing.* Only in *Index.*

(5) Law of Actions

Paulus, *De actionibus lib. sing.* Only in *Index.*

Paulus, *De conceptione formularum lib. sing.*

[1] Mommsen, *Schr.* vii. 264; Kreller, *Z. f. das gesammte Handels- u. Konkursrecht*, lxxxv (1921), 352; H. Krüger, *St. Bonfante*, ii. 314.

[2] Byzantine interpolation assumed by Kreller, but in our opinion impossible.

Paulus, *De concurrentibus actionibus lib. sing.*
Modestinus, *De praescriptionibus lib. sing.*
Venuleius, *De interdictis libri vi.*
Arrianus, *De interdictis*, at least 2 books.

(6) Private Law in General

Paulus, *De iuris et facti ignorantia lib. sing.* Post-classical: see *Index Interp.* on the one fragment, *D.* (22. 6) 9, and Ebrard, *Z* xlv. (1925), 118.

Paulus, *De iure singulari lib. sing.* Hardly genuine, though Orestano, *Ius singulare e privilegio* (1937), treats it as such.

(7) Procedure

Paulus, *De cognitionibus lib. sing.*; Berger, *PW* x. 716, giving the literature. Of our seven fragments six deal with *excusatio tutelae.* Apparently post-classical, which would explain the variations in the titles given to the Emperors.

Callistratus, *De cognitionibus libri vi.*

Paulus, *De iure libellorum lib. sing.* Berger, *PW* x. 719.

Arcadius Charisius, *De testibus lib. sing.* Post-classical in style.

De appellationibus.
Paulus, *lib. sing.*
Ulpianus, *libri iv.*
Marcianus, *libri ii.*
Macer, *libri ii.* Post-classical revision: Beseler, *Beitr.* ii. 142.

Paulus, *Ad municipalem lib. sing.*; Berger, *PW* x. 709. Above, p. 196.

Ulpianus, *De omnibus tribunalibus libri x.*[1] The title sounds unclassical, and that of 'Protribunalia' given by the *Index* and Lydus, *De magistrat.* 1. 48, is even less normal. Plan unrecognizable; contents post-classical in character. It may well be a post-classical collection of excerpts from Ulpian, with alterations and additions.

(8) Criminal Law

De iudiciis publicis.
Maecianus, *libri xiv.*
Venuleius, *libri iii.*
Marcianus, *libri ii.*
Macer, *libri ii.*

Paulus, *De poenis omnium legum lib. sing.* Only in the *Index.*

Paulus, *De poenis paganorum lib. sing.*

Claudius Saturninus, *De poenis paganorum lib. sing.* One long fragment (*D.* 48. 19. 16). In the *Index* (xxi. 4) under 'Venuleius Saturninus'. The fragment is unclassical in style: Beseler, *Z* li (1931), 198.

[1] Pernice, *Z* xiv (1893), 135; Joers, *PW* v. 1454; Kübler, *Festschr. Hirschfeld* (1903), 58; Wlassak, *Zum röm. Provinzialprozess* (*SB* Wien. Ak., phil.-hist. Kl., cxc, 1919), 68; Beseler, *Beitr.* iv. 118.

Paulus, *De extraordinariis criminibus lib. sing.* Only in *Index.*
Modestinus, *De poenis libri iv.*

(9) Fiscal Law

Callistratus, *De iure fisci et populi libri iv.*
Paulus, *De iure fisci libri ii.*
Paulus, *De portionibus quae liberis damnatorum conceduntur lib. sing.*
Marcianus, *De delatoribus lib. sing.*
Fragmentum de iure fisci (so-called).[1] The unknown source can hardly have been a special treatise *de iure fisci.*
Paulus, *De censibus libri ii.*
Ulpianus, *De censibus libri vi.*
Arcadius Charisius, *De muneribus civilibus lib. sing.*

(10) Military Law

De re militari.
Tarrutenius Paternus, *libri iv.* See above, p. 106.
Menander, *libri iv.*
Macer, *libri ii.*
Paulus, *De poenis militum lib. sing.*

From this survey the important fact stands out that *classical jurisprudence produced hardly any monographs.* Those we have assembled (to which the works *ad formulam hypothecariam* mentioned earlier should be added), so far as they are in any sense classical, are either very short or else deal with matters for which there was not room enough in the ordinary systematic works, such as *fideicommissa*, appeals, and criminal, fiscal, and military law. The one exception is that the law of *stipulatio* received monographic treatment from at any rate Pomponius and Venuleius. It could not have been otherwise. A legal science which eschewed legal history, law reform, and legal philosophy, which laid stress mainly on case law and problems and was only very mildly interested in system and abstraction, contained no place for a monographic literature of the modern type. And yet one may see in the lack of such a literature one reason why the stream of classical literature eventually ran dry. No systematic work could hope to outdo Ulpian's great commentaries, and though problematic literature might have been further spun out, since casuistry is in its nature inexhaustible, one can well understand that satiety was at length reached. Only by monographic literature could new paths have been opened and explored.

[1] *Collect. libr.* ii. 162; Seckel–Kübler, ii. 172; Girard–Senn, *Textes*, 499; *FIRA* ii, ed. 2, 627.

(x)

We close our survey of classical juristic literature with a brief characterization of the legal language of the period.[1] Legal language was no more uniform than in the preceding period:[2] it was different in each of the various genera of legal literature.

1. About the language of the *leges* and *senatusconsulta* there is nothing to add to what has been said of the previous period.[3] As to the style of the *orationes principum* it is impossible to generalize, since it would depend on the personal taste of the emperor.[4]

2. As we have related,[5] the praetorian and aedilician Edict was revised by Julian at Hadrian's order and stereotyped by means of a senatusconsult. Here and there, no doubt, Julian made stylistic alterations in the traditional text, but he was much too conservative to recast the whole Edict into the style of a second-century jurist. This means that even his stereotyped Edict lacks linguistic uniformity. Side by side with terse clauses in the regular juristic phraseology stand passages in the antiquated style proper to the magistracy. This is equally true of the individual edicts (edicts in the narrow sense) and of the edictal formulae. Combinations of *actio*, *exceptio*, and *replicatio* produce highly complicated and stylistically obscure formulations. No linguistic study of the Edict and its formulae exists.

For example, the edict on *restitutio in integrum* of *maiores xxv annis* is a single long and involved sentence ending: 'in integrum restituam quod eius per leges plebis scita senatus consulta edicta decreta principum licebit.' Here *quod* is used in the sense of *si*, which is characteristic of the ancient official style: e.g. in the *L. Cornelia de xx quaestoribus* (Bruns i. 89, 1. 4–5) we read: 'quod (= si) sine malo pequlatuu fiat', and again in the formulary *demonstratio* (Gaius 4. 40) we find *quod* used in the same sense.[6] The genitive *eius* in the above-quoted edict is a genitive of respect or relation, which also is characteristic of the official style.[7] Thus it is found in the common clause of *leges*: 'eius hac lege nihil rogatur', and again in the *eius . . . condemna* of a formulary *condemnatio* (Gaius 4. 40). The edict *de noxalibus actionibus* has *vel deierare iubebo*; now *deierare* (= *deiurare*) is not used by the

[1] On what follows see Levy-Bruhl, 'Le Latin et le droit romain', *Rev. des Études Latines*, ii (1924), 103 ff.; Schulz, 80 ff.; Albertario, *Introduz.* i. 50 ff.

[2] Above, p. 96.

[3] Above, p. 96.

[4] See, e.g., the *Oratio Claudii* (Bruns, i. 52; *FIRA* 1. 281).

[5] Above, p. 127.

[6] On this usage of *quod* see Stolz-Schmalz, *Syntax*, pp. 284, 287.

[7] Ibid. s. 29.

classical jurists,[1] but belongs to the ancient official phraseology:[2] see, e.g., the *Lex repetundarum*, s. 19 (Bruns, no. 10).

3. In general the style of the writings of the classical jurists conforms strictly to the republican tradition.[3] It is a professional form of speech[4] and therefore a thing apart, diverging in many respects from common usage.[5] It falls under the *genus tenue*[6]—a plain, unadorned style, which disdains all rhetorical artifice and aims solely at simplicity and exactitude.[7] Things are called by their technical names and by them alone,[8] even though such terminological strictness produces a certain monotony. Neologisms and metaphors are sternly eschewed;[9] unusual words, archaisms especially, are shunned like the plague;[10] so also any expression savouring of sentiment or pomposity.[11] Passion, pathos, and emotion in expression are taboo; the *tempo* of the exposition is a serene *andante*.[12] It goes without saying that rhythmic *clausulae* were not affected.[13] For so severely professional a science as that of the classical jurists such a style was, according to the canons of antiquity, becoming (*πρέπον*, *decorum*).[14] Further, it harmonized with the whole intellectual attitude of the jurists, especially with their decided distaste for rhetoric.[15] Its clear and impressive

[1] *Voc.* ii. 142. [2] See *Thes.* v. 403. [3] Above, p. 97.

[4] Legal Latin is not considered by J. Svennung, *Untersuchungen zu Palladius und zur lateinischen Fach- und Volkssprache* (1935).

[5] Quint. *Inst.* 11. 2. 41 *i.f.*: '. . . magis ab usu dicendi remota, qualia sunt iurisconsultorum.'

[6] Cic. *Or.* 5. 20; Quint. *Inst.* 12. 10. 21, 59.

[7] Cic. *Or.* 23. 78 f. set aside all rhetorical curling-tongs and rouge-pots; 'elegantia' (on this expression see below, p. 335) 'modo et munditia remanebit! Sermo purus erit et Latinus, dilucide planeque dicetur . . . unum aberit: ornatum.'

[8] Quint. *Inst.* 5. 14. 34: 'iurisconsulti, quorum summus circa verborum proprietatem labor est.'

[9] Cic. *Or.* 23. 81: 'Ergo ille tenuis orator, modo sit elegans, nec in faciendis verbis erit audax et in transferendis verecundus.'

[10] Julius Caesar (Gell. 1. 1. 10) advises: 'ut tamquam scopulum sic fugias inauditum atque insolens verbum.' Cic. *Or.* 24. 81: *parcus in priscis.* Tubero was fond of archaisms; the classical age disliked his writings—*D.* (1. 2) 2. 46: 'sermone etiam antiquo usus affectavit scribere, et ideo parum libri eius grati habentur.'

[11] e.g. *coniux, repulsa, humanitas*: cf. Schulz, 81.

[12] Cic. *Or.* 19. 63 f.: 'Loquuntur cum doctis . . . Mollis est enim oratio philosophorum et umbratilis . . . nihil iratum habet, nihil invidum, nihil atrox, nihil miserabile, nihil astutum.'

[13] So expressly Quint. *Inst.* 11. 2. 41: 'solutiora numeris . . . qualia sunt iuris consultorum.' Cf. Cic. *Or.* 19. 64: *nec vincta numeris*; ibid. 23. 77. Thus Rechnitz, *Studien zu Salvius Iulianus* (1925), is fundamentally in error; cf. Ed. Fraenkel, *Z* xlii (1927), 396 ff., 405.

[14] Cic. *Or.* 21. 70; 36. 124; 21. 72: 'indecorum est de stillicidiis, cum apud unum iudicem dicas, amplissimis verbis . . . uti.' Here *de stillicidiis* is equivalent to *de iure civili* (*pars pro toto*); cf. Cic. *De leg.* 1. 4. 17. Quint. *Inst.* 2. 10. 5.

[15] Above, p. 119.

objectivity is yet another manifestation of Roman greatness and sobriety. Naturally the style of the jurists was not absolutely uniform, but in a profession which gave scanty scope even to scientific individuality[1] the stylistic idiosyncrasies were trifling. A more important point is that in certain kinds of juristic literature (legal history, or instructions as to official conduct such as Ulpian's *libri de officio proconsulis*) the standard juristic style was not strictly adhered to.[2] The same is, of course, true of uncompleted, posthumously published works like Gaius' *Institutes*.[3]

It is only by recent critical research that this characterization of the classical juristic style has been made possible. Since, as we have shown, all the surviving writings have come to us from the post-classical period with their texts more or less seriously revised, it is only by the study of the interpolations that the special characteristics of the classical style can be revealed. Less recent researches, coming from so late as the end of the nineteenth and the first decade of the twentieth century, are now out of date.[4] Their authors were blinded by false presuppositions as to the nature of our literary tradition.[5] Moreover, their lexical apparatus was defective. Since 1910 the study of the linguistic usage of the classical jurists has been very active under the leadership of G. Beseler. Almost every modern work on Roman law contains at least some observations on the subject. We are still far from our goal; many points are still (often, it must be said, erroneously) disputed. As yet no comprehensive critical study of this widely scattered literature exists; Guarneri Citati's *Indice*[6] is, however, a valuable guide. The almost finished (perhaps already finished) *Vocabularium Iurisprudentiae Romanae* furnishes an exhaustive index of the passages in which a given word occurs. Then we have vocabularies of the *Institutes* of Gaius and of the fragments of Celsus and of Callistratus.[7] Dirksen's and Seckel's dictionaries are out of date,[8] though the latter is still indispensable.

4. The imperial constitutions of the period are couched in yet

[1] Above, p. 125. Schulz, 107. [2] Above, p. 169, 245.
[3] Above, p. 163. [4] Schulz, *Einf.* 58 ff.; Stolz–Schmalz, *Syntax*, p. 357.
[5] Above, p. 142.
[6] *Indice delle parole, frasi e costrutti ritenuti indizio di interpolazione nei testi giuridici romani* (ed. 2, 1927). Add: *Supplemento* I in *Studi Riccobono*, i (1934), 701 ff.; *Suppl.* II in *Festschr. Koschaker*, i (1939), 117 ff.
[7] Zanzucchi, *Vocabolario delle Istituzioni di Gaio* (n.d.); Stella Maranca, *Intorno ai frammenti di Celso* (1915); J. B. Nordeblad, *Index verborum quae Callistrati libris continentur* Fasc. 1 (1934), 'A'—'is' *init.* (perhaps more has appeared).
[8] Dirksen, *Manuale Latinitatis fontium iur. civ. Rom.* (1837); Heumann-Seckel, *Handlexicon zu den Quellen des röm. Rechts* (1907).

another style,[1] though in general this is simple and unadorned and obviously seeks not to diverge far from the juristic style. But the Chancery had its own special formulae, which were alien to the jurists; at times it is more rhetorical than they. At times, also, the language is influenced by the Emperor's personal taste. A linguistic study of the constitutions has not yet been attempted.[2]

5. Finally, business documents have their own linguistic peculiarities, so that it is erroneous to argue from their language to the juristic: it does not follow, merely because an expression is employed in business documents, that it was also employed by the jurists.[3]

[1] Vernay, *Études Girard*, ii (1913), 266; Schulz, 82.

[2] Materials collected in: Haenel, *Corpus Legum ab imperatoribus Rom. ante Iustinianum latarum* (1857)—out of date, but still useful, especially on account of its extensive indexes. A collection of the classical constitutions has been planned in Italy. The first fasc. has appeared (Acc. dei Lincei).

[3] Cf., e.g., Schulz, *JRS* xxxii (1942), 87; xxxiii (1943).

PART IV

THE BUREAUCRATIC PERIOD

Διὸ δεῖ μὴ δυσχεραίνειν παιδικῶς τὴν περὶ τῶν ἀτιμοτέρων ζῴων ἐπίσκεψιν. ἐν πᾶσι γὰρ τοῖς φυσικοῖς ἔνεστί τι θαυμαστόν . . . καὶ πρὸς τὴν ζήτησιν περὶ ἑκάστου τῶν ζῴων προσιέναι δεῖ μὴ δυσωπούμενον, ὡς ἐν ἅπασιν ὄντος τινὸς φυσικοῦ καὶ καλοῦ.[1]

ARISTOTELES, *De part. anim.* 1. 5. 645 *a*.

INTRODUCTION

(i)

THE final period of Roman jurisprudence begins with Diocletian and ends with the completion of Justinian's codification in 534. In accordance with our programme[2] we shall confine ourselves to legal science inside the framework of the Roman Empire, and shall therefore take no account of the Visigothic or the Burgundian legislation, except in so far as they throw light on the jurisprudence of the western Empire and particularly on that of Italy. For our purpose it is not necessary to subdivide the period. The definite partition of the Empire after Theodosius' death is not a dividing line; the legal unity of the Empire was preserved: even under Odoacer and Theodoric Italy remained part of the Empire.[3] It is true that in the western Empire, owing to political conditions, the level of legal science sank ever lower in the course of the fifth century, whereas in the eastern Byzantine Empire it remained considerably higher and at the end of the fifth and the beginning of the sixth centuries shows a marked rise. But the contrast should not be exaggerated; the modern belief in the grand achievements of the Byzantine law schools is erroneous.

(ii)

We shall call the period from Diocletian to Justinian the bureaucratic period of Roman jurisprudence. The description 'post-classical' is not only uninformative but also misleading, in that it treats the jurisprudence of this period as a mere epilogue to classical jurisprudence, whereas it has a significance and a value of its own, which are independent of what preceded as well as of what

[1] 'We therefore must not recoil with childish aversion from the examination of the humbler animals. Every realm of nature is marvellous. . . . So we should venture on the study of every kind of animal without distaste; for each and all will reveal to us something natural and something beautiful.' (Translation by W. Ogle in Smith and Ross, *The Works of Aristotle*, 5.)

[2] Above, p. 2.

[3] Above, p. 2.

followed it.[1] In both general and legal history the decisive factor during this period is the complete victory of bureaucracy and the thorough-going application of bureaucratic methods of government. Mommsen's verdict[2] on Diocletian's reforms, 'everything, one may say, is new', cannot be accepted; it would be truer to say 'hardly anything is new'.[3] The bureaucratic system, in particular, had begun with Augustus and had been extended, now slowly, now rapidly, all through the Principate. Diocletian and Constantine did no more than complete an existing development. The political historian may pronounce that they merely broke through a brittle shell which till then had concealed the existence of a new order, but to the legal historian this shell, consisting of the legal forms, is the very core of his subject, and its final destruction is for him the beginning of a new period. The republican forms, though ultimately they had become empty forms, had remained unchanged for 300 years. At least externally Augustus' ambition that his constitution should endure[4] had been realized. But with Diocletian and Constantine the republican forms passed away. Down came the façades and hoardings which Augustus had tenderly preserved and which had been clung to throughout the Principate.

The thorough-going application of the bureaucratic system led necessarily to a transformation of legal science. The innate tendency of every bureaucracy to convert the development of the law into the monopoly of a central office, to codify the law and to assure and supervise its strict application and enforcement, undoubtedly produced a complete change in the structure of Roman legal science. Yet this change was only a metamorphosis. The spirit of Roman jurisprudence did *not* die but migrated into another body. If one limits one's view of legal science to its expression in the law schools and in literature,[5] one is completely baffled by the sudden and unexpected collapse of classical jurisprudence in the second half of the third century, immediately after Ulpian; one can merely note the withdrawal of God's grace.[6] But, while it is true that classical jurisprudence, that is jurisprudence expressing itself in the forms proper to the Principate, died with the Princi-

[1] L. v. Ranke, *Ueber die Epochen der neueren Gesch.* (1888), 5: 'Every epoch belongs immediately to God, and its value depends not at all on what it produces, but on its very existence. Thus history, including the history of individuals, possesses a peculiar charm of its own, because every epoch must be regarded as something having value in itself, and its history as highly deserving of study.'

[2] *Abriss d. röm. Staatsr.* (1893), 351.

[3] M. Gelzer, *HZ* CXXXV (1927), 177.

[4] Sueton. *Aug.* 28. 2.

[5] Above, p. 1.

[6] Beseler, *Bull.* XLV (1938), 170, n. 2.

pate, jurisprudence lived on. Certainly the best legal talent now entered the administration of the Christian Church[1] or the imperial bureaucracy, but as early as the Severi pure teachers of law had played but a lowly part, and the leading jurists, Papinian, Paul, and Ulpian, had been members of the central bureaucracy. Diocletian's rescripts are not on a lower level than Papinian's or Paul's *responsa*. The difference is that under the Severi the forms of the Principate were still preserved, so that consultations and books came from individual jurists, while from Diocletian onwards the bureaucratic system concentrated a monopoly of the direction of legal practice and development in a central office, and imposed anonymity. The actual draftsmen of the rescripts and statutes were to be unknown outside the office; everything must appear to come from the head of the government, in other words from the Emperor; he is *legum dominus, iustitiae aequitatisque rector*.[2] For great, original work in jurisprudence during the bureaucratic age one must look not to the law school but to the legal members of the imperial chancery. The characteristic productions of the period are official and semi-official codifications, rescripts, and imperial statutes; for in a thorough-going bureaucracy only official and semi-official literature counts. The works of mere law teachers are of small importance and serve only for scholastic instruction; but we must not forget that even in the eyes of Papinian and Ulpian the *Institutes* of Gaius, which loom so large to-day, were insignificant. If one wishes to compare the achievements of the bureaucratic with those of the Severan jurisprudence, one must compare the works of Papinian and Ulpian with the imperial legislation and the great official and semi-official codes. These products of bureaucratic jurisprudence are anything but insignificant and, unless judged solely by their latinity, cannot be dismissed with the note 'unsatisfactory'. Roman legal science did *not* die with the Principate, but took on forms suitable to contemporary conditions; its adaptability shows its vitality. We do not, however, deny the growing intellectual fatigue of the times; but this was already observable in the second century.[3]

[1] Well illustrated by the life of Gregorius Thaumaturgus, as early as the third century. He meant to go to Berytus to study Roman law (*ad Originem*, 5. 62), but became a bishop and, with his brother, the founder of the Pontic Church. Another illustration is Tertullian, if he is really identical with the jurist Tertullian: cf. Kübler, *Gesch.* 279; A. Beck, *Röm. Recht bei Tertullian u. Cyprian* (1930), 39.

[2] *CIL* vi. 1180, 1181; *ILS* 765. Remarkably clear is Mamertinus (under Diocletian), cap. 11 (*Panegyrici Latini*, x): 'Vestra haec, imperator, vestra laus est. A vobis proficiscitur etiam quod per alios administratur.'

[3] Above, p. 129.

(iii)

The period, our last, ends with the completion of Justinian's great codification in 534. Others before us have observed the cleavage that occurs in the middle of Justinian's reign. The general historian may not find it deep enough to mark the beginning of a new period, but in legal history it is a turning-point. Justinian continued to pour out novels, but the great body of the law was now petrified, and jurisprudence survived only in the form of scholastic interpretation of his imposing *Corpus*. Henceforward, as never before, *the book* was the sacred spring from which alone, as in Bologna, the jurisprudence of the Byzantine schools drew its inspiration. The year 534 is for jurisprudence the beginning of the Middle Ages.[1]

(iv)

The final period of Roman jurisprudence has up to our own day been treated by scholars without sympathy and therefore without understanding. It has been viewed almost exclusively with the eyes of the Humanists, that is to say from the standpoint of classical jurisprudence. This is why the fourth and fifth centuries have been seen as a period of decline and fall, as an age of degeneration, decadence, and depravation, which it was pleasanter to avoid in favour of the unsullied forms of the classical period. Modern Romanists have devoted themselves almost exclusively[2] to classical law, and, in the true humanistic style,[3] have poured invective on the post-classical depravation of classical law and exclaimed against the bad Latin and crass stupidity of an age of unthinking *epigoni*. To the numerous works which Mommsen, in his latest creative period, devoted to these very fourth and fifth centuries no attention was at first paid.[4] This attitude, creditable to Romanistic scholars as classicists, was discreditable to them as serious historians.[5] It is time for our science to conform with the general move-

[1] Gwatkin, *Cambridge Medieval History*, i (1911), 1; Zilliacus, 72; A. Berger, *Annuaire de l'Institut de Philologie et d'Histoire Orientales et Slaves*, vii (1939–44), 357.

[2] There are isolated exceptions. But Greek, Hellenistic, and oriental laws do not belong, at least directly, to Romanistic studies, even when Romanists concern themselves with them.

[3] See, e.g., the declamation of Maphaeus Vegius (†1458) in Savigny, *Gesch d. r. R. im Mittelalter*, vi (1850), 429 ff. The tone of A. Faber's (†1624) studies of interpolations is well known. Jac. Gothofredus's (†1652) monumental commentary on the *Cod. Theod.* is an exception.

[4] Not even his new edition of the *Cod. Theod.* produced new studies. Similarly, Max Conrat's works on the Visigothic Gaius and Paul passed unnoticed at first: Kantorowicz, *Z* xxxiii (1912), 465.

[5] Mommsen, *Schr.* v. 384.

ment amongst ancient historians[1] and, shaking off the shackles of humanism, to throw itself into the study of late antiquity, understood in the spirit of Aristotle and Ranke.[2] But as things stand, for want of indispensable preliminary studies of numerous sociological and juristic problems, this final part of our work can be but a modest outline, lacking in many respects precision, completeness, and colour.

[1] See especially M. Gelzer, *HZ* cxxxv (1927), 173 ff.; Hans Lietzmann, 'Das Problem der Spätantike', *SB. Berlin.* xxxi (1927), 345; R. Laqueur, *Probleme der Spätantike* (1938), 17 ff. Palanque, Du Bas-Empire en général (*Mémorial Marouzeau des Ét. Lat.*, 1943), 304.

[2] Above, p. 263, n. 1.

I

THE JURISTS AND THE LEGAL PROFESSION

IN this period the jurists belonged to definite professional groups, and it is to the description of these groups that we must confine ourselves. Quite enough is known of the names of jurists, but for the history of legal science these are of but slight interest: only seldom can we connect particular legal works with them. Consideration of the individual jurists must be deferred until the *prosopographia* of the fourth and fifth centuries is further advanced than it is at present.[1]

(i)

The most prominent and important group is that of the bureaucratic jurists. It is a group which, as we have previously shown,[2] already existed under the Principate, but in our bureaucratic period it became considerably larger. But though the number of officials who had made a serious study of law was now certainly greater than before,[3] legal knowledge was not even yet a *statutory* condition of appointment to the higher offices of State. The higher officials were indeed, as a rule, selected from the ranks of the advocates, but it was only in 460 that a course of legal studies was prescribed by statute for advocates, and then only in the eastern Empire.[4] Inside the bureaucratic group the jurists who belonged to the imperial council (*consistorium*)[5] or to the central imperial chancery were naturally the most important. They were the real framers of the imperial rescripts and statutes, the inspirers and composers also of the great codifications. Among them must be sought the composers of the two earliest collections of constitutions, Gregorius and Hermogenianus;[6] the *Codex Theodosianus* was produced almost entirely by bureaucratic jurists,[7] and the soul of Justinian's codification was undoubtedly Tribonian, who held various high offices of State.[8]

[1] Thus the *Prosopogr. imp. Rom.* covers only the first three centuries. *PW* is very defective for the fourth and fifth centuries.

[2] Above, p. 104.

[3] Hirschfeld, *Röm. Verwaltungsbeamten*, 428; Schulz, 242.

[4] Below, p. 270.

[5] Hirschfeld, op. cit. 342; Seeck, *PW* iv. 930.

[6] Below, p. 287.

[7] See the lists in *C.Th.* (1. 1) 5 and 6, and *Nov. Theod.* 1; Mommsen, *Praef. ad Theod.*, p. ix.

[8] Kübler, *PW* vi A. 2419.

(ii)

The profession of advocate underwent an important change.[1] The jurisconsults of the classical period, like those of the last century of the Republic, had held aloof from advocacy. They left it to the rhetoricians who, possessing themselves only a smattering of law, took their instructions on the law of a case from the jurists.[2] And so things remained till the close of the third century. Gregorius Thaumaturgus, a contemporary of Modestinus, shows as much.[3] Wishing to become an advocate (*rhetor*), he took lessons in Latin at Neo-Caesarea, his native town. His teacher 'knew some Roman law'[4] and gave him some elementary teaching in it, holding that 'a knowledge of Roman law would be his best equipment for life, whether he eventually became an advocate or something else'.[5] Gregory, then, having studied Roman law, though without great enthusiasm,[6] with this private tutor, resolved to go to Berytus for more serious studies in the subject. But on his way there, at Caesarea (Palestine), he fell in with Origen, who led him into quite other paths. He stayed a considerable time at Caesarea and did *not* proceed to Berytus, but returned to his native town to practise as an advocate,[7] *without* having studied Roman law seriously.[8] But by the fourth century things had changed in the eastern Empire: advocates now were really lawyers. It became the rule that an intending advocate should repair to a law school (not merely to a school of rhetoric in which law was taught as a sideline), to Berytus in particular, where he would study Roman law seriously for four or five years.[9] This procedure, the full importance of which in the history of jurisprudence has never yet been recognized, is vividly described by Libanius (314–93) in many

[1] On what follows: Bethmann-Hollweg, *Röm. Civilprozess*, iii (1866), s. 143; Mitteis, *Reichsr. u. Volksr.* 189 ff.; Partsch, *AP* vi (1914), 39; Lécrivain, 'Note sur le recrutement des avocats dans la période du Bas Empire', *Mél. d'archéol. et d'hist.* v (1885), 276 ff.; Max Conrat, 'Z. Kultur des röm. Rechts im Westen des röm. Reichs im vierten u. fünften Jahrh. n. C.', *Mél. Fitting*, i (1907), 16 ff. (offprint); Kubitschek, *PW* i. 438; De Ruggiero, *Diz. Epigr.* i. 116, 118 ff.; Taubenschlag, 386 ff.

[2] Above, p. 119.

[3] *Paneg. ad Origenem*, i. 7 f.; v. 56 f. See *Des Gregorios Thaumaturgos Dankrede an Origines*, ed. P. Koetschau (1894). On what follows see also Collinet, *Ét.* ii (1925), 26.

[4] 5. 58: '*ἔτυχε δὲ νόμων οὐκ ἄπειρος ὤν*', in fact just like the schoolmaster at Capua (above, p. 110).

[5] 5. 60: *μέγιστον ἔσεσθαί μοι 'ἐφόδιον' (τοῦτο γὰρ τοὔνομα ἐκεῖνος ὠνόμασεν) εἴτε τις ῥήτωρ τῶν ἐν τοῖς δικαστηρίοις ἀγωνιουμένων, εἴτε καὶ ἄλλος τις εἶναι θελήσαιμι, τὴν μάθησιν τῶν νόμων.*

[6] 5. 62: *ἐξεπαιδευόμην ἑκὼν καὶ ἄκων τοὺς νόμους τούσδε.*

[7] 36, 26f.

[8] Koetschau, *Praef.* p. xii, is wrong.

[9] Below, p. 275.

passages.[1] Libanius, here as always a reactionary devoid of any sympathy for or understanding of contemporary developments, exalts the good old times when the rhetorician had no need to study law but could devote himself entirely to the study of rhetoric.[2] To-day, he complains, young men—and indeed those of the best families—go (Athene forgive them!) to Berytus[3] to study Roman law,[4] instead of receiving their initiation into the higher mysteries of rhetoric from himself. Once again, and for the last time in the history of the ancient world, Roman law was showing its power of attraction. As of old under the Republic, and still under the Principate, it was precisely the educated and well-to-do classes who in the eastern Empire[5] turned to jurisprudence with the object of becoming advocates and higher officials; for in the East as in the West the higher offices were in principle filled from the ranks of the advocates. The effects of this continuous stream of fresh and educated recruits for legal science during the fourth century produced in the fifth an efflorescence of jurisprudence at Berytus and among the higher officials an increasing knowledge of law and an interest in legal science. To this new interest it is that we owe the *Codex Theodosianus* and in the end Justinian's codification and the consequent preservation of Roman jurisprudence for future ages. But even in the East a course of legal studies was not at once imposed on intending advocates by statute. Once again Libanius shows quite clearly how the bureaucracy went to work: magistrates found the elegant disquisitions of rhetoricians unlearned in the law wearisome; so they laughed them out of court and showed them the door 'like very criminals'.[6] Stripped of rhetoric this means that a rhetorician who had not studied law was no longer acceptable to the magistrates as an advocate. Moreover, legal studies had material

[1] Often commented on, but without the far-reaching effects of the phenomenon described being recognized, or the fact of their being confined to the East. Some appreciation of the truth will be found in Mitteis, *Reichsr. u. Volksr.* 189 ff.; Kübler, *PW* A. 398; Collinet, *Ét.* iii. 35 ff.; Beseler, *Byz.-neugriech. Jahrb.* xiv (1937/8), 10 (offprint); Taubenschlag 388.

[2] *Epist.* 1170 (ed. Foerster; 1116 ed. Wolf); *Orat.* 62. 21 f. (ed. Foerster); 2. 44.

[3] Ibid. 62. 21: *νεανίσκοι, λέγειν εἰδότες καὶ κινεῖν ἀκροατὴν ἔχοντες, εἰς Βηρυτὸν θέουσιν.* He means the young men whom he has just described as *ἐξ εὐδαιμόνων οἰκιῶν οἷς γένος ἐπιφανὲς καὶ χρήματα.*

[4] Ibid. 2. 44: 'He who studies rhetoric runs on the rocks. Only elsewhere is there profit—from the Latin tongue (holy Athene!) and the law: *καρποὶ δ' ἐτέρωθεν ἀπὸ τῆς Ἰταλῶν φωνῆς, ὦ δέσποινα Ἀθηνᾶ, καὶ τῶν νόμων* (a passage misconstrued by Mitteis, *Reichr. u. Volksr.* 192, n. 5).

[5] So Libanius, expressly, in the passage quoted above, n. 3.

[6] *Orat.* 2. 44: *ὁ δὲ τὸ λέγειν ἀντ' ἐκείνου μαθὼν ὑπ' ἐκείνων καταγελᾶται.* 18. 288: *ῥητορικῆς δὲ διδάσκαλοι, συζῶντες πρότερον τοῖς ἀρχὰς ἔχουσιν, ἀπελαύνονται τῶν θυρῶν ὥσπερ ἀνδροφόνοι.*

attractions, since a legally competent advocate had special qualifications for the higher offices of State.[1] In 460 an enactment of the Emperor Leo[2] for the first time made statutory what had certainly long been required by custom, namely, that a man desiring to be admitted to appear in court as advocate must pass an examination in law and produce a sworn certificate of his possessing the necessary knowledge of it from a professor. In the West things took a different course.[3] Though an intending advocate might sometimes study in the law school at Rome,[4] we have no evidence of any kind of development similar to that which we have described in the East. The advocate remained essentially a rhetorician who took his law from the instructions of a jurisconsult. A (western) statute of Valentinian, of 452,[5] draws the classical[6] contrast between the advocate (*causidicus*) and the jurisconsult, and if an earlier (western) statute of the same Emperor, of 442,[7] makes *studia* a condition of being admitted advocate, the whole context shows that studies in rhetoric are what is meant.[8] Cassiodorus at the beginning of the sixth century says characteristically:[9] 'Advocati tibi militant[10] eruditi, quando in illa patria difficile non est *oratores* implere, ubi magistros *eloquentiae* contigit semper audire.' And in another passage:[11] 'Pueri liberalium scholarum (no law schools!) conventum (= celebritatem) quaerunt et mox (without having studied law) foro potuerint esse digni.' Obviously in the West the advocate was still in the first place a rhetorician.[12] For the rest, in conformity with contemporary ten-

[1] These are the *praemia* referred to in *Nov. Theod.* 1 pr.: 'tantis propositis praemiis, quibus artes et studia nutriuntur.' Cf. Justinian, *C. Imperatoriam*, 7.

[2] *C.* (2. 7) 11; cf. Collinet, *Ét.* ii. 259.

[3] A correct observation of Conrat's, op. cit. above, p. 268, n. 1, which has passed unnoticed.

[4] Rutilius Namatianus, *De reditu suo*, i. 209: 'Facundus iuvenis Gallorum nuper ab arvis / Missus, Romani discere iura fori.' Kübler, *PW* i A. 398.

[5] See Note FF, p. 342. [6] Above, p. 108.

[7] *Nov. Valent.* 2. 2. 1: *ut . . . inprimis studia requirantur.*

[8] Had Valentinian wished to prescribe the study of law, he would have stated this novel requirement expressly. In the same novel we find: in s. 2 *reverentia litterarum*, in s. 4 *litteratae militiae*. Again, in *Nov. Valent.* 2. 3. 1 *imbuti studiis litterarum causas agere*, and in 2. 4 *litterariae indolis iuventute*. Cf. Conrat, *Mél. Fitting*, 20 (offprint); Wölfflin, *Arch. f. Lat. Lex.* v (1888), 52.

[9] *Variae*, 6. 4. 6 (ed. Mommsen, p. 177. 30).

[10] Advocacy is reckoned as *militia*: *C. Th.* (1. 29) 1; *C.* (2. 7) 14.

[11] *Variae*, 8. 31 (ed. Mommsen, p. 260. 4).

[12] The *Commemoratio professorum Burdigalensium* by Ausonius (ed. Peiper, Teubner, pp. 48 ff.) is significant. No professor of law is mentioned, obviously because no such professor existed at Bordeaux. The professors of rhetoric and grammar, praised by Ausonius, were active as advocates (ii. 7. 17; xxiii. 2; xxiii. 7; xxvi. 4) and trained future advocates: i. 9: *Mille foro dedit hic iuvenes.*

dencies, in the East and West alike, the profession of advocate was made bureaucratic. One had to be *admitted* advocate before a particular court; naturally on being admitted one's qualifications were tested.[1] A maximum number (*numerus clausus*) of advocates was introduced at an early date, though Constantine abolished this in 319. Constantine's law was incorporated in the *Codex Theodosianus* of 438,[2] but in the very next year we encounter once more the principle of *numerus clausus*,[3] which thereafter was adhered to.[4] The advocates admitted before a court were entered on a register and formed a *schola*[5] endowed with corporative rights.[6] They enjoyed certain privileges, but were under a duty of residence and were subject to the disciplinary control of the magistrate before whom they were entitled to appear.[7] The fees which they were permitted to demand were fixed by statute.[8]

The social origins of the advocates as a group were much the same as under the Principate.[9] Plebeians still made their way under cover of the *toga*,[10] but large numbers of young men of respectable family also entered the profession.[11] Advocates were held in high respect. In the East they were summoned to help in imperial legislation, especially in the preparation of the great codifications;[12] above all, both in East and West, the higher official

[1] Bethmann-Hollweg, iii. 164; De Ruggiero, *Diz. Epigr.* i. 119. Jews were admissible under a law of Honorius and Theodosius of 418 (*C. Th.* (16. 8) 24), but *C.* (2. 6) 8 of Leo and Anthemius, of 468, requires Catholic religion.

[2] *C. Th.* (2. 10) 1. [3] *Nov. Theod.* 10.

[4] Bethmann-Hollweg, iii. 162. The numbers do not interest us here.

[5] Mommsen, *Schr.* vi. 231, n. 3. The advocates were also called *scholastici*, e.g. *C. Th.* (1. 29) 3; (8. 10) 2. Cf. *PW* ii A. 624.

[6] This is assumed in Justinian's law, *C.* (6. 48) 1.

[7] Bethmann-Hollweg, iii. 163, 165.

[8] Diocletian's *Edictum de pretiis*, 7. 72; 'Ordo salutationis sportularumque provinciae Numidiae' (Bruns, no. 103) l. 26. Bethmann-Hollweg, 164; De Ruggiero, *Diz. Epigr.* i. 121.

[9] Lécrivain, *Note sur le recrutement des avocats*, &c. (above, p. 268, n. 1).

[10] Above, p. 109. e.g. Ammianus, 28. 1. 5: 'Maximinus regens quondam Romae vicariam praefecturam . . . obscurissime natus est, patre tabulario praesidialis officii . . . Is post mediocre studium liberalium doctrinarum defensionemque causarum ignobilem. . . .' Mamertinus too has in mind the advocates, *Panegyr. Lat.* xi. 20: 'Iuris civilis scientia, quae Manilios, Scaevolas, Servios in amplissimum gradum dignitatis evexit, libertorum artificium dicebatur.' Cf. Lécrivain, op. cit. in last note.

[11] Proved by Libanius (above, p. 269). See also Lécrivain, op. cit. last note but one.

[12] In the first commission appointed by Theodosius in 429 there was one advocate *Apellem virum disertissimum scholasticum* (*C. Th.* (1. 1) 5). Justinian appointed on the commission for his *Codex* two advocates 'Dioscorum et Praesentinum, disertissimos togatos fori amplissimi praetoriani' (*Const. Haec quae necessario*, s. 1), and on the commission for the *Digest* eleven (*Const. Tanta*, s. 9); on that for the revision of the *Codex* three (*Const. Cordi*, s. 2). Questions put by advocates to Justinian leading to legislation: *C.* (2. 3) 30; (2. 7) 24, 29; (6. 38) 5; (6. 58) 12; (8. 4) 11; (8. 40) 27; *Inst.* (2. 8) 2; (3. 19) 12.

positions were filled from their ranks. In the words of a constitution of Theodosius and Valentinian of 442,[1] the profession was *seminarium dignitatis*. The biographical evidence shows that in fact numerous advocates rose to high and even the highest posts.[2] In these circumstances the exacerbated criticism levelled at the advocates by Ammianus (second half of the fourth century) is of little importance.[3] The old soldier apparently found them particularly distasteful and, as usual, he generalized from individual cases of bad behaviour, such as advocates have always been and always will be guilty of. His reproaches are essentially the same as those uttered long previously by Seneca and Juvenal and deserve to be rated no higher than they.[4]

(iii)

We encountered jurists of the purely academic type even in the second century,[5] and in the third jurists of the bureaucratic group, such as Papinian, Paul, and Ulpian, seem occasionally to have given instruction.[6] But in the age we are now dealing with the teaching of law, like everything else, was made bureaucratic. It was given exclusively by professional teachers, in State schools, following a fixed programme over a fixed term of years, at the end of which came a final examination; the professors were now salaried officials. Full details as to the evolution of this system are lacking.[7]

[1] *Nov. Valent.* 2. 2. 1.

[2] See the *cursus honorum* of the following advocates: Gaianus, iuris consultor et amicus Constantini: *CIL* vi. 33865, Diehl, *Inscr. Lat. Christ.* no. 748; Seeck, *PW* vii. 484. Aedesius: *CIL* vi. 510 = *ILS* 4152; Ammianus, 15. 5. 4. Memmius Vitrasius Orfitus: *CIL* vi. 45 and 1741 = *ILS* 3222 and 1243; Ammianus, 14. 6. 1, Seeck, *PW* iv A. 1144. Ragonius Vincentius Celsus: *CIL* vi. 1759 = *ILS* 1272; Seeck, *PW* iii. 1884. Floridus: *CIL* vi. 31992, Diehl, no. 87. Commentary: G. B. de Rossi, *Inscr. Christ. urb. Romae* I (1857 f.), p. 283. Further examples: Joh. Sundwall, *Abh. z. Gesch. des ausgehenden Römertums* (Helsingfors, 1919), 89 ff. On the East: O. Seeck, *Die Briefe des Libanios* (Texte u. Untersuchungen z. Gesch. d. altchristlichen Literatur herausg. v. O. v. Gebhardt, A. Harnack, C. Schmidt, xv, 1906), 472; 15th Homily of Makarios, Migne, *PG* xxxiv. 603; Fr. Fuchs, *Die höhere Schule im Mittelalter*, p. 6. (Below, p. 299, n. 1.)

[3] 30. 4. 8 f.

[4] Above, p. 109. The σχολαστικός who is a common butt in the *Philogelos*, a fifth-century book of anecdotes, is not the advocate but the learned dunderhead.

[5] Above, p. 107.

[6] Above, p. 122.

[7] On what follows see especially Collinet, *Ét.* ii: *Hist. de l'école de droit de Beyrout*, where the older literature will be found. In addition: Max Conrat, Grünhut's *Z* xxiii (1896), 401 ff.; 'Z. Kultur d. röm. Rechts im Westen', &c., *Mél. Fitting*, i (1907), 6 (offprint); Hans Peters, 'Die oströmischen Digestenkommentare u. die Entstehung der Digesten', *SB. Leipzig*, lxv (1913), 1. Heft; Kübler, *PW* i A. 399 ff., and *Gesch.* s. 43; Barbagallo, *Lo stato e l'istruzione pubblica nell' impero romano* (Catania, 1911); Herzog, 'Urkunden z. Hochschulpolitik der röm. Kaiser', *SB. Berlin*, 1935, 907; Ermini, 'La scuola in Roma nel VI. secolo', *Archivum Romanum*, xviii (1934),

1. There were law schools at Rome and Berytus and, from 425,[1] but not, it seems, earlier, at Constantinople. Whether true law schools, in which the teaching of law was approximately on a level with the standards of Rome and Berytus, existed elsewhere is doubtful. In many other places law was certainly taught, but probably in more or less elementary fashion, as an appendage to grammar and rhetoric, and clearly not in a way that was of the slightest scientific importance. Tribonian, speaking obviously from knowledge,[2] relates that at Alexandria, Caesarea (Palestine), and elsewhere were to be found ignorant teachers of false doctrine; his words are confirmed only too fully by the production of the school of Autun which we possess.[3] Justinian forbade any teaching of law outside the three imperial universities of Rome, Berytus, and Constantinople.[4]

2. The professors were appointed by the Senates of the University towns.[5] They received a *honorarium*[6] from the students and also a stipend.[7] Their number appears to have been small. A statute of 425, referring, indeed, solely to Constantinople,[8] speaks of only two professors of law; at times there may have been more.[9] In any case, by the side of the official professors there were private teachers, who, however, were not allowed to use the public lecture-rooms.[10] Professors of law had none of the *privilegia* which professors of medicine, grammar, and rhetoric had long enjoyed.[11] The holding of a professorship was, indeed, an *excusatio tutelae* as early as classical times, but only at Rome.[12] In the period with which we are dealing professors of law never obtained freedom from public

143–54; Bréhier, 'Notes sur l'histoire de l'enseignement supérieur à Constantinople', *Byzantion*, iii (1926), 73 ff.; C. A. Forbes, *Class. Journal*, xxviii (1933), 413–26.

[1] *C. Th.* (14. 9) 3 = *C.* (11. 19) 1.

[2] *Const. Omnem*, s. 7: 'audivimus etiam in Alexandrina splendidissima civitate et in Caesarensium et in aliis quosdam imperitos homines devagare et doctrinam discipulis adulterinam tradere.'

[3] Below, p. 301.

[4] *Const. Omnem*, s. 7.

[5] Collinet, *École de Beyrout*, 197. Eumenius, *Pro restaurandis scholis*, c. 14 (*Panegyr. Latini*, iv), gives us an imperial *epistula* containing the appointment of a professor of rhetoric for the university at Autun.

[6] See Note GG, p. 342.

[7] *C. Th.* (14. 9) 3 = *C.* (11. 19) 1; *C. Th.* (6. 21) 1; Cassiod. *Var.* 9. 21; Justinian, *Const. pro petitione Vigilii*, s. 22 (3. 802 in the stereotype *Corpus iur. civ.*); Collinet, op. cit. 203; Kübler, *PW* i A. 400 ff.

[8] *C. Th.* (14. 9) 3. 1; cf. Savigny, *Gesch. d. r. R. im Mittelalter*, i (ed. 2, 1834), 460.

[9] Justinian's *Const. Omnem* is addressed to eight professors. See Kübler, *Gesch.* 427.

[10] *C. Th.* (14. 9) 3 pr. The prohibition, indeed, concerns only the school at Rome.

[11] Herzog, *Urkunden z. Hochschulpolitik*, 907.

[12] Modestinus, *D.* (27. 1) 6. 12. *F.V.* 150 is a careless abridgement; it concerns only law teachers in the provinces: Kübler, *PW* i A. 397.

munera (*immunitas*).[1] Even in Justinian's revised *Codex* of 534 the relevant statute (*C.* 10. 53. 6) does not mention them; it is by a later interpolation that *legum doctores* has got into the text, which implies that they did at long last, we know not when, secure *immunitas*. We do not know the name of a single professor of the law school at Rome,[2] but no inferences can be drawn from this, since the same is true of the third century. The names of the most important professors in the eastern universities are, on the contrary, preserved.[3] In the fifth century we have the elder Cyrillus,[4] Patricius,[5] Domninus,[6] Demosthenes,[7] and Eudoxius,[8] all, it seems, teachers at Berytus, and mentioned with special veneration by the jurists of the age of Justinian. They are 'the famous teachers',[9] 'the oecumenical teachers',[10] and sometimes 'the men of old' or 'the men of yore'.[11, 12] Amblichus[13] and Leontius,[14] though of a younger generation, still belong to the fifth century. In the sixth, up to Justinian's codification,[15] the most important are Thalelaeus,[16] Theophilus,[17] Dorotheus,[18] and Anatolius.[19] The high standing of these men is shown by their being included in the commissions for the preparation of the official codifications. There was one professor, Erotius, *vir spectabilis ex vicariis, iuris doctor*,[20] on the commission for the *Codex Theodosianus*, and one, Theophilus[21] of the University of Constantinople, on that for the *Codex Iustinianus* in 528. Dorotheus was on the commission for the revision of the *Codex*.[22] Four professors—Theophilus, Cratinus, Doro-

[1] Collinet, *École de Beyrout*, 205.

[2] Perhaps Floridus was professor of the law school at Rome; see the inscription cited above (p. 272, n. 2): 'publica post docuit Romani foedera iuris.'

[3] On what follows: Collinet, op. cit. 119 ff.; Heimbach, *Proleg. ad Bas.* vi, pp. 8 ff.

[4] Berger, *PW*, *Suppl.* vii. 337.

[5] Berger, *PW* xviii.

[6] Joers, *PW* v. 1521.

[7] Ibid. ix. 190.

[8] Kübler, *PW* ii. 927.

[9] οἱ ἐπιφανεῖς (or ἐπιφανέστατοι) διδάσκαλοι.

[10] οἱ τῆς οἰκουμένης διδάσκαλοι. Cf. Collinet, op. cit. 130 ff., 167 ff.; Schulz, 114.

[11] οἱ παλαιοί, οἱ παλαιότεροι. The designation deserves special attention. When Justinian, in his constitutions, speaks of controversies among the *veteres* or *antiqui*, or of *antiqua sapientia* or *antiquae dubitationes*, he is referring at times to the fifth-century professors of Berytus, not to the classical jurists: Schulz, *Z* 1 (1930), 213; Rotondi, *Scritti*, i. 441.

[12] Modern Romanists call these professors 'the heroes' (οἱ ἥρωες). The term is to be avoided. True the jurists of the age of Justinian speak of ὁ ἥρως Εὐδόξιος, but they mean only 'the long dead Eudoxius', 'Eudoxius of blessed memory'. So Heimbach, *Proleg. ad Bas.* vi. 10 f.; Collinet, *École de Beyrout*, 125.

[13] Ibid. 141.

[14] Berger, *PW*, *Suppl.* vii. 373.

[15] Collinet, op. cit. 303 on what follows.

[16] See Kübler, *PW* v A. 1208.

[17] Ibid. 2138.

[18] Joers, *PW* v. 1572.

[19] Hartmann, *PW* i. 2073.

[20] *C. Th.* (1. 1) 6. 2.

[21] *Const. Haec quae necessario*, s. 1; *Const. Summa*, s. 2.

[22] *Const. Cordi*, s. 2.

theus, and Anatolius[1]—sat on the *Digest* commission, while the commission for the *Institutes* consisted of Tribonian and the two professors Theophilus and Dorotheus.[2]

3. We know the plan of studies followed in the two eastern universities.[3] Justinian's *Const. Omnem*, which regulates the future curriculum under the new codification, relates that which existed in 533,[4] but we know that this goes back to the fifth century and that it was probably evolved at Berytus. Justinian's constitution, which was issued in Greek as well as Latin,[5] has reached us only in the Latin version and unfortunately, in important passages, in a corrupt state.[6] Nevertheless we can in essentials make out the course of studies, and this throws important light on the intellectual state of the Byzantine law schools. The period of study seems to have been fixed *by statute* only as late as a constitution of Anastasius of 505.[7] Unfortunately we have only the version of this constitution given by the *Codex Iustinianus*, where the compilers, in their usual style, have replaced the definite number of years by *per statuta tempora*, which tells us nothing. But from *Const. Omnem*, taken with *Const. Imperatoriam*, we can see that the period was five years; doubtless Anastasius merely made statutory what had long been sanctioned at Berytus by custom. In the first year there were lectures on six books, namely Gaius' *Institutes* and four so-called *libri singulares* (*de re uxoria*, *de tutelis*, *de testamentis*, and *de legatis*). We must infer that only two of the four books of Gaius' *Institutes* were taken,[8] since it is improbable that a shortened edition of that work, in two books, was used.[9] The *libri singulares* seem to have been anonymous post-classical compilations.[10] First-year students bore the slang name of *dupondii*,[11]

[1] *Const. Tanta*, s. 9. [2] *Const. Imperatoriam*, s. 3; *Const. Omnem*, s. 2.

[3] On what follows: Collinet, *École de Beyrout*, 219 ff.; Kübler, *Gesch.* 429 ff.; *PW* i A. 402; Cantarelli, *Rend. Linc.* 1926, ii. 12; Wieacker, *Z* lxv. 298.

[4] *Const. Omnem*, s. 1. [5] *Const. Tanta*, s. 22 *i.f.*

[6] At the beginning of s. 1. This should be recognized at long last, and attempts by hook or by crook to force a meaning out of the text should be abandoned. The words 'et primi anni' *rell.* show that the lectures of the *primus annus* have already been mentioned. The six *libri* spoken of can only have been connected with the lectures of the first year, since Justinian cannot have used the word *liber* in two different senses in the same sentence. The Accursian Gloss is right; wrong Krüger, 395.

[7] *C.* (2. 7) 22. 4. Cf. *C.* (2. 7) 24. 4.

[8] Cf. Mommsen, *Schr.* ii. 35, n. 25. Only eight books of Papinian's *Responsa* were lectured on!

[9] Below, p. 304.

[10] Schulz, *T* xvii (1939), 19 ff.; Düll–Seidl, *Z* lxi (1941), 406.

[11] *Const. Omnem*, s. 2: 'vetere tam frivolo quam ridiculo cognomine "dupondios" appellari.'

meaning simply 'recruits'.[1] In the second year the lectures were on the Edict, with Ulpian's commentary as the probable textbook,[2] and the students were called *edictales*.[3] In the third year lectures on the Edict continued and eight books of Papinian's *Responsa* were also interpreted, the students being therefore called *Papinianistae*.[4] In the fourth year Paul's *Responsa* were studied, but privately, without public lectures, though no doubt with the help of private teachers, whose existence is expressly evidenced.[5] The students of this year were called *Lytae* (λύται),[6] which must mean *solutores*,[7] the λῦσις or *solutio* referred to being the solution of doubtful and difficult legal problems. In the fifth year the imperial constitutions were studied,[8] but without compulsory public lectures.[9]

Further details of the method of instruction are obscure. In the eastern universities, from an early date, lectures were given in Greek. For the fifth century this is an ascertained fact, and that they were given in Latin in the fourth century is *a priori* improbable[10] and unsupported by any evidence. If Gregorius Thaumaturgus learnt Latin in preparation for Berytus,[11] that was because the *leges, edicta, senatusconsulta,* and *constitutiones* were in Latin, and the classical literature also. Again, when Libanius complains that Latin was triumphing over Greek at Berytus,[12] he is referring to the language of the legal sources, not to that in which lectures were given.

4. In the matter of special law for students, we know that at Rome they were obliged to register with the *magister census*, who

[1] Collinet, *École de Beyrout*, 225; Kübler, *Gesch.* 431; *PW* i A. 403, giving the literature. See *Thes.* v. 2285. 65; 2286. 36.

[2] Collinet, op. cit. 226.

[3] *Const. Omnem*, s. 3; *Vita Severi* (Peters, op. cit. above, p. 272, n. 7, p. 109, and Collinet, op. cit. 107): ἠδικτάλιοι.

[4] *Const. Omnem*, s. 4.

[5] Above, p. 273.

[6] *Const. Omnem*, s. 5.

[7] It is linguistically inadmissible to understand by λύται the students freed from compulsory lectures; this would have to be λυτοί. Collinet, *École de Beyrout*, 228 is right; Kübler, *Gesch.* 431, *PW* i A. 403, incomprehensible.

[8] *Const. Imperatoriam*, s. 3: 'et quod in priore tempore vix post quadriennium prioribus contingebat, ut tunc constitutiones imperiales legerent. . . .' *Vita Severi* in Peters, op. cit. 63, Collinet, op. cit. 237. On this course of five years see especially Collinet, pp. 234 ff. *Const. Omnem*, s. 1, says merely that the study of the classical literature ended with the fourth year: 'in quartum annum omnis antiquae prudentiae finis.'

[9] But there were private lectures. Theodorus (*Bas.* ed. Heimbach, i. 704), in reporting Patricius' interpretation of a constitution, cites his ἀναγνώσματα ἰδικά = *recitationes privatae*: Peters, op. cit. 64; Collinet, op. cit. 238 ff.

[10] Ibid. 211 ff., goes astray; cf. Zilliacus, *Zum Kampf der Weltsprachen* (1935), 83.

[11] Above, p. 268.

[12] Above, p. 269.

supervised their discipline.[1] There must have been similar arrangements in the eastern universities. That brawling was rife in the East, at any rate, we learn from Justinian's strictures.[2] Diocletian freed the students of Berytus from *munera* up to the age of 25;[3] the same probably held good at Rome. There is a western constitution of 370[4] permitting residence at Rome for the purpose of study only up to the end of a student's twentieth year. The two ages are irreconcilable: either the compilers have substituted *xxv* for *xx* in Diocletian's constitution, or, as is more probable, we ought to emend *vicesimum* in Valentinian's constitution of 370 to *vicesimum quintum*.

(iv)

Besides the three groups described there was, of course, a body of subordinate jurists in this period. To it belonged not only, as in the earlier period, the scribes (*tabelliones*),[5] but also consultants who, as has been shown above,[6] continued to exist in the western Empire till the very end of our period. Even in the classical period[7] the functions of advising parties and instructing advocates had been exercised by an inferior class of lawyers; the change lay in the disappearance during our period of the independent, authoritative jurisconsults of the classical period: for them there was no place in a bureaucratic age.

[1] *C. Th.* (14. 9) 1.
[2] *Const. Omnem*, s. 9. Cf. Kübler, *Gesch.* 433, giving the literature, and Collinet, op. cit. 99 ff.
[3] *C.* (10. 50) 1.
[4] *C. Th.* (14. 9) 1. Collinet, op. cit. 112.
[5] *Sachers, PW* iv A. 1847. [6] Above, p. 270. [7] Above, p. 108.

II

CHARACTER AND TENDENCIES OF LEGAL SCIENCE IN THE BUREAUCRATIC AGE

IN this final period jurisprudence displays an abundance of new tendencies, in part conflicting tendencies and therefore the more difficult to analyse. The task must, nevertheless, be attempted. These tendencies represent the aims of the age and express its proper character, but scholars have for long misjudged and ignored them, because the humanistic outlook[1] has limited their vision. It is only quite recently that post-classical tendencies have received attention; the study of them is in its infancy. Here no more than a general outline can be given.

(i)

One of the most characteristic and important phenomena of the period is *juristic classicism*,[2] the classicizing tendency.[3]

1. Such a tendency was quite foreign to the jurisprudence of the Principate; the jurists were conservatives, but not classicizers. It never entered their minds to canonize the jurisprudence of an earlier period, to make it the standard and measure (*μέτρον καὶ κανών, norma et regula*) of their own activities. They were conscious of possessing a standard within themselves and of not needing to seek one from others. They were quietly self-dependent, and their admirable sureness of themselves is one of their essential characteristics. They had no thought of canonizing the jurisprudence of the Republic; neither was canonization achieved by any one of themselves, not even by Julian; Papinian too, in the eyes of Paul and Ulpian, was open to criticism. The attachment of the classical writers to Q. Mucius or Sabinus is merely an attachment to a convenient literary form. When they quote from older writers, they do so in order to put in a word of their own. Even the terse *hoc probo* appended by Iavolenus to a quotation from Labeo asserts a claim to at least equal authority for his own view. Post-classical jurisprudence, on the contrary, is characterized by its lack of self-confidence, by its need for external support. Thus the jurists of the Principate became for them 'classics': their writings became

[1] Above, p. 265.
[2] On the meaning of 'classical' see above, p. 99.
[3] See Note HH, p. 343.

the standard and measure, *norma et regula*, and Papinian, Paul, and Ulpian figured as the ἀκμή, as the κορυφαῖοι τῶν νομικῶν.[1]

2. Both in East and West the home of juristic classicism was naturally the law school. Possessing no authority of his own, the post-classical law teacher could attain to authority only by his knowledge and dissemination of classical jurisprudence. The classicism of the western Roman school is evidenced as late as the fifth century by the Veronese MS. of Gaius and the Autun commentary on Gaius,[2] the classicism of Berytus by its programme of studies, which goes back to at least as early as the fifth century. As we have seen,[3] the lectures of the first three years were devoted exclusively to classical works or extracts from them. In their fourth year the students were still occupied with classical jurisprudence, reading Paul's *Responsa* privately. Only in one's fifth year did one begin the study of the imperial constitutions, in the *Codices Gregorianus, Hermogenianus*, and *Theodosianus*, again without the help of official lectures.[4] It is a programme which accords exactly with the classicism of Savigny and the scheme of lectures which under his inspiration was laid down for the newly founded University of Berlin. In those days Prussia was under the *Code* of 1794, which had displaced the previously valid Roman law. None the less, on Savigny's advice, at the University of Berlin lectures were given only on the now invalidated Roman law and not on the *Code* actually in force. It is with complacency that Savigny records, in his famous *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft*,[5] that 'up to now the University of Berlin has not taught Prussian law'. 'So far as lectures on the local law are concerned, I am of opinion that in the present state of things they had better not be delivered, since for the needs of practice subsequent' (i.e. private!) 'training suffices.' This might be the utterance of one of the classicizing professors of Berytus on the imperial codifications.

3. Classicism admits of various forms. It is not identical with the historical spirit, though both classicist and historian concentrate on the past. The historian[6] seeks to recover past relations,

[1] *D.* (27. 1) 13. 2, perhaps post-classical.

[2] Below, p. 301. [3] Above, p. 275.

[4] Official lectures would cite the collections of constitutions only occasionally, as in the *Schol. Sinaitica*: below, p. 325.

[5] Ed. 3 (1840), pp. 144–6; reprint (1892), pp. 88–9. H. Kantorowicz, *Was ist uns Savigny?* (Berlin, 1912), 18, is one-sided and incorrect.

[6] Cf. E. Troeltsch, 'Der Historismus u. seine Probleme' (*Ges. Schr.* iii, 1922), especially pp. 102 ff., 217, and elsewhere; Acton, *A Lecture on the Study of History* (1895), 56 ff., 58: 'historicism and historical-mindedness'; W. Jäger, *Tr. and Pr. of the Am. phil. ass.* lxvii (1936), 363 ff.

to see and depict the past as it once actually was, in its historical conditions and its relative imperfection. The classicist seeks a standard; from some historical phenomenon, which he claims to have been a culminating achievement, he strives to derive a canon or norm for the present day. His constant tendency is therefore to rejuvenate the classical model and adapt it to the present day: 'non ut quid derogetur antiquioribus, sed ut, si quid deesse eis videbatur, hoc repleatur.'[1]

Accordingly the classicism of the second half of the third century and the first half of the fourth strove to adapt the texts of the classical juristic works to contemporary life. Its object was, by abridgement, by the insertion of introductions, paraphrases, justifications, and other matter, and by the production of epitomes and anthologies, to render the classical works more readily accessible and intelligible. The majority of the post-classical texts mentioned in Chapter IV of the preceding Part III[2] were produced in this period. From the classical point of view this work of adaptation was nothing but a depravation of the classical texts, and may well strike ourselves as a curious way of honouring the classics. But its sole aim was to keep the classical literature alive, to save it from being buried under the dust of the library shelf. It is worth recalling that the first thought of the classicizing Humanists, on discovering a manuscript of some hitherto unknown ancient work, was to establish a 'readable' text; this, from our point of view, meant as a rule a depraved text. Once they had established such a text, they troubled no further about the ancient manuscript, but allowed it to perish or to vanish. The classicists of the third and fourth centuries were more excusable, for they could not foresee that their adaptations would cause the originals to disappear. The fact that this was, indeed, the result proves how well the post-classical adaptations were suited to contemporary needs. Nor were all these productions utterly bad: one should not forget Mommsen's laudation[3] of the *liber singularis* of the pseudo-Ulpian.[4] Again, the *libri responsorum* attributed to Cervidius Scaevola are a respectable performance, for all that they are nothing but a ruthless post-classical abridgement and condensation of the original.[5] In its own way the early post-classical period still remained productive.

[1] *C.* (4. 1) 12. 6.

[2] Above, pp. 141 ff.

[3] Mommsen, *Schr.* ii. 48: 'Ulpiani regulae ea brevitate, perspicuitate, proprietate scripta sunt, quam adhuc secuti sumus omnes, assecutus est nemo!' Cf. Schulz, *Epit. Ulpiani*, 12.

[4] Above, p. 180.

[5] Above, p. 233.

But this process of adaptation and transformation did not continue for ever. In the fourth century the second period of juristic classicism begins. The farther the classics receded into the past, the greater became the veneration with which they were regarded. Adaptation of their works was now abandoned; in essentials the texts now became stable.[1] Even obsolete works were prized, not, of course, for the purposes of the practitioner, but for those of the law school—for training and as an education. Theodosius and Valentinian, in 429,[2] instructed the drafting commission to include in a preparatory collection even obsolete constitutions—a concession, say the emperors, to the desire of the law school to be acquainted with the law no longer in force.[3] By this date the classical texts were no longer being kept up to date by the insertion of changes in the law; such changes were left to be notified by the professor in his lectures. Consequently texts coming from this period can no longer be assumed to be stating the existing law—an important point in questions of dating. The texts that have reached us show this quite clearly. The classical works have not been radically christianized; in particular they have not been purged of polytheism.[4] In the editions of Papinian's *Responsa* the *notae* of Paul and Ulpian were allowed to stand undisturbed, although Constantine had deprived them of validity.[5] The expositions of the formulary procedure and even of the *legis actiones* were not struck out of the fourth book of Gaius' *Institutiones*, as the Veronese manuscript shows, though the whole subject was completely obsolete. This part of the *Institutiones* even continued to be lectured on, as we see from the Autun commentary. This is what Justinian refers to when he declares that so much that is useless,[6] so much that is merely ancient history[7] (*antiquae fabulae*) is served up to the students.

4. It is in this second period of juristic classicism that we find the first attempt to set up a *closed canon* of authoritative, standard juristic works, similar to the older list of literary 'classics' (κεκριμένοι),[8] or to the canon of Holy Scripture defined by the Church.[9] Such a canon of classical jurisprudence was set up by the

[1] We see the same phenomenon in the textual history of the New Testament. After a period of adapting and interpolating the texts were regarded as sacrosanct, naturally the interpolated texts which alone were then in the possession of the Church. See literature above, p. 142 n. 4.

[2] *C. Th.* (1. 1) 5.

[3] '*Scholasticae* intentioni tribuitur nosse etiam illa, quae mandata silentio in desuetudinem abierunt.'

[4] Done only by Justinian: above, p. 164, and below, p. 299.

[5] Above, p. 221.

[6] *Const. Omnem*, s. 1.

[7] *Const. Imperatoriam*, s. 3.

[8] Above, p. 100.

[9] Below, p. 330.

constitution of Theodosius and Valentinian of 426, which since Hugo has been known as 'the Law of Citations'. Unfortunately this enactment has not reached us in its original formulation but only in that incorporated twelve years later, in 438, in the *Codex Theodosianus*.[1] In all probability the original formulation[2] named none but the five juristic evangelists: Papinian, Paul, Ulpian, Modestinus, and Gaius. Only their writings were to possess *auctoritas*. In the event of a difference of opinions that of the majority was to be followed; if the voting was equal, Papinian's voice was to be decisive. But almost at once this canon was felt to be too restrictive. According to the formulation of the *Codex Theodosianus* the writings of other jurists were also to enjoy *auctoritas*, those namely of the jurists cited by the five great men—the reference is not merely to passages cited by them. The result was that the system of votes was deprived of any reasonable meaning,[3] and the whole canon was in fact as good as abandoned. For example, the multiplicity of Ulpian's citations would reduce the number of uncanonized juristic works to vanishing point.[4] Once more the academic interest, the *intentio scholarum*, had conquered. That the works used in actual practice amounted to but a small selection is probable *a priori* and expressly evidenced.[5] The *Law of Citations* in this revised form was in force up to the time of Justinian, by whom it was included in the *Codex* of 529.[6] Rendered obsolete by the publication of the *Digest* it was excluded from the *Codex* of 534.

[1] *C. Th.* (1. 4) 3. Biscardi, *Studi Senesi* liii (1939), was inaccessible. See *Addenda*.

[2] On this, Gradenwitz, *Z* xxxiv (1913), 274 ff., is decisive. I regard it as possible that Gaius also was not named in the first formulation, but only the four Severan jurists. If so, it would not follow that the reading and citation of Gaius was forbidden, but only that he did not count in the voting. See below, n. 4.

[3] Gradenwitz, *Z* xxxiv. 282, is right. On *collatio codicum* see Conrat, 'Z. Kultur des r. R.', *Mél. Fitting*, i (1907), 31 ff. (offprint).

[4] Marcian seems to have been cited by Ulpian and Paul, though only as the result of a textual corruption (above, p. 220). Whether Florentinus was cited by Paul, Ulpian, or Modestinus, is uncertain, but even if he was not one of the authorized jurists, one was naturally permitted to read and cite him: that was nowhere forbidden. Thus it is not surprising that the *Schol. Sinaitica* (13. 35) cite him. False inferences are drawn from this citation by Krüger, 371, and Pringsheim, 'Die Entstehung des Digestenplanes', *ACI, 1935, Roma*, i. 463. Scherillo ('Sulle citazioni di giureconsulti class. nella legislazione di Giustiniano anteriore alla cost. Deo auctore', *Rend. Lomb.* lxiii. 1930) misunderstands the *Law of Citations*.

[5] Justinian, *Const. Tanta*, s. 17: 'Homines etenim, qui antea lites agebant, licet multae leges fuerant positae, tamen ex paucis lites perferebant vel propter inopiam librorum, quos comparare eis impossibile erat, vel propter ipsam inscientiam et voluntate iudicum.' On the paucity of the books commented on in the law school see above, p. 275 f.; referring to this Justinian speaks of 'penuria legum' (*Const. Omnem*, s. 2).

[6] P. Krüger, *Z* xliii (1922), 563; De Francisci, *Aegyptus*, iii (1922), 68 ff.; Bonfante, *Bull.* xxxii (1922), 280 = *Scritti*, iv. 132.

5. The most important fruit of the classicizing tendency was the codification of classical jurisprudence in Justinian's *Digest* and *Institutes*. This imposing monument of ancient classicism might very properly bear the device: 'Tanta nobis antiquitatis habita est reverentia.'[1] It could not have been produced except by men imbued with profound veneration and enthusiasm for classical jurisprudence and an unshakable conviction that in it was to be found the norm of any future jurisprudence. This is a truth which only the prejudice of the Humanists could ignore. The inspiration undoubtedly came from the seat of classicism, the law school,[2] but for its realization we have to thank that bibliophile[3] and man of many-sided culture, Tribonian,[4] and surely also Justinian himself.[5]

(*a*) The *Digest* and the *Institutes* contain excerpts only from classical works, that is works written under the Principate;[6] republican and post-classical works are alike excluded.[7] The five short fragments taken from a work attributed to Q. Mucius are just a formal homage offered to the founder of Roman jurisprudence, in the true sense of the term.[8]

(*b*) The aim, which the *Law of Citations* failed to achieve, of setting up a canon of authoritative classical jurisprudence, was now realized. Taken together, the *Digest* and *Institutes* became thenceforward the lawyer's bible of classical jurisprudence. Anything outside them was devoid of authority and banned.[9]

(*c*) The excerpted texts were *adapted*:[10] inequitable decisions were corrected, and there was much abbreviation, obsolete matter being simply cut out or replaced by modern law. The work of abbreviation was necessarily radical, but for the rest adaptation was sparing. It is becoming daily clearer that numberless interpolations hitherto attributed to the compilers are in fact of

[1] *Const. Tanta*, s. 10.

[2] Shown by Pringsheim, *ACI, 1933, Roma*, i. 460 ff.

[3] *Const. Tanta*, s. 16: 'antiquae autem sapientiae librorum copiam maxime Tribonianus . . . praebuit, in quibus multi fuerant et ipsis eruditissimis hominibus incogniti.'

[4] Kübler, *PW* vi A. 2419; *ACI, 1933, Roma*, i (1935), 22 ff.

[5] See Erman, *Festschrift f. Koschaker*, i. 158, 163.

[6] Justinian, in *Const. Deo auctore*, s. 4, and *Const. Tanta*, s. 20, puts it thus: only jurists who had received the *ius respondendi* from the Emperors were to be extracted; this would exclude the Republican jurists. See below, p. 288.

[7] *Const. Deo auctore*, s. 4, correctly interpreted by H. Krüger, *Die Herstellung der Digesten* (1922), 63.

[8] The single extract from Aelius Gallus was certainly obtained by the compilers at second hand; they can have had no exact knowledge of his period. They reckoned Alfenus, who was still living under Augustus, as a jurist of the Principate.

[9] *Const. Tanta*, s. 19.

[10] Rich materials are given by Chiazzese, *Confronti*, i. 131 ff.

pre-Justinian origin; the compilers found them already existing in their copies of the classical texts.[1] This is yet another case of *reverentia antiquitatis*.

(*d*) Obsolete matter was not cut out root and branch, but only so far as it was likely to mislead the reader. For Justinian agreed with the academic view that in the education of the lawyer obsolete law has its value; it is part of his training; if he knows nothing of it, he is uneducated (ἀπαίδευτος)[2] and will at times be unable properly to understand and estimate the present law.[3] Moreover, the magnitude of the imperial legislative reforms would stand out all the more prominently if the memory of the older law were preserved.[4] This avowed pedagogic aim of Justinian's codification is, of course, specially clear in the *Institutes*,[5] but it is visible also in the *Digest*, which was left uninterpolated with Justinian's reformatory legislation, in order that it might provide a foil for the imperial statute-law.[6] Thus the *Digest* still speaks of praetor and aediles, of Edicts and their interpretation, still discusses whether an *actio directa* or *utilis* lies, still distinguishes between *actio* and *interdictum*, between *ius honorarium* and *ius civile*—all matters which had become irrelevant in the living law. The title *De origine iuris*, &c. (*D.* 1. 2), is purely educational. It begins with Gaius' preface to his commentary on the Twelve Tables; the passage with its admonition not to embark on the study of law 'with unwashed hands', that is without knowledge of the older law, strikes a key-note. It is followed by the long historical fragment from Pomponius, containing in particular the list of the jurists up to Julian. Consistently, the fragments in the *Digest*, in contrast to those in the *Institutes*, are headed by an 'inscription' giving the author's name, the title of the work, and the number of the book. We are expressly told by Justinian and Tribonian that this is an act of homage (*reverentia*) to the classical writers,[7] and it is merely prejudiced

[1] Above, p. 142.

[2] *Inst.* (2. 10) 1: 'ut nihil antiquitatis penitus ignoretur.' *D.* (1. 2) 1: 'illotis manibus protinus materiam interpretationis tractare.'

[3] e.g. *Inst.* (2. 20) 3: *legata* and *fideicommissa* are equated, and yet they are at once treated of separately, 'ne in primis legum incunabulis' (above, p. 35) 'permixte de his exponendo studiosis adulescentibus quandam introducamus difficultatem'.

[4] e.g. *Inst.* (2. 23) 5–7—a long account of the *Sca. Trebellianum* and *Pegasianum*, in order to exhibit Justinian's reform. Cf. *Const. Tanta*, s. ii.

[5] See also *Inst.* (1. 1) 2, which is quite in the style of ancient school-books: e.g. the introduction in Pseudo-Agenius Urb., *De agrorum qualitate* (*Corpus agrimens Rom.* ed. Thulin (Teubner), i. 51.

[6] *Const. Deo auctore*, s. 9; *Const. Tanta*, s. 14. See Schulz, *St. Bonfante*, i (1930), 342.

[7] *Const. Tanta*, s. 10: 'Tanta autem nobis antiquitati habita est reverentia, ut nomina prudentium taciturnitati tradere nullo patiamur modo.'

humanism to doubt the sincerity of their assurance.[1] By omitting the inscriptions or confining them to the author's name,[2] or by simply numbering the fragments, the compilers would have saved themselves a deal of trouble. But, like the *Institutes*, the *Digest* was intended to be not only a book of authority but also an educational text-book. The passages from classical jurisprudence of which it was composed were, indeed, selected and emended, but it was meant to form an anthology of classical jurisprudential literature.[3] Justinian and his commission were entirely devoid of interest in history in the proper sense: they went so far as to forbid future recourse to the original texts,[4] although the evolution of classical jurisprudence could not be learnt, or learnt only very imperfectly, from the interpolated texts of the *Digest*. That did not trouble them in the slightest degree. What governed them was a classicistic pedagogic interest. For them classical jurisprudence as a whole was the great model, an instrument for the training of lawyers, even though the law which it stated was not always the existing law. The point was that from the *Digest* one should be instructed in the canonical essentials of classical jurisprudence.[5] We know that this was and is possible. But it follows from the double character of the *Digest*, as both a book of authority and a text-book, that the law of Justinian's day is not to be discovered by a straightforward reading of the *Digest*. One has to interpret its texts, and to understand them in the Byzantine sense. How to do this was taught in the law school, nor is it so difficult as many arm-chair lawyers, who have never used the *Digest* as a book of living law, believe.

(ii)

A novel and highly characteristic feature of the post-classical period is its tendency to convert all law into statute law: under an absolute monarchy all law tends to be thought of as royal command.[6] Thus the tendency is not an indication of a movement in

[1] Incorrect: Bluhme, *Z. f. geschichtl. RW.* iv (1820), 373; Gradenwitz, *Interpolationen*, 18; H. Krüger, *Herstellung der Digesten*, 187; Riccobono, op. cit. p. 343, n. HH, 251. The decisive factor cannot have been tradition. It is not true that no other procedure was possible: the fragments could have been numbered, or only the names of the jurists have been given.

[2] So often in the *Basilica* and in the later MSS. of the Vulgate *Digest*.

[3] Admirably expressed by Riccobono, op. cit. 248: 'raccoglie il fiore della produzione del genio latino, comunque purgato e rinnovato.'

[4] *Const. Tanta*, s. 19.

[5] Riccobono, op. cit. 247: 'la quintessenza di tutto il sapere giuridico dei Romani col proposito e al fine di fondere in esso lo spirito e la civiltà dei nuovi tempi.'

[6] So Mommsen, *Schr.* ii. 372.

favour of reformatory legislation; it is merely a tendency to elevate to the rank of statute law the law already existing as juristic doctrine. Thereby further juristic controversy would be precluded, the uncertainty attending all juristic law would be got rid of, and stability of law would be produced. What had previously floated on the mobile waters of juristic doctrine would now be solidly based on statute: 'quod antea vacillabat, in stabilitatem redigendum est.'[1] We will call this tendency the tendency to stabilization.

1. It was quite alien to earlier Roman jurisprudence. As we have shown,[2] the jurisprudence of both the Republic and the Principate avoided and impeded the fixing of the law by State enactment. The tendency of the jurists had been rather the contrary, namely to prevent the law from being petrified and stabilized. They wished the law to remain in a state of flux, so as to be adaptable and elastic. They did not undervalue certainty of the law, only they did not view this as the hard-and-fast certainty of statute; in their view true certainty implied elasticity.[3] Therefore, no customary law, no servitude to previous decisions (*stare decisis*), and above all as little statute law as possible. Their ideal was the malleable *lex annua* of the Edict (before it was stereotyped by Hadrian).[4] The proper purpose of *leges*, *senatusconsulta*, and imperial constitutions in their eyes was to introduce reforms, not to stabilize. Thus in classical times, as in republican, juristic law held the first place, both in volume and esteem; the scanty *leges*, *senatusconsulta*, and constitutions were in the background. But from the time of Diocletian there was a veritable revaluation. Statute law, as generating *ius certum*, became the ideal. The vacillations of juristic law now produced a feeling of revolt; let it be stabilized by being absorbed into statute. The beginnings of this tendency can be observed already in the second half of the Principate. Hadrian's codification of the Edict had stabilization, not reform, for its object.[5] Nor are purely stabilizing constitutions altogether lacking. But these were mere beginnings. From Diocletian onwards, however, the tide set decidedly in the direction of statute law, declaratory or stabilizing, not reformatory. The tendency was now nakedly revealed to throw the whole law into statutory form and thus to stabilize it. There can be no doubt from which of the groups of jurists this tendency proceeded; the classicizing tendency came from the law school, but the stabilizing from the jurists of the central bureaucracy. The ideal of every bureaucracy is a code of uni-

[1] Cf. *Const. Tanta*, s. 11.
[2] Above, pp. 24, 60 f., 128.
[3] Schulz, 238 ff., 247.
[4] Above, p. 61.
[5] Above, p. 127.

form, officially sanctioned regulations, the strict application of which can be supervised by the central office.

2. The new tendency declared itself as early as Diocletian.[1] His imposing rescripts have for their main object the stabilization of the law, not its reform. No doubt in the provinces, since the *Constitutio Antoniniana*, there may have been a crying need for an authoritative solution of many legal questions. But the answer might have been left to the jurists, as it was under the Principate, when Cervidius Scaevola, for example, answered, as we know, numerous questions coming from the provinces. But now—herein lay the novelty—this function was now taken over by the central imperial chancery. The full revelation of the new tendency came with the earliest large collections of constitutions, the *Codices Gregorianus* and *Hermogenianus*,[2] the former, which appears to date from 291, containing a collection of constitutions beginning with Hadrian, and the latter, apparently also from the third century, being a supplement to it. Their authors, Gregorius and Hermogenianus, are to be sought in the imperial chancery, not in the law school of Berytus,[3] since the tendency revealed by their collections is quite out of harmony with the tendency of the Berytean professors as described above.[4] Paul Krüger[5] regarded it as 'significant that both *Codices* contain a preponderance of constitutions which do not introduce new law, but apply undisputed existing law and which thus do not properly belong to a collection of statutes'. He holds that the objects sought were 'the instruction of practitioners and the education of beginners'. This is a misconception. The object was not legal education: we have seen[6] that the law school held aloof from the interpretation of the constitutions as far as it could. Nor was it merely the instruction of practitioners. The real object was to stabilize the law, to convert it into royal commands by publishing the stabilizing constitutions in a handy collection. Thenceforward these *Codices* were to be the standard reference-book of the practitioner. If he found his question answered by them, he would have no need to trouble further with the *ius incertum* of jurisprudence, no need to turn up the juristic literature: no need and no duty. For imperial enactment took

[1] R. Taubenschlag, *Das röm. Privatrecht z. Zeit Diokletians* (Extr. *Bull. Ac. Polonaise Cracow*, 1919–20, Cracow, 1923), especially pp. 266 ff., 280; cf. Schulz, 135, giving literature.

[2] Details on both *Codices* below, p. 308.

[3] As Mommsen, *Schr.* ii. 368, thinks, rightly dissented from by Krüger, 318, 322. On Mommsen's arguments see Wilcken, *Hermes*, lv (1920), 14 ff., 41.

[4] Above, p. 279. [5] Krüger, 322. [6] Above, p. 279.

precedence, it absorbed the juristic law, cleared away all disputes, and brought stabilization.

3. A comprehensive stabilization of juristic law was planned by Theodosius II. The *Codex Theodosianus*, besides collecting all constitutions still in force, and no others, was to dispose under each of its titles excerpts from the classical literature.[1] But the plan failed. The *Codex* produced in 438[2] was merely a collection of (amended) constitutions; the earliest of these are from the time of Constantine, so that the new *Codex* formed a supplement to the *Gregorianus* and *Hermogenianus*. Though it included constitutions no longer in force[3] (a concession to the law school),[4] its main purpose was to stabilize the law by making the statutes more accessible. Dislike of the *ius incertum* of jurisprudence is clearly displayed in the law publishing the *Codex*: it was to help to suppress this *ius incertum*.[5]

4. The same tendency is shown by the Edict of Theodoric.[6]

5. Its most far-reaching result was its influence on Justinian and his staff: their *Digest* is a highly imposing and comprehensive stabilization of Roman juristic law. Tribonian, with all his veneration for the classics, belonged to the bureaucratic group of jurists and was swayed by their tendencies. In his eyes classical law was beyond doubt the great pattern and model, but imperial statute took precedence, and even classical jurisprudence received the consecration that was its due by being stabilized and converted into royal command. That is why he defines the classical jurists as those who had received from the Emperors *auctoritas* to declare and interpret the law.[7] He is alluding to the *ius respondendi*,[8] the nature of which Augustan institution he naturally did not understand.[9] Still less did he know on which of the jurists the *ius respondendi* had been bestowed; in his belief these would be all

[1] *C. Th.* (1. 1) 5.
[2] Below, p. 315.
[3] Krüger, 326.
[4] Above, p. 281.
[5] *Nov. Theod.* 1. 1: 'retro principum scita vulgavimus, ne iurisperitorum ulterius severitate mentita dissimulata inscientia, velut ab ipsis adytis' (from the holy temples) 'expectarentur formidanda responsa, cum liquido pateat, quo pondere donatio deferatur' *rell.*
[6] Mommsen, *Schr.* ii. 372; Brunner, *RG.* 1. 525. The *lex Romana Visigothorum* and the *l. R. Burgundionum* obey the same tendency, but can be mentioned here only in passing: above, p. 2.
[7] *Const. Deo auctore*, s. 4; *Const. Tanta*, s. 20; *C.* (1. 14) 12. 5.
[8] So, rightly, Krüger, 371; H. Krüger, *Die Herstellung d. Digesten*, 188 (with unhistorical humanistic criticisms); De Visscher, *Conferenze* (1931), 76 ff. Incorrect: Buonamici, *Arch. giur.* lx (1898), 42, who thinks that the jurists of the *Law of Citations* are meant; but that would have been expressed quite otherwise.
[9] Above, p. 114.

those whose writings were still known.[1] A true son of his bureaucratic age, he could not conceive of the authority of classical jurisprudence except as having been conceded by the emperors. Whence but from imperial concession, he argued, could the classics have derived the *auctoritas* which they undoubtedly possessed? In the constitution (*Tanta*) publishing the *Digest* he goes so far as to make his Emperor lay down that all the classical utterances collected in the *Digest* are to be considered as having been written by Justinian himself, or as having been written with his permission.[2] They have thus henceforward the force of imperial statute,[3] since 'nostra maiestas quidquid dubium et incertum inueniebatur, emendabat et in competentem formam redigebat'.[4] *In competentem formam* hits the nail on the head. A bureaucratic age recognizes the *competens forma*, the proper form of all law, only in statute, in royal command. We have reached the opposite pole to the jurisprudence of Q. Mucius. It follows, of course, that the stability now achieved is to hold for all eternity;[5] jurisprudence is therefore forbidden to disturb it by its interpretations and controversies.[6] A plainer and more thorough-going expression of the tendency to stabilization could not be found. It is queer company for the classicistic tendency.

(iii)

A tendency towards simplicity is shown unmistakably by the jurists of the Republic: a few clear and simple forms—that was their aim and what in essentials they achieved.[7] During the Principate this tendency persisted, but was menaced by conflicting tendencies. The sane conservatism of the men of the Republic was passing into a dangerous quietism.[8] The resolution was lacking to uproot obsolete and dying institutions. Instead, new forms were offered as alternatives to the old; compromises which saved the old forms were adopted. Moreover, the courageous advance made under the Republic towards the formulation of general principles of law and towards its systematization died away under the

[1] Labeo, for example, certainly did not have this privilege.

[2] *Const. Tanta*, s. 10: 'unaque omnibus auctoritate indulta, ut, quidquid ibi scriptum est, hoc nostrum appareat et ex nostra voluntate compositum'; s. 20: 'quasi ex nobis promulgatas.'

[3] Ibid.: 'constitutionum vim et has leges' (the pronouncements of the classical jurists) 'obtinere censuimus.'

[4] Ibid., pr.

[5] Ibid., ss. 12, 23; *Const. Omnem*, ss. 2, 11.

[6] *Const. Deo auctore*, s. 12; *Const. Tanta*, s. 21; Berger, *QB Pol.* 1945, 656 ff.

[7] At greater length: Schulz, ch. v, 'Simplicity'.

[8] Above, p. 128.

Principate.[1] The interest of the classical jurists in abstraction and systematization was very moderate, their main study being of casuistic problems: as we have seen,[2] the kernel of classical legal literature as a whole is the literature of problems. Lastly, juristic literature became very extensive, and, since the classical writers rejected all historical methods of appreciation and arrangement, and on the contrary regarded the whole of jurisprudence since Labeo, and, indeed, since Q. Mucius, as a unity, without historical perspective,[3] the literature became practically unmanageable. At Ulpian's death jurisprudence had become complex and difficult, especially for the new *cives* created by the *Constitutio Antoniniana*. The result was that from the end of the third century a tendency towards simplification of the law set in, which is no less characteristic of the period up to Justinian than the tendencies towards classicism and stabilization.

1. Clearly the tendency towards simplification was retarded by the conflicting tendency towards classicism. The lead in promoting simplification was naturally taken by the central bureaucracy. In the third and fourth centuries the law school co-operated in it, but later withdrew from active participation. For the aim of the classicizing *savants* of Berytus was not to be simple, but to rival the subtlety of the classical jurists, especially Papinian,[4] whom not without reason they took as their patron saint.[5] For them *subtilitas* was a virtue; it was a professor's duty to be 'subtle'.[6] It was against the fifth-century Berytean professors,[7] not against the classical jurists, that Justinian's complaints of the subtleties of *antiqua sapientia* were at times directed, and what we already know of them shows that they had in fact reverted to a somewhat hair-splitting and scholastic study of *problemata*.[8] This impression is likely to be confirmed as our knowledge advances. In Justinian

[1] Above, p. 130. [2] Above, p. 223. [3] Schulz, 100 ff.; above, p. 134.
[4] Above, p. 236.
[5] *Const. Omnem*, s. 4: the third-year students are called *Papinianistae* and keep a 'feast of Papinian': 'eius reminiscentes et laetificentur et *festum diem*, quem, cum primum leges eius accipiebant,' (i.e. when they began the study of his *Responsa*), '*celebrare solebant*, peragant, et maneat viri sublissimi praefectorii Papiniani et per hoc in aeternum memoria.'
[6] *C. Th.* (6. 21) 1: learned men were to be installed as academic teachers 'si laudabilem in se probis moribus vitam monstraverint, si docendi peritiam facundiamque dicendi, *interpretandi subtilitatem*, copiam disserendi se habere patefecerint'. This constitution became *C.* (12. 15) 1. Justinian, too, desired the interpretation of his codification to be subtle: *Const. Tanta*, s. 15: '... si quis *subtili animo* diversitatis rationes excutiet.'
[7] Above, p. 274.
[8] Schulz, *Z* 1 (1930), 212 ff.; Kübler, *Gesch.* 426.

the simplifying tendency was present in its most extreme form,[1] but the classicizing tendency acted as a brake. Tribonian and his staff were perfectly qualified to write a simple law book in the style of the *Codex Euricianus*,[2] a hundred times better qualified than the Visigothic jurists. But the classicism of the law school proved too strong, and as a result Justinian's work was a compilation.

2. Only the main outlines of the work of simplification can be sketched here.

(*a*) The first object was to reduce the bulk of the classical literature.[3] It would have been feasible simply to adopt the 'restatements' of Ulpian's *Ad Edictum* and *Ad Sabinum*,[4] but to this the simplifiers could not make up their minds. Consequently the classical writings were drastically abbreviated and condensed, doubtless by the law teachers; anthologies and epitomes were composed. This simplification was in the main carried out in the third and fourth centuries; we have already spoken of it.[5] The attempt at a drastic reduction of the literature made by the *Law of Citations* was a failure.[6] No doubt the practice of the courts and the law schools contented itself in fact with only a small number of classical works,[7] but in the East more recondite works still had their readers. Theodosius II's complaints against the *copia immensa librorum*[8] cannot have been levelled at books only to be found in the libraries. Again, the numerous manuscripts used by the compilers can hardly have been of so early a date as the third century. The works in question must therefore have been further studied and copied in the fourth and fifth centuries. In the West, on the other hand, classical literature fell during the fifth century farther and farther into oblivion. The most important, perhaps the only, representatives of classical jurisprudence were now Gaius' *Institutes*, Paul's *Sentences*, and Ulpian's *Epitome*; Papinian had become just a magic name.[9] The simplification of the lawyer's work was also promoted by the collections of constitutions already

[1] *Inst.* (3. 2) *3a*: *simplicitas legibus amica. Inst.* (2. 23) 7: 'nobis in legibus magis simplicitas quam difficultas placet.' Cf. Riccobono, *Z* xliii (1922), 381. Chiazzese, *Confronti*, i. 235 ff., 460. The simplifying tendency is not archaistic: below, p. 343, n. HH.

[2] Zeumer, *Leges Visigothorum antiquiores* (1894); *MGH*, *Legum Sect.* i, *tom.* 1. Our plan (above, p. 2) excludes treatment here. Schwerin, *AHD* 1 (1924), 27.

[3] Mommsen, *Schr.* ii. 372 ff. [4] Above, p. 198 and p. 212.

[5] Above, p. 142. [6] Above, p. 282. [7] Above, p. 282.

[8] *Nov. Theod.* i. 1.

[9] As is well known, there is at the end of the *l. Rom. Vis.* a short meaningless sentence from Papinian's *Responsa* (*Collect. libr.* ii. 157), the only piece from him. The idea was, under his name, to invoke classical jurisprudence and thereby indicate the connexion of the law book with it—Papinian's name had become one to conjure with.

described. 'It is the task of our times', says the introductory law of the *Codex Theodosianus*,[1] 'to clarify the statutes by a short abridgement.' Hence, precisely as in the *Codex Justinianus*, the constitutions selected for the *Codex Theodosianus* were shortened.

(*b*) With the simplification of the presentment of the law simplification of the law itself went hand in hand. To this end a concentration of the classical legal institutions was carried out: many of them were assimilated and fused with each other, while others were abolished. The two forms of criminal proceedings, by *quaestio* and *cognitio*, were reduced to one, only the latter being left;[2] similarly, of the two forms of civil proceedings, that by formula and that by *cognitio*, only the *cognitio* was retained.[3] This involved the unification of the *ius civile* and the *ius honorarium*. In order to produce a thorough-going simplification of the law it should now have been the business of legal science to restate the law in its unified form, but this task was beyond the intellectual capacity of the times. Hence, in spite of the basic alteration of the law, the terminology of the formulary system was adhered to; it was considered sufficient to understand it in an altered sense.[4] We may apply to the jurists of this period the words of Maitland:[5] 'the forms of action they had buried, but they still ruled them from their graves.' Alterations of the classical texts were only occasional:[6] sometimes the antithesis between *ius civile* and *ius honorarium* was set aside,[7] the classical mechanism of *actio* and *exceptio* destroyed,[8] the classical distinctions between *actio competit* and *actio danda est*,[9] between *denegatio actionis* and *exceptio*,[10] between *actio* and *interdictum*[11] or between *actio* and *in integrum restitutio*[12]

[1] *Nov. Theod.* 1. 1: 'egimus negotium temporis nostri et discussis tenebris compendio brevitatis lumen legibus dedimus.'

[2] Mommsen, *Strafr.* 221; Schulz, 93. [3] Ibid. 94, n. 1. [4] Ibid. 94.

[5] *Equity. Also the Forms of Action at Common Law* (1909), 296.

[6] See, especially, numerous articles by Riccobono: 'La fusione del ius civile e del ius praetorium in unico ordinamento', *Arch. f. Rechts- u. Wirtschaftsphilos.* xvi. 503 ff.; *Dal diritto classico al diritto moderno* (1915), 588 ff.; *T* iii (1902), 333 ff.; *Z* xliii (1922), 290 ff.; 'Fasi e fattori', *Mél. Cornil*, ii (1926), 237 ff.; 'La prassi nel periodo postclassico', *ACI, 1933, Roma*, i. 322 ff. Cf. Albertario, *Introduzione*, i (1935), 81; Chiazzese, *Confronti*, i. 327 ff.

[7] A clear example in *D.* (45. 1) 36: 'erit quidem subtilitate iuris obstrictus, sed doli exceptione uti potest.' Here *subtilitate iuris* is an interpolation for *ipso (civili) iure*. Compare also *F.V.* 83 with *D.* (7. 2) 3. 2.

[8] Riccobono, *Z* xliii (1922), 296, with literature; Beseler, *Z* xlv (1925), 190; Schulz, 94; Guarneri-Citati, *Contributi alla dottrina della mora* (1923), no. 25, p. 72.

[9] P. Krüger, *Z* xvi (1895), 1 ff. [10] Guarneri-Citati, l.c. no. 5, pp. 10 ff.

[11] Albertario, *Riv. it.* lii (1912), 13 ff.; *St.* v. 450; Beseler, *Beitr.* iv. 87; *Z* xlvii (1927), 359; lii (1932), 293; Riccobono, *Festschr. Koschaker*, ii (1939), 368 ff.

[12] *D.* (15. 1) 32 pr., compared with the formulation in the Strasbourg fragment. Paul, *Sent.* 1. 7. 1: 'Integri restitutio est redintegrandae rei vel causae actio.'

obliterated. But all this was done inconsequently and without plan. The great majority of interpolations of this class seem to have been first introduced into the texts by the compilers.[1] But the compilers had neither the capacity nor the desire to carry through a radical and systematic fusion of *ius civile* and *ius honorarium* in the texts. Thus, though *legatum* and *fideicommissum* were assimilated and ultimately fused,[2] their fusion was merely declared by the compilers; they did not alter consequentially the classical texts selected for the *Digest*. *Tutela impuberum* and *cura minorum* were assimilated,[3] as were *testamentum* and codicil.[4] *Consortium* disappeared, leaving only consensual *societas* to survive.[5] Of the forms of guarantee only *fideiussio* was left, modified, however, by a reception of rules taken from *sponsio*.[6] There was fusion of the *actio rei uxoriae* and the *actio ex stipulatu*[7] and of other institutions also. Lastly, some of the classical decisions were simplified as being too fine, too artificial and hair-splitting. Strictures against subtleties are specially characteristic of Justinian; some of them, however, are levelled at the subtleties of the Berytean school. The great majority of interpolations of this kind appear to originate from the compilers.[8]

It is not possible here to enter further into these efforts at simplification. As yet no survey of their development and extent has been made.

(iv)

Closely related to the tendency towards simplification is the tendency to supersede the juristic formalism created by the republican jurists and preserved in essentials by the classical.[9] By creating sharply defined and unambiguous legal situations classical juristic formalism had itself contributed to simplification, but all comprehension of this method had disappeared; it now

[1] But see *F.V.* 266, with Riccobono, *Z* xliii (1922), 294, n. 1; Beseler, *Z* xlv (1925), 192; lvii (1937), 46; *Juristische Miniaturen* (1929), 124; Albertario, *St.* iv. 10. See also Gaius, 4. 155, where the interdict is described as *actio*; spurious: above, p. 292, n. 11.

[2] *Inst.* (2. 20) 3; *D.* (30) 1. Cf. Riccobono, 'Legati e fedecommessi', *Mél. Cornil*, ii (1926), 348 ff.; *Ind. Interp.* on *D.* (30) 1.

[3] See, for the very copious literature: Bonfante, *Corso*, i. 491; Kunkel, s. 193, n. 5; Sargenti, *Il dir. priv. nella legislazione di Costantino* (1938), 149–75.

[4] M. David, *St. z. heredis institutio ex re certa im klass. r. R.* (1930), 56 ff.; Kunkel, s. 207; M. Scarlata Fazio, *La successione codicillare* (1939), 199 ff.

[5] Gaius, 3. 154, in the Veronese version, compared with the Egyptian (above, p. 165).

[6] Flume, *St. z. Akzessorietät der röm. Bürgschaftsstipulationen* (1932).

[7] *C.* (5. 13) 1; *Inst.* (4. 6) 29. Bonfante, *Corso*, i. 350; Kunkel, s. 183; Tripiccione, *L'actio rei uxoriae e l'actio ex stipulatu nella restituzione della dote secondo il diritto di Giustiniano* (1920).

[8] See Note II, p. 343.

Above, p. 132.

seemed mere technicality. The tendency to supersede it is unmistakable, but we do not as yet possess a survey of its operation in detail.

1. The formal legal acts of the classical period (*actional formalism*)[1] were now almost entirely abandoned; new, up-to-date forms were created, so far as legal acts did not become completely formless. We have already mentioned the abandonment of the formal proceedings by *quaestio* and formula. *Mancipatio*, including its fiduciary[2] applications in *mancipatio matrimonii causa* (*coemptio*),[3] *adoptio*,[4] and *emancipatio*,[5] and also in the *testamentum per aes et libram*,[6] *in iure cessio*,[7] and *cretio*[8]—all these formal acts degenerated into what in fact was simply an agreement in writing.[9] So, too, the classical forms for *institutio heredis* and for the making of *legata* and *fideicommissa* seemed now to be mere technicalities and perished.[10] The details of this interesting development are difficult to make out from our sources. Classicism prevented the old forms from being expunged from the texts;[11] through the servile conservativism of the notaries they continued to encumber legal documents.[12] The result is that neither the juristic texts which are independent of Justinian nor the surviving documents are trust-

[1] Above, p. 24.

[2] *Mancipatio* still in *C. Th.* (8. 12) 4, 5, 7, and *fiducia* in *C. Th.* (15. 14) 9. It is questionable whether these acts were still conducted in classical form. That *mancipatio* was abolished by *C. Th.* (2. 29) 2. 2 is an error. On the decline of *mancipatio*: Kunkel, *PW* xiv. 1005; Collinet, i. 222; Archi, *L'epitome Gai* (1937), 442; Naber, 'De mancipationis natura aliquando mutata', *Μνημόσυνα Παππούλια* (1934), 183–5; *Mnemosyne*, xlviii (1920), 169.

[3] *Coemptio* is omitted, obviously because by then disused, in the *Epit. Ulpiani* (fourth century): Schulz, *Epit. Ulp.* p. 34, on 9. 1; Kunkel, *PW* xiv. 2269.

[4] On the decline of *adrogatio* (*adoptio per populum*): Castelli, *Scritti giur.* (1923), 189 ff. Decline of the classical form of *adoptio*: *C.* (8. 47) 11, with Bergmann, *Beitr. z. röm. Adoptionsrecht* (Lund, 1912), 7 ff.; Kunkel, s. 186.

[5] Decline of the classical form: *C.* (8. 48) 5, 6. Kunkel, s. 186.

[6] On the degeneration of the form of testation and its displacement by other forms: David, *Z* lii (1932), 314 ff.; Kunkel, s. 202.

[7] *Cessio in iure* still appears in the Visigothic *Breviary*: Paul, *Sent.* 3. 6. 28 and 32. But in practice its place had been taken—since when we cannot say—by a formless *cessio*: Kunkel, s. 55. 4; Conrat, *Der westgotische Paulus*, 145.

[8] *C. Th.* (8. 18) 8. 1; *C.* (6. 30) 17. Cf. Kunkel, s. 212.

[9] For the extensive literature on the degeneration of *stipulatio* see Kunkel, s. 56. 3.

[10] *C.* (6. 23) 15; (6. 9) 9; (6. 37) 21. Kunkel, ss. 204, 221. 5. Ciapessoni, *St. Bonfante*, iii. 678.

[11] Above, p. 281. Thus *mancipatio*, *fiducia*, and *in iure cessio* are still found in the Visigothic Paul.

[12] Thus we read in a document as late as 553 (Marini, *Papiri diplomatici*, no. 86, p. 133): 'quae tradenda erant, tradidimus, quae mancipanda erant, mancipavimus.' In a document of about 444 (Marini, no. 73, p. 108) we find: *fiduciae nexu obligaverat.* See Marini, p. 304; Savigny, *Gesch. d. r. R. im Mittelalter*, ii. 233; Kohler, *Pfandrechtliche Forschungen* (1882), 80 ff.; Leicht, *RSDI* v (1932), 19.

worthy evidence as to the actual state of the law. It was Justinian who first by special statutes and interpolations in all departments registered the total result of the development.

2. The *interpretative formalism*[1] of the classical period now likewise met with hostility. About the nature of post-classical interpretation of legal rules, especially those of the Edict and imperial constitutions, we know as yet, it must be admitted, very little:[2] the general maxims of the title *De legibus* (*D.* 1. 3) do not carry us far. But we cannot mistake the pronounced voluntaristic tendency now discernible in the interpretation of acts in private law, in particular wills and codicils. It was sought, by means of liberal interpretation, to give effect systematically to *voluntas* as opposed to *verba*. Not merely what a declarant (e.g. a testator) intended (his actual intention) but also what he would have intended had he foreseen and taken account of other eventualities (his fictitious intention)[3] was now to govern the interpretation of his declaration. From such unshackled voluntarism the classical jurists were still far off, but by means of endless interpolations made by both Justinian's compilers and their post-classical predecessors their decisions were adapted to this later tendency. This process of adaptation, however, got no farther than individual decisions; there was never any discussion of the question of principle, namely how far it was justifiable to take account of *voluntas* as opposed to *verba*. Consequently our sources present us with a chaos of case law. Only after an examination at once systematic and dispassionate of the whole of the vast evidence will a clear conception of the effects of post-classical voluntarism be obtained.[4]

(v)

In this period jurisprudence once again was strongly influenced by Hellenism, so strongly, indeed, that one may almost speak of a second Hellenistic period.[5] Obviously jurisprudence was now far less capable of resisting Greek influences than it had been in the days of Q. Mucius and the classical jurists. With Constantine Greek legal ideas began to be adopted,[6] Greek terms (e.g. *hypotheca*)[7] to

[1] Above, p. 29.
[2] Exactly as in classical times: above, p. 133.
[3] On this see Schulz, *Gedächtnisschrift f. Seckel* (1927), 73.
[4] Literature above, p. 133.
[5] First period: above, p. 38.
[6] Collinet, *Ét.* i (1912), 47 ff.; Schulz, 136, giving literature: Volterra, *Dir. rom. e diritti orientali* (1937), 241 ff.; Sargenti, *Il dir. priv. nella legislaz. di Costantino* (1938).
[7] Above, p. 202. On *hyperocha* see Manigk, *PW* ix. 293; ἀντίχρησις also was not

be borrowed, reminiscences of Greek philosophy to affect various legal doctrines.[1] Thus in the theory of the sources of law we meet for the first time with the Greek antithesis of *aequitas* and *ius*,[2] and the Greek distinction between written and unwritten law paves the way to a modern conception of customary law;[3] also natural law gains in importance.[4] Above all, interest in Greek dialectic was reawakened.[5] *Διαίρεσις* and *σύνθεσις* were once again vigorously practised,[6] new juristic categories,[7] new abstract general rules (*regulae*),[8] and new definitions[9] were devised. None of these things were complete novelties. As we have shown,[10] dialectic had been employed in Roman jurisprudence since Q. Mucius. But the interest felt by the classical jurists in the dialectical experiments of the Republic was very moderate,[11] and the renaissance of dialectic is thus a mark of the post-classical period. The authority of Mucius was appealed to: it can hardly be just an accident that a perhaps unauthentic work of his, *Περὶ ὅρων*, survived in the law schools down to Justinian.[12] Interpolation accounts for much of the intrusion of this later dialectic into our texts, but at present there is no survey of the subject. It is for future scholars to do justice to the by no means despicable results of this movement. At any rate their importance for the subsequent history of jurisprudence must not be underrated, for undoubtedly they inspired the Bolognese Glossators.[13] Post-classical jurisprudence was a channel by which Greek dialectic flowed into medieval jurisprudence.[14]

a classical term. The classical mode of expression: Ebrard, *Die Digestenfragmente ad formulam hypoth.* (above, p. 203), 116. For the literature on *antichresis*: Kunkel, s. 93. 3. Further examples: Albertario, *St.* v. 382.

[1] Schulz, 129 ff.; above, pp. 84 and 135. Illustration above, p. 85.

[2] Above, p. 74.

[3] *D.* (1. 3) 32; above, pp. 73 and 137; below Note EE, p. 342.

[4] Maschi, op. cit. above, p. 136, n. 6.

[5] Above, p. 129.

[6] Albertario, *Introduzione*, i. 120 ff.; Pringsheim, *Beryt u. Bologna*, 220 ff. Pringsheim's study suffers from the fact that it rests solely on lexicography. Naturally there are many classical and post-classical distinctions in our texts which do not use the words *distinctio*, *distinguere*, or *differentia*. There is a long post-classical *distinctio* in *D.* (48. 19) 16 (above, p. 256), in which these words do not occur.

[7] Thus 'servitutes' as a genus embracing personal as well as praedial servitudes: Longo, *Bull.* xi (1898), 281 ff.; Schulz, 44. This is doubtless a construction of the school of Berytus.

[8] Schulz, *Z* 1 (1930), 227, 237, 248.

[9] Schulz, 44 ff.

[10] Above, p. 62. [11] Above, p. 130. [12] Above, p. 94.

[13] Pringsheim, *Beryt u. Bologna*, 220 ff., 244 ff.; Genzmer, *ACI, 1933, Bologna*, i. 397 ff.

[14] The other channel was medieval scholasticism: Genzmer, 399 ff.

(vi)

The Hellenizing tendency is closely related to the tendency to humanize the law.[1] 'Humanity' is an idea of Greek origin, which, however, received a special Roman stamp in the circle of the younger Scipio and Panaetius: both the term and the concept *humanitas* are original Roman creations. It was meant to express the sense of the value of human personality, placing man above all other creatures on earth. The unique value of his personality imposes on a man the duty both of cultivating his own personality and of respecting and developing that of other men. Thus *humanitas* embraces not only social and intellectual culture but also graciousness, kindly action, regard for and fellowship with others, and abstention from an immoderate and ruthless assertion of one's own rights. This is not the place to describe the influence of *humanitas* thus conceived on the development of the law under the Republic and Principate.[2] But, always in connexion with Graeco-Roman philosophy, it was specially active in the post-classical period. *Rigor iuris* was systematically attacked, inhuman legal institutes and rules were to be set aside or at least moderated. *Humanitas, benignitas, pietas, caritas, clementia*—these are watchwords of the age even in the sphere of law.[3]

By the side of the tendency to humanize the law there appeared from the time of Constantine a tendency to christianize it.[4] The two tendencies travel a good part of the way peacefully together, but now and then they diverge and conflict. The christianizing tendency laboured to endow the Church with a legal constitution and to enact special laws against pagans, Jews,[5] heretics, and

[1] On what follows: Schulz, ch. x, 'Humanity'.

[2] In detail ibid.

[3] Ibid. 210, giving literature. Much material is also given by Pringsheim, *Z* xlii (1921), 643 ff.

[4] Baviera, *Mél. Girard*, i (1912), 67–121, reviewing the older literature; Marchi, *St. Senesi*, xiii (1924), 61; Chiazzese, *Confronti*, i. 399 ff., 459 ff.; Albertario, *Introduzione*, i (1935), 86 ff.; Riccobono, *Corso*, ii (1933/4), cap. xi; Jonkers, 'De l'influence du Christianisme sur la législation relatif à l'esclavage dans l'antiquité', *Mnemosyne*, ser. 3, 1 (1934), 241; Roberti, *Cristianesimo e dir. rom*, containing essays by Roberti, Bussi, and Vismara (1935); numerous articles in *ACI, 1933, Roma*, ii (1935) and in *ACII* 1934, vols. i and ii (1935); Biondi, *Giustiniano Primo, principe e legislatore cattolico* (1936); Alvisatos, *Die kirchliche Gesetzgebung Justinians I* (Neue Studien zur Geschichte der Theologie u. Kirche, xvii (1913); Volterra, *Dir. rom. e diritti orientali* (1937), 268, with literature; Dupont, *Les Constitutions de Constantin et le droit privé au début du 4. siècle*, 1937 (cf. Monier, *RH* xvi (1937), 489); Sargenti, *Il dir. priv. nella legislaz. di Costantino* (1938), 182; Leifer, *Z* lviii (1938), 185 ff.; Renard, *Rev. des sciences philos. et théol.* xxvii (1938), 53 ff.; Cochrane, *Christianity and Classical Culture* (1940), 198 ff. Jonkers, *Invloed* (1938) 213. See *Addenda*.

[5] Juster, *Les juifs dans l'empire rom.* 1914. Recently Solazzi, *Bull.* xliv (1937).

schismatics. In criminal law it demanded severe punishment of religious and sexual wrongdoing.[1] In private law it made for the abandonment of rules felt to be specifically pagan (for example, the *lex Iulia et Papia Poppaea*, which conflicted with the ascetic ideal); it imposed regard for the weak and simple,[2] for women and slaves; in fact, everywhere it stood for *caritas*, *benignitas*, and *clementia*.

The complex of legal rules developed under the influence of these two tendencies is extensive and important. But one cannot always with any certainty attribute them to the one or the other tendency. Where a rule concords with both (as, for example, *favor libertatis* or the abrogation of statutes impeding manumission) we must be content to note the fact. Modern scholarship has concerned itself with these tendencies but seldom; when it has done so, it has frequently failed to employ the right methods. Consequently our literature has wavered between over- and underestimating the influence of Christianity. The present tendency seems to be once more to overestimate it. It is assumed that every reference in the texts to *caritas*, *benignitas*, *clementia*, or *humanitas* must come from Christian influence. To do this is simply to ignore that these were also the watchwords of ancient *humanitas*;[3] even the brotherhood of man had been proclaimed long before Christianity could have exercised any influence on the law.[4] Against such exaggerations we must hold fast to the following truths.

1. The humanizing tendency worked independently by the side of the christianizing; sometimes the two tendencies co-operate, sometimes they conflict. The idea of *humanitas* originated from the Stoa, but in the fourth and fifth centuries it was no longer felt to be specifically Stoic.

2. Ancient learning remained true to the pagan tradition in the fourth and fifth centuries, after the recognition of Christianity by

396 ff.; 'Le unioni di Cristiani ed Ebrei nelle leggi del basso impero', *Atti Napoli*, lix (1939); P. Browe, 'Die Judengesetzgebung Justinians', *Analecta Gregoriana*, viii (1935), 109 ff.; Peter Charanis, *Church and State in the Later Roman Empire*, 1939.

[1] Mommsen, *Strafr.* 595 ff., 682 ff.; Bury, *Hist. of the Later Roman Empire*, i (1923), 409 ff. [2] Pringsheim, *Z* xlii (1921), 659; *St. Bonfante*, i. 581.

[3] On pagan virtue see Leclercq in his excellent article 'Bonté chrétienne' in Cabrol's *Dictionnaire d'Archéologie Chrétienne*, ii (1910), 1008–15. Further, Charlesworth, 'The Virtues of a Roman Emperor', *Pr. Brit. Ac.* xxiii (1937), 105, with a bibliography; H. Lange, *Z* lii (1932), 1914, n. 2.

[4] See an inscription of about A.D. 220 given by Maas–Oliver, *Bull. of the Hist. of Medicine*, vii (1939), 315 ff.: the physician should be the saviour of slaves, the poor, the rich, the highly placed; he must help them like a brother, *for we are all brothers*: *πάντες γὰρ πέλομεν κάσιες*. Marc. Aurel. 7. 22: Love those who offend, for all men are kindred, and they know not what they do. Cf. Schulz, 219.

the State; at any rate it was not as a matter of principle stamped with a Christian character.[1] It is certainly significant that even in the fifth and sixth centuries there were no professors of theology in the universities at Rome and Constantinople.[2] Things cannot have been otherwise in the law school, where we observe that there was no thought of purging the classical texts of polytheism, a work performed later by the compilers.[3] The law school was classicistic, but not pronouncedly Christian, and thus pre-Justinian interpolations, which combat and recast classical decisions on grounds of *humanitas*, *caritas*, *clementia*, and *benignitas*, should in general be attributed to the humanizing tendency.

3. The outstanding champion of christianization was not the law school, but the bureaucracy.

The details of this group of rules cannot be gone into here; but if one ignores them, one cannot do justice to the jurisprudence of the period. For it was just these rules that lay closest to the heart of the age, far closer than the razor-edged classical decisions.

(vii)

Our sketch of the general juristic tendencies of the age is concluded. It was a polyphonic period, and only an attentive ear can distinguish the individual voices. Neither the will nor the strength to act were lacking, as would be evident to all, if we but possessed the *Codices Gregorianus* and *Hermogenianus*, the *Theodosianus* in their entirety, and some remains of the writings of the Berytean professors. But at any rate one literary work does survive complete, in which all the tendencies of the time reveal themselves: Justinian's codification. However one may judge of these tendencies, this at least is certain, that without the transformation of Roman law and jurisprudence effected in the fourth, fifth, and sixth centuries the law school of Bologna would never have existed, neither would classical jurisprudence have survived the passing of the ancient world.

[1] Joh. Geffcken, *Der Ausgang des griech.-röm. Heidentums* (Religionswissenschaftl. Bibliothek herausg. v. Streitberg, vi, Heidelberg, 1920, with an addition 1929); Fr. Fuchs, 'Die höhere Schule im MA.', *Byz. Arch.* viii (1926), 4; Eduard Norden, *Agnostos Theos* (1913), 123; Alföldi, *Die Kontorniaten* (1943), p. 49, on paganism under the Christian Emperors.

[2] For Rome this is expressly stated by Cassiodorus, *Inst.* (ed. Mynors), Praef. s. 1: 'Gravissimo sum, fateor, dolore permotus, ut scripturis divinis magistri publice deessent, cum mundani auctores celeberrima procul dubio traditione pollerent.' See Ermini, *Archivum Romanum*, xviii (1934), 151. For Constantinople see Bréhier, *Byzantion*, iii (1926), 84 ff.

[3] Above, pp. 164, 281.

III

THE LITERATURE OF THE AGE

(i)

WE have already, in Chapter IV of the preceding Part III, dealt with a considerable part of the literature of our present period, namely the post-classical elaborations of classical works, which stand under the names of classical jurists. All these editions, abridgements, and anthologies were produced, we repeat,[1] in the early post-classical period, at the end of the third and in the first half of the fourth century, mostly, it seems, in the western Empire, probably in the law school at Rome. The first idea of twentieth-century scholars was to ascribe these lucubrations to Berytus, a preference which is explicable only by the history of our studies. At the beginning of the century interpolations were thought of as coming exclusively from Justinian.[2] Then, as the multitude of the pre-Justinian interpolations gradually came to be recognized, these were ascribed without much consideration to 'the Byzantines', that is to the eastern jurists, and in the first place to the Berytean professors. Unclassical Latin occurring in the texts was summarily described as 'Byzantine Latin', although eastern Latin was known only from Justinian's codification, and although many of the linguistic peculiarities could be readily paralleled from western Latin of the fourth and fifth centuries. The truth is that there is rarely any evidence of an eastern origin of these interpolations.[3] In its absence either a western or an eastern origin is conceivable, but the former is the more probable. It is *a priori* improbable that the professors of Berytus, who spoke, taught, and wrote in Greek, should have recast classical Latin texts so drastically as early as the third and fourth centuries. The eastern jurists wrote independent commentaries or inserted in the margins of the classical manuscripts glosses which, being in Greek, penetrated but seldom into the Latin texts. In any case, research must in the future look much more carefully than hitherto for such indications as there may be of eastern or western origin. In the absence of evidence one must either presume a western origin or be content with a *non liquet*. The verdict 'thoroughly Byzantine Latin' must

[1] See especially above, p. 142.
[2] Above, p. 142.
[3] So with the interpolation of 'hypotheca': above, p. 202.

be pronounced with far greater caution and never without a previous comparison of the western Latin of the period.[1] We shall deal no further with this class of literature.

(ii)

This period did not produce independent isagogic works, but continued to use the classical *Institutiones*, especially Gaius'. We proceed to assemble the post-classical works connected with the classical institutional literature.

1. *The Autun commentary on the Institutes of Gaius.*[2] We possess a large fragment of this work in a manuscript which belonged to the school at Autun and is, for the greater part, still in that city.[3] It is a palimpsest, the upper writing of which, giving the *Instituta Cassiani*, is of the sixth or seventh century and the lower writing, giving our text, of the fifth or sixth. It was discovered by Chatelain in 1898. The first reports gave hopes of a second manuscript of the *Institutiones* of Gaius.[4] When the truth was realized, the disillusion was so great[5] that though the text, which unfortunately is badly preserved, was edited, no further attention was paid to it. Had it been discovered in an Egyptian papyrus it would undoubtedly have aroused greater interest. The commentary was written, probably in the fifth century, by an *anonymus*, who must have been a teacher at Autun (Augustodunum). It is true that there was no law school at Autun comparable to those of Rome and Berytus; but the city was an educational centre of ancient fame;[6] the author doubtless imparted the elements of law in connexion with his lessons in grammar and rhetoric. His work affords us a picture of that adulterine teaching which Tribonian abolished in the East.[7] It is a lemmatic commentary,[8] the headings

[1] e.g. (to mention only easily accessible examples of a kindred literary genus) Macrobius' commentary on the *somnium Scipionis*; Pseudo-Aggenius Urbicus, *Corp. agrimensorum Rom.* i (1939, ed. Thulin), pp. 51 ff.; Cassiod., *Inst. divinarum et humanarum litteram* (ed. Mynors, 1937); also Traube's *Index verborum* to Mommsen's edition of Cassiodorus' *Variae* (*MGH, Auctores antiquissimi*, xii, 1894) should not be overlooked. It will be found that many supposed Byzantinisms are really fourth- and fifth-century western Latin. Zimmermann, *Vocabulary* (1944).

[2] *Ed. princeps*: *Collect. libr.* i, ed. 4, 1899, by P. Krüger, and ultimately (improved) ed. 6, 1912; the edition by Scialoja and Ferrini, *Bull.* xiii (1901), 5 ff. (Ferrini, ii. 437 ff.) has independent value. Based on these: Seckel–Kübler, ii. 2. 432; Girard–Senn, *Textes*, 354; *FIRA* ii (1940), 207.

[3] Four leaves are now in the Bibl. Nat. at Paris; description by Delisle, *Biblioth. de l'École des Chartes*, 1898, 383.

[4] Mommsen, *Z* xix (1898), 365.

[5] See Mommsen's savage 'Epimetrum' in *Collect. libr.* i: 'Ut patres nostri laetati sunt recuperato Gaio, ita nobis quoque similis sors evenit, sed ita similis ut gemma carboni.' He then describes the commentary as a *monstrum*.

[6] Hirschfeld, *SB Berlin*, 1907, 197. [7] Above, p. 273. [8] Above, p. 183.

of which are provided by the opening words, written in capitals, of the sections of Gaius which are under discussion.[1] The classicizing tendency of the work is obvious: thus Gaius' fourth book, with its obsolete law of actions, is commented on at length. The style, too, bears the stamp of the school, recalling in many details that of Theophilus' *Paraphrase*.[2] The surviving text appears not to be unitary but to consist of layers.[3] No complete study of it exists.

2. *The Epitome Gaii*.[4] The *Lex Romana Visigothorum* of 506 (also called *Breviarium Alarici* or briefly *Breviarium*) has a part bearing the title *Liber Gaii*. Modern scholars refer to it as the 'Epitome Gaii' or the 'Visigothic Gaius'. It is an abridgement of Gaius' *Institutes*, which radically shortens and alters the classical text. Its tendency to set aside obsolete and to present only living law is obvious. Being primarily a monument of Visigothic jurisprudence it has no more place in a history of Roman jurisprudence than has the Visigothic *Codex Euricianus*.[5] Its composers used a post-classical version of Gaius originating, possibly, from Italy. We may consequently be content to give only a summary orientation. That the *Epitome* was derived from a post-classical epitome of the fifth century and not direct from Gaius has long been the prevailing opinion. Max Conrat's attempt to refute it was unsuccessful. However, as Conrat showed, the arguments in favour of the dominant opinion are not all of equal force, and some of them are untenable. But there is one decisive argument, to which Conrat paid no attention.[6] The title of the *Epitome*, as has been said, is *Liber Gaii*, and accordingly the *Epitome* itself ignores any division into several books. But it begins: 'Gaii liber primus dicit. . . .' Then where Gaius book 2 begins we read: 'Gaius superiore commentario de iure personarum aliqua disputavit; nunc in hoc commentario de rebus iterum tractat.' At this point a fresh numeration, starting from number one, begins.[7] But at the point

[1] See the *Commentary*, ss. 66, 79, 80, 96, 97.

[2] Ferrini, ii. 426; Albertario, *Introduzione*, i. 113.

[3] ss. 47 and 48 are probably a later addition; s. 49 connects directly with s. 46.

[4] There is no satisfactory edition of the *Epitome*. One must use Boecking's, in the so-called Bonn *Corpus iuris rom. anteiust.* i (1841), and Kübler's in Seckel–Kübler, ii. 2. 395. Literature: Fitting, *Z. f. Rechtsgesch.* xi (1873), 325 ff.; Hitzig, *Z* xiv (1893), 187 ff.; Max Conrat, *Die Entstehung des westgothischen Gaius* (1905), on which Kantorowicz, *Z* xxxiii (1912), 459 ff.; Krüger, 355; Kübler, *PW* vii. 504; *Gesch.* s. 41, p. 394; Albertario, *Sulla epitome Gai*, *ACI*, *1933*, *Roma*, i (1934), 497; Archi, *L'Epitome Gai* (Milan, 1937). FIRA ii (1940), 231.

[5] Above, p. 291.

[6] Even the latest writer, Archi, does not recognize its decisive importance.

[7] Krüger, 355.

where Gaius book 3 begins we find no similar notification: books 2 and 3 of Gaius are compressed into a single book. Now the intention of the Visigoths was, as the title *Liber Gaii* shows, to produce a work in *one* book. If then they had the authentic *Institutes* before them, what motive had they to compress books 2 and 3 into one—a senseless performance from their point of view? If at the beginning of the first and of the second books they noted the division of the original Gaius, why did they not do the same at the beginning of the third book? There is only one plausible answer: the Visigoths were using not an authentic copy of Gaius, but an epitome which compressed books 2 and 3 into one. The existence of a post-classical epitome, which served as model for the Visigoths, is thus proved. It was in all probability a product of some law school, not of practice, since one would hardly choose Gaius' *Institutes* to form the basis of a practitioner's manual. But, as we have seen,[1] academic jurisprudence in the fifth century was classicistic and had ceased to bring classical texts up to date, whereas our Visigothic *Epitome*, on the contrary, seeks in principle to state living law.[2] This characteristic must therefore come from the Visigothic legislators; it is to them that the work of adaptation must throughout be ascribed.[3] The simplest explanation of their having provided Paul's *Sentences* but not the *Liber Gaii* with an adapting *interpretatio* is that the text of the latter had been adapted by the legislators themselves. Hence the text on which the Visigoths did their work of adaptation cannot be reconstructed. Even when statements of law in the *Epitome* agree with other legal sources, it does not follow that the Visigoths found them in their post-classical model. It is likewise impossible to determine the date and place of the composition of this model. Attempts have been made to do so, but the passages adduced in evidence may have been introduced by the Visigoths and not before them. All that can be said is that the pre-Visigothic *Epitome* was probably produced in the fifth century in a law school of the western Empire or of the Visigothic dominions. That it did not displace the authentic Gaius is shown by the existence of the

[1] Above, p. 281.

[2] The point is correctly taken by Archi, p. 35.

[3] Archi, p. 67, distinguishes the following layers of text: (1) Gaius' authentic *Institutes*, (2) a post-classical paraphrase of the same, elaborated in the law school, (3) an adaptation of this paraphrase for practice, to which Archi gives the misleading name of *interpretatio*, (4) the Visigothic epitome, being an unsystematic production from (3). This development is not, indeed, impossible, but stage (3) is unprovable. Why should not the Visigoths themselves have been the authors of the adaptation for practice?

Veronese Gaius and the Autun commentary. That in the universities of Berytus and Constantinople it had ousted the *Institutes*[1] is an unprovable and quite improbable conjecture.[2] On the view we have taken the Visigothic Gaius is of only very modest interest for the history of Roman legal science.[3] In general it is only in combination with other sources that it can be used as evidence as to Roman law in the western Empire.

3. *The Institutes of Justinian.*[4] The *Institutes* are an official educational manual. They were published, as a statute, in November 533. Apparently the idea was first conceived after the *Digest* had been virtually completed;[5] at any rate work was begun only then, that is in the course of the year 533.[6] The drafting commission consisted of Tribonian and two professors, Dorotheus and Theophilus.[7] The work is not an original production, but a mere compilation. Its text combines into a continuous whole excerpts from classical writings, especially Gaius' *Institutes*, and from imperial constitutions, especially Justinian's; the excerpts have been adapted, but they are not headed by inscriptions as are the *Digest* fragments. The attempt is made to make a stylistic reality of the fiction enacted by Justinian in *Const. Tanta* for the *Digest*,[8] namely that the fragments were to be treated as having been written by himself. In the *Institutes* the teacher addressing the students is Justinian himself. Hence Justinian's enactments are referred to as *nostrae constitutiones*; again, where the classical original described a party to a case as '*I*' the text is altered, because '*I*' would mean Justinian, and the Emperor is outside private law.[9] This idea is most pedantically applied. Two examples will suffice:[10] Gaius 3. 176 compared with *Inst.* (3. 29) 3, and Gaius 3. 198 compared with *Inst.* (4. 1) 8.

The sources upon which the composers of the *Institutes* drew cannot be completely identified. The *praefatio* states[11] that all the classical institutional works, especially the *Institutes* and *Res*

[1] So, e.g., Karlowa, *RRG* i. 980, and those he cites there.

[2] On the interpretation of *Const. Omnem*, s. 1, see above, p. 275.

[3] It has great interest for the history of Romanistic jurisprudence in the Visigothic Empire. Roman and Romanistic jurisprudence must be kept distinct: above, p. 2.

[4] Standard edition by P. Krüger, in vol. i of the stereotype *Corpus Iuris* (ed. 1, 1868); quarto edition, latest (4th), 1921. Complete literature: Kotz–Dobrz, *PW* ix. 1566 ff., 1585 ff. Translation with comment: R. W. Lee, *Elements of Roman Law*, 1944.

[5] In *Const. Deo auctore*, s. 11, the reference to the *Institutes* (*vel si quid . . . scientiam*) must be a later addition.

[6] *Const. Imperatoriam*, s. 4. [7] Ibid., s. 3. [8] Above, p. 289.

[9] *D.* (1. 3) 31: 'Princeps legibus solutus est.' *Nov.* 105. 2. 4. Cf. Schulz, *EHR* lx. (1945), 158. [10] Further examples: Ferrini, *Opere*, i. 22 ff.

[11] *Const. Imperatoriam*, s. 6.

cottidianae of Gaius, have been made to contribute, and *multi commentarii* as well. Identification is possible only so far as the sources used have reached us through some other channel than the *Institutes*.[1] Attempts to go farther and to trace the sources by stylistic evidence have led to no assured results.[2] Naturally imperial constitutions were taken from the *Codex Iustinianus* of 529 or, if later than the *Codex*, from the *Quinquaginta Decisiones* or from the statutory text as first published. Since we possess only the revised *Codex* of 534, the information given by the *Institutes* as to these constitutions is of special value to us: several of them were not received into the *Codex* of 534,[3] while of some others the *Institutes* give the original terms, which the *Codex* of 534 has altered.[4] No microscopic analysis of the *Institutes* exists.

4. *The Paraphrase of Theophilus.*[5] We possess a Greek paraphrase of Justinian's *Institutes* almost complete.[6] In many of the manuscripts of the work and in two sixth-century *scholia*[7] Theophilus is named as its author. On this evidence the prevailing modern opinion is that the Theophilus in question is the professor of law at Constantinople who collaborated in Justinian's codification, especially in the *Institutes* themselves, and that he composed his paraphrase immediately after the completion of the *Institutes*

[1] Thus, besides the works of Gaius mentioned, use was made of the *Institutes* of Florentinus, Ulpian, and Marcian, and possibly of the *libri vii regularum* of Ulpian.

[2] On Ferrini's attempt (*Bull.* xiii (1901), 101 ff. = *Opere*, ii. 307) see Kübler, *Z* xxiii (1902), 508 ff. Also against Ferrini: Zocco-Rosa, 'Iustiniani Institutionum Palingenesia' (*Ann. ist. di storia del dir. rom.*, Catania, ix. 1 (1905/6), 180, continued in ix. 2 and x. 3 (1907/8); appendix in x; xi and xii (1911)). On this: Kübler, *Z* xxx (1909), 433. The title is misconceived: there is no question of a *palingenesia* of Justinian's *Institutes*, since we possess the work; it is a misnomer for a study of the classical works used for the *Institutes*. On the question of those works see also Kotz, *PW* ix. 1578 ff., and Ebrard, *Z* xxxviii (1917), 327. See *Addenda*.

[3] *Inst.* (2. 10) 11; (3. 5) 1; (3. 27) 7.

[4] Schulz, *St. Bonfante*, i. 339 ff.

[5] Standard edition: Ferrini, *Institutionum graeca paraphrasis Theophilo antecessori vulgo tributa; pars prior*, Berlin, 1884; *pars posterior*, Berlin, 1897. Its quite insufficient *Prolegomena* have to be supplemented by various articles of Ferrini's, which can now be easily consulted in his *Opere*, i. 1 ff. The edition needs searching philological criticism; Zachariae v. Lingenthal's, *Z* v (1884), 271, is insufficient. The critical apparatus seems to leave much to be desired. There are materials in A. F. Murison's papers, at University College, London. See A. F. Murison, *Memoirs of 88 years*, ed. by A. L. Murison and Sir J. W. Murison (1935), 177 ff., 204. On the older editions: Kübler, *PW* v A. 2147; *ACI Roma*, i (1935), 21. Useful is Triantaphylides, *Lexique des mots latins dans Théophile et les Novelles de Justinien*, Bibliothèque de l'école des hautes études, xcii (1892), 159 ff. See *Addenda*.

[6] The paraphrase of *Inst.* 1. 1 is missing; in Ferrini's edition it is supplied from a *scholium*—a procedure rightly criticized by Riccobono, *Bull.* xlv (1938), 1 ff.

[7] Ferrini, i. 147. Later *scholia*: Zachariae, *Z* v (1884), 272; Ferrini, i. 112 ff.

and before the publication, on 16 November 534, of the revised *Codex Iustinianus*.[1] However, neither the authorship of Theophilus nor the date of the work can be regarded as certain. But these questions do not affect us greatly. There is a more important point. The author used as the basis of his paraphrase of Justinian's *Institutes* a Greek paraphrase of Gaius' *Institutes*. This can be proved in a few words. We have seen[2] that Justinian's *Institutes* at times altered the Gaian text simply because in it one of the parties figured as '*I*'. Now Theophilus' *Paraphrase* in many passages agrees in this matter with Gaius' and not Justinian's *Institutes*. If one supposes that Theophilus, when he was composing the *Paraphrase*, had before him only Justinian's *Institutes* and Gaius' in the original Latin, one cannot understand how it was that, in a matter of complete indifference substantially, he chose to adhere to Gaius instead of following the *Institutes*. His readers or hearers would have before them, for comparison with the *Paraphrase*, only Justinian's *Institutes*; the only possible effect of describing the parties to a case otherwise than in the *Institutes* would be to confuse them. But if one supposes that Theophilus merely adapted an existing Greek paraphrase of Gaius, his procedure at once becomes comprehensible. He kept as much as he could of his model and did not adopt the above-mentioned changes made by Justinian's *Institutes*, because they made no material difference. That this model was in Greek is practically certain; it is *a priori* improbable that a Latin paraphrase should have been written at Constantinople and used in the law school. Our point is illustrated by the two cases cited above[3] (*Inst.* 3. 29. 3; 4. 1. 8): the *Paraphrase* keeps to the Gaian '*I*'.

Thus Theophilus' *Paraphrase* provides us with fragments of an eastern paraphrase of Gaius' *Institutes*,[4] which gives us a picture of the manner in which Gaius' work was handled in the Byzantine law schools till 533; they form a pendant to the Autun commentary, to which they are related stylistically.[5] The similarity is, however, not close enough for us to infer that both are based on the same Latin paraphrase. No exact historical analysis of Theophilus' *Paraphrase* exists.

[1] Inferred from the fact that Justinian's *Novels* are nowhere mentioned and that in the *Praefatio* (paraphrase of *Const. Imperatoriam*), s. 2, only the *Codex* of 529 appears to be mentioned. Cf. Ferrini, i. 109. Not absolutely convincing.

[2] Above, p. 304.

[3] Above, p. 304. The passages are *Inst. Paraphr.* 3. 29. 3 and 4. 1. 8.

[4] See Note JJ, p. 343.

[5] Ferrini, ii. 426 ff.; above, p. 301.

(iii)

Not far removed from the isagogic class are the works of *definitiones*, *differentiae*, *regulae*, and *sententiae*. The post-classical demand for works of this kind was at first satisfied by adaptations of classical works of which we need speak no further at this point.[1] But independent works of the same kind were not lacking; two such are known to us.

1. The elder Cyrillus,[2] professor at Berytus, wrote a *commentarius definitionum*, which is mentioned once, by Thalelaeus in his commentary on the *Codex Iustinianus*. What is there said tells us nothing as to the nature of the work, in particular not that Cyrillus appended classical excerpts to his definitions;[3] he may have done so, but this is not exactly probable in a work of this class.

Schol. Thalelaei ad Bas. 40. 1. 67 (Heimbach, 1. 646 and 6. 9, no. 13). *Ταύτην τὴν διάταξιν ὑπομνηματίζων ὁ ἥρως Πατρίκιος τολμηρὸν ἔφη εἶναι τὸ ἐξαριθμήσασθαι καὶ καταλέξαι, ποῖά ἐστι τὰ κόντρα λέγεμ ἤτοι ἐναντί ι νόμου γενόμενα πάκτα, ὡς τον ἥρωα καὶ κοινὸν τῆς οἰκουμένης διδάσκαλον Κύριλλον τελείως καὶ ἀνελλιπῶς τὰ περὶ τούτων συναγαγόντα ἐν τῷ ὑπομνήματι τῶν δεφινίτων αὐτοῦ. τὸν γὰρ δὲ πάκτις τίτλον ὑπομνηματίζων, τελείως καὶ ἀνελλιπῶς καὶ ὡς αὐτῷ μόνῳ δυνατὸν ἦν, συνήγαγεν τὰ περὶ τούτων. νῦν δὲ διέσπαρται ἐν πᾶσι τοῖς διγ. ὅταν οὖν βούλῃ μαθεῖν, ποῖα σύμφωνα κόντρα λέγες ὄντα κάμνει, δεῖ σε ζητεῖν ἐν τοῖς διγ.*

Translation: 'Patricius of blessed memory' (above, p. 274) 'commenting on this constitution' (*C* 2. 3. 6, read by Patricius in *C. Greg.*) 'said that it was hazardous to enumerate and catalogue the pacts that were *contra legem*, i.e. were infringements of statute, as in his *commentarius definitionum* Cyrillus of blessed memory, the common teacher of the world, had collected, perfectly and without omission, all that related to them. For Cyrillus, commenting on the title *de pactis*' (the title in his work) 'collected perfectly and without omission, as he alone could, what related to them. But now they are scattered all over the *Digest*, so that he who wishes to know what pacts are void as being *contra legem* must search in the *Digest*.'

Not a word, therefore, to the effect that Cyrillus' *commentarius* gave excerpts from the classical writings, which excerpts were scattered all over the *Digest*.

[1] Above, p. 174.

[2] Above, p. 274.

[3] According to Krüger, 361, excerpts from classical literature played a large part in the *liber definitionum*. He is followed by Pringsheim, *Beryt u. Bologna*, 283. Collinet, *Ét.* ii. 275, is not clear: his polemic against Krüger shows that he misunderstood him. Berger, *PW*, *Suppl.* vii. See *Addenda*.

2. We possess some fragments of a sumptuously presented collection of *regulae* and *definitiones*. The text, though badly damaged, can be reconstructed in part.[1] The definitions are numbered continuously; they begin with ὅτι (= *item*) and end with a precise citation of a classical work. The surviving fragments cite Papinian, Paul, Ulpian, and Modestinus. The disposition of topics cannot be made out. The work, for which we suggest the name *Collectio definitionum*, originated in the eastern Empire in pre-Justinian times, probably in the fifth century. At present there is no satisfactory edition.

3. We also possess a small tract in Greek bearing the Latin title *De actionibus*.[2] It contains brief elementary rules as to the individual *actiones*. Our version is of the post-Justinian period, but its kernel must have been written before Justinian, probably in the fifth century. In spite of its shortness this tract is interesting and important, but it still needs to be studied critically.[3]

(iv)

Most important for us is the group of works formed by the post-classical collections of imperial constitutions and of excerpts from the classical writings.

1. *The Codices Gregorianus and Hermogenianus*.[4] The *Gregorianus* was the earliest comprehensive collection which arranged the constitutions systematically, but gave their actual words. The *Hermogenianus* was a supplement to it. What we know of them comes from intermediate sources; neither is independently preserved.

Our knowledge is based on the following materials:

i. The *Lex Romana Visigothorum* of 506 contains an epitome of the *Gregorianus*; also one of the *Hermogenianus*, but consisting of only two passages. Edition: P. Krüger, *Collect. libr.* iii. 224. *FIRA*, ii. 653.

ii. The Appendix to the *Lex Romana Visigothorum* comes to us in three versions, two of which contain passages from the *Gregorianus* and *Hermogenianus* not included in the *Lex Romana*. Edition: P. Krüger, *Collect. libr.* iii. 249. *FIRA*, ii. 667.

[1] *Ed. princeps*: Angelo Segrè, *St. Bonfante*, iii (1930), 421–8. Cf. Schulz, *JRS* xxxi (1941), 63–9. See *Addenda*.

[2] Edited by Zachariae v. Lingenthal, *Z* xiv (1893), 88. Literature: Ferrini, i. 365 ff.; Segrè, *Mél. Girard*, ii (1912), 543 ff.; Brugi, 'Il nome dell' azione', *Ann. ist. di storia del dir. rom.*, Catania, xiii. 1 (1913). See *Addenda*.

[3] Zachariae's critical notes need revision: much that he regards as added in post-Justinian times may have been reproduced from pre-Justinian jurisprudence.

[4] Mommsen, *Schr.* ii. 359, 366; Joers, *PW* iv. 162, 164; Krüger, s. 34; Rotondi, *Scritti*, i. 111 ff.; Scherillo, *St. Ratti* (1933) 249–323.

iii. A number of fragments from both *Codices* have reached us through juristic writings of the pre-Justinian period. Collected by P. Krüger, *Collect. libr.* iii. 236 ff.

iv. Every constitution in the *C. Iustinianus*, other than those taken from the *C. Theodosianus* and those published after that *Codex*, comes from the *Gregorianus* or the *Hermogenianus*. Of course such constitutions have been much altered by the compilers.

v. Probably every constitution in the *Fragm. Vat.*, the source of which is not acknowledged to be one of our two *Codices*, is nevertheless so derived.[1]

The *Gregorianus* was a collection of constitutions beginning with Hadrian (inclusive) up to May 291, the year in which it was published. Subsequent additions seem to have differed in the western and eastern editions. The *Hermogenianus* originally contained only the constitutions of 293–4, having probably been published at the beginning of 295. To it also additions were later made. The constitutions of the *Gregorianus* were taken in the main from the imperial archives, and only exceptionally from classical juristic writings.[2] The *Codex* was divided into books, the books into titles; the arrangement was that of the classical *Digesta*.[3] Inside the titles the constitutions were in chronological order. The composer's name was Gregorius, not Gregorianus, and *Codex Gregorianus* means 'Gregory's Code'.[4] He must have belonged to the central bureaucracy, since his work, as shown above,[5] obeys the bureaucratic tendency to stabilize the law. There is no evidence in favour of his having been a professor of Berytus.

The *Hermogenianus* was derived entirely from the archives of the eastern Empire. It was divided into titles only, not books, and doubtless followed the same arrangement as the *Gregorianus*. Inside the titles the constitutions were, as in the *Gregorianus*, in chronological order. The composer's name was Hermogenianus, not Hermogenes, and his book is at times called *Codex Hermogeniani*.[6] He too must have belonged to Diocletian's central bureaucracy. He can hardly be the same man as the late classical jurist of the same name, from whose *libri vi epitomarum* extracts were taken for the *Digest*.

The textual history of the two codices is (apart from the above-mentioned additions) still obscure, but it is *a priori* improbable

[1] Below, p. 311.
[2] Krüger, 318; Rotondi, *Scritti*, i. 123.
[3] Above, p. 226.
[4] Mommsen, *Schr.* ii. 361.
[5] Above, p. 286.
[6] Mommsen, *Schr.* ii. 362.

that their text should have remained absolutely pure up to Justinian's times.[1]

2. *The collection of the Fragmenta Vaticana.*[2] It was in 1821 that Cardinal Angelo Mai discovered in a Vatican manuscript (Cod. Vat. 5766) the fragments of a juristic collection which have for long been known as *Fragmenta Vaticana*. Earlier the manuscript had belonged to the monastery of Bobbio (between Genoa and Piacenza). It is a palimpsest: the underlying text was written in the fourth or fifth century and the text written on top of it in the eighth. Author's name and title are unknown. The work was divided not into books but only into titles; it contained excerpts from classical, or supposedly classical, juristic writings and from imperial constitutions. We have not yet succeeded in discovering its principle of arrangement. We do not even know the system of arrangement within the titles; that at any rate of the constitutions is not chronological. So far as the juristic writings are concerned, only those of Papinian, Paul, and Ulpian seem to be used.[3] Already Ulpian is in the foreground; the absence of Gaius is notable. Some of our fragments did not belong to the original work, but were added later.[4] The fragments are inscribed with the name of the jurist, the title of the work, and number of the book; exceptionally the title inside the book is also given.[5] The composer shortened the classical texts by the simple process of excision, but he made no other changes.[6] His editions of the classics, however, gave texts which had already been profoundly altered in post-classical times.[7] That he used earlier collections of excerpts[8] cannot be proved. As to the imperial constitutions, it is established that he

[1] *Cons.* 5. 7, a rescript of Diocletian, taken from the *C. Hermogenianus*, certainly contains a big interpolation (*sive-competentem*): Lenel, *Z* xv (1894), 388, n. 2; Gradenwitz, *Z* xliv (1924), 572; Solazzi, *SD* v (1939), 231. But the interpolation was most probably added to the text of the *Consultatio* and not taken from an edition of the *C. Hermogenianus*. See further, Albertario, *Athenaeum*, N.S. vi (1928), 327 and 339; *SD* ii (1936), 136; Siber, *ACI, 1933, Roma*, i. 423. See further the acclamations: 'Ne interpolentur constituta' in *Gesta Senatus Rom. de Theodosiano publicando* (Mommsen, *C. Th.* p. 3 and Praef. p. cxxi).

[2] See Note KK, p. 344.

[3] *F.V.* 90–3 are probably from Ulpian (from his *libri* 67–70 *ad edictum*): Kübler, *Gesch.* 387, n. 3. Krüger, *Quellen*, 340, n. 21, regards this origin as excluded by *D.* (43. 3) 1. 8, as compared with *F.V.* 90. But the *Digest* version has obviously been tampered with.

[4] So, doubtless, *F.V.* 224–6, the only three extracts from Papinian's *Quaestiones*, with an unusual introduction at the beginning of 224.

[5] *F.V.* 227, 298, 90–3.

[6] Common opinion, challenged by Beseler, *Z* xlvi (1936), 139.

[7] Above, p. 213.

[8] So Felgenträger, op. cit. Note KK, p. 344, with no sort of proof.

did *not* use the *Codex Theodosianus* of 438; probably his sole sources were the *Gregorianus* and *Hermogenianus*[1] as presented in western editions containing additions not to be found in eastern editions. The original collection seems to have been completed shortly after 318.[2] The latest constitutions in the collection as we have it are of 312, 313, 315, 316, 317, and 318.[3] There are, indeed, two later constitutions, of 330 and 372,[4] but these stand in such obvious isolation that Mommsen rightly pronounces them to be additions to the original collection. Another indication of the collection having been completed soon after 318[5] is that the *damnatio memoriae* of Licinius, which was decreed on 16 May 324,[6] is only partially taken into account in the collection as we have it. Evidently in the original publication the name of Licinius still stood, and it has been expunged only later, and that hastily.[7, 8]

3. *The Collatio legum Mosaicarum et Romanarum.*[9] We have three manuscripts,[10] none of which gives the entire work.

i. The *Codex Berolinensis* (Mommsen's B) is of the ninth century. Its readings are fully given in Mommsen's edition. Hyamson's edition has a full photographic reproduction.

ii. The *Codex Vercellensis* (Mommsen's V) is of the tenth century.

iii. The *Codex Vindobonensis* (Mommsen's W) is of the tenth century.

Mommsen's edition gives the readings of V and W, as well as those of B, in full.

The filiation of the three manuscripts, which till now has not been recognized, is shown by the following tree.[11]

[1] In the original collection the source from which the constitutions were derived was not noted, any more than it is in the *Codex Iust.* But there are some later additions, recognizable as such in the MS. as it stands, which tell us occasionally that the constitution comes from this one or that of the *Codices* named.

[2] In the western Empire: Felgenträger, op. cit., 31.

[3] See *F.V.* 32, 34, 33, 273, 274, 249, 36, 287.

[4] *F.V.* 248 and 37.

[5] So also Felgenträger, op. cit., 30.

[6] *C. Th.* (15. 14) 1.

[7] See *F.V.* 32–6, 249, 273, 274, 287. Cf. Mommsen's smaller edition 11 and 12; *Schr.* vi. 312; Felgenträger, 30.

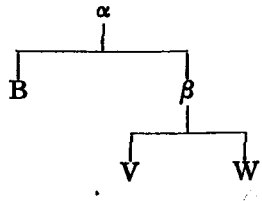
[8] As *F.V.* 66 shows, the collector included *Notae* of Ulpian on Papinian's *Responsa*, which had been deprived of validity by Constantine in 321. But this proves nothing as to the date of the collection, since Constantine did not forbid future copying and reading of these *Notae*. One finds them still in the Egyptian fragments of the *Responsa*: above, p. 221.

[9] See Note LL, p. 344.

[10] For small pieces from two further MSS. see Mommsen, *Praef.* 113, 114; notice of a MS. in Hincmar of Rheims: Mommsen, 112.

[11] I reserve my proof of this *stemma*. Meanwhile: P. Maas, *Byz. Z.* xxxvii (1937), 289 ff.; Rotondi, *Scritti*, i. 127 n. 1. See *Addenda*.

In using the existing editions for critical purposes this *stemma* is indispensable.



This quite singular work, known shortly as the *Collatio*, is a collection of excerpts from classical juristic works and imperial constitutions, with a passage from the Mosaic law at the head of each title. None of our three manuscripts preserves more than a fragment of the work. The introduction, in which no doubt the author and his purpose were declared, is lacking. So is the conclusion, for the end of our most complete manuscript (B) cannot have been the end of the complete work.[1] One manuscript (W) begins *Incipit liber primus*;[2] if that is trustworthy, the work must have been in several books, of which our manuscripts preserve only the first, or rather a fragment of it. The following are the sources used:

(*a*) The *Pentateuch*. But it was not the Hebrew text that was used and translated into Latin, but rather the Septuagint, not, however, in the Greek text, but in Latin versions made in the period preceding St. Jerome's *Vulgate* (end of fourth century).[3]

(*b*) Fragments of classical, or supposedly classical, juristic works. Only the five great jurists of the *Law of Citations*, Gaius, Papinian, Paul, Ulpian, and Modestinus, are drawn on.[4] The texts were not tampered with in the process of incorporation into the *Collatio*, nor was anything expunged from within the excerpts,[5] but they were taken from works which had already undergone revision by post-classical hands.[6]

(*c*) *Imperial constitutions*. In general the *Codices Gregorianus* and *Hermogenianus* are the sole sources. A single constitution, of 390, has

[1] So, rightly, Krüger, 344.

[2] Mommsen, *Praef.* 118. Hincmar of Rheims, also, cites book 1: *sic ut in primo libro*: Mommsen, 112.

[3] Schulz, op. cit., below, p. 344.

[4] Nevertheless the book may have been written before 426: Krüger 344.

[5] *Coll.* 15. 2. 4 (Ulpian, *De off. proc.*): 'Extat denique decretum divi Pii ad Pacatum legatum provinciae Lugdunensis, cuius rescripti verba, quia multa sunt, de fine eius ad locum haec pauca subieci. Denique divus Marcus. . . .' The promised *verba* are missing, but the omission is not due to the collector. The phrase *cuius . . . subieci* is certainly not Ulpian's.

[6] Above, pp. 196, 200; in general Volterra, 'Indice delle glosse III', *RSDI* ix (1936).

been obtained from some other source.[1] No use is made of the *Codex Theodosianus*.

Our text shows clear signs of stratification—an original text worked and built on in divers ways. The isolated constitution of 390 is a clear example of a later addition;[2] it comes at the end of a title, a favourite place for additions. The end of *tit.* 14 is another example; we find here, as nowhere else, a reference to later Novels, but without an exact citation. Further examples are the end of *tit.* 6 and the beginning of *tit.* 7.[3] In *tit.* 4 a text from Papinian's *Responsa* has been added.[4] The biblical passages exhibit numerous additions.[5]

But what is most notable is that the biblical passages are themselves not part of the original work. No special religious bias can be discovered, Semitic or anti-Semitic, Christian or anti-Christian.[6] All that one finds is Mosaic law juxtaposed to and, to that extent, compared with Roman law. But the comparison is unconsidered and superficial, the biblical passages having been tacked on without the least reflection.[7] This much is clear: no reasonable man could have made so considerable an array of juristic materials for the purpose of making so superficial a comparison of them with Mosaic law. A man who was so superficial in his comparison would have been equally superficial in his assemblage of the Roman materials: he would have been content to quote just one or two passages and would not have adduced long series. It follows therefore that the juristic collection existed before the biblical passages were tacked on to it. Thus the question of the authorship and the date of the *Collatio* may well be dropped. There was no single author and, equally, no single date. The wiser course is to distinguish the various stages of the evolution of our text, which were as follows.

i. The original juristic collection. This resembled the *Fragm. Vat.* Its purpose lay purely in the legal sphere, whether the practical or the academic. The author's name and the title of the work are unknown. Since the *Theodosianus* is not used, it must have

[1] *Coll.* 5. 3. The text in *C. Th.* (9. 7) 6, being different, cannot be the source: cf. Mommsen, *Praef.* 127.

[2] So, rightly, Volterra, *Collatio*, 97.

[3] Schulz, *Die biblischen Texte* (below, p. 344), 31, 33.

[4] *Coll.* 4. 5. The author makes no other use of Papinian's *Responsa*. The passage cannot be part of the preceding passage of Paul, since Paul does not transcribe the *responsa* word for word. See Schulz, *Anordnung nach Massen* (below, p. 344), 13.

[5] Schulz, *Die biblischen Texte*, l.c.

[6] Moreover, *Coll.* 5. 3 and 7. 1 are, as we have just said, late additions.

[7] This has been shown once again, briefly and decisively, by Solazzi, *Per la data della Collatio* (below, p. 344), 3 ff.: 'L'autore della Collatio non dimostra nulla di serio.'

been written before 438. The constitution of 390, being a later addition, does not preclude a date before 390. In fact, since the latest of the constitutions originally included is of 292 or 302,[1] a date about the beginning of the fourth century is probable; the author, being a jurist, would not, if he had written later, have passed over later constitutions.[2]

ii. Next, additions may have been made, for example of the passage from Papinian's *Responsa* in *Coll.* 4. 5, before the tacking on of the theological additions. This cannot be proved.

iii. The collection was adapted by some theologian or someone interested in theology. He inserted biblical passages where he thought he saw parallels with Mosaic law, but since he would leave out the many titles to which he found no parallels, he incidentally produced an abridgement. He may also have reduced the series of excerpts. Of him personally there is little that can be said. The attempt to show that he was a Jewish theologian has not been successful. He was probably a Christian; although a Christian bias cannot be detected, the book was current later in Christian circles.[3] St. Ambrose is excluded as the author because of the inferiority of the workmanship and because his authorship would have been known in Christian circles and its memory preserved at least by oral tradition.[4] The theological adaptation may have been before or after 438, since the adapter was no lawyer and would not have been capable of furnishing fresh legal information. The title of the adapted work is also unknown.[5]

iv. Then came further revision, whereby *Coll.* 6. 7 and 7. 1 were added and the biblical passages interpolated. It is possible that at this stage the Roman materials were once more added to. This scheme of the evolution must be the basis of any future research.

4. *The Constitutiones Sirmondianae.*[6] This little collection,

[1] *Coll.* 15. 3.

[2] Cf. Krüger, 344.

[3] Cited by Hincmar of Rheims (about 860) and in a *Collectio canonum* of the tenth or eleventh century: Mommsen, *Praef.* 112–13; Volterra, *Collatio*, 23 ff.

[4] Nor, for the same reason, St. Jerome, as Conrat, *Mél. Fitting*, i. 299, believes, appealing, with unusual lack of critical insight, to *Coll.* 7. 1, which is obviously (above, p. 313) a later addition: the title cannot have begun with *quodsi*.

[5] In our MSS. the title varies slightly (Mommsen, *Praef.* 118): B has 'lex Dei quam Deus praecepit ad Moysen'; VW 'lex Dei quod praecepit Dominus ad Moysen'. But neither title corresponds in the least to the contents. The traditional title must come from someone who had read only the first words. Hincmar of Rheims (Mommsen, *Praef.* 112) writes: 'sicut in primo libro legis Romanae', but this too does not tell us the title.

[6] *Editio princeps*: *Appendix Codicis Theodosiani novis constitutionibus cumulatior, opera Jac. Sirmondi*, Paris, 1631. Standard edition: *Theodosiani libri XVI*, ed. Mommsen, i. 2, pp. 907 ff. See the *Proleg.* i. 1, p. ccclxxix. Ritter's edition of Gothofredus' *Theodosianus* provides a commentary: see next note.

which is named after its first editor, contains sixteen imperial constitutions dealing with ecclesiastical law, of which the earliest is of 333 and the latest of 425. The collection must therefore have been made between 425 and 438, the date of the *Codex Theodosianus*, of which it takes no account. It comes from the western Empire, probably from Gaul. It is a private collection; the constitutions are neither abridged nor interpolated. The fact that ten of them are also in the *Codex Theodosianus*, though there abridged and altered, gives the collection a high historical interest, as providing an ocular demonstration of the methods of treatment applied by the compilers of the *Theodosianus* to their selected constitutions.

5. *The Codex Theodosianus.*[1] This was published on 15 February 438 by the eastern Emperor Theodosius II. More ambitious plans having come to naught,[2] it had been reduced to a collection of the constitutions from Constantine (actually from 312) onwards. The *Gregorianus* served as model: the arrangement was that of the *Digesta*,[3] and inside the titles the constitutions were ordered chronologically. But the *Theodosianus* had statutory force; it was not just a semi-official private collection like the *Gregorianus* and the *Hermogenianus*. The compilers had express orders to alter the constitutions by shortening and otherwise,[4] which they obeyed very thoroughly. In many cases they broke up a constitution and distributed its parts between various titles of the *Codex*. A clear picture of the methods employed can be obtained by comparing the *Constitutiones Sirmondianae* with the corresponding versions of

[1] The older editions have been put out of date by Mommsen, *Theodosiani libri XVI*, i. 1 (1905), *Prolegomena*, with numerous tables; i. 2 (1905), Text of the *Codex Theod.* On it: P. Krüger, *Z* xxvi (1905), 316; P. Maas, *Goetting. Gelehrte Anzeigen*, 1906. Only books 1–8 of *Codex Theod.*, ed. P. Krüger (Fasc. i, 1923; Fasc. 2, 1926) appeared, Krüger dying 11 May 1926. There was no need for another edition, and Krüger's is marred by numerous oversights and misprints (Kübler, *Philol. Wochenschr.* 1924, 451 ff.); it can only be used along with Mommsen's. Literature: Mommsen, *Schr.* ii. 371, 406, 408, 410, 412, and his *Prolegomena*; P. Maas, l.c.; P. Krüger, 'Beitr. z. Cod. Theod.', *Z* xxxiv (1913), 1; xxxvii (1916), 88; xxxviii (1917), 20; xl (1919), 98; xli (1920), 1; xlii (1921), 58; Joh. Sundwall, 'De constitutionibus Theodosiani imperatoris restituendis', *Acta Ac. Aboensis, Humaniora*, iii (1922); Archi, 'Contributo alla critica del Codice Teodosiano', *SD* 1936, 44. A photograph of the Cod. Paris. 9643 (Mommsen, *Praef.*, p. xlii) was published by Omont, *Code Théodosien livres VI–VIII* (1909), see Girard, *NRH* xxxiii (1909), 493. On the *Cod. Halberstadiensis* (Mommsen, *Praef.*, p. lvii) see Alban Dold, *Zentralblatt für Bibliothekswesen*, xliii (1926), 301. The great commentary of Jac. Gothofredus (1665; with additions, ed. Ritter, Lips. 1736) is still indispensable. Gradenwitz's *Heidelberger Index zum Theodosianus* (1925), with *Supplement* (1929), is valuable.

[2] See above, p. 288.

[3] See Mommsen, i. 1, p. xiii f.; Scherillo, 'Il sistema del Codice Teodosiano', *St. Albertoni*, i (1935), 515 ff.; *St. Ratti* (1933), 249.

[4] *C. Th.* (1. 1) 6.

the *Theodosianus*. There was no express order to omit obsolete constitutions, but power to do so was implied in the authorization to abridge and interpolate.[1] In the event the compilers did omit many constitutions of the period, but they also included some that were obsolete—a concession to the academic interest. All constitutions enacted after 312 that were not included *ipso facto* lost their validity[2] from 1 January 439, the date on which the *Codex* came into force; thus the *Gregorianus* and *Hermogenianus* remained in force. In the West also the *Theodosianus* was published with statutory force before the end of 438.[3]

The *Theodosianus* was abrogated by the *Codex Iustinianus* in the East in 529, and in Italy in 554, when Justinian after his conquest of that country introduced his codification into it.[4] In the Visigothic dominions it was superseded by the *Lex Romana Visigothorum* of 506, but an epitome of it was included in that compilation.

The *Theodosianus* has not survived complete. Besides the Visigothic abridgement, to which additions were made, we possess fragments of copies of the complete work.[5] Full details as to the transmission of the text can be found in Mommsen's extensive *Prolegomena*. The historical and legal study of the Theodosianus is as yet in its infancy; the question of interpolations presents a wide field for exploration,[6] nor is this the only problem.

6. *Collections of post-Theodosian Constitutions.* The constitutions enacted between 438 and the *Codex Iustinianus* were never officially collected, but various private collections were made. We have information of the existence of eastern collections;[7] some western collections have reached us.[8]

7. *Private collections of excerpts from the classical jurists.* Such collections were made in the eastern law schools. No one to-day believes any longer in a comprehensive *pre-Digest*, but on a more limited scale, for definite subjects, *florilegia* of the same kind existed.[9] Such may have been the nature of the four mysterious

[1] P. Krüger, 326, is wrong.
[2] With some exceptions: *Nov. Theod.* 1. 5 and 6.
[3] Mommsen, i. 2, p. 1.
[4] *Sanctio pragmatica*, s. 11 (*Novelae*, ed. Schöll, p. 800).
[5] To the fragments given by Mommsen's edition add *P. Oxy.* xv. 1813, on which see Krüger, *Z* xliii (1922), 560.
[6] Gradenwitz, *Z* xxxiv (1913), 274—a brilliant article.
[7] *Const. Haec quae necessario*, s. 2; cf. Rotondi, *Scritti*, i. 221.
[8] Edited in Mommsen's *Theodosianus*, vol. ii (1905): *Leges Novellae ad Theodosianum pertinentes*, ed. P. M. Meyer. The supplement to Gradenwitz's *Heidelberger Index* (above, p. 315, n. 1) gives the complete vocabulary.
[9] Below, p. 322.

libri singulares which were taken at Berytus and Constantinople in the student's first year.[1] But the question is still problematical; perhaps further papyrological discoveries will throw light on it.

8. *The Codex Iustinianus.*[2] On 13 February 528 Justinian appointed a commission to prepare a new collection of imperial constitutions.[3] The task was completed in a year, and the new *Codex* was published on 7 April 529.[4] A series of decisions issued by Justinian after the completion of the *Codex* were incorporated to begin with in a special collection known as the *Quinquaginta Decisiones.*[5] This took place probably at the end of 530 or the beginning of 531, before the immensity of the task presented by the projected *Digest* had been grasped. During the preparation of the *Digest* it became clear that after its completion the *Codex* of 529 would have to be revised; in this revision it was possible to take account of all decisions arrived at and laws enacted by Justinian since the completion of the *Codex* of 529. The revision was completed in 534 and the new *Codex* was published on 16 November of that year under the title of *Codex Iustinianus*[6] *repetitae praelectionis.*[7] The sources from which it was compiled were as follows:

(*a*) The *Codices Gregorianus* and *Hermogenianus*, in eastern editions containing additions to the original *Codices.*

(*b*) The *Codex Theodosianus* of 438.

(*c*) Eastern collections of constitutions after 438[8] and individual constitutions from the imperial archives.

The three above-mentioned *Codices* (*a* and *b*) were the sole sources used by the compilers for the period up to 438.[9] The disposition of the *C. Iustinianus* is a combination of those of the *Gregorianus* and the *Theodosianus.*[10] In each title the constitutions are in chronological order; frequently they are broken into parts,

[1] Above, p. 275.

[2] See Note MM, p. 344.

[3] *Const. Haec. quae necessario.*

[4] *Const. Summa rei publicae.*

[5] This collection is mentioned by *Const. Cordi*, s. 1. The citation of the *Turin Gloss*, on *Inst.* 3. 1. 2, is doubtful—ed. Krüger, *Z. f. Rechtsgesch.* vii (1868), 66, and Alberti, *La Glossa Torinese* (Turin, 1933), 91. On the collection: Joers, *PW* iv. 2775; Di Marzo, *Le quinquaginta decisiones di Giustiniano*, i (Palermo, 1899), ii (1900); P. Krüger, *Festg. f. Bekker*, 1 ff.; Rotondi, *Scritti*, i. 227 ff.; De Francisci, *Aeg.* iii (1922), 68 ff.; Bonfante, *Bull.* xxxii (1922), 277 ff. = *Scritti*, iv. 132 ff.; Pringsheim, 'Die Entstehungszeit des Digestenplanes', *ACI, 1933, Roma*, i. 457 ff.

[6] Not 'Codex Iustinianeus'; Mommsen, *Schr.* ii. 362; *Nov. Iust.* 66. 1. 1.

[7] *Const. Cordi.*

[8] Including, of course, the *Quinquaginta Decisiones.* For the rest: above, p. 316.

[9] *Const. Haec quae necessario* pr.; *Const. Summa rei publicae*, s. 1; Rotondi, *Scritti*, i. 211 ff.

[10] On what follows: ibid. 146 ff., 185 ff.

which are distributed between various titles. A difference from the three older *Codices* is that only constitutions in force were included. In accordance with Justinian's directions[1] the texts of the constitutions included were drastically revised, abridged, and interpolated; in particular, the flowery rhetoric of the constitutions of the *Theodosianus* was severely pruned,[2] in conformity with the bureaucratic tendency towards simplification.[3] A clear picture of what was done is afforded by a comparison of the versions in the *Theodosianus* and the *Iustinianus* of the constitutions contained in both.[4] The *Codex* of 529 and the *Quinquaginta Decisiones* have not come down to us, nor have we the materials for their reconstruction. We possess only two fragments of the *Codex* of 529,[5] though further fragments may come to light. However, considerable information as to the older *Codex* can be gleaned from a minute analysis of the *Codex* of 534.[6] We can, in particular, establish the form in which many constitutions stood before the revision of 534 or before their incorporation in the *Codex* of 529.[7] In this matter research has only begun. A book on the genesis of the *Codex Iustinianus* is needed; G. Rotondi's penetrating studies should be carried farther.

9. *Justinian's Digest.*[8] The scheme for the *Digest* first ripened

[1] *Const. Haec quae necessario*, pr. to s. 2; *Const. Summa*, ss. 1 and 2; *Const. Cordi*, ss. 1–4.

[2] e.g. *C. Th.* (2. 17) 1: '. . . ita demum aetatis veniam impetrare audeant, cum vicesimi anni clausae aetas adulescentiae patefacere sibi ianuam coeperit ad firmissimae iuventutis ingressum, ita ut post . . .', for which *C.* (2. 44) 2 pr. has: 'ita demum aetatis veniam impetrare audeant, cum vicesimi anni metas impleverint, ita ut post....' See further Grupe, *Z* xiv (1893), 224; xv (1894), 327. [3] Above, p. 290.

[4] Where our text of the *C. Th.* depends on the Visigothic *Breviary* alone (above, p. 316), we must, of course, remember that the Visigoths may have abridged; also that the Visigoths may have had an inferior copy to that of Justinian's compilers. Cf. Wieacker, *Symb. Frib.* 259 ff. I have not found very useful Marchi, 'Le interpolazioni risultanti dal confronto tra il Gregoriano, l'Ermogeniano, il Teodosiano, le Novelle Postteodosiane e il Codice Giustinianeo (*sic*)', *Bull.* xviii (1906), 5 ff.

[5] (1) Fragm. of the index of titles: *P. Oxy.* xv. 1814; P. Krüger, Z xliii (1922), 561; De Francisci, *Aeg.* iii (1922), 68 ff.; Bonfante, *Bull.* xxxii (1922), 277 ff. (2) Fragm. of the end of 12. 59 and the beginning of 12. 60: *editio princeps* by Seymour de Ricci in *Études d'histoire juridiques offertes à P. F. Girard*, i (1912), 275. But Naber was the first to see and to prove that the text was a fragment of the *Codex* of 529: *Studi Albertoni*, i (1935), 21; *Riv. di stor. di dir. civ.* xi (1938), 257 ff. Whether the leaf from the *Cod. Iust.* published by Segrè, *St. Bonfante*, iii. 429 ff., is from the *Codex* of 529 or 534 is uncertain: Schulz, *Z* li (1931), 417.

[6] Rotondi, *Scritti*, i. 175, 237 ff.; Pringsheim, *Die Entstehungszeit des Digestenplanes* (above, p. 317, n. 5), 468 ff.

[7] Gradenwitz, *Bull.* ii (1889), 15; xli (1932), 1 ff.; *Z. f. Kirchengesch.* li (1932), 228 ff.; *Z* liii (1933), 409 ff.; liv (1934), 147 ff.; Schulz, *St. Bonfante*, i. 337 ff.; *Acta Congr. iurid. internat., 1934*, i. 83 ff.; Pringsheim, l.c. in last note.

[8] See Note NN, p. 345.

in the course of the year 530.[1] On 15 December 530 the drafting commission was appointed and the necessary instructions were given.[2] The title of the work, *Digesta sive Pandectae*, was settled at the same time,[3] *Digesta* being clearly a tribute to the masterpiece of classical jurisprudence, Julian's *Digesta*.[4] The work was completed in an astonishingly short time. It must have been ready in essentials as early as the summer of 533;[5] it was published on 16 December 533.[6] The introductory statute has come down to us in both Latin and Greek.[7] In it Justinian reports in general terms on the work done. Unfortunately he does not go into technical details, but he emphasizes[8] the fact that by his direction a list of the writings used for the *Digest* is to be published. We possess, in a Greek version, a list of classical works bearing the superscription: 'From what ancient authors and from what books written by them is composed this present system of *Digesta* or *Pandectae* of our most pious Emperor Justinian.' This list is known shortly as *Index Florentinus* or *Index auctorum*.[9]

The manner of the genesis of the *Digest* was first revealed in 1818 by Bluhme, in a brilliant study.[10] His results have been repeatedly and thoroughly checked, but though some details have been found to require correction,[11] his position has proved to be in all essentials unassailable. This is how the compilers went to work:

(i) They first drafted a *schema*, settling the arrangement of the work as a whole and its division into books and titles.[12] This basic system was that of the *Digesta*,[13] though modified in many points.

(ii) The works from which excerpts were to be made were divided into four groups, which we call the Sabinus, the Edict, the

[1] Pringsheim, *Die Entstehungszeit*, &c. (above, p. 317, n. 5), 451 ff., 459.
[2] *Const. Deo auctore*. [3] Ibid. s. 12.
[4] This work was placed symbolically at the head of the *Index Florentinus* (below, p. 145).
[5] The *Institutes* could only be taken in hand when the *Digest* was ready.
[6] *Const. Tanta, Const. Δέδωκεν*.
[7] The two versions differ considerably, neither being simply a translation of the other. We cannot tell which was the earlier. Compare the Greek Edict of the Emperor Julian in Hertlein, *Hermes*, viii (1875), 172, and *Iuliani Opera* (ed. Hertlein), ii. 600, with the Latin version: *C. Th.* (9. 17) 5. Mommsen, *Schr.* ii. 341.
[8] *Const. Tanta*, s. 20. [9] See on the Index above, p. 144.
[10] *Z. f. geschichtl. RW* iv (1818), 256 ff.
[11] Krüger's final results are given in the last edition of the stereotype *Digest*, p. 927, and in the Italian edition ii. 1586 ff. See also Joers, l.c.
[12] *Const. Deo auctore*, s. 5: 'Cumque haec materia . . . collecta fuerit, oportet eam . . . in libros quinquaginta et certos titulos totum ius digerere, tam secundum nostri constitutionum codicis quam edicti perpetui imitationem, prout hoc vobis commodius esse patuerit.' Cf. W. H. Roscher (1917). [13] Above, p. 226.

Papinian, and the Appendix groups. The Appendix group was no doubt composed of works which were discovered or brought forward only during the course of the work. In each group the writings were allotted a definite order.[1]

(iii) Next came the work of excerpting. Of course it was distributed between various members of the commission, and these no doubt employed a subordinate staff. The exact details of the distribution are not known, but we can see that the work of excerpting from all the groups took place concurrently, not successively,[2] and from each group independently, the works of each group being dealt with in the settled order. The excerpts were certainly at once arranged under the various titles of the *schema*, and doubtless the work of adapting, shortening, and interpolating the texts was put in hand forthwith. Thus at the end of the process of excerpting there were four groups of excerpts arranged in the order of the books and titles of the *schema*. Inside the titles the excerpts stood in the order in which they had been made, that is in the order that had been allotted in each group to the works from which the excerpts had come. As it proceeded, the work was guided by imperial decisions, which naturally would be drafted by the head of the commission, Tribonian. In these 'constitutiones ad commodum propositi operis pertinentes'[3] we can watch the progress of the work of excerpting.[4] But many of them appear not to have been included in the *Codex* of 534, and Tribonian may have settled many points by means of imperial instructions to the commission.[5]

(iv) Next, the composition of the titles came up. The first step was that the excerpts from the four groups which had been prepared for each title were put together, title by title: for example, for title 18. 1 *De contrahenda emptione* four heaps of excerpts were lying ready; the four heaps were now put together. In general the largest heap was placed at the beginning of the title. As a rule the groups were kept apart, but sometimes, for reasons that vary greatly, an excerpt belonging to one group was placed among the

[1] This order appears also in the *Index auct.*, as Rotondi, *Scritti*, i. 298 ff., first showed.

[2] Decisively proved by De Francisci in the articles cited in the next note but one.

[3] *Const. Cordi*, s. 1.

[4] See the brilliant studies by Longo, *Bull.* xix (1907), 145 ff., and De Francisci, *Bull.* xxii (1910), 155; xxiii (1911), 39, 186; xxvii (1914), 5; xxx (1921), 154; see also H. Krüger, *Herstellung der Digesten*, &c., 32; Bonfante, *Storia*, ii. 50, n. 2.

[5] In *Const. Tanta*, s. 6*a*, and *Inst.* 2. 23. 7, Justinian says that he has fused the *SC. Pegasianum* with the *SC. Trebellianum*; in his *Codex* there is no enactment on the subject. Cf. H. Krüger, op. cit. 18 ff.

excerpts coming from another group. This, however, was somewhat exceptional; in principle the excerpts were left in the group to which they belonged and in the defined order of the works of that group. Duplicate excerpts were now dealt with; on this and other grounds excerpts were now eliminated, and the work of adapting the texts was completed. This arrangement of the excerpts in groups may seem strange to us, but in antiquity it was a recognized method of assembling a compilation.[1]

Such is the well-grounded dominant view of the manner of the making of Justinian's *Digest*. Two attacks have been made on it.[2] It has been maintained that the compilers could not in so short a time have accomplished the gigantic work of excerpting and adapting. Justinian's report of the production of the *Digest* must be untruthful. The truth is said to be that the compilers availed themselves of various anthologies and collections, perhaps even of a veritable *pre-Digest*, which had been elaborated over long years in the law school of Berytus. All that the compilers did was to complete and re-edit these anticipatory works. These propositions require in the last resort no refutation. Consider what they involve: Justinian was announcing *urbi et orbi* that he had appointed a commission to assemble and edit the classical literature. He declared emphatically that the undertaking was one of the greatest difficulty, which he himself had at first judged to be impracticable.[3] No one, he claimed, had as yet even projected such a work.[4] In the law of promulgation he reported on the enormous work accomplished by Tribonian and his staff, and he published a list of the writings from which excerpts had been taken. But the whole story was a fraud. And it was a fraud which Justinian presented to the hundreds of more mature jurists, who had all studied at Berytus and Constantinople and consequently were bound to detect the imperial fraud at once. Why, they would exclaim, this is only our dear old *pre-Digest*! The mere statement of this absurdity suffices to refute the theory; accordingly it has been rejected by all prudent scholars. Let us hope that

[1] Schulz, *Die Anordnung nach Massen*, &c., *ACI, 1933, Roma*, ii. 11 ff.

[2] (1) Franz Hofmann, Die Komposition der Digesten Justinians (1900); Ehrenzweig, *Z. f. d. Priv.- u. öff. R.*, xxviii (1901), 313 ff. Strongly attacked by Mommsen, *Z* xxii (1901), 1 ff. (*Schr.* ii. 97 ff.); P. Krüger, *Z* xxii (1901), 12 ff.; Joers, *PW* v. 497 ff.; Longo, *Bull.* xix (1907), 132 ff. (2) H. Peters, *Die öström. Digesten-Kommentare u. d. Entstehung der Digesten, 1913, SB. Leipzig*, 65, Heft 1. Rightly rejected by Lenel, *Z* xxxiv (1913), 373; Mitteis, ibid. 402; Rotondi, *Scritti*, i. 87 ff.; Albertario, *Introduzione*, i. 15; Buckland, *Text-book*, 40.

[3] *Const. Deo auctore*, s. 2.

[4] True; Theodosius II's plan was far more modest. Above, p. 288.

we have heard the last of it. Further discussion would be idle. In the words of Goethe: 'Getretner Quark wird breit, nicht stark.' At the present day our eyes have been opened to the grounds from which these erroneous views have sprung.

i. Tribonian and his staff have been underrated, and in truth without the least reason. So influential still was the humanistic depreciation of the vile corrupters of classical jurisprudence.[1]

ii. The fact was rightly emphasized that the compilers could not in so short a time have interpolated the classical texts to the extent which had been assumed from the end of the nineteenth century. But the correct deduction would have been merely: therefore the compilers did not interpolate to the assumed extent. Later research has in fact shown that the compilers, though naturally they made many excisions, were moderate in interpolating. A large proportion of the interpolations do not come from them, but were found by them ready-made in their editions of the classics.[2] Doubtless the number of Justinian's own interpolations is also large. But scores of such interpolations could be made almost mechanically; the substitution of *traditio* for *mancipatio*, of *aditio* for *cretio*, of *fideiussio* for *sponsio*, and so on could be executed for the compilers by their clerical staff. Interpolations of this kind—they are the great majority—could be executed very rapidly.

Our conclusion, therefore, is that Bluhme has been shown to be right in all essentials. That is not to claim that his work does not require amelioration. Improvements have in fact been made by P. Krüger and Joers, and other suggested improvements are at least defensible.[3] With regard to many of the excerpted works we must, unlike Bluhme, pronounce *non liquet*: we do not know to which of the four groups they were assigned nor what position they occupied inside their group. Moreover, the compilers in certain limited branches of their subject may have found and used pre-existing anthologies;[4] and there are other ways in which a given fragment may have found its way into the compilation out of due order.[5] Fresh light may perhaps be thrown by further researches and further discoveries.

[1] Above, p. 265. [2] Above, p. 283. Cf. Collinet, *T* iv (1923), 20 ff.

[3] e.g. above, p. 209. See further Wieacker, *Z* lv (1935), 292.

[4] Thus the four *libri singulares* mentioned above, p. 275, may have been *florilegia*.

[5] Cf. Arangio-Ruiz, 'Precedenti scolastici del Digesto', *Conferenze per il XIV centenario delle Pandette* (Milan, 1931), 287 ff.; 'Di alcune fonti postclassiche del Digesto', *Atti Napoli*, liv (1931); Wieacker, *Gnomon*, ix (1933), 207 f.; Albertario, *Introduzione*, i. 16; Buckland, *Jurid. Rev.* xlviii (1936), 340 ff.; Schulz, *T* xvii (1939), 19 ff.; Düll.-Seidl, *Z* lxi (1941), 406; De Visscher, *CR* 1943, 299.

(v)

Collections of case law can hardly have been numerous in this period, which was making for concentration, not for a further spinning out of the classical problematic literature. We know of only one small anonymous work which may perhaps be assigned to this literary category, the work which since its *editio princeps* has been known as *Consultatio veteris cuiusdam iurisconsulti*.[1] It was first edited in 1577, by Cujas, from a manuscript, the only one, discovered by Loysel. The manuscript has disappeared; Volterra's search for it has till now been fruitless.[2] The *opusculum* was written in the western Empire in the fifth or sixth century; it is doubtful[3] whether it made use of the Visigothic *Breviarium* of 506. Its literary character is problematical. Our text appears not to form a unity, but to consist of three pieces: the first occupying *capp.* 1–3 and 7, 7 *a*, and 8; the second *capp.* 4–6; the third *cap.* 9. The last is a mere addition, being a collection of passages from the *Gregorianus*, the *Hermogenianus*, and the *Theodosianus*. The second piece contains three theoretical discussions (*capp.* 4, 5, 6), in which the statements made are supported by passages from Paul's *Sentences* and the *Hermogenianus*. The first piece contains the answers given by the author to questions of law addressed to him.[4] They, too, are supported by passages from the *Sentences* and the *Gregorianus* and *Hermogenianus*. It is generally assumed that we have here answers given by some jurisconsult to questions put by an advocate (*causidicus*). But this does not accord with the pedagogic tone, which recalls the Autun commentary.[5] The author warns the questioner to pay attention so that he may follow the legal argument. One such warning is directed not to the questioner but to the other listening students. Once the questioner is rebuked for laying a needless question before 'us'.

3. 11: 'Attentus audi, quid loquitur lex subter adiecta: tunc intelleges . . .'; 3. 4: 'Respice leges subter adiectas: tunc intelliges . . .'; and, a little below, 3. 5: 'Ergo testimonium legum, sicut iam dictum est, sequentium diligenter attendite (!): sic agnoscetis (!) . . . .' Compare the

[1] The title was probably not in the MS., but comes from Loysel or Cujas. Standard edition: P. Krüger, *Collect. libr.* iii. 201. Also in Seckel–Kübler, ii. 2. 485 (Kübler); Girard–Senn, *Textes*, 621; Baviera, *FIRA*, ii (1940), 591. See Conrat–Kantorowicz, *Z* xxxiv (1913), 46 ff., where the older literature is given; Volterra, *Indice*, i. 42 (*RSDI* viii. 1935).

[2] Volterra, 'Il MS. della Consultatio etc.', *Acta Congr. iurid. internat. 1934*, ii. 399 ff.

[3] In spite of Wieacker, *Symb. Frib.* (1933), 349.

[4] A parallel to *Schol. Sin.* s. 4.

[5] Above, p. 301.

Autun commentary s. 105, 106: 'Vides quod non qualitas actionis efficit. . . . Haec si tenetis (!), iam videtis. . . .' *Consult. 7a.* 1: 'minime fuerat necessarium consultationem nostram tuis utilitatibus sciscitari.'

Thus the supposed questioner must be a student; it was an old custom of the law schools to lay cases and questions before the teacher for his observations, and this first piece probably contains a real or imaginary scholastic disputation. The occasional employment of locutions habitually used in a *responsum* in practice is not surprising.[1]

(vi)

We have only one representative of general systematic works in this period, namely the book still known as the *Syro-Roman Lawbook*.[2] It has reached us in several oriental versions (Syriac, Arabic, and Armenian); but they are all descended from a Greek version, which itself was probably a translation from the Latin. Now that Nallino's powerful pen has cleared away the accumulation of hypotheses and misunderstandings that had been piled on the work, we can discern its original contents: it was a presentation of the Roman *ius civile*, which took account of the *ius novum* created by the imperial constitutions, but omitted the *ius honorarium*. It was not intended for practitioners, nor yet for ecclesiastical use, but solely for the school; it exhibits the classicizing tendency of the school of Berytus in the fifth century.[3] Whether written at Berytus or elsewhere, such a work can have been inspired only by Berytus. It is therefore justifiable to denominate it 'the Berytean Lawbook'. The current denominations ought, in obedience to Nallino's demonstrations, to be abandoned as incorrect and misleading. In any case the name 'Syrian Mirror' (*Spiegel*) should be rejected unconditionally. As applied to such works as the *Sachsenspiegel* or the *Schwabenspiegel*, the term *Spiegel* or *Mirror* suggests a presentation of the law actually in force, which the *Berytean Lawbook* was not.[4]

(vii)

But little in the nature of commentative literature has come down to us from the fourth and fifth centuries.

[1] Especially *Cons.* 3. 1 and 2: 'Addidisti etiam quod mandatum neque gestis legaliter fuerit allegatum. . . . Quod si verum est (!) . . .'

[2] See Note OO, p. 345.

[3] Above, p. 279.

[4] To adduce the *Mirrour of Justices* (ed. Whittaker, Selden Soc. vii, 1897) would be equally misleading.

1. The Autun commentary on and the Greek paraphrase of the *Institutiones* of Gaius have already been dealt with.[1]

2. Fragments of a Greek commentary on Ulpian's *Libri ad Sabinum* survive in a manuscript of the monastery of Sinai. The traditional name, *Scholia Sinaitica*,[2] is not misleading, provided that it is not understood to imply *scholia* in the ancient sense of marginal notes on a text.[3] The *Scholia Sinaitica* were not originally written in the margin of some manuscript of Ulpian's *Ad Sabinum* and later copied separately, without Ulpian's text. From the beginning they were an independent set of notes, in fact a lemmatic commentary. The initial word or words of the passage to be commented on are given in Latin, and this lemma is followed by the commentary. Occasionally the reader is asked —a usual feature in such commentaries—to skip a few lines, till he reaches a certain catchword, at which the commentary resumes. The text we have is not unitary, but shows stages of evolution. A layer of texts signed *Sab* or *Σαβ* stands out with special clearness; this is the *siglum* of some commentator probably named Sabinus, not that of the classical writer whose work was commented on by Ulpian. Here is an illustration:

Schol. Sin. 15. 41: 'Quid si. Sab. *τῇ τῶν "παίδων" προσηγορίᾳ καὶ οἱ ἔγγονοι περιέχονται, οὐκέτι δὲ τῇ τῶν "υἱῶν". διὰ τοῦτο ὁ δεδωκὼς "τοῖς παισὶ" ἐπίτροπον ἔδοξεν αὐτὸν καὶ τοῖς ἐγγόνοις δεδωκέναι.*'

Translation: 'Quid si. Sab(inus): Under the term "children" are included grandchildren as well, but not under the term "sons". Therefore, if a testator has appointed a tutor for his "children", he is considered to have appointed him also for his grandchildren.'

The text of Ulpian here interpreted is preserved in *D.* (26. 2) 6: 'Quid si nepotes sint? An appellatione "filiorum" et ipsis tutores dati sint, videndum. et magis est, ut ipsis quoque dati videantur, si modo "liberos" dixit: ceterum si "filios", non continebuntur; aliter enim "filii", aliter "nepotes" appellantur.'

The following are the classical works cited in the surviving fragments: Ulpian's *Ad Edictum*, Paul's *Responsa* and *Libri ad Sabinum*, Florentinus' *Institutiones*, Marcian's *Liber singularis ad formulam hypothecariam*, and Modestinus' *Regulae* and *Differentiae*. Thus the work did not limit itself to the five great jurists of the *Law of Citations*.[4] Also cited are the three older collections of constitutions (the *Gregorianus*, *Hermogenianus*, and *Theodosianus*). The commentary in the form in which we have it must therefore

[1] Above, pp. 301 and 305.
[2] See Note PP, p. 345.
[3] Zuntz, *Byzantion*, xiv (1939), 551.
[4] Above, p. 282.

have been written before 529, when these *Codices* ceased to be in force, and probably before the end of the fifth century. The writer or writers cannot have had Ulpian's authentic text to comment on. We have seen[1] that Ulpian's *Libri ad Sabinum* were early subjected to a specially severe revision; the composer of the *Fragm. Vat.* was already using a post-classical second edition of the work. The fact that an interpolated text from Ulpian's *Ad Sabinum* occurs in the *Digest* and that the same interpolated text is the subject of commentary in the *Scholia Sinaitica* is to-day no occasion for surprise: the coincidence is just evidence of the fact that Ulpian's text underwent interpolation before Justinian. So long as only interpolations by Justinian were thought of,[2] one was driven to the conjecture that one stratum of text in the Sinai fragments came from the age of Justinian—an ill-conceived expedient,[3] for after the promulgation of the *Digest* who would have troubled to revise an old commentary the use of which had been forbidden? But to-day the difficulty no longer arises. It is impossible to state anything on the size of the commentary. At the foot of one page[4] stands the figure κα′ (= 21), so that twenty quaternions must have preceded. But the *Codex* may have contained a miscellany.

The fragments preserved in *P. Ryl.* iii. 475, are probably fragments of the same commentary (though, of course, not of the same manuscript). The language is the same and a Greek marginal gloss is signed 'Sab.', as in the *Scholia Sinaitica*. If this conjecture is right, then *P. Ryl.* shows an earlier state of the commentary (compared with that in the *Schol. Sin.*) in which the glosses signed 'Sab.' had not yet been inserted in the text of the commentary, but still stood on the margin. Unfortunately *P. Ryl.* is so very mutilated that it is impossible to come to an assured decision.

3. The Sinai fragments have reached us by a pure accident. There must, of course, have been many other eastern commentaries,[5] especially on Ulpian's *Ad Edictum*. The writings of the fifth-century Berytean professors are constantly cited by later jurists,[6] but, apart from an exception already noticed,[7] never with a precise

[1] Above, p. 213. [2] Above, p. 142.

[3] An explanation to which I was myself driven in 1913, before I had realized the extent of the pre-Justinian interpolations: *Z* xxxiv (1913), 67, n. 2, 87, 103. Rightly rejected by Krüger, 363, n. 13; Kübler, *Gesch.* 392, and in the preface to his edition.

[4] See *Z* iv (1883), 13.

[5] *PSI* 55 (= *Bull.* 24, 1911, 180) is not a pre-Justinian work. Wrong Partsch, Aus nachgel. u. klein. Schriften (1931), 19; Taubenschlag, 27. See *Addenda*.

[6] See the evidence in Heimbach, *Bas.* vi (*Manuale*), 9 ff.; Kübler, Seckel–Kübler, ii. 2. 515 ff.; Krüger, 361 ff.; Rotondi, *Scritti*, i. 113. [7] Above, p. 307.

title. But obviously, if we read that some professor gave an interpretation of a passage in the *Gregorianus*, it does not follow that he was the author of a commentary on that *Codex*. He may have given the interpretation on some other occasion, as the *Schol. Sinaitica* show.

4. We have knowledge of Latin commentaries on the three older *Codices* (the *Gregorianus*, *Hermogenianus*, and the *Theodosianus*) and on the *Sentences* of Paul. We also possess fragments of a copy of the *Theodosianus* with a Latin commentary in the margin.[1] Moreover, the *interpretationes* of the three *Codices* and Paul's *Sentences* given by the Visigothic *Breviary* are not original Visigothic work, but are based on fifth-century Latin commentaries.[2]

(viii)

It remains to mention the fragment of a work by Anatolius, which we would call the *Dialogus Anatolii*.[3] Only scanty beginnings and ends of lines survive, so that not much can be inferred as to its contents, but for the history of juristic literary forms the fragment is not uninteresting. It is a dialogue between Anatolius and a *tiro*, that is a student. The student proposes theoretical problems to the teacher and Anatolius answers. For example, B. v. 12: '*τίρ(ωνι)*: *ἆρα . . . τί λέγεις π[ερὶ τούτου·] Ἀνατόλιος. . . .*' This literary form of *colloquium scholasticum* is ancient, but there is only one case of its employment in Roman juristic literature: Iunius Brutus' work *De iure civili* was a dialogue between father (teacher) and son (learner).[4] In the *scholia* of Thalelaeus and Stephanus[5] we meet with scholastic colloquies of the age of Justinian. Anatolius' *Dialogus* admits of no more exact description: it may belong either to the isagogic category or to that of

[1] Edited by Manenti, *St. Senesi*, iii (1887), 259 ff.; iv (1887), 141 ff.; v (1889), 203 ff. Cf. Mommsen, *Theodosianus*, i. 1, p. xliv f., and Krüger, 237. G. Haenel, *Antiqua summaria Codicis Theod.* (1834), should not be used: Krüger, *Z* vii. 1 (1886), 138 ff.

[2] Wieacker, 'Lateinische Kommentare zum Codex Theod.', *Symb. Frib.* (1933), 259 ff., giving a list of the literature—a thorough piece of work, but needing some correction in detail. To be added Buckland, 'The Interpretationes to Pauli Sententiae and the Codex Theodosianus', *LQR* lx (1944), 361. Solazzi, *Festschrift Koschaker*, i (1939), 52 ff., tries to prove the existence of a commentary on the *constitutiones* of Caracalla. A Greek summary of imperial constitutions in *P. Ryl.* iii. 476 is unfortunately much mutilated.

[3] First edited by Schönbauer, *Aeg.* xiii (1933), 621 ff., and *Z* liii. 451 ff. We must reject the name given to it by the editor: 'Papyrus Festheft Wilcken'!

[4] Above, p. 93.

[5] e.g. *schol.* 2 *ad Bas.* 39. 1. 1 (Heimbach, 2. 2). On scholastic dialogues other than juristic: Krumbacher, *Gesch. d. byz. Lit.* (ed. 2, 1897), s. 232, p. 562; Fitting, *Jur. Schr. des früheren Mittelalters* (1876), 51; Oellacher, *Wien. St.* lv (1937), 78.

definitiones and *regulae* or to that of *quaestiones*; lastly, it is possible that a commentary on some classical work, such as Paul's *Ad Sabinum*, was presented in this form.

(ix)

We have only a few remarks to offer on the legal language of this period.

1. In essentials Diocletian's chancery kept to the language of the classical constitutions. A more emphatic style is adopted by Diocletian in his edicts than in his *subscriptiones*,[1] which is in the classical tradition, but even so the style remains clear and intelligible. But with Constantine an unrestrained rhetoric invades the chancery: the simple clear expression is now avoided with deliberate artifice; the *proprietas verborum*, upon which the republican and classical jurists alike had spent such pains,[2] is systematically abandoned; it is a labour to extract the sense from the flowery verbiage.[3] The style of Constantine's constitutions accords completely with that of Cassiodorus' *Variae*; Justinian's, on the contrary, exhibit an evident reaction: his classicizing and simplifying tendencies find expression even in his language. The same tendencies are also apparent in his revision of the constitutions of the *Theodosianus*: his compilers have systematically pruned their wild rhetorical artificialities.[4]

2. The non-official productions all doubtless come from the law school; consequently their language has a scholastic tone. The writer addresses imaginary students: 'you see', 'you come and say', 'this is new to you and you ask', 'put to yourself the following case', 'there is your answer'—these and the like phrases are now current; both genuine and rhetorical questions are much the fashion.[5] It is a style which, naturally, we also meet with in our interpolated classical texts. It is not, as was long believed, Byzantine Latin, but the language current in the western schools.

[1] For example, Diocletian's edicts in *Coll.* 6. 4 and 15. 3.

[2] Above, p. 98.

[3] Schulz, 82; Sargenti, *Il. dir. priv. nella legislaz. di Costantino* (1938), 177 ff. Vernay's attempt to minimize the contrast between Diocletian and Constantine (*Ét. Girard*, ii (1913), 263 ff.) is unsuccessful. A wide gulf divides the elevated style of Diocletian's edicts from the wild rhetoric of the fourth century.

[4] An example above, p. 318. On Justinian's Latin: Eisele, *Z* vii. 1 (1886), 15 ff.; *Beitr. z. röm. Rechtsgesch.* (1897), 225; Grupe, *Z* xiv (1893), 224; xv (1894), 327. The evidence can be found in Longo's 'Vocabolario delle costituzioni lat. di Giustiniano', *Bull.* x (1897/8).

[5] Cf. the *Autun Commentary* (above, p. 301), the *Schol. Sinaitica*, and the *Paraphrase* of Theophilus.

3. From the fourth century onwards a strange law-Greek[1] develops. Latin words are adopted into Greek, to some extent graecized. Thus arises a peculiar blended language, of which we have examples in the *Schol. Sinaitica*.[2]

See, for instance, *Schol. Sin.* 9. 21: 'Ob donationes: μὴ ἰσχυέτω pacton ἀναιροῦν τὴν ob res donatas ἢ ob res inpensas ἢ ob res amotas retentiona.'

[1] Crusius, *Phil.* lxii (1903), 133 ff.; Zilliacus, *Zum Kampf der Weltsprachen im oström. Reich*, Ak. Abh. Helsingfors, 1935; Christ–Schmid–Stählin, *Gesch. d. griech. Lit.* ii. 2 (1924), 945 ff.

[2] Also in the *Dialogus Anatolii* (above, p. 327). See also Triantaphyllides, *Lexique des mots latins dans Théophile et les Novelles de Justinien.*

EPILOGUE

'Iureconsulti, suae quisque patriae legum (vel etiam Romanarum aut Pontificiarum) placitis obnoxii et addicti sincero iudicio non utuntur, sed tanquam e vinculis sermocinantur.' Fr. Bacon, *De dignitate et augmentis scientiarum*, viii. 3. 10.

I. THE completion in 534 of Justinian's codification marks the close of Roman jurisprudence in the proper sense. Jurisprudence thereafter is Byzantine in the East, Romanistic in the West.[1] A long series of Novels were, indeed, enacted by Justinian and his successors in the East, but for centuries the character of jurisprudence was determined by the *Digest* and *Code*. The astonishing similarity of the *scholia* of the *Basilica* and the Bolognese glosses strongly suggests that Bolognese jurisprudence was influenced by Byzantine. But there is no evidence of this.[2] The truth is that both at Byzantium and Bologna the governing influence on jurisprudence was Justinian's codification; the same similarity would be exhibited by any jurisprudence which elaborated Justinian's codification in accordance with his directives.[3] We cannot here give a detailed account of the new jurisprudence either of Byzantium or Bologna which was built on this foundation, though it is only by such an account that the contrast between jurisprudence before and after Justinian's codification could be exposed in all its sharpness. It would be profitable also to compare the effects of Justinian's codification on jurisprudence[4] with those of the fixing of the canon of the New Testament on theology.[5]

II. The outstanding characteristic of the new jurisprudence is its rigid adherence to the codification (with the subsequent *Novels*). What had not been received into the codification was to be ignored by jurisprudence,[6] and with insignificant exceptions[7] was in fact ignored. Now though in what it had received the

[1] Above, p. 2.

[2] Kantorowicz, *Z* xxx (1909), 96 ff.; Pringsheim, *Beryt u. Bologna*, 205; Genzmer, *ACI Bologna*, i (1934), 365.

[3] Pringsheim, op. cit. 211, but this interesting study now needs thorough revision.

[4] We refer to its effects only on jurisprudence, not on practice. As regards the latter see Taubenschlag, 'The legislation of Justinian in the light of the Papyri', *Byzantion*, xv (American Series, *i*, 1940), 280 ff.

[5] A. v. Harnack, *Die Entstehung des Neuen Testaments* (1914), 76 ff.; *The Origin of the New Testament*, transl. by Wilkinson (1925), 115 ff. We shall cite the English version.

[6] *Const. Tanta*, s. 19.

[7] For example Thalelaeus: Krüger, 411.

codification undoubtedly saved a valuable part of the pre-Justinian sources, especially the classical, from perishing, equally it consigned to oblivion and annihilation whatever it had not received. A similar effect has been attributed to the fixing of the canon of the New Testament: 'it has preserved to us the most valuable portion of primitive Christian literature, yet at the same time it delivered the rest of the earlier works to oblivion.'[1]

To the sources thus rigidly delimited the harmonizing exegesis expressly prescribed by Justinian[2] was now applied at Byzantium and Bologna alike. Contradictions between the various fragments, however widely separated they might be in dates of origin, were not to be admitted as existing; wherever consistency had not been achieved by the compilers it was to be achieved by every artifice, however forced, of 'dogmatic exegesis'. The results on jurisprudence were disastrous. The historical meanings of the texts were obscured and distorted, their colours toned down to a uniform grey, their historical contours obliterated; the circumstances in which this or that decision had been given were ignored. Above all, the science was obscured by an ever-spreading forest of fine-spun *distinctiones* and *solutiones contrariorum* which, for the most part, lack any juristic value, since they are not the products of juristic reflection on juristic problems, but of sham and empty cleverness and pseudo-philology. In consequence, jurisprudence took on an unrealistic, unpractical, and frivolous character which had been entirely alien to pre-Justinian and especially classical jurisprudence. The pre-Justinian *Codices* had never been subjected to exegesis of such a kind. Imposing as is Justinian's codification, the jurisprudence which grew out of it is of a lower order. Little as one can overlook our debt to it, it served in countless instances merely to confuse, cripple, and disintegrate dogmatic jurisprudence. It involved a vast expenditure of human intelligence and industry, but its permanent results are quite modest. Legal science can be fruitful only on condition of being a science of *law* and not merely the science of artificially patching up the contradictions and deficiencies of a codification. Of such a science v. Kirchmann's[3]

[1] Harnack, 131. See St. Jerome's dictum (cited by Harnack, 135): 'Quid necesse est in manus sumere quod ecclesia non recipit? Omne, quod dicitur in libris canonicis, quaeritur, et plus legisse peccare est.'

[2] *Const. Tanta*, s. 15. Cf. Tertullian, *De pudicitia*, c. 19 (*CSEL* xx. 262): 'Totius sacramenti interest nihil credere ab Johanne concessum, quod a Paulo sit denegatum: hanc aequalitatem spiritus sancti qui observaverit, ab ipso deducetur in sensus eius.' Harnack, 140 ff.

[3] See Th. Sternberg, *J. H. v. Kirchmann und seine Kritik der Rechtswissenschaft* (1908), pp. 9 ff. E. Landsberg, *Gesch. d. deutsch. RW* 3 (1910), 739 ff.

aphorism will ever be true: 'one stroke of the legislator's pen and whole libraries become waste-paper.'

All this is what makes the year 534 the decisive turning-point at which the historian of *Roman* legal science is entitled to lay down his pen.

NOTES

NOTE A (*p. 25*)

Only our knowledge of the Roman forms is less; our reports are often silent as to the symbolic acts. We cannot go into details here. There is as yet no work corresponding to Grimm's *Rechtsaltertümer*. Jhering, *Geist*, ii, ss. 46–47 d, made an interesting first attempt, but is now out of date. The collection of materials in Brissonius, *De formulis* (last ed. Bach, 1783), is quite out of date and hardly serviceable now. One has to collect the forms of sacral law from Wissowa's *Religion*, those of public law from Mommsen's *Staatsr.*, and those of private law and civil procedure from the text-books on those subjects. For the most part they need closer critical study; a beginning is made by G. Appel, 'De Romanorum precationibus', *Religionsgeschtl. Versuche u. Vorarbeiten*, vii. 2 (1909).

NOTE B (*p. 28*)

A *consecratio* (Macrob. *Sat.* 3. 9. 10 f.; cf. Wissowa, 384, n. 6): 'Carthaginem exercitumque, quem ego me sentio dicere . . . quos me sentio dicere . . . si haec ita faxitis, ut ego sciam sentiam intellegamque. . . .' *Votum* of *ver sacrum* (Liv. 22. 10. 2 f.): 'Si res publica populi Romani . . . sicut velim sentiamque' (this or *sciamque* must be read) 'salva servata erit. . . .' *Dedicatio* and *consecratio* of a temple (*ILS* 4908): '. . . quam me sentio dedicare. . . .' The clause is already completely stereotyped in the *vota* of the Arval brethren (Henzen, *Acta fratrum Arvalium*, 100 f.): '. . . imperatorem Caesarem . . . Traianum . . . quem nos sentimus dicere!' On these clauses: Wissowa, 398, n. 4; Appel, *De Romanorum precationibus* (1909), 146; Haegerström, *Das magistratische ius*, &c. (above, p. 12, n. 1), 52, n. 3; Norden, *Aus altröm. Priesterbüchern*, 55.

NOTE C (*p. 30*)

Twelve Tables, 4. 2: 'Si pater filium ter venum duit, filius a patre liber esto.' From the late ceremonies of emancipation and adoption of a person *alieni iuris* it does not follow (as is generally supposed, e.g. by Jhering, *Geist*, ii. 458) that this clause was confined by interpretation to sons. For these ceremonies come from a time when children were no longer really sold, so that the rule of the Twelve Tables had long gone out of application in practice. No doubt those who devised the ceremonies believed that in the days of its practical application the rule was confined to sons, but they had very little knowledge of those days. In fact, they interpreted the tabular rule precisely as they themselves would have interpreted a *lex rogata*: cf. above, p. 30.

NOTE D (*p. 38*)

Meaning thereby the movements of the Greek spirit from Alexander to Augustus: Wilamowitz-Möllendorff, *Hellenist. Dichtung in d. Zeit des Kallimachos*, i (1924), 2. A satisfactory account of Hellenism has not and cannot yet be given; only particular aspects have been treated of. The study of the Hellenistic scientific movement has only been begun. The capital work (in spite of all deficiencies) remains J. Kaerst, *Gesch. d. Hellenismus*, especially vol. ii (ed. 2, 1926), 80 ff. The further literature, which is scattered and has never been collected, cannot be cited here. An introductory orientation is given by Otto, *Kulturgesch. d. Altertums* (1925), 94; V. Ehrenberg,

Der griech. u. d. hellenistische Staat (Gercke–Norden, *Einl. in d. Altertumswissensch.* iii, Heft 3, 1932) giving literature; Momigliano, 'Genesi storica e funzione attuale del concetto di ellenismo' (*Giorn. crit. della filosofia italiana*, xvi (1935), 10 ff., literature, p. 30). Many works on literary history have dealt with the relations between Rome and Hellenism. Schanz-Hosius, i. 45, 179, 636, n. 1, collects the literature. The Hellenistic sections in Jacob Burckhardt's *Griech. Kulturgesch.* remain as masterly as ever. Important is Ed. Fraenkel, *Rome and Greek Culture* (1935), 5–26.

NOTE E (*p. 44*)

Servius Sulpicius began by wishing to be an advocate, like Cicero. Cf. Cic. *Brut.* 41. 151: 'in isdem exercitationibus ineunte aetate fuimus.' This does not exclude the possibility that he was an *auditor* of Q. Mucius Scaevola *pont.*, even as Cicero was. Gelzer, *PW* vii A. 829. It may be that it was in this manner that the scene reported by Pomponius (*D.* 1. 2. 2. 43) occurred when Q. Mucius told Servius 'turpe esse patricio et nobili et causas oranti ius in quo versaretur ignorare'. (Exactly to the same effect Cic. *Orat.* 34. 120: 'Ius civile teneat' (sc. *orator*) 'quo egent causae forenses cotidie. Quid est enim turpius quam legitimarum et civilium controversiarum patrocinia suscipere, cum sis legum et civilis iuris ignarus?' Cicero may have heard this maxim from Q. Mucius.) But Servius did not at once follow Mucius' advice to become a jurisconsult, as Pomponius' pretty tale would have it. He went in 78 (thus after Mucius' death) with Cicero to Rhodes, in order to perfect himself in rhetoric (Cic. *Brut.* 41. 151), and his decision to become a jurisconsult was made after his return: 'inde ut rediit, videtur mihi in secunda arte' (jurisprudence, on Cicero's rating) 'primus esse maluisse quam in prima' (rhetoric) 'secundus' (ibid.). Thereupon he betook himself for instruction in law to L. Lucilius Balbus and C. Aquilius Gallus: ibid. 42. 154.

NOTE F (*p. 44*)

Cic. *Brut.* 89. 306: 'ego autem in iuris civilis studio multum operae dabam Q. Scaevolae Q.F.' That means the *augur*, not the *pontifex*, since the latter was 'P(ublii) F(ilius)'. Karlowa, *RG* i. 481, is therefore wrong. Cic. *De am.* 1. 1: 'Q. Mucius augur multa narrare de C. Laelio socero suo memoriter et iucunde solebat. . . . ego autem a patre ita eram deductus ad Scaevolam sumpta virili toga, ut, quoad possem et liceret, a senis latere nunquam discederem. itaque multa ab eo prudenter disputata, multa etiam breviter et commode dicta memoriae mandabam fierique studebam eius prudentia doctior; quo mortuo me ad pontificem Scaevolam contuli. . . . sed de hoc alias, nunc redeo ad augurem. Cum saepe multa, tum memini domi in hemicyclio sedentem, ut solebat, cum et ego essem una et pauci admodum familiares. . . .' We shall have to return to this vivid picture below when dealing with legal education. Cf. Gelzer, *PW* vii A. 829.

NOTE G (*p. 49*)

Cic. *De orat.* 3. 33. 133 (the speaker is the orator L. Crassus, 140–91 B.C.): 'M'. vero Manilium nos etiam vidimus transverso ambulantem foro; quod erat insigne eum, qui id faceret, facere civibus suis *omnibus* consilii sui copiam. Ad quos olim et ita ambulantes et in solio sedentes domi sic adibatur, non solum ut de iure civili ad eos, verum etiam de filia conlocanda, de fundo emendo, de agro colendo, de omni denique aut officio aut negotio referretur.' Perhaps rather a rosy picture of the good old times, but that *cavere* was one of a jurisconsult's duties is definitely stated by

the orator Antonius in *De orat.* 1. 48. 212: 'Sin autem quaereretur, quisnam iuris consultus vere nominaretur, eum dicerem, qui legum et consuetudinis eius, qua privati in civitate uterentur, et ad respondendum et ad agendum et ad cavendum peritus esset, et ex eo genere Sex. Aelium, M'. Manilium, P. Mucium nominarem.'

NOTE H (*p. 49*)

Testator wishes to leave someone a legacy subject to what is called a negative potestative condition—stock example: 'Titio, si in Capitolium non ascenderit, heres meus centum dare damnas esto.' From this Titius can derive no personal benefit, since the realization of the condition can only be ascertained when he dies. Hence Q. Mucius *pont.* advised the following form: 'Titio, si caverit se legatum, si in Capitolium ascendisset, cum fructibus restituturum, heres meus centum' *rell.* This, nothing else, was Q. Mucius' *cautio*: Beseler, *Z* xlvii (1927), 60. The text-books are mostly wrong. For Q. Mucius' cautelary jurisprudence in connexion with *sacra*: Cic. *De leg.* 2. 20. 51, on which Kübler, *Z* ii (1881), 37 ff.; Lepointe, *Q. Mucius Scaevola* (1926), 100 ff. Bruck, *Seminar* III (1945), 1 ff.

NOTE I (*p. 49*)

(1) For a case in which four jurisconsults (Cascellius, Ofilius, Trebatius, Labeo) were consulted see *D.* (28. 6) 39 pr. Trebatius' cautelary jurisprudence: Cic. *Ad fam.* 7. 6: 'tu, qui ceteris cavere didicisti, in Britannia ne ab essedariis (fighters in war-chariots) decipiaris caveto.' Caesar thanks Cicero for having sent him Trebatius, because till then there was no one by him who could draft a *vadimonium*: Cic. *Ad Q. Fratrem*, 2. 14. 3. (2) Servius' cautelary jurisprudence is attested by Cic. *De leg.* 1. 5. 17: 'Non enim id quaerimus hoc sermone, Pomponi, quemadmodum caveamus in iure aut quid de quaque consultatione respondeamus. Sit ista res magna, sicut est, quae quondam a multis claris viris, nunc ab uno summa auctoritate et scientia sustinetur.' Only Servius can be meant: cf. Bake, *Cic. de leg.* (ed. 1873), p. 318. The text is wrongly applied by Pernice, *Labeo*, i. 3.

NOTE J (*p. 54*)

Let us give a correct translation of Cicero's pronouncements on Q. Mucius' oratory. Cicero uses technical terms, which must, of course, be taken in their technical sense. On the terminology: Ernesti, *Lexicon terminologiae latinorum rhetoricae*, Leipzig, 1797 (not entirely superseded); Ch. Causeret, *Ét. sur la langue de la rhétorique et de la critique littéraire dans Cicéron*, Paris, 1886; P. Geigenmüller, *Quaestiones Dionysianae de vocabulis artis criticae* (Diss. phil. Leipzig, 1908). *Brut.* 39. 145 f.: 'an exceedingly acute legal thinker; his language very terse and admirably suited to legal discussion(!). An incomparable interpreter of the law, but in the matters of emotional appeal, oratorical embellishment and debate a formidable critic rather than a marvellous orator.' Ibid. 52. 197: 'knowing and versed in the law, terse and pithy, sufficiently(!) ornate, and very exact, clear and simple' ('breviter et presse et satis ornate et pereleganter', *eleganter* meaning not 'elegance' but clarity and correct choice of words, but with avoidance of all rhetorical, and especially emotional, appeal: Geigenmüller 30). *Brut.* 30. 115: 'clear and polished, as always, but deficient in the force and amplitude demanded by the nature of the suit and the importance of the case'. *De or.* 1. 39. 180: 'profoundly learned in the civil law and a most acute legal thinker, his language refined and unadorned' (*maxime limatus atque subtilis, subtilis* meaning *ἰσχνός* = in plain terms: Causeret, 153). *De or.* 1. 53. 229: 'as his manner was, without adornment, plainly and clearly.' If one does not allow oneself

to be deceived by the polite terms in which Cicero thinks proper to refer to his former teacher, one sees that he thought nothing of Q. Mucius as a rhetorician. All his judgments come to this, that he considered him as a speaker too brief, too objective and unemotional, in short too much of a lawyer.

NOTE K (*p. 54*)

In Cic. *De or.* 1. 55. 23–6 the orator Antonius says: 'Nunc vero iuris consultum *sine hac eloquentia*, de qua quaerimus, fateris esse *posse fuisseque plurimos*.' Of Crassus, who advocated the combination of jurisprudence and rhetoric, he says: 'novo et alieno ornatu velis ornare iuris civilis scientiam.' Cicero's judgment on the jurists as orators is uniformly unfavourable. We have just quoted him on Q. Mucius *pont.* Of Rutilius Rufus' speeches he admits the sobriety, their excellent law, their acuteness and art, but regards them as dry and unattractive to the vulgar (*Brut.* 30. 114). Q. Aelius Tubero (consul 118) was, in his eyes, nothing of a speaker (ibid. 31. 117). His own teacher, Q. Mucius Scaevola *aug.*, was likewise no orator (*oratorum in numero non fuit*), though an outstanding jurist (ibid. 26. 102); his speeches in the Senate were brief and unadorned (*breviter impoliteque—De or.* 1. 49. 214). The criticisms all come to this, that the jurisconsults spoke too tersely, too objectively, too juristically, in other words unrhetorically. In *De leg.* 1. 14. 12 he says accordingly that studying law seriously is dangerous for the orator.

NOTE L (*p. 67*)

Some definitions: *tutela* (*impuberum* omitted by the compilers): *D.* (26. 1) 1 pr. (Servius); *dolus* in the *actio doli*: Cic. *De off.* 3. 14. 60 and *De nat. deor.* 3. 30. 74 (Aquilius Gallus); also *D.* (4. 3) 1. 2 (Ulpian quoting Servius), on which cf. Pernice, *Labeo*, 2. 1. 208, and Partsch, *Z* xlii (1921), 249; *penus*: Gell. 4. 1. 17 (Q. Mucius and Servius); *litus*: Cic. *Top.* 7. 32 (Aquilius Gallus); *testamentum*: Gell. 7. 12. 1 (Servius); *gentiles*: Cic. *Top.* 6. 29 (Q. Mucius); *ambitus*: ibid. 4. 24 (P. Scaevola); *postliminium*: ibid. 8. 37 (Q. Mucius); *aqua pluvia*: ibid. 9. 38 (Q. Mucius); *pars*: Paul, *D.* (50. 16) 25. 1 (Q. Mucius and Servius); *vindicia*: Festus, 376 (Servius); *religio*: Macrob. 3. 3. 8 (Servius); *noxia*: Festus, 174. 2 (Servius); *sacellum*: Gell. 7. 12. 5 (Trebatius); *argentum factum*: Ulp. *D.* (34. 2) 19. 9; 27 pr. (Q. Mucius); *silva caedua*: Gaius, *D.* (50. 16) 30 pr. (Servius); *suppellex*: Celsus, *D.* (33. 10) 7 (Tubero and Servius). On the corruption of the last text see *Index Interp.* In it Servius says: 'non ex opinionibus singulorum, sed ex communi usu nomina exaudiri debere.' As Eisele, *Jherings Jahrb.* xxiii (1885), 39, pointed out, Servius is adopting the Stoic doctrine. Whether the defective definitions of *abalienatio* and *hereditas* given by Cic. *Top.* 5. 28 f. come from juristic works is very doubtful; Varro's definition of *dos*, *De l.l.* 5. 175, certainly does not.

NOTE M (*p. 69*)

Cic. *Brut.* 41. 152: 'Hic Brutus: Ain tu? inquit. Etiamne Q. Scaevolae Servium nostrum anteponis? Sic enim, inquam, Brute, existimo, iuris civilis magnum usum et apud Scaevolam et apud multos fuisse, artem in hoc uno. Quod nunquam effecisset ipsius iuris scientia, nisi eam praeterea didicisset artem, quae doceret rem universam *tribuere in partes*, latentem explicare *definiendo*, obscuram explanare interpretando, ambigua primum videre, deinde *distinguere*, postremo habere *regulam*, qua vera et falsa iudicarentur et quae quibus propositis essent quaeque non essent consequentia. Hic enim adtulit hanc artem omnium artium maximam quasi lucem ad ea quae confuse ab aliis aut respondebantur aut agebantur.—

Dialecticam mihi videris dicere, inquit.—Recte, inquam, intelligis.' (A similar description of the dialectical method is given in *Orator*, 4. 16.) This text, which exactly describes dialectic, deserves a closer examination than we can give here. Cf. J. Marthe, *Œuvres de Cicéron. Brutus* (1892), 116. That the words *adtulit quasi lucem* are a reminiscence of the passage of Plato's *Philebus* quoted in the last note appears hitherto to have escaped attention. Cf. Th. B. De Graff, *Class. Phil.* xxxv (1940), 43 ff.

Note N (*p. 69*)

Cic. *De or.* 1. 42. 188 f.: 'Adhibita est igitur ars quaedam extrinsecus ex alio genere quodam, quod sibi totum philosophi adsumunt, quae rem dissolutam divulsamque conglutinaret et ratione quadam constringeret. . . . Tum sunt *notanda genera* et ad certum numerum paucitatemque revocanda. "Genus" autem id est, quod sui similes communione quadam, specie autem differentes, duas aut plures complectitur partes. "Partes" autem sunt, quae generibus eis, ex quibus manant, subiciuntur. Omniaque, quae sunt vel generum vel partium nomina, *definitionibus*, quam vim habeant, est exprimendum; est enim "definitio" rerum earum quae sunt eius rei propriae, quam definire volumus, brevis et circumscripta quaedam explicatio. . . . nunc complectar quod proposui brevi: si enim aut mihi facere licuerit, quod iam diu cogito, aut alius quispiam aut me impedito occuparit aut mortuo effecerit, ut primum omne ius civile "*in genera digerat*", quae perpauca sunt; deinde eorum generum quasi "*quaedam membra dispertiat*"; tum propriam cuiusque vim "*definitione*" declaret: perfectam artem iuris civilis habebitis, magis magnam atque uberem quam difficilem et obscuram.'

Note O (*p. 72*)

No account of Greek natural law which is satisfactory from the legal point of view exists. Some modern works are: R. Hirzel, *Dike, Themis u. Verwandtes* (1907); *Agraphos Nomos* (Abh. Sächs. Ak. xx. 1, 1900); E. Burle, *Essai hist. sur le développement de la notion de droit naturel dans l'antiquité grecque* (Lyons thesis, 1908); Max Salomon, 'Der Begriff d. Naturrechts b. d. Sophisten', *Z* xxxii (1911), 129 ff.; 'Der Wissenschaftscharakter der Rechtswissenschaft nach Aristoteles', *Rev. intern. de la théorie du droit*, i (1939, N.S.), 76 ff.; *Der Begriff der Gerechtigkeit nach Aristoteles* (1937); Karl Reinhardt, *Parmenides* (1916), 82 ff.; Adolf Menzel, *Kallikles. Eine Studie z. Gesch. d. Rechts des Stärkeren* (1922); 'Beitr. z. Gesch. d. Staatslehre', *Wien SB* ccx (1930), 136 ff.; 'Griech. Soziologie', *Wien SB* ccxvi (1936); V. Ehrenberg, *Die Rechtsidee im frühen Griechentum* (1921); 'Anfänge griech. Naturrechts', *Arch. f. Gesch. d. Philosophie*, xxxv, NF xxviii (1923), 119 ff.; W. Eckstein, *Das antike Naturrecht in sozialphilosophischer Bedeutung* (1926); Sauter, 'Die philosoph. Grundlagen d. antiken Naturrechts', *Z. f. öffentl. Recht*, x (1931), 28 ff. Hildenbrand's excellent book (above, p. 70, n. 1) is still serviceable, though naturally rather out of date. So too perhaps, on account of its collection of materials, is M. Voigt, *Das ius naturale aequum et bonum und ius gentium der Römer* (1856 ff.), but the work is unsound and must be read critically. Kamphuisen, *RH* xi (1932) 389.

Note P (*p. 104*)

Inscriptions: (1) *CIL* iii, *Suppl.* no. 9960 = (*ILS* 1015), from Nedinum. (2) *CIL* viii, *Suppl. Pars IV*, no. 23165, from Thiges. (3) *CIL* viii, no. 27–854 (*ILS* 9089), from Theveste. (4) *CIL* xvi, no. 36, a military diploma of 27 Oct. 90. Literature: Ritterling, *Archaeolog.-epigr. Mitteil. aus Oesterreich-Ungarn*, xx (1897), 15; Piganiol,

Mél. d'archéol. et d'hist. (École franç. de Rome), xxviii (1908), 341 ff.; Stech, *Klio*, Beih. x. 30; Ritterling, *Fasti d. röm. Deutschlands unter d. Prinzipat* (1932), 25 ff.; A. Betz, *Untersuch. z. Militärgesch. d. röm. Provinz Dalmatien* (Abh. d. archäol.-epigraph. Seminars Wien, NF, Heft 3, 1938), 47 ff. Berger, *PW* xii, 1830, is unsatisfying. On the station of *legio IV*: Ritterling, *PW* xvii. 1540 ff., 1542, 1547. On the governorship of Numidia: Marquardt, *Staatsverw.* i. 467 ff.; Domaszewski, *Rangordnung d. röm. Heeres*, xxix. 173; Betz, *Untersuch.* &c. 48. On the office of provincial *iuridicus* (governor's representative): Mommsen, *Staatsr.* i. 231 ff., ii. 246, 1048 ff.; *Strafr.* 246 ff.; *Schr.* viii. 355; Hesky, *Wiener St.* xxxvi (1904), 72; v. Premerstein, *PW* xii. 1149; Mason Hammond, *Harvard St. in Class. Phil.* li (1940), 156. The year of Iavolenus' consulship is very probable, but not quite certain; Groag (in Ritterling's *Fasti*, 26), however, writes: 'since it is in evidence that Iavolenus Priscus was *legatus* of *legio III Augusta* in 83, he cannot have reached the consulship only in 87'. This overlooks the fact that after 83 and before his consulship he was still *iuridicus* in Britain. In this state of the evidence the Priscus named in the *Acta Arval.* as consul of the year 87 may well be identified with our jurist. On Pliny's letter of 106 or 107: Mommsen, *Schr.* iv. 384; Kalb, *Roms Juristen* (1890), 52.

NOTE Q (*p. 108*)

See the picture in Quint. *Inst. or.* 12. 3. 1 f. The orator takes his lawyer with him into court, 'qui velut ad arculas sedent et tela agentibus subministrant' (above, p. 55). If an unexpected point of law arises, for which the orator had not been instructed, he must lose no time in getting instruction. Naturally Quintilian finds fault with this—'quid fiat in iis quaestionibus, quae subito nasci solent? non deformiter respectet et inter subsellia minores advocatos interroget?' We find just the same in Libanius, *Or.* 62. 21 f. (ed. Förster, vol. iv, p. 356 f.): 'In the good old times an orator did not study law, and a good thing too, since one cannot do both' (exactly the opinion of the orator Antonius: above, p. 45). Again, Libanius, *Epist.* 1170 (Förster), 1116 (Wolf): 'in earlier times an orator did not study law, but had a lawyer with him'. Nor did Apuleius of Madaura study law, though like most of the better orators he had the elementary legal knowledge, which no doubt was taught in the schools of rhetoric. Cf. Fritz Norden, *Apuleius von Madaura u. d. röm. Privatrecht* (1912), 11 ff., 24. On Greg. *Thaumaturg.*, see above, p. 268.

NOTE R (*p. 115*)

Not even in *Iust. Inst.* 1. 2. 8, where it was only intended to say the same as Gaius, 1. 7, which, however, could not be copied unaltered, since it would not have been consistent with the *Digest*, which *ex hypothesi* contained no contradictions. For the rest the compilers of the *Institutes* probably drew on some gloss or commentary on Gaius, and not, as has been suggested, on Ulpian's *Institutiones*. It is impossible that Ulpian should have said that only one who had received the *ius respondendi* from the Emperor was called 'iurisconsultus'. The phrase 'ut est constitutum' is no proof, since the compilers had read so much of Ulpian that the phrase would come naturally to them. Kübler, *Z* xxiii (1902), 512, is wrong; Wieacker, op. cit. 56.

NOTE S (*p. 123*)

Pomp. *D.* (1. 2) 2. 52: 'appellatique sunt partim Cassiani, partim Proculiani, quae origo a Capitone et Labeone coeperat.' The loose Latin (no subject for *appellati*, *quae origo* without connexion) shows that this phrase is a later addition. *Epit. Ulp.*

11. 28 speaks of *Cassiani* and *Proculiani*, but the work is post-classical (above, p. 180) and in this passage is based on Gaius, 1. 196, which has been reworded. In *F.V.* 266 the words *ut Proculiani contra Sabinianos putant* are a gloss inserted out of place (above, p. 209). The quotation from Marcellus in Ulp. *D.* (24. 1) 11. 3 cannot be authentic, because it distinguishes Julian, a Sabinian, from the Sabinians. In *D.* (45. 1) 138 pr. we read: 'Venuleius . . . petere posse Sabinus ait: Proculus autem et ceteri diversae scholae auctores . . .'; apparently genuine, but Venuleius was a contemporary of Gaius. Paul, *D.* (47. 2) 18, mentions the *Cassiani*, but the passage is corrupt—see Mommsen's comment and *Index Interp.* On *D.* (39. 6) 35. 3 see Pringsheim, *Z* xlii (1921), 281; Beseler, *Beitr.* iii. 135. There are no special signs that *ut Sabinianis visum est* in *D.* (41. 1) 11 is interpolated, but contrast *Inst.* 2. 1. 25 with the classical formulations in Gaius, 2. 79, and *D.* (41. 1) 7. Lastly, see Schönbauer, *Aegyptus*, xiii (1933), 638, and (antiquated) Baviera, *Scritti*, i (1909), 111 ff.

Note T (*p. 125*)

D. (41. 2) 18. 1; (47. 2) 68. 2; (28. 1) 27. Beseler, *Beitr.* iv. 220, 230; *Z* lvii (1937), 17, pronounces all three passages interpolated. But see *D.* (3. 5) 9. 1: 'istam sententiam Celsus eleganter deridet.' In *D.* (28. 1) 27 the unmannerly words 'aut valide stulta est consultatio tua' may well be gloss. On this passage see Kretschmar, *Z* lvii (1937), 52; Erman, *Z* lix (1939), 560. Nor is it likely that Celsus should have pronounced an opinion of Sabinus to be stupid (*stolidus*): *F.V.* 75. 5 is not authentic —Beseler, *Beitr.* iv. 171; *Z* l (1930), 72. In Pedius, *D.* (21. 1) 44 pr. *ridiculum est* is also not genuine—Beseler, *Beitr.* iii. 152; v. 38; *T* x (1930), 206. 'Labeo: absurdum admodum est dicere . . .' is scarcely a verbal quotation in Gell. 4. 2. 12. Cf. Beseler, *Beitr.* iii. 25 ff., 34. See above, p. 259.

Note U (*p. 130*)

The evidence has not been collected; see, e.g., *D.* (12. 6) 65 pr., with Pernice, *Labeo*, iii. 1, 236. Cf. Pringsheim, 'Beryt u. Bologna' (*Festschr. f. O. Lenel*, 1921), 263. *D.* (21. 1) 4. 4, with Schulz, *Einführung*, 34. Pringsheim collects considerable materials, but examines only the terminology (*distinctio, divisio*, &c.), which is not very helpful, since legal history is concerned with realities rather than words. He does not deal with the passages in which, though the term *distinctio* or the like does not occur, there are in fact distinctions. The unlearned are likely to be misled when, for example, he finds (p. 241) it remarkable that *triplex divisio* (*trifariam dividere*) is found first in Arcadius Charisius; this is true of the terminology, but of course divisions into three (Gaius, 4. 142, 143; 2. 152), four (Gaius, 3. 89), and more are in fact found in the classics. Goudy, 'Trichotomy in R. 1' (*St. Fadda*, v (1906), 207 ff.; also Oxford, 1910), is insufficiently critical.

Note V (*p. 133*)

If a testator instituted his slave *heres*, but omitted to declare him free, the classics stuck to it that the institution was void. It was left to Justinian to respect the testator's intention by allowing the slave to be free and *heres*. He reports (*Inst.* 2. 14 pr.), on the testimony of Paul *Ad Sabinum* and *Ad Plautium*, that this view had already been taken by Atilicinus; but one may well doubt whether the copies of Paul's works in which the compilers had unquestionably found this stated, gave what Paul himself really said. However, even if Atilicinus did so hold, it was an isolated opinion which had no influence on the development of doctrine: Riccobono, *Z* xxxv (1914), 280, n. 2.

NOTE W (*p. 141*)

The pioneer was Thomas Diplovatatius (*De claris iuris consultis*, 1 ed. Kantorowicz–Schulz, 1919). In lectures Cujas studied the surviving fragments of individual works (Africanus' *Quaestiones*, Papinian's *Responsa* and *Quaestiones*, and so on). Jacques Labitte, his pupil, was thus inspired to produce an *Index Legum* (Paris, 1557); this cited the fragments in the *Corpus Iuris*, work by work, but did not reproduce the texts. Antonio Agustín (*De nominibus propriis*, &c., Tarragona, 1579; cf. Zulueta, *Don Ant. Agustín*, Glasgow Univ. 1939, p. 30) gave similar lists, but including fragments preserved outside the *Corpus Iuris*. J. W. Freymon, *Symphonia iuris utriusque chronologica* (Frankfurt, 1574; cf. Stintzing, *Gesch. d. deutsch. Rechtswissensch.* i. 513 ff.), and Abraham Wieling, *Iurispr. restituta* (Amsterdam, 1727), are derived from Labitte. The texts cited in these lists were first reprinted in Hommel's *Palingenesia* (Leipzig, 1768), but still in the order of the *Digest*, no attempt being made to recover the original order or its underlying plan. Moreover, neither the inscriptions nor the texts were critically handled. Savigny's school was not interested in this field of research: thus Hugo, *Lehrb. eines civilistischen Cursus*, vi (ed. 3, 1830), 304, speaks of the 'inconvenient fashion of piecing together this or that writer out of the *Digest*'. Generally: Stintzing, op. cit. 514; Stella Maranca, 'Gli Studi Palingenetici', *Historia*, viii (1934), 270 ff.

NOTE X (*p. 154*)

Both epitomes are mentioned in the *Index libr.* xxv. 10 and 15. The title of the first was: *Imperialium sententiarum in cognitionibus prolatarum ex libris sex.* That this was the title is proved by the inscriptions of the fragments taken from this book (*Pal.* i. 1111). The title as given in the *Index Florentinus* 'sentention ἤγουν facton βιβλια ἓξ' is due to the author of the *Index*. (*factum* means *decretum*: *Thes.* 6. 1289; *Coll.* 1. 11. 1; *C. Th.* 11. 29. 6; *SHA. Gord.* 5. 7; Macrin. 13. 1; Heliog. 10. 3. The words 'ἤγουν facton' were added to distinguish these *sententiae* from the well-known *sententiarum libri quinque*.) The true title (*ex libris sex*) implies that the book was an epitome. The title of the other work was *Decretorum libri tres*. Here the *Index* agrees with the inscriptions of the fragments (*Pal.* i. 959). That this work too was only a post-classical epitome is shown by *D.* (10. 2) 41 and (37. 14) 24. The same case is here transmitted in both books, and in both passages the original text has been abbreviated by two post-classical but pre-Justinian hands.

NOTE Y (*p. 160*)

It denotes unadorned, purely objective work, with no literary pretensions, as does the Greek equivalent ὑπομνήματα. Its more precise meaning varies with the case. An orator's *commentarii* mean more or less elaborate notes for a speech: see Schanz–Hosius, i, s. 146 a, p. 453, s. 198, p. 595, on Cicero's and Servius Sulpicius'. A law teacher's (so far as intended for teaching, and not merely private notes) are more or less elaborate sketches for lectures. A student's are his notes taken at lecture ἀπὸ φωνῆς: Quint. *Inst.* 2. 11. 7; 3. 6. 59. See H. Dernburg, 'Die Inst. des Gaius ein Collegheft aus d. Jahre 161 n.C.' (*Festschr. f. Wächter*, Halle, 1869), 55 ff.; v. Premerstein, *PW* iv. 726; Birt, *Das antike Buchwesen* (1882), 346; v. Wilamowitz-Möllendorff, *Einl. in d. griech. Tragödie* (1910), 121; G. Zuntz, 'Die Aristophanes-scholien der Papyri', *Byzantion*, xiv (1939/40), 560 ff. Kübler, *PW* vii. 498 ff. is inconclusive.

NOTE Z (*p. 167*)

Just. *Inst. praef.* s. 6: *commentarii rerum cottidianarum. Index Flor.* XX: *aureon βιβλια ἑπτά*. The compilers of the *Digest* began by heading their excerpts with the full title, e.g. *D.* (40. 2) 7 and (7. 1) 3 from the first and the beginning of the second book. This became wearisome and in excerpting from the later parts of the second book and from the third they abbreviated: e.g. *D.* (17. 1) 2, *libro secundo cottidianarum*; *D.* (17. 1) 4, (19. 2) 2, and (22. 1) 28, *libro secundo rerum cottidianarum*; *D.* (17. 2) 72 and (18. 6) 2 and 16, *libro secundo cottidianarum rerum*; *D.* (44. 7) 1, 4, and 5, *libro . . . aureorum. D.* (50. 13) 6, from book 3, has the full title by way of exception. Cf. Mommsen, *Digesta* (*ed. mai.*), i. 479, n. 2 (not quite accurate).

NOTE AA (*p. 177*)

A question remaining to be answered is whether the so-called *Epitome Guelpherbitana*, printed (one cannot say edited) by Haenel in his edition of the *Breviarium*, made use of the complete *Sententiae* and consequently is evidence for the reconstruction of the text used by the Visigoths. v. Schwerin's study (*ACI, 1933, Bologna*, i. 169 ff.) is in its present state unusable, because he has overlooked the existence of a second and better manuscript of the *Epitome G.*, namely Vat. Lat. Reg. 1050, to which Max Conrat, *Z* (*Germ. Abt.*) xxix (1908), 245, had already drawn attention. Schwerin (p. 181) raised the question whether the *Epitome* was not rather in the nature of an index preceding a complete text, but unfortunately he at once abandoned the idea. In the Vatican MS. the *Epitome* figures as *Explanatio titulorum*, i.e. as additions to the list of rubrics. But Haenel's text is so bad that, till the Vatican MS. has been collated, conclusions should be reserved.

NOTE BB (*p. 183*)

The following give a picture of the ancient commentary: Asconius on Cicero's speeches (ed. Clark, Oxford, 1907), of the time of Nero; Servius on Vergil (fourth century); Aelius Donatus on Vergil (about 350); Ti. Claudius Donatus (about 400) on the *Aeneid* (ed. Georgii, 1905, 1907); Boethius (sixth century) on Cic. *Top.* (ed. Migne, *PL* lxiv. 1040); Pseudo-Agenius Urbicus on Frontinus (ed. Thulin, Teubner, 1913). Greek commentaries: Didymus on Demosthenes (*Berlin Classikertexte*, i. ix ff.; also ed. Teubner); *Anon.* on Plato's *Theaetet.* (*Classikertexte*, ii, 1905). Zuntz, 551, collects further lemmatic commentaries. Those on Homer: Schubart, *Einführung*, 166; Wilamowitz, *Hermes* xxiii (1888), 142. *P. Haun.* (1942), n. 3.

NOTE CC (*p. 216*)

In *D.* (17. 1) 32, 'et in summa . . . procul dubio est' can hardly come from the compilers: Schulz, *Einf.* 30 ff., 34; Beseler, *Beitr.* v. 48; *St. Bonfante*, ii. 58; *Index Interp.* In *D.* (46. 3) 36 Iulian cannot have written 'aut quartam partem . . . aut sextam' and left the decision to the reader. The phrase *pro qua . . . nasci* is badly formulated, because the event of a *postumus* being born is overlooked. Julian must have written substantially 'Iulianus notat: verius est me perdidisse quartam partem, quia tres nasci potuerunt', as his school taught and was still held by Paul (*D.* 5. 1. 28. 5). Julian may not yet have known of the famous 'quintuplets', or else he rightly disregarded the possibility. In the post-classical school, however, this case was prominent, as *D.* (5. 4) 3 (above, p. 216) shows. The present fr. 36 is incorrectly handled by Albertario, *St.* v. 373.

NOTE DD (*p. 223*)

In the pseudo-Aristotelian *Problemata* (the collection, of course, goes back to Aristotle) the most disparate problems are discussed. Each is a separate unit; there is no interconnecting text. The problem begins with the question why so and so (διὰ τί . . .), and this is followed by an answer of the utmost caution and reserve (an example was given above, p. 71). Cf. Christ–Schmid, *Gesch. d. griech. Lit.* i (ed. 6, 1912), 737; ii (1920), 53. This literary form was kept to in after times; question is regularly introduced by διὰ τί. See, e.g., Plutarch's αἴτια Ρωμαϊκὰ καὶ Ἑλληνικά, αἴτια φυσικά (here the title is modelled on Callimachus' αἴτια) and συμποσιακὰ ζητήματα, the Πλατωνικὰ ζητήματα of pseudo-Plutarch, the Ὁμηρικὰ ζητήματα of Porphyrius, the Ὁμηρικὰ προβλήματα of Heraclitus (Schmid–Stählin, *Gesch. d. griech. Lit.* i (1929), 168). Didymus too likes to begin his disquisitions with: ζητεῖται διὰ τί . . .: cf. Zuntz, *Byzantion*, xiii (1938), 647. Incidentally one may remark that the *quare*-literature of the Bolognese law school is a last offshoot of Aristotle's *Problemata*, a point apparently missed by Seckel, and by Genzmer, 'Quare Glossatorum', *Gedächtnisschr. f. Seckel* (1927), 1 ff.; *ACI, 1933, Bologna*, i. 422.

NOTE EE (*p. 230*)

A celebrated example is *D.* (1. 3) 32, giving the post-classical theory of customary law: *Index Interp.*, and especially Steinwenter's exhaustive discussion in *St. Bonfante*, ii. 421 ff., who is mistaken only in imagining the editor to have been an eastern. Another clear example is in *D.* (12. 1) 20, where the compilers' interpolations begin at *sed haec*, so that anything interpolated in what precedes (cf. *Index Interp.*) must be due to a pre-Justinian interpolator. Again, *D.* (35. 2) 87. 7, from *dicet aliquis* is thoroughly in the style of the *Autun Commentary*: Beseler, *Beitr.* iv. 237; v. 58; *Z* xlvii (1937), 74. Lastly, the obvious interpolation of *D.* (37. 6) 3. 2 is not due to the compilers: Beseler, *Z* lvii (1937), 12; A. Guarino, *Collatio bonorum* (Rome, 1937), 72 ff. According to Solazzi additions by a graecizing editor are found in Julian's work: 'Tracce di un commento agli scritti di Salvio Giuliano', *St. Besta*, i (Milan, 1939), 17.

NOTE FF (*p. 270*)

Nov. Valent. 35. 2: 'poena defensoribus negotii, qui in eodem extraordinario iudicio adfuerint atque egerint, huiusmodi constituta, ut *causidicum* officii amissio, *iurisconsultum* existimationis et interdictae civitatis damna percellant.' Note *adfuerint* and *egerint*; the jurisconsult is merely present at the proceedings in court (above, p. 338), the advocate (*causidicus*) *agit*. In Diocletian's tariff of prices (Mommsen–Blümner, *Edictum de pretiis rer. ven.* 1893) the fee to be given *advocato sive iuris perito* is fixed. The *iuris peritus* is the jurisconsult in contrast to the advocate; the advocate is not alternatively described as *iuris peritus*, as Bethmann-Hollweg, 3, 162, wrongly assumes. Correct view: Conrat, *Mél. Fitting*, 18 (offprint).

NOTE GG (*p. 273*)

D. (50. 13) 1. 5. This text is naturally not authentic Ulpian, but a post-classical fabrication (from the *libri de omnibus tribunalibus*, on which above, p. 256). It does not, however, come from the compilers (on this point Kübler, *PW* i A. 398, is wrong); see the similar expressions in Cassiodorus, *Variae*, 6. 20. 5, about the medical students: 'in ipsis quippe artis huius initiis' (this corresponds to *ingressu* in the *Digest*)

'quaedam sacerdotii genere' (*res sanctissima* of the *Digest*) 'sacramenta vos consecrant: doctoribus enim vestris promittitis' *rell.* In the *Digest*, *sacramenti* should be emended to *sacramento*. See also Collinet, *École de Beyrout*, 200.

NOTE HH (*p. 278*)

On what follows see Pringsheim, 'Die archaistische Tendenz Justinians', *St. Bonfante*, i (1930), 551 ff., a valuable and stimulating article, but misconceived: there is no archaizing tendency in Justinian. (1) The classicizer takes as his guide a product of the culture of the past, which he regards as a supreme (ἀκμή) development; the archaizer strives consciously after the primitive. Pliny is a classicist when he declares Demosthenes to be the *norma oratoris et regula* (*Epist.* 9. 26. 8), Hadrian an archaizer when he ranks the elder Cato before Cicero and Ennius before Vergil (*SHA*, *Hadr.* 16). Obviously Justinian and his staff were classicists, not archaizers. (2) Justinian's claims that in a given enactment he is saying nothing new (e.g. Nov. 78. 5: ποιούμεθα δὲ ξενὸν οὐδέν: Pringsheim, 558) are not expressions of archaism, but of Roman conservatism. See Schulz, 84. For passages with *non est novum* see *Voc.* iv. 232. 40; cf. iv. 293. 50 f.; Beseler, *Beitr.* v. 36. (3) Justinian's struggle after *simplicitas* is due not to archaism, but to a native Roman instinct: Schulz, 66 ff. His occasional appeals to the 'simple law' of the Twelve Tables show a certain antiquarian interest, but no more. Against Pringsheim's theses as to 'Justinian and the *Twelve Tables*' (op. cit. 566) see Berger, *St. Riccobono*, i (1933), 587 ff.; *ACI*, *1933*, *Roma*, i (1934), 39 ff. The correct view in all essentials is taken in Riccobono's admirable contribution: 'La verità sulle pretese tendenze arcaiche di Giustiniano', *Conferenze* (1931), 237 ff.

NOTE II (*p. 293*)

Many examples in Heumann–Seckel, s.v. 'subtilis'. We must consider on the one hand Justinian's constitutions, in which *subtilis*, *subtiliter*, *subtilitas*, *scrupulositas*, *scrupulosus* are found (cf. Longo's Vocabulary, *Bull.* x), and on the other hand the *Digest* passages, in which these words are invariably interpolated. See *Voc.* v. 291; v. 727 and 728. But the evidence is much wider. The expressions of such tendencies cannot be exhaustively assembled with the help of vocabularies alone; they take effect at times without these catchwords occurring. That the bulk of these interpolations come from the compilers is shown by the absence from Levy's *Ergänzungsindex* of *subtilis* and *subtilitas*, while *scrupulosus* is found only once (*F.V.* 314, Diocletian). *C. Th.* has *subtilitas* only once, in the good sense (6. 21. 1). In the post-Theodosian *Novels* we have *subtilis* only once, not in the bad sense (*Nov. Valent.* 8. 2), and *scrupulositas* not at all. In Gaius' *Institutes* there is 3. 94 ('quod nimium subtiliter dictum est'), a section which is perhaps entirely post-classical: Beseler, *Z* lvii (1937), 44. The only other case is 4. 30: 'ex nimia subtilitate veterum', which text also Beseler (p. 45) pronounces post-classical. I admit the grounds for suspicion, but attribute the text to Gaius.

NOTE JJ (*p. 306*)

We are following the view taken by Ferrini, 1. 15 ff. Nevertheless: (1) Ferrini held that Theophilus wrote a Greek paraphrase of Gaius' *Institutes*. This is possible, but unprovable, and Ferrini himself withdrew the view in his edition (*Proleg.*, p. xii) and supposed that this paraphrase was produced in the law school of Berytus. (2) The argument we have appealed to is among the arguments advanced by Ferrini (p. 22), but he does not see that it is *the only decisive argument*. He urges it

along with other arguments which go to show that Theophilus did indeed use Gaius' *Institutes*, but leave open the possibility that he used the original Latin text, and therefore give no support to the theory of an intermediate paraphrase in Greek. The decisive argument is overlooked by Ferrini, *Byz. Z.* vi (1897), 547 ff. The result was that his thesis was not accepted (cf. Brokate, *Strassb. Diss.* 1886; P. Krüger, 410, n. 23; Collinet, *Ét. 2.* 291; Kübler, *PW* v A. 2146—all without noticing the decisive argument), but he was nevertheless right.

Note KK (*p. 310*)

Ed. princeps by Angelo Mai and Fr. Bluhme, 1823. This and later editions have been out of date since 1860. The editions in current use are: (1) Mommsen, 'Codicis Vaticani N. 5766, in quo insunt iuris anteiustiniani fragmenta quae dicuntur Vaticana', *Abh. Berlin Ak. 1859* (1860). This alone gives an apograph and thus an exact picture of the MS., but Mommsen made a number of improvements later. (2) Mommsen's small edition in *Collect. libr.* iii. (3) Kübler's edition in Seckel–Kübler, ii. 2 (1927), 191. Huschke's editions are no longer usable. School editions: Girard–Senn, *Textes*, 511; *FIRA* ii (1940), 463. Literature: the best is still to be found in Mommsen's editions; see also Felgenträger, 'Z. Entstehungsgesch. d. Fragmenta Vaticana' (*Freiburger Rechtsgeschichtl. Abh.* v, 1935, 27–42). The commentary in A. A. Buchholtz's edition (1828), though out of date and insufficient, is still useful.

Note LL (*p. 311*)

Editio princeps by Pithou in 1573. This and all later editions were put out of date by Mommsen's standard edition in *Collect. libr.* iii (1890). Hyamson's edition (Oxford, 1913) is valuable, particularly on account of its photographic reproduction of the Berlin MS. Other serviceable editions: Kübler, Seckel–Kübler, ii. 2. 325 (1927); Girard–Senn, *Textes*, 572; *FIRA* ii (1940), 541. Literature: Read first Mommsen's fundamental preface to his edition. Further: Rudorff, 'Über den Ursprung u. die Bestimmung d. lex Dei oder Mosaicarum et Romanarum legum Collatio', *Abh. Berlin Ak.* 1868; Dirksen, *Hinterlassene Schr.* ii (1871), 106 ff.; Conrat, *Gesch.* (1891, but written before Mommsen's edition), 87; 'Z. Kultur des r. R. im Westen des r. Reiches im 4. u. 5. Jahrh.', *Mél. Fitting*, i (1907), 299; Joers, *PW* iv. 367; Triebs, *St. z. Lex Dei*, i (1905), 2 (1907); Volterra, *Collatio legum Mos. et Rom.*, Mem. Ac. Lincei, anno 327, ser. vi. 3, fasc. 1, 1930; Levy, *Z* 1 (1930), 698 ff.; N. Smits, *Mos. et Rom. legum Collatio*, 1934 (an outstanding dissertation of Groningen); Schulz, *Die Anordnung nach Massen als Kompositionsprinzip, ACI, 1933, Roma*, ii. 11 ff.; 'Die biblischen Texte in d. Collatio legum Mos. et Rom.', *SD* 1936, 20 ff.; Ostersetzer, 'La Collatio leg. Mos. et Rom.', *Rev. des ét. juives*, xcvii (1934), 65–96; K. Hohenlohe, *Ursprung u. Zweck der Collatio* (Vienna, 1935); *SD* v (1939), 486; Bossowski, *Acta Congr. iurid. internat. 1934*, i. 369; Solazzi, 'Per la data della Collatio Mos. et Rom. legum', *Atti Ac. Napoli*, 1936.

Note MM (*p. 317*)

Only Krüger's editions should be used at the present day: *Ed. maior*, 1877; smaller editions 1877–1915 (ed. 9); details: Schulz, *Z* xlvii (1927), pp. xxxiii ff. The large edition is not sufficient: there are improvements in that of 1915. Literature: *Vocab. Codicis Iust.* i (Prague, 1923), by R. Mayr; ii (1925, the Greek words), by San Nicolò; corrections by H. Krüger, *Z* xlvii (1927), 387 ff. For Justinian's own constitutions Longo, 'Vocabolario delle costituzioni di Giustiniano', *Bull.* x (1897/8)

is more convenient. See also: P. Krüger, *Kritik des Just. Codex* (1867); *Z. f. Rechtsgesch.* xi. 2 (1873), 166; *Z* xiii (1892), 287; xxii (1901), 12, 52; xxxvi (1915), 82; *Festg. f. Bekker* (1907), 1 ff.; *Festg. f. Güterbock* (1910), 239; Rotondi, *Scritti*, i. 146 ff. (admirable); Guarneri-Citati, *Leggendo i primi libri del Codice Giustinianeo* (1926).

NOTE NN (*p. 318*)

Only Mommsen's larger, two-volume edition (Berlin, 1870) gives a full critical apparatus. His smaller edition first appeared in 1868; it has since the eleventh edition (1908) been re-edited by P. Krüger (last the 13th, 1920). Krüger has introduced, in notes and appendix, mention of many interpolations: Schulz, *Z* xlvii (1927), pp. xxviii ff. This was convenient at the time, but gave Mommsen's work an unpleasantly ephemeral appearance: such information belongs to the *Palingenesia* and the *Index Interp.*, not to the edition. Bonfante and others have given a handy pocket-edition: i (1908), ii (1931). In case of doubt recourse should be had to *Codex Florentinus olim Pisanus phototypice expressus . . .*, 10 fasc., the last Rome, 1910. On the MSS. it suffices to refer to H. Kantorowicz's masterly 'Die Entstehung der Digestenvulgata' (*Z* xxx (1909), 183 ff.; xxxi (1910), 14 ff.; also in book-form), on which Schulz, *Einführung*, 1 ff.; P. Krüger, *Bemerkungen z. Benutzung der Ausgaben von Justinians Digesten, Festg. f. Bergbohm* (1919). In general: Joers, *PW* v. 484 (1905); Schulz, *Einführung in das Studium der Digesten* (1916); H. Krüger, *Die Herstellung der Digesten Justinians u. der Gang der Exzerption* (1922). Schulting-Smallenburg, *Notae ad Digesta*, 8 vols. (1804 ff.); Schimmelpfeng, *Hommel Redivivus*, vols. i and ii (1858); *Index interpolationum quae in Iustiniani Digestis inesse dicuntur*, i (1929); ii (1931); iii (1935); Supplementum I (1929); Generalregister der *Z* zu vols. i–l.

NOTE OO (*p. 324*)

Editions: Bruns-Sachau, *Syrisch-römisches Rechtsbuch aus dem 5. Jahr.* (1880), with extensive commentary, now out of date; Sachau, *Syrisch-römische Rechtsbücher*, i (1907): Latin trs. by Ferrini, *Z* xxiii (1902), 101 (*Opere*, i. 397 ff.) and in *FIRA* ii (revised by J. Furlani in the second edition, 1940). Literature: Nallino, 'Sul libro Siro-Romano e sul presunto diritto siriaco', *St. Bonfante*, i (1930), 201 ff. This fundamental study gives, pp. 211 ff., a thorough review of the literature. Older studies by Nallino: 'Gli studi di E. Carusi sui diritti orientali', *Riv. di St. Orientali*, ix (1921), 69 ff.; '*Παῤῥησία* e nozze senza scrittura nel Libro siro-romano di diritto', ibid. x (1923), 76 ff.; 'Apokeryxis e diseredazione nel Libro s.-r.', *Rend. Lincei*, ser. vi. 1 (1925), 709 ff.; 'Di alcuni passi del Libro s.-r. concernenti le successioni', ibid. 774 ff. Volterra, *Dir. rom. e diritti orient.* (1937), 52 ff., 64; A. Baumstark, *Gesch. d. syrischen Lit.* (1922), 153; Seidl, *PW* iv A. 1779. Nallino's early death, in 1938, has unfortunately cut off the hope of having soon a final analysis of the whole work.

NOTE PP (*p. 325*)

The MS. was discovered and, unfortunately, very incompletely copied by Bernadakis. Our editions depend on this copy. Gardthausen saw the MS., but unfortunately knew nothing of the edition which had already appeared. He made a reproduction of one page: see Lenel, *Z* ii (1881), 233. Winstedt revised the MS. and reported his results in 'Notes from Sinaitic Papyri', *Class. Philol.* ii (1907), 201 ff. But unluckily he had too little time and was not properly prepared for making the

highly needed revision. Thus our present editions are very imperfect. *Editio princeps*: Dareste, *Bull. de corr. hellénique*, iv (1880), 449 ff.; improvements *NRH* iv (1880), 643 ff. Krüger, *Z* iv (1883), 1 ff., gave an apograph based on Bernadakis's report, and an edition in *Collect. libr.* iii. 265. Winstedt's new readings were first incorporated by Girard, in his *Textes*, and are now in Kübler's edition, Seckel–Kübler, ii. 2. 461; Girard–Senn, *Textes*, 609; *FIRA* ii (1940), 635. See Riccobono, *Bull.* ix (1896), 217 ff.; *Mél. Fitting*, ii (1907), 490; Scheltema, *T* xvii (1940), 422.

ADDENDA

Books and papers marked by † were inaccessible.

p. 3, n. 4. Add G. A. Petropoulos, *Ἱστορία καὶ εἰσηγήσεις τοῦ ῥωμαικοῦ δικαίου.* Athens 1944.

pp. 40 ff. See †Kunkel, 'Über Herkunft und soziale Stellung der römischen Juristen in republikanischer Zeit', in *Abhandlungen zur Rechts- und Wirtschaftsgeschichte, Festschrift für Adolf Zycha*, 1941.

pp. 60 ff. See Biondi, 'Obietto e metodi della scienza giuridica Romana', in *Studi di diritto Romano in onore di C. Ferrini* (Università di Pavia 1946), pp. 201–62.

p. 62, n. 3. Add Walter Müri, 'Das Wort Dialektik bei Platon', *Museum Helveticum*, i (1944), 164; P. Friedländer, *American Journal of Philology*, lxvi (1945), 337 ff.

p. 66. See †Brugi, 'Le *regulae iuris* dei giureconsulti Romani', in *Studi in onore di G. del Vechio* (1930), i. 29 ff.

p. 73, n. 1. Add †Lombardi, *Concetto di ius gentium* and *Ricerche in tema di ius gentium* (year unknown, probably after 1939).

p. 105, n. 2. Julian was proconsul Africae (1 July 168–30 June 169): Alfred Merlin, *Inscriptions Latines de la Tunisie* (1944), no. 699, p. 123. See further †A. Merlin, 'Le Jurisconsulte Salvius Iulianus proconsul d'Afrique', *Mémoires de l'Académie des inscriptions et belles lettres*, xliii. 2, 1941.

p. 106, n. 2. Add Degrassi, *Epigraphica*, iii (1941), 23–7.

p. 106, n. 8. Q. Cervidius Scaevola was *praefectus vigilum* in 175 and a member of Marcus' *consilium: CIL* xiv, *Supplementum Ostiense*, no. 4502; *SHA*, Marcus, 11. 10; P. M. Meyer, *Z* xlviii (1938), 586.

p. 112, n. 4. Add †Siber, 'Der Ausgangspunkt des *ius respondendi*', *Z* lxi (1941), 397 ff.; Massimo Massei, *Studi Ferrini* (1946), 430 ff., 462 ff.

pp. 124 ff. See Biondi, 'Obietto e metodi della scienza giuridica Romana', *Studi Ferrini* (1946), 201 ff.

pp. 125 f. See Riccobono, 'La giurisprudenza classica come fattore di evoluzione nel diritto Romano', *Studi Ferrini* (1946), 19 ff.

p. 138, n. 8. Add E. Hahn, *Die Exkurse in den Annalen des Tacitus*, Münchener phil. Diss. 1933, pp. 5 ff.

p. 142, n. 4. Add K. K. Hulley, 'Principles of Textual Criticism known to St. Jerome', *Harvard Studies in Class. Philology*, lv (1944), 87 ff. on interpolations p. 100. G. Jachmann, Der Platontext, *Göttinger Nachrichten*, Jahrg. 1941, Nr. 11 (1942).

p. 148, n. 4. Add F. de Visscher, *Les Édits d'Auguste découverts à Cyrène* (1940).

p. 161, n. 8. Add Solazzi, 'Glosse a Gaio', *Studi Ferrini* (1946), 139 ff.

p. 164, n. 1. Add Solazzi, 'Glosse a Gaio', ii. 389 and *Studi Ferrini*, p. 143.

p. 167, n. 1. Add Arangio-Ruiz, *Studi Ferrini*, p. 88, n. 1 and p. 89, n. 1.

p. 229, n. 1. Add Stroux, *Phil.* lxxxvi (1931), 362.

p. 238, n. 5. Add Hülsen, *Rhein. Mus.* lxxxii (1933), 365; *CIL* xiv, *Index* 519, 779.

p. 289, n. 3. On the Law of Citations see further Massimo Massei, *Studi Ferrini* (1946), 437 ff. and †Scherillo, 'La critica del Codice Teodosiano e la legge delle citazioni', *SD* viii (1942), 5 ff.

p. 297, n. 4. Add Brasiello, 'Sull' influenza del cristianesimo in materia di elemento subbiettivo nei contratti', *Studi Ferrini* (1946), 503–70; Orestano, 'Alcune

considerazioni sui rapporti fra matrimonio cristiano e matrimonio romano nell' età postclassica', *Studi Ferrini*, 343–82.

p. 302, n. 2. Add Albertario, *Studi Ferrini* (1946), 133.

p. 304, n. 4. Add †*Vocabularium Institutionum Iustiniani Augusti* instruxit Rodulphus Ambrosini, Milano, 1942.

p. 305, n. 2. On the sources of Justinian's *Institutiones* see Arangio-Ruiz, *Studi Ferrini* (1946), 83 ff.

p. 305, n. 5. Add C. A. Maschi, 'La parafrasi Greca delle istituzioni attribuita a Teofilo e le glosse a Gaio', *Studi Ferrini* (1946), 319 ff.; Arangio-Ruiz, ibid., pp. 90 ff.

p. 307. Scheltema, *T* xvii (1940), 413, has rightly pointed out that the text of the schol. in Cod. MS. Coisl. 152 differs from that in Heimbach's edition. In the former the text runs as follows (I have a photograph of the MS. before me): *ὡσ τοῦ ἥρωος καὶ κοινοῦ τῆς οἰκουμένης διδασκαλίας Κυρίλλου τελείως καὶ ἀνελλιπῶς τὰ περὶ τούτων συναγαγόντα* (!) *κτλ.* The last syllable of *διδασκαλίας* is written with an abbreviation which may also mean *ου* (*διδασκαλίου*); see Thompson, *An Introduction to Greek and Latin Palaeography* (1912), pp. 82 and 83. The text of the MS. is obviously corrupt and Heimbach's emendation is probably right; *ὡς τὸν ἥρωα . . . συναγαγόντα* is Byzantine Greek, as Paul Maas told me. Scheltema's conjecture is hardly probable.

p. 308. Scheltema, *T* xvii (1940), 423, has rightly pointed out that Iabolenus (= Iavolenus) is cited in the *Collectio Definitionum*, line 27.

p. 308, n. 2. Add Scheltema, op. cit. 420 ff.

p. 311, n. 11. My paper 'The Manuscripts of the Collatio Legum Mosaicarum et Romanarum' will appear in *Symbolae ad ius et historiam pertinentes Iulio van Oven dedicatae*, Leyden, 1946.

p. 322, n. 5. Add Arangio-Ruiz, *Studi Ferrini* (1946), 96 ff.

p. 326, n. 5. Add Scheltema, op. cit. 413–15.

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