A COMPENDIUM OF ROMAN LAW

FOUNDED ON THE INSTITUTES OF JUSTINIAN

TOGETHER WITH EXAMINATION QUESTIONS SET IN THE UNIVERSITY AND BAR EXAMINATIONS (WITH SOLUTIONS)

AND DEFINITIONS OF LEADING TERMS IN THE WORDS OF THE PRINCIPAL AUTHORITIES

BY

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PREFACE TO THE SECOND EDITION.

In the preparation of this edition I have been able to avail myself of the kindly criticism of friends and pupils tending to the elimination of the more serious errors which existed in the work as originally produced.

Three new appendices have been added which it is trusted will prove useful. The book is intended solely for students preparing for examination; the entire sacrifice of style to concise statement will perhaps under the circumstances be forgiven.

G. C.

Trinity College, Cambridge,
March 1892

PREFACE.

THE following pages are intended for those students at the Universities and the Inns of Court who have to pass an examination in Roman Law. In the preparation of this little volume, free use has been made of such books as Sandars' Justinian, Poste's Gaius, Maine's Ancient Law, Austin's Jurisprudence, and other standard works. Occasional reference has also been made to the excellent treatises of Messrs. Whitcombe Greene and Seymour Harris, and to the translation of Ortolan, by Messrs. Nasmith and Prichard.

The examination questions in the first Appendix are inserted through the kindness and by special permission of the authorities of the various Universities and of the Inns of Court.

The occasional repetitions of important quotations have been made advisedly, and it is hoped that at any rate those who have to teach will not urge this as a serious defect in the book.

TRINITY COLLEGE, CAMBRIDGE,
January 1878.

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Definitions.

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"JUSTICE is the constant and perpetual wish to render every one his due."

Justitia est constans et perpetua voluntas jus suum cuique tribuendi.

"Jurisprudence is the knowledge of things divine and human, the science of justice and injustice."

Jurisprudentia est divinarum atque humanarum rerum notitia justi atque injusti scientia.

These definitions are taken from Ulpian.

The criticism raised by Austin to these definitions is as follows (Lect. v.):—

"Jurisprudence, if it is anything, is the science of law, or, at most, the science of law combined with the art of applying it; but what is here given as a definition of it embraces not only law, but positive morality, and even the test to which both these are to be referred. It therefore comprises the science of legislation and deontology. Further, it affirms that law is the creature of justice, which is as much as to say that it is the child of its own offspring. . . . But, in truth, law is itself the standard of justice."

It is, however, suggested by Professor Holland ("Elements of Jurisprudence," p. 3, 1st ed.) that Ulpian's definition of jurisprudence is merely the Stoic definition of *σοφία* (= *prudentia*), or philosophy in general, together with a limiting clause showing the particular portion of human knowledge which comes within the province of jurisprudence. The definition of Σοφία is *Θείων τέ καὶ ανθρωπίνων ἐπιστήμη* (Cic. de Off. i. 43).

Law. Jus.

The word *jus* is used in three main senses:—

1. The body of rules received as law by the Romans, or any large section of such body, as in the expressions—*Jus civile, jus prætorium, jus publicum, jus privatum.*
2. In the sense of a specific right as opposed to the correlating duty or obligation.
3. The proceedings before the magistrate, under the formulary system, were said to be *in jure*, as opposed to those before the *judex*, or trier of fact, which were said to be *in judicio.*

Austin's definition of Law.

"Law (Positive) is set by a sovereign one or number, to a person or persons in a state of subjection to its author. Some positive laws are set immediately, others mediately by subordinate political superiors."

Maxims of Law.

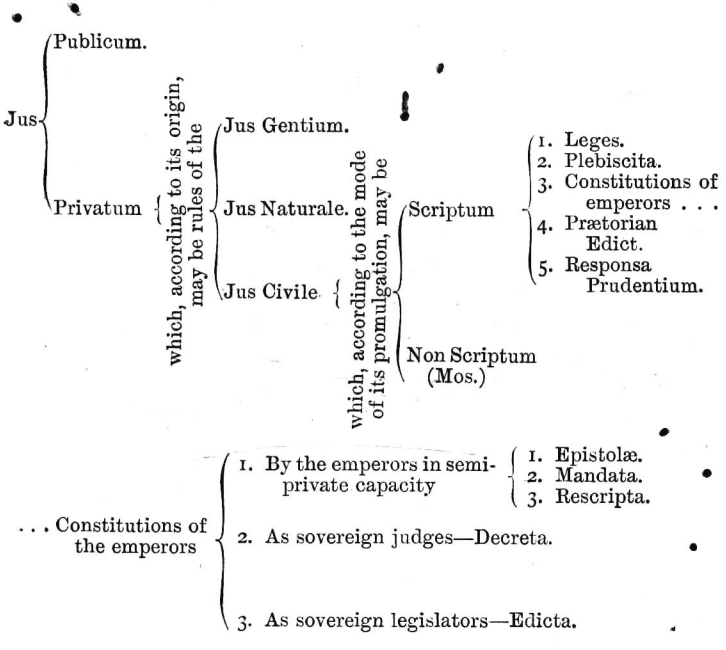
To live honestly, to hurt nobody, to give every one his due.

These so-called maxims of law are taken from the *Regulæ* of Ulpian.

The probable meaning of these maxims, taken conjointly, is, that the aim of law is, by means of its sanctions, (1) to bring men's actions into conformity with morality, while compelling them (2) to abstain from violating the rights of others, and (3) to carry out the obligations towards others they have created of their own free will.

Divisions of Law.

Table illustrating the various divisions of law:—



Jus publicum, jus privatum, public and private law.

The Institutes define *jus publicum*, or public law, to be that "*quod ad statum rei Romanæ spectat,*" while private law is that "*quod ad singulorum utilitatem spectat.*"

This somewhat loose phraseology is probably meant to express the distinction between the two main aggregates known as public and private law, a distinction which is thus described in effect by modern jurists. Law is the command of a State superior directed to subject members of the political body wherein its author is supreme, directing acts or forbearances. The persons to whom such commands are addressed are said to be under a duty, and the person or persons in whose favour the acts or forbearances are to take place may be said to have a right.

Private law is the body of rules concerning rights and duties where both parties are private individuals; public law, where one of the parties concerned is a public person.

Austin, doubtless deceived by the consideration of the fact that the State authority cannot be said to be under duties towards the subject members of the State, assumes the converse to be true, that the State cannot have *rights* against its own subjects. It is submitted that, though it may be inconsistent with the idea of sovereignty that the Sovereign should use force against himself to procure obedience, yet there is no such difficulty when we regard the State as applying force to its subjects by means of commands, thus creating duties on their part, with a correlative right in the State or Sovereign.

According to this argument, criminal law would in any system be a part of public law, and the statement of the Digest, that public law "*in sacris, in sacerdotibus, in magistratibus consistit*," will not be negatived.

The actual line of demarcation between public and private law would in any case be hard to draw, but the principle may be apprehended in spite of that difficulty. For example, the position of the tutor would be dealt with as part of the *jus publicum* did not convenience require the discussion of *tutela* in connection with the legal position of a *pupillus* under private law.

Jus naturale, jus gentium, jus civile.

The Institutes deal solely with private law, although, at the end of the work, there is found an appendix of criminal statutes (book iv. tit. xviii. *De publicis judiciis*).

The Institutes, following Ulpian, define *jus naturale* to be "*quod natura omnia animalia docuit*."

Austin (Lect. v.) comments on this to the effect that Ulpian here confounds the instincts of animals with laws and laws themselves with certain motives or

affections which are among the ultimate causes of laws :—

"This most foolish conceit, though inserted in Justinian's compilation, has no perceptible influence upon the detail of Roman Law."

The *jus gentium* is described thus :—

"*Quod vero naturalis ratio inter omnes homines constituit id apud omnes perœque custoditur vocaturque jus gentium quasi quo jure omnes gentes utuntur.*"

"That which a natural sense of reason fixes among all men, that obtains equally among all men, and is called the *jus gentium.*"

Originally merely the observed common element in all systems, it was probably regarded with no peculiar reverence by the early Romans, but in the later days of Rome's Empire, the days of a cultivated Stoicism, the universality of the *jus gentium* gave a stronger title to respect than was furnished by the native origin of the *jus civile.*

The *jus civile,* according to the Institutes, is that portion of a legal system which is peculiar to a given community.

"*Quod quisque populus ipse sibi jus constituit id ipsius civitatis proprium est vocaturque jus civile.*"

The *jus naturale* we may take to be that ideal standard to which all law should conform. Ulpian and Gaius would ascribe the formulation of the rules of this system to the teachings of natural reason.

But the history of the term shows us that the practical mode of arriving at the ideal standard was by using the test of universality, and the rules of the *jus gentium* introduced into Roman law by the *prætor peregrinus* and adopted by the *prætor urbanus* were recognised as the nearest approach to the ideal, so that the three-fold division of *jus civile, jus gentium,* and *jus naturale* lacked practical importance in the later periods of Roman law through the practical assimilation of the ideas involved in the two last terms.

The main factor in producing this result was the teaching of the Stoic philosophers, while at the same time their tenets would deny to slavery the position of being in accordance with the *jus naturale*, though undoubtedly a constitution of the *jus gentium*. Possibly it was this single point which prevented Roman lawyers, imbued with the Stoic doctrines, from treating the *jus gentium* and *jus naturale* as convertible terms, in spite of their theoretically diverse origin.

Maine, A. L., p. 49.

"*Jus gentium* was, in fact, the sum of all the common ingredients in the customs of the old Italian tribes, for they were all the nations whom the Romans had the means of observing. . . . . The circumstances of the origin of the *jus gentium* are probably a sufficient safeguard against the mistake of supposing that the Romans had any particular regard for it."

Justinian seems to confuse this *jus gentium*, or law obtaining generally among nations, with the "*jus naturale*," a term almost equivalent to the φυσικὸν δίκαιον of the Greek philosophers.

DISTINCTION BETWEEN WRITTEN AND UNWRITTEN LAW.

The words are here taken in their literal sense. Written law is that which is committed to writing at its origin; unwritten law, that which is not so committed.

In the juridical sense written law is that which is made immediately and directly by the supreme legislature; and unwritten law, that which is not so made. (Austin, Lect. xxviii. Analysis of Austin, pp. 95, 96.)

FORMS OF WRITTEN LAW.

1. *Leges*, enacted by the people in the *Comitia centuriata*, and proposed by a senatorial magistrate.
2. *Plebiscita*, enacted by the plebs and proposed by a plebeian magistrate. After the passing of the *lex*

Hortensia (287 B.C.), *plebiscita* had practically the force of *leges*.

3. *Senatus consulta* were ordinances of the Senate. In the times of the Cæsars they became the prevailing form of legislation.

4. *Imperial constitutions*, which, under Hadrian, superseded in reality all other sources of law. They consisted of—
   (α) *Epistolæ*, *rescripta*, *mandata*, or letters addressed to officers and others, giving the Emperor's advice on doubtful points.
   (β) *Decreta*, or judicial sentences.
   (γ) *Edicta*, or laws generally binding.

5. The Prætorian Edict, or *jus honorarium*.

6. The *responsa prudentium*, or decisions and opinions of persons authorized to interpret the law.

The *Comitia centuriata*, or assembly of the Roman nation, the patricians and plebeians, was organised by Servius Tullius upon the principle of a classification according to wealth. The people were divided into classes according to their individual means, one hundred thousand asses being the qualification for the highest class, with decreasing amounts for each successive class, till the proletariate, the unclassed members of the State, were reached. Each class comprised a number of Centuries, but the arrangement was such that the first class and a small proportion of the second could outvote the rest of the assembly. Thus, a plan originally intended to create plutocratic ensured for a time aristocratic rule.

The growth of the plebeians in wealth and political importance led to corresponding changes in the representative assembly of that order. The *Comitia tributa*, originally designed by Servius as a local organisation in which the whole nation should take part, became in practice entirely plebeian, but, after centuries of struggle, the inequalities between patricians and plebeians are gradually swept away, and eventually we find that *plebiscita*, or the ordinances of the plebeian assembly, are of equal force with *leges*.

The noticeable steps in this process are as follows:—

445 B.C. The *lex Canuleia* gives the *connubium* to the plebeians, the way for this piece of legislation having been prepared by a secession of the plebs and the enactment of the *lex Horatia Valeria*, which assured to the tribal assembly its threatened privilege of independent existence.

The *leges Publiliæ* (339 B.C.) advanced the position of the plebeian assembly still further; it was now enacted that in all measures of private law not of constitutional import the resolutions of the plebs should not require the approval of the Centuries.

The *lex Hortensia* (287 B.C.) puts the finishing touch to the work by abolishing the necessity of the consent either of Senate or Centuries for any enactments of the plebs.

By the commencement of the third century B.C. all offices of state had practically become open to plebeians, the consulship by the Licinian Rogations (366 B.C.), the other offices following at short intervals.

The establishment of the imperial system led to no violent changes in the theory of the Roman Constitution. The high offices of state were vested in one man, the *princeps*, and for a time at least the functions of the two popular assemblies continued to be exercised, while the Senate gradually, through its more intimate association with the State-ruler, took a larger share of the work of legislation, until we may say that at the end of the first century A.D. the legislative work of the Comitia ceased, while that of the Senate continued, perhaps, another century. At the commencement of the third century it is fairly clear that by a *lex de imperio*, in later times called *lex regia*, each successive ruler was invested at the commencement of his reign with the combined powers and authorities of the Comitia. Although, therefore, we can without doubt treat the Roman Emperor from the point of view of the Austinian jurist as a law-making despot, we must not forget the fact that the despotism of the one

was actually, as well as theoretically, the gift of the many.

The sovereign powers of the Roman nation, used merely for the purpose of their own destruction, gradually decay, and a military despotism takes the place of a Constitution organised on the broad basis of popular responsibility.

The Prætor's Edict had afforded contemporaneously another source of legal rules. At the commencement of his year of office the prætor published a body of rules as to the remedies which he would grant "*adjuvandi vel supplendi vel corrigendi juris civilis gratiâ propter publicam utilitatem.*" The rules thus enunciated by successive generations of prætors became so unwieldy that in the reign of Hadrian a codified edict was constructed called the *Edictum Salvianum* or *Perpetuum* (A.D. 131).

Unwritten law is that which usage has established. We are told (Inst. 1, 3, 11) that laws can be changed by the tacit consent of the people; and a similar expression is found in the Digest, I. 3, 32, 1. In the Code, viii. 53, it is laid down that customs cannot overcome reason or law, but here, probably, particular and not general customs are meant.