ROMAN PRIVATE LAW

FOUNDED ON THE 'INSTITUTES' OF GAIUS AND JUSTINIAN

BY

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PREFACE

THIS is an attempt to meet a want which I have felt in teaching Roman Law at Oxford, viz. some book which is content to give, as simply as possible, the subject-matter of the *Institutes* of Gaius and Justinian, following, in the main, the original order of treatment. It has proved impossible to keep strictly within these limits, and while I have sometimes judged it expedient to omit minor details of little practical importance, such as some of the degrees of cognatic relationship, I have also found it necessary, in order to make a coherent statement, to add information not contained in the *Institutes*, but derived from the *Digest*, *Code*, *Novels*, or from modern Civilians. In some cases, where the evidence is weak or controversy rages, I have ventured to state dogmatically what in a more pretentious work would require qualification. The Historical Introduction presupposes a knowledge of the elements of Roman Constitutional History.

I have to acknowledge my obligations to the works below mentioned.

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Imperatoris Justiniani Institutiones, Moyle, 4th ed.; *Roman Private Law in the Times of Cicero and the Antonines*, Roby; *An Introduction to the Study of Justinian's Digest*, Roby; *Gai Institutiones*, Poste, 4th ed.; *Historical Introduction to the Private Law of Rome*, Muirhead, 2nd ed.; *The Institutes of Gaius and Rules of Ulpian*, Muirhead; *The Institutes of Justinian*, Sandars; various Articles on legal topics, Smith's *Dictionary of Greek and Roman Antiquities*; *Manuel Élémentaire de Droit Romain*, Girard, 3rd ed.; *The Institutes*, Sohm, edited by Ledlie, 2nd English ed.; *Römische Processgesetze*, Wlassak.

References to Roby and Muirhead denote *Roman Private Law* and the *Historical Introduction* respectively, where it is not otherwise expressly stated.

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[1] Some of these dates are conjectural.

[2] For discussion as to probable date, see Girard, p. 987.

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INTRODUCTION

To appreciate Roman Law it is necessary to understand not only the substance of the law, but also the *sources* from which it came.

The sources of the law of any civilised country may be—

1. The Sovereign Legislature, *e.g.* in England the King in Parliament.

2. Some person or body to whom the Legislature has delegated the right to make law. The Judges, *e.g.*, in England are sometimes a source of law, though here the delegation is tacit, *i.e.* no Act of Parliament has ever in so many terms given them this right, and, in theory, they only administer and interpret the existing law. Examples of express delegation are seen in regulations and by-laws made by such bodies as the London County Council or the Great Western Railway Company.

3. Custom, *e.g.* in England the 'Common Law.'

Gaius tells us that the laws of the Roman people consisted of Leges, Plebiscita, Senatus Consulta, Imperial Constitutions, the Edicts of the Magistrates, and the Responsa Prudentium,[1] and to these Justinian adds Usus.[2] This list includes law of all

[1] G. i. 2. [2] J. i. 2. 9.

three kinds above mentioned. Leges, Plebiscita, Senatus Consulta,[1] and Imperial Constitutions are all examples of laws set by a Sovereign Legislature, and may be termed Statute Law; the Edicts and the Responsa are examples of law made by some delegated authority; while Usus is 'the unwritten law which Custom has established.'[2] The object of this introduction is to explain each of these sources in detail, beginning with the oldest of all, Custom, dealing next with Statute Law, and then with the Edicts and Responsa; finally, an account will be given of Justinian's work of Codification, *i.e.* how he embodied the law derived from all these origins in one harmonious system.

Section I. Custom, or Usus

A custom may be explained as follows: Where an act is capable of being performed in more ways than one, but is almost invariably done in some particular manner, a custom exists that the act shall be so performed. Whether this custom is a *customary law* as distinguished from a custom simply, depends upon whether, if brought up in a Court of Law, the custom would be approved. This is always a question of fact. If the custom is universal, reasonable, and not opposed to any definite rule of law, it will nearly always be treated as law proper, *i.e.* not as a rule which the citizens *may* obey, but as one which they must.

Sir Henry Maine found the earliest conception of

[1] Henceforth called for brevity S.C.C.

[2] J. i. 2. 9.

law in the Themistes, or divinely inspired judgments of the early kings, but it is probable that at Rome, at any rate, the earliest law was custom, springing unconsciously from the habits and life of the people themselves. This customary law soon became fixed and inelastic, chiefly, perhaps, because at an early date it was embodied by the Legislature in a code drawn up by the Decemviri, and known as the XII. Tables, of which the traditional date is 451-448 B.C.[1] It would be a mistake, however, to think that after this early code 'usus' finally ceased to be a source of law, both because it is improbable that the whole of the existing customary law was embodied in it, and also because Justinian,[2] more than a thousand years afterwards, expressly states, 'ex non scripto jus venit quod usus comprobavit. Nam diuturni mores consensu utentium comprobati legem imitantur.'[3] What is more remarkable to an English lawyer is that the Romans took the view that an existing statute might even be repealed by adverse usage, 'ea vero' (*i.e.* jura) 'quae ipsa sibi quaeque civitas constituit, saepe mutari solent vel *tacito consensu populi* vel alia postea lege lata.'[4]

Examples of laws resting on custom and dating from a period prior to the XII. Tables are the rules as

[1] For other views see Lambert, *L'histoire traditionnelle des XII. Tables.*

[2] In the time of Gaius 'usus' was overshadowed by the writings of the Jurists and statute law, which may account for his omission of custom as a source of law.

[3] J. i. 2. 9.

[4] J. i. 2. 11. And again in the *Digest*: 'Quare rectissime illud receptum est, ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur.' But the statute might by anticipation provide against this effect, *cf.* Moyle, 108.

to 'patria potestas' and the right of 'sui heredes' and the 'gens' in relation to intestate succession; at a much later period fidei-commissa, codicils and, probably, the literal contract, may be traced to the same origin.

Section II. Statute Law:—Leges, Plebiscita, S.C.C., Imperial Constitutions

Subsect. 1. *Leges and Plebiscita*

Lex is a term wide enough to include not only the whole of statute law, but every species of legal rule. Used, however, in the above sense, viz., as something different from Plebiscita, S.C.C. and Constitutions, it includes the laws of—

(i.) the early kings,
(ii.) the Comitia Curiata,
(iii.) the Comitia Centuriata, and
(iv.) the Comitia Tributa.

A plebiscitum, on the other hand, was a law passed by the Concilium plebis.

(i.) *Laws of the early kings—the so-called* 'Leges regiae.'

At the beginning of Roman history the Roman people were governed by kings. The evidence with regard to these times is almost wholly legendary, but that there was such a period is proved by the survival in republican times of institutions such as the 'rex sacrorum' and the 'interrex,' which presuppose that there was a regal epoch before the Republic. A well-known passage in the *Digest* is sometimes cited to prove that these kings themselves legislated: 'Et ita leges quasdam et ipse' (*i.e.* Romulus) 'curiatas

ad populum tulit, tulerunt et sequentes reges quae omnes conscriptae exstant in libro Sexti Papirii qui fuit illis temporibus.' But it seems probable that the laws made by the legendary kings were little more than isolated decisions given to meet particular cases, and although there is a work known as the *Jus Civile Papirianum*, made up of rules largely relating to matters of religion (fas), which probably date back to the regal period, the work itself seems to have been written not, as the passage from the *Digest* suggests, contemporaneously with the laws themselves, but about the time of Augustus.

The real legislative body during the early regal period was not the king himself but the king acting in combination with the Comitia Curiata and the Senate.

(ii.) *The Comitia Curiata.*

The Roman people were originally divided into three tribes, each tribe being composed of ten curiae, and the male members of these curiae who were capable of bearing arms formed the Comitia Curiata. This body had no power of initiating legislation. It met only when called together by the King, and could merely assent to or negative such proposals as he chose to lay before it. The real power of the Comitia Curiata lay in the fact that no change affecting any important department of public or private law could be made save with its consent. It was just as necessary for the King to obtain such consent, if, for example, he wished to break a treaty by declaring war, as it was for a private individual who wished to change his family (Adrogatio) or to break the rules of intestate succession by providing

for himself some heir other than the person who would naturally succeed him (Testamentum Calatis Comitiis).[1] When the Comitia Curiata met for the convenience of individuals, as in the cases last instanced, it was called the 'Comitia Calata,' and in this form it survived in republican times long after it had lost its power of legislation. The Senate, whose function was to nominate the King and tender him counsel, was an inner body of the Comitia Curiata, and is said to have been formed of the heads of the Roman gentes.[2] After his nomination by the Senate the King was elected by the Comitia Curiata, who by a lex regia conferred his 'imperium' upon him, a practice revived under the Empire.[3]

(iii.) *The Comitia Centuriata.*

For Rome in its earlier stages the Comitia Curiata was a sufficient legislature, but it ceased to be so as soon as a numerous body of persons came to live on Roman soil who were not Roman citizens. These people, who were soon known as the 'plebs,' being liable to taxation and to military service,[4] naturally desired a voice in the making of law, a voice which was necessarily denied them in the Comitia Curiata, since the plebs were not members of any Roman family. The reforms attributed to Servius Tullius paved the way for the creation of two new Comitia which, at any rate partially, remedied this grievance.

[1] Girard, p. 14.

[2] The gens, a subdivision of the Curia, seems to have been a kind of clan consisting of families united by the peculiar Roman tie of agnation.

[3] J. i. 2. 6.

[4] Some civilians, however, consider that the plebs were not originally liable to military service, and that the object of the Servian census was to create such liability.

The first of these Comitia was the Comitia Centuriata, which, though based in theory upon the arrangement of the Roman people from a military point of view, was in fact organised on the principle of wealth, and accordingly any one, patrician or plebeian, could, if of sufficient substance, attend it. This Comitia had, however, no power of initiating legislation, for no measure could be proposed there except by a consul, and he could bring forward nothing without the previous sanction of the Senate. Further, all measures which required a religious sanction had to be confirmed by the Comitia Curiata. The most important piece of legislation passed by the Comitia Centuriata was the law of the XII. Tables, the celebrated code which was the foundation of Roman law and which, though immensely improved and enlarged, was never wholly superseded by subsequent legislation, but continued to be, in theory, the ancient source from which all law flowed until the time of Justinian himself.[1]

(iv.) *The Comitia Tributa and the Concilium Plebis.*

The other Comitia which is said to have sprung from the reforms of Servius Tullius is the Comitia

[1] The chief grievances of the plebs which led to the passing of the XII. Tables were—

(i.) Their inability to hold ager publicus.

(ii.) Their exclusion from marriage with patricians.

(iii.) The fact that the knowledge and administration of the law was wholly in the hands of the pontiffs, who were themselves patricians.

(iv.) The power of the magistrates to exact arbitrary fines. But the XII. Tables did little directly to remedy these matters, the chief value of the code being that henceforth the plebs knew the main outlines of the law under which they lived. For the provisions of the XII. Tables see Index.

Tributa. This assembly was based not, like the Comitia Curiata, on kinship, nor, like the Comitia Centuriata, on the possession of property, but on a division of the Roman people according to districts. Being so based this assembly included the plebs as well as the patricians.

Until comparatively recent times it was thought that the resolutions of the Comitia Tributa had originally no binding force, but were merely statements of what the plebs considered ought to be law (plebiscita), and it was also supposed that a series of laws ending in the lex Hortensia (287 B.C.) gave to these plebiscita the force of leges in the strict sense. But it was always difficult to make this account fit in with the definition of plebiscita in the *Institutes*. 'Plebiscitum,' Justinian[1] says, 'est, quod plebs plebeio magistratu interrogante, veluti tribuno, constituebat,' and he goes on to state that the plebs differs from the populus as a species from a genus, because while the term 'populus' includes all the citizens, the term 'plebs' means merely the citizens other than patricians and senators. It is, therefore, hard to suppose that in this place Justinian can refer to the resolutions of the Comitia Tributa, since, though it is likely enough that the patricians at first held aloof from it, that assembly in point of fact included the whole populus.

Mommsen is probably right, therefore, in holding—

(1) that as soon as the Comitia Tributa acquired legislative power it acquired full legislative power, its laws being *leges* in the strict sense, and

(2) that the body which really passed plebiscita

[1] J. i. 2. 4.

was the Concilium plebis, a body which can be shown to have existed apart from the Comitia Tributa, and to have existed entirely of plebeians. On this theory the lex Hortensia gave the force of law not to the laws of the Comitia Tributa, since they did not need it, but to the informal resolutions of the Concilium plebis. It is important to bear in mind, therefore, that after the date of the lex Hortensia there were at Rome three independent legislative bodies, the Comitia Centuriata and the Comitia Tributa with power to make leges, and the Concilium plebis, whose resolutions, though technically known as plebiscita, had the same force as leges proper: 'Sed et plebiscita, lege Hortensia lata, non minus valere quam leges coeperunt.'[1] It is obvious that on either theory the political grievances of the plebs must have been wholly at an end after the date of the last-mentioned law.

Subsect. 2. *Senatus Consulta*

Just as in the course of time the Comitia Curiata was superseded by these later legislative bodies, so they, in turn, had to make way, towards the close of the Republic, for a new legislature, and the last recorded *lex* was passed in the reign of Nerva. The reason for the decline of these assemblies was partly because they had become too large[2] and unruly for the delicate work of legislation, partly because from the time of Augustus onwards republican institutions tended insensibly towards a natural extinction. Even during the republic, when Gaius says the

[1] J. i. 2. 4. [2] J. i. 2. 5.