INSTITUTIONUM

JUSTINIANI

PROŒMIUM.

IN NOMINE DOMINI NOSTRI JESU CHRISTI.

IMPERATOR CÆSAR FLAVIUS, JUSTINIANUS, ALAMANICUS, GOTHICUS, FRANCICUS, GERMANICUS, ANTICUS, ALANICUS, VANDALICUS, AFRICANUS, PIUS, FELIX, INCLYTUS, VICTOR AC TRIUMPHATOR, SEMPER AUGUSTUS CUPIDÆ LEGUM JUVENTUTI.

Imperatoriam majestatem non solum armis decoratam, sed etiam legibus oportet esse armatam, ut utrumque tempus et bellorum et pacis recte possit gubernari; et princeps Romanus victor existat non solum in hostilibus præliis, sed etiam per legitimos tramites calumniantium iniquitates expellens, et fiat tam juris religiosissimus, quam victis hostibus triumphator.

1. Quorum utramque viam cum summis vigiliis summaque providentia, annuente Deo, perfecimus. Et bellicos quidem sudores nostros barbaricæ gentes sub juga nostra deductæ cognoscunt, et tam Africa quam aliæ numerosæ provinciæ post tanta temporum spatia, nostris victoriis a cœlesti Numine præstitis, iterum ditioni Romanæ nostroque additæ imperio protestantur; omnes vero populi legibus jam a nobis promulgatis vel compositis reguntur.

IN THE NAME OF OUR LORD JESUS CHRIST.

THE EMPEROR CÆSAR FLAVIUS JUSTINIANUS, VANQUISHER OF THE ALAMANI, GOTHS, FRANCS, GERMANS, ANTES, ALANI, VANDALS, AFRICANS, PIOUS, HAPPY, GLORIOUS, TRIUMPHANT CONQUEROR, EVER AUGUST, TO THE YOUTH DESIROUS OF STUDYING THE LAW, GREETING.

The imperial majesty should be not only made glorious by arms, but also strengthened by laws, that, alike in time of peace and in time of war, the state may be well governed, and that the emperor may not only be victorious in the field of battle, but also may by every legal means repel the iniquities of men who abuse the laws, and may at once religiously uphold justice and triumph over his conquered enemies.

1. By our incessant labours and great care, with the blessing of God, we have attained this double end. The barbarian nations reduced under our yoke know our efforts in war; to which also Africa and very many other provinces bear witness, which, after so long an interval, have been restored to the dominion of Rome and our empire, by our victories gained through the favour of heaven. All nations moreover are governed by laws which we have either promulgated or arranged.

2. Et cum sacratissimas constitutiones antea confusas in luculentam ereximus consonantiam, tunc nostram extendimus curam ad immensa veteris prudentiæ volumina; et opus desperatum, quasi per medium profundum euntes, cœlesti favore jam adimplevimus.

3. Cumque hoc Deo propitio peractum est, Triboniano viro magnifico, magistro et exquæstore sacri palatii nostri, nec non Theophilo et Dorotheo viris illustribus, antecessoribus nostris (quorum omnium solertiam et legum scientiam et circa nostras jussiones fidem jam ex multis rerum argumentis accepimus) convocatis, mandavimus specialiter ut nostra auctoritate nostrisque suasionibus Institutiones componerent, ut liceat vobis prima legum cunabula non ab antiquis fabulis discere, sed ab imperiali splendore appetere; et tam aures quam animæ vestræ nihil inutile nihilque perperam positum, sed quod in ipsis rerum obtinet argumentis, accipiant. Et quod priore tempore vix post quadriennium prioribus contingebat, ut tunc constitutiones imperatorias legerent, hoc vos a primordio ingrediamini: digni tanto honore tantaque reperti felicitate, ut et initium vobis et finis legum eruditionis a voce principali procedat.

4. Igitur post libros quinquaginta Digestorum seu Pandectarum, in quibus omne jus antiquum collatum est, quos per eumdem virum excelsum Tribonianum nec non ceteros viros illustres et facundissimos confecimus, in hos quatuor libros easdem Institutiones partiri jussimus, ut sint totius legitimæ scientiæ prima elementa.

5. In quibus breviter expositum est et quod antea obtinebat, et quod postea desuetudine inumbratum imperiali remedio illuminatum est.

6. Quas ex omnibus antiquorum Institutionibus, et præcipue ex commentariis Gaii nostri tam Institutionum quam rerum cotidianorum, aliisque multis commentariis compositas cum tres prædicti viri prudentes nobis obtulerunt, et legimus et cognovimus et plenissimum nostrarum constitutionum robur eis accommodavimus.

2. When we had arranged and brought into perfect harmony the hitherto confused mass of imperial constitutions, we then extended our care to the endless volumes of ancient law; and, sailing as it were across the mid ocean, have now completed, through the favour of heaven, a work we once despaired of.

3. When by the blessing of God this task was accomplished, we summoned the most eminent Tribonian, master and ex-quæstor of our palace, together with the illustrious Theophilus and Dorotheus, professors of law, all of whom have on many occasion proved to us their ability, legal knowledge, and obedience to our orders; and we specially charged them to compose, under our authority and advice, Institutes, so that you may no more learn the first elements of law from old and erroneous sources, but apprehend them by the clear light of imperial wisdom; and that your minds and ears may receive nothing that is useless or misplaced, but only what obtains in actual practice. So that, whereas, formerly, the foremost among you could scarcely, after four years' study, read the imperial constitutions, you may now commence your studies by reading them, you who have been thought worthy of an honour and a happiness so great as that the first and last lessons in the knowledge of the law should issue for you from the mouth of the emperor.

4. When therefore, by the assistance of the same eminent person Tribonian and that of other illustrious and learned men, we had compiled the fifty books, called Digests or Pandects, in which is collected the whole ancient law, we directed that these Institutes should be divided into four books, which might serve as the first elements of the whole science of law.

5. In these books a brief exposition is given of the ancient laws, and of those also, which, overshadowed by disuse, have been again brought to light by our imperial authority.

6. These four books of Institutes thus compiled, from all the Institutes left us by the ancients, and chiefly from the commentaries of our Gaius, both from his Institutes and his Journal, and also from many other commentaries, were presented to us by the three learned men we have above named. We read and examined them, and have accorded to them all the force of our constitutions.

7. Summa itaque ope et alacri studio has leges nostras accipite; et vosmetipsos sic eruditos ostendite, ut spes vos pulcherrima foveat, toto legitimo opere perfecto, posse etiam nostram rempublicam in partibus ejus vobis credendis gubernari.

7. Receive, therefore, with eagerness, and study with cheerful diligence, these our laws, and show yourselves persons of such learning that you may conceive the flattering hope of yourselves being able, when your course of legal study is completed, to govern our empire in the different portions that may be entrusted to your care.

D. CP. XI. calend. decembris, D. Justiniano PP. A. III. cons.

Given at Constantinople on the eleventh day of the calends of December, in the third consulate of the Emperor Justinian, ever August.

LIBER PRIMUS.

TIT. I. DE JUSTITIA ET JURE.

JUSTITIA est constans et perpetua voluntas jus suum cuique tribuendi.

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

D. i. 1. 10.

This definition is borrowed from Ulpian (D. i. 1. 10), as is that of jurisprudence in the next section. *Justitia* is the constant disposition to follow what *jus* prescribes, *perpetua* meaning, "on every occasion that offers." Some editions read *voluntas tribuens*, a disposition that renders what is due, which justice is when it is seen in action. By *jus* (*id quod jussum est*) is meant all that is imposed, or that by a contemplation of the higher law of nature, we conceive ought to be imposed, as a rule of action, on the dwellers in a particular state by the general authority of that state. Celsus defined *jus* (D. i. 1. 1) as *ars boni et æqui*, the doctrine of all that is good and equitable. If we wish to separate distinctly the province of *jus* from that of morality, we must understand this to mean all of that which is good and equitable, that we think ought to take the form of law, that is, be imposed as obligatory by the supreme authority. (See Introd. sec. 39, 40.)

It may be observed here, that the sphere of natural law, *jus naturale*, is co-extensive with that of morality, but that they differ in the mode in which they severally regard this sphere. The sphere of both is right and wrong, good and evil; natural law pronounces what in this sphere God, through the medium of our reason, enjoins as right, and forbids as wrong. Morality sees in right and wrong a field in which the free-will of man is to make its choice. If man, as a free agent, chooses what God enjoins, we may speak indifferently of that which he chooses as being right by natural law or right morally. *Jus*,

taken absolutely, has a sphere less than that of morality, as it only includes that portion of right which is, or we conceive ought to be, enjoined by civil authority. We have no word in English that expresses *jus* accurately. "Right" is sometimes adopted, but is too wide in its application, as it may mean morally right, or legally right, whereas the exact equivalent of *jus* would be, "that which is in fact, and in theory should be, legally right."

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

1. Jurisprudence is the knowledge of things divine and human; the science of the just and the unjust.

D. i. 1. 10. 2.

Jurisprudentia is the knowledge of what is *jus*, and *jus* not only lays down the rights and duties of men (*res humanæ*), but also the mode in which religious worship is to be carried on and is to enter into the administration of law and the government of the state (*res divinæ*). The place which the sacred or pontifical law held in the Roman system was so conspicuous that no Roman jurisprudent could fail to treat of *res divinæ* in this sense as a part of law. The jurisprudent is, of course, only concerned with things divine and human, so far as to examine what in them is just and unjust.

2. His igitur generaliter cognitis, et incipientibus nobis exponere jura populi Romani, ita videntur posse tradi commodissime, si primo levi ac simplici via, post deinde diligentissima atque exactissima interpretatione singula tradantur. Alioquin, si statim ab initio rudem adhuc et infirmum animum studiosi multitudine aut varietate rerum oneraverimus, duorum alterum, aut desertorem studiorum efficiemus, aut cum magno labore, sæpe etiam cum diffidentia quæ plerumque juvenes avertit, serius ad id perducemus, ad quod leviore via ductus sine magno labore et sine ulla diffidentia maturius perduci potuisset.

2. Having explained these general terms, we think we shall commence our exposition of the law of the Roman people most advantageously, if we pursue at first a plain and easy path, and then proceed to explain particular details with the utmost care and exactness. For, if at the outset we overload the mind of the student, while yet new to the subject and unable to bear much, with a multitude and variety of topics, one of two things will happen—we shall either cause him wholly to abandon his studies, or, after great toil, and often after great distrust of himself (the most frequent stumbling-block in the way of youth), we shall at last conduct him to the point, to which, if he had been led by an easier road, he might, without great labour, and without any distrust of his own powers, have been sooner conducted.

3. Juris præcepta sunt hæc: honeste vivere, alterum non lædere, suum cuique tribuere.

3. The maxims of law are these: to live honestly, to hurt no one, to give every one his due.

D. i. 1. 10. 1.

These *juris præcepta* are not rules of law, but short statements of the chief moral obligations on which rules of law are based. The first and most general of these moral obligations is that *honeste vivere*, to live honestly, in the wide acceptation of the word "honest" in which it connotes the general fulfilment of social duties. Sometimes, although not generally, this obligation takes the shape of positive law, as when, for instance, the marriage of very near relations is forbidden. How rules of positive law are based on the two other *præcepta juris* is too obvious to need explanation.

The Romans clearly perceived the distinction between *jus* and morality—*Non omne quod licet, honestum est*, says Paul (D. i. 17. 144.); not all that is permitted by law is morally right. The obligation *honeste vivere* was much wider in its application than could be expressed by positive law.

4. Hujus studii duæ sunt positiones, publicum et privatum. Publicum jus est, quod ad statum rei Romanæ spectat; privatum, quod ad singulorum utilitatem. Dicendum est igitur de jure privato, quod tripertitum est; collectum est enim ex naturalibus præceptis aut gentium aut civilibus.

4. The study of law is divided into two branches; that of public and that of private law. Public law regards the government of the Roman Empire; private law, the interests of individuals. We are now to treat of the latter, which is composed of three elements, and consists of precepts belonging to natural law, to the law of nations, and to the civil law.

D. i. 1. 1. 2.

Both the *jus publicum* and the *jus privatum* fall under municipal law, that is, the law of a particular state. *Publicum jus in sacris, in sacerdotibus, in magistratibus consistit.* (D. i. 1. 1.) Public law regulates religious worship and civil administration; private law determines the rights and duties of individuals. *Jus gentium* is the rules of right which govern the transactions of social life and nations in their dealings with each other. *Jus civile* here means the law peculiar to the Roman state.

TIT. II. DE JURE NATURALI, GENTIUM ET CIVILI.

Jus naturale est, quod natura omnia animalia docuit: nam jus istud non humani generis proprium est, sed omnium animalium quæ in cœlo, quæ in terra, quæ in mari nascuntur. Hinc descendit maris atque feminæ conjunctio, quam nos matrimonium appellamus; hinc liberorum procreatio, hinc educatio. Videmus

The law of nature is that law which nature teaches to all animals. For this law does not belong exclusively to the human race, but belongs to all animals, whether of the earth, the air, or the water. Hence proceeds the union of male and female, which we term matrimony; hence the procreation and education of chil-

etenim cetera quoque animalia istius juris peritia censeri.

dren. We see, indeed, that all the other animals besides man are considered as having knowledge of this law.

D. i. 1. 1. 3.

This description of natural law is taken from Ulpian (D. i. 1. 1. 3), who makes a three-fold division of law, adopted here, into the *jus gentium*, *jus civile*, and *jus naturale;* the last being quite distinct from natural law in the sense of that law which is based on man's natural reason, and being scarcely in any sense a division of law at all, but merely the result of observing that many things, such as animal instincts and wants, which afford matter for the regulations of human law, are shared by man with the brute creation. The Stoic definition of virtue was, living according to nature; and as brutes lived according to their nature, it was hence, perhaps, that they seemed to be following the same law as man, who is bound to live after his nature, ought to follow. But to speak of the brutes following a law in the same sense in which man ought to follow laws, is to confound instinct with reason.

1. Jus autem civile vel gentium ita dividitur. Omnes populi qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur; nam quod quisque populus ipse sibi jus constituit, id ipsius civitatis proprium est, vocaturque jus civile, quasi jus proprium ipsius civitatis. Quod vero naturalis ratio inter omnes homines constituit, id apud omnes peræque custoditur, vocaturque jus gentium, quasi quo jure omnes gentes utuntur. Et populus itaque Romanus partim suo proprio, partim communi omnium hominum jure utitur: quæ singula qualia sint, suis locis proponemus.

1. Civil law is thus distinguished from the law of nations. Every community governed by laws and customs, uses partly its own law, partly laws common to all mankind. The law, which a people makes for its own government belongs exclusively to that state, and is called the civil law, as being the law of the particular state. But the law which natural reason appoints for all mankind obtains equally among all nations, and is called the law of nations, because all nations make use of it. The people of Rome, then, are governed partly by their own laws, and partly by the laws which are common to all mankind. We will take notice of this distinction as occasion may arise.

Gai. i. 1.

What modern writers term natural law is here called the *jus gentium*, i. e. those principles of right dictated by our reason, which are common to all men alike. If these are looked upon as constituting the basis of the dealings of nations with each other, they form what *we* call the *jus gentium*, that is, international law. They also enter into and determine the public and the private law of each state; but each state, in the composition of its own public and private law, also

adds certain arbitrary enactments. The enactments of each state are termed by the Roman writers *jus civile*, or, as we should say, municipal law. This *jus civile* embraces those principles of the *jus gentium* which are incorporated in public or private law, because, though these principles have an independent authority, they are adopted, or perhaps expressly enacted, in each state, by the same power which makes purely arbitrary enactments.

2. Sed jus quidem civile ex unaquaque civitate appellatur, veluti Atheniensium: nam si quis velit Solonis vel Draconis leges appellare jus civile Atheniensium, non erraverit. Sic enim et jus quo populus Romanus utitur, jus civile Romanorum appellamus, vel jus Quiritium quo Quirites utuntur; Romani enim a Quirino Quirites appellantur. Sed quotiens non addimus nomen cujus sit civitatis, nostrum jus significamus: sicuti cum poetam dicimus nec addimus nomen, subauditur apud Græcos egregius Homerus, apud nos Virgilius. Jus autem gentium omni humano generi commune est; nam usu exigente et humanis necessitatibus, gentes humanæ quædam sibi constituerunt. — Bella etenim orta sunt et captivitates secutæ, et servitutes quæ sunt naturali juri contrariæ; jure enim naturali ab initio omnes homines liberi nascebantur. Et ex hoc jure gentium, omnes pene contractus introducti sunt, ut emptio venditio, locatio, conductio, societas, depositum, mutuum et alii innumerabiles.

2. Civil law takes its name from the state which it governs, as, for instance, from Athens; for it would be very proper to speak of the laws of Solon or Draco as the civil law of Athens. And thus the law, which the Roman people make use of, is called the civil law of the Romans, or that of the Quirites, as being used by the Quirites; for the Romans are called Quirites from Quirinus. But whenever we speak of civil law, without adding the name of any state, we mean our own law; just as the Greeks, when "the poet" is spoken of without any name being expressed, mean the great Homer, and we Romans mean Virgil. The law of nations is common to all mankind, for nations have established certain laws, as occasion and the necessities of human life required. Wars arose, and in their train followed captivity and slavery, both which are contrary to the law of nature; for by that law, all men are originally born free. Further, by the law of nations almost all contracts were at first introduced, as, for instance, buying and selling, letting and hiring, partnership, bailments, loans, and very many others.

D. i. 1. 5.

Jus gentium here means the established usages of man, growing out of the requirements of social life, such as the rights of war and the different kinds of contracts; and these are often, as in the case of slavery, at variance with natural law. *Jus gentium* in this sense includes the law regulating the dealings of one nation with another, to which modern writers appropriate the term *jus gentium*, but which is expressed more correctly by the term *jus inter gentes*.

3. Constat autem jus nostrum aut ex scripto aut ex non scripto, ut apud

3. Our law is written and unwritten, just as among the Greeks

Græcos τῶν νομῶν οἱ μὲν ἔγγραφοι, οἱ δὲ ἄγραφοι. Scriptum jus est lex, plebiscita, senatus-consulta, principum placita, magistratuum edicta, responsa prudentium.

4. Lex est quod populus Romanus, senatorio magistratu interrogante, veluti consule, constituebat. Plebiscitum est quod plebs, plebeio magistratu interrogante, veluti tribuno, constituebat. Plebs autem a populo eo differt, quo species a genere; nam appellatione populi universi cives significantur, connumeratis etiam patriciis et senatoribus. Plebis autem appellatione, sine patriciis et senatoribus, ceteri cives significantur. Sed et plebiscita, lata lege Hortensia, non minus valere quam leges cœperunt.

some of their laws were written and others not written. The written part consists of laws, *plebiscita*, *senatus-consulta*, enactments of emperors, edicts of magistrates, and answers of jurisprudents.

4. A law is that which was enacted by the Roman people on its being proposed by a senatorian magistrate, as a consul. A *plebiscitum* is that which was enacted by the plebs on its being proposed by a plebeian magistrate, as a tribune. The *plebs* differs from the people as a species from its genus; for all the citizens, including patricians and senators, are comprehended in the people; but the *plebs* only includes citizens, not being patricians or senators. The *plebiscita* after the Hortensian law began to have the same force, as the laws themselves.

GAI. i. 3.

A *lex* or *populi scitum*, to use a word made by the commentators on the analogy of *plebiscitum*, was passed originally only in the *comitia curiata;* after the establishment of the *comitia centuriata*, in both these *comitia;* but, excepting in the case of conferring the *imperium*, almost always in the *centuriata*. (See Introd. sec. 16.)

The *lex Hortensia*, 467 A.U.C., had been preceded by the *lex Valeria*, 304 A.U.C., and the *lex Publilia*, 414 A.U.C., by both of which it was provided that *plebiscita* should bind the whole people. Either the effect of their provisions had been disputed, or exceptions had been made to them, or perhaps the extension of the authority of the *plebiscitum* which they gave was not so complete as their terms would seem to imply. (Nieb. 2. 366.) The term *lex* is very frequently applied to *plebiscita* as well as to *populi scita*. (See Introd. sec. 16.)

5. Senatus consultum est quod senatus jubet atque constituit: nam cum auctus esset populus Romanus in eum modum ut difficile esset in unum eum convocari legis sanciendæ causa, æquum visum est senatum vice populi consuli.

5. A *senatus-consultum* is that which the senate commands and appoints: for, when the Roman people was so increased that it was difficult to assemble them together to pass laws, it seemed right that the senate should be consulted in the place of the people.

GAI. i. 4; D. i. 2. 2. 9.

The *senatus-consultum* had in some instances the force of

a law even in the times of the republic, for we have a few preserved of a date antecedent to the Cæsars, which undoubtedly had the force of law; but they all relate to matters of social administration, such as forbidding burial within the city, or the importation of wild beasts. (See Introd. sec. 16.) But we cannot speak of *senatus consulta* as a substantial part of the general legislation till the times of the emperors, when they superseded every other except the emperor's enactments. The appeal of the emperor to their authority dwindled down almost immediately into a mere form. (Cod. i. 14. 12, *in presenti leges condere soli imperatori concessum est.*) (See Introd. sec. 20.)

6. Sed et quod principi placuit, legis habet vigorem; cum lege regia quæ de ejus imperio lata est, populus ei et in eum omne imperium suum et potestatem concessit. Quodcumque ergo imperator per epistolam constituit, vel cognoscens decrevit, vel edicto præcepit, legem esse constat; hæ sunt quæ constitutiones appellantur. Plane ex his quædam sunt personales, quæ nec ad exemplum trahuntur, quoniam non hoc princeps vult; nam quod alicui ob meritum indulsit, vel si cui pœnam irrogavit, vel si cui sine exemplo subvenit, personam non transgreditur. Aliæ autem cum generales sint, omnes procul dubio tenent.

6. That which seems good to the emperor has also the force of law; for the people, by the *lex regia*, which is passed to confer on him his power, make over to him their whole power and authority. Therefore whatever the emperor ordains by rescript, or decides in adjudging a cause or edict, is unquestionably law; and it is these enactments of the emperor that are called constitutions. Of these, some are personal, and are not to be drawn into precedent, such not being the intention of the emperor. Supposing the emperor has granted a favour to any man on account of his merit, or inflicted some punishment, or granted some extraordinary relief, the application of these acts does not extend beyond the particular individual. But the other constitutions, being general, are undoubtedly binding on all.

GAI. i. 5; D. i. 4. 1.

The imperial constitutions, though known in the time of the previous emperors, first attained, under Hadrian, the position of being in reality the only source of law. They were of three kinds; first, *epistolæ*, letters or answers to letters addressed by the emperor to different individuals or public bodies, or *mandata*, orders given to particular officers, and *rescripta*, answers given by the emperor to magistrates who requested his assistance in the decision of doubtful points; secondly, judicial sentences, *decreta*, given by the emperors (Bk. ii. 15. 4); both these kinds having force only by serving as a precedent in similar cases; and thirdly, *edicta*, or laws binding generally on all the subjects of the emperor. (See Introd. sec. 18.)

It is here said, on the authority of Ulpian (D. i. 4. 1), that

the emperor derives his authority from the *lex regia*. This does not refer to any one law of that name; but to the law of the *comitia curiata* by which the *imperium* was conferred. Gaius says, l. 5, *nec unquam dubitatum est quin principis constitutio legis vicem obtineat cum ipse imperator per legem imperium accipiat*. This law was a relic of that by which the king had been invested with the royal authority, intrusted to him by the *curia* representing the *populus;* and it was considered that the emperor was in like manner invested with all the power of the Roman people transferred to him on his receiving the *imperium*. (See Introd. sec. 18.)

7. Prætorum quoque edicta non modicam juris obtinent auctoritatem. Hoc etiam jus honorarium solemus appellare, quod qui honorem gerunt, id est magistratus, auctoritatem huic juri dederunt. Proponebant et ædiles curules edictum de quibusdam causis, quod edictum juris honorarii portio est.

7. The edicts of the prætors are also of great authority. These edicts are called the honorary law, because those who bear honours in the state, that is, the magistrates, have given them their sanction. The curule ædiles also used to publish an edict relative to certain subjects, which edict also became part of the *jus honorarium*.

Gai. i. 6; D. xxi. 1. 1.

Papinian says (D. i. 1. 7), that the *jus prætorum* was introduced by the prætors, *adjuvandi vel supplendi vel corrigendi juris civilis gratiâ*. New circumstances, new habits of thinking, and, in the case of the *prætor peregrinus*, a new scope for authority, compelled the prætor to use an equitable power, and frequently equitable fictions, to extend the narrow limits of the old civil law. (See Introd. sec. 14.) The decisions by which he did this were called *edicta*. At the beginning of his year of office, the prætor published a list of the rules by which he intended to be bound, and this was called the *edictum perpetuum*, because it was to apply to all cases that might fall under it during the year of office, and was not made, like an *edictum repentinum*, to meet a particular case. Of course each prætor borrowed much from his predecessors, and thus the edict, or rather all that was not new in it, was called the *edictum tralatitium*. (Cic. *Ad. At.* v. 21.) The *lex Cornelia* (B.C. 67) forbad a prætor to depart during his term of office from the edict he had promulgated at its commencement. In the time of Hadrian, a jurist named Salvius Julianus, who filled the office of prætor, systematized and condensed the edicts of preceding prætors into one which he called the *edictum perpetuum*, and thus this term, *edictum perpetuum*, which generally means the edict for the year, is sometimes the name of this work of

Julianus, which was intended, no doubt, to serve as the basis for future annual edicts. (See Introd. sec. 21.)

8. Responsa prudentium sunt sententiæ et opiniones eorum quibus permissum erat jura condere. Nam antiquitus institutum erat, ut essent qui jura publice interpretarentur, quibus a Cæsare jus respondendi datum est, qui jurisconsulti appellabantur: quorum omnium sententiæ et opiniones eam auctoritatem tenebant, ut judici recedere a responso eorum non liceret, ut est constitutum.

8. The answers of the jurisprudents are the decisions and opinions of persons who were authorized to determine the law. For anciently it was provided that there should be persons to interpret publicly the law, who were permitted by the emperor to give answers on questions of law. They were called jurisconsulti; and the authority of their decisions and opinions, when they were all unanimous, was such, that the judge could not, according to the constitution, refuse to be guided by their answers.

Gai. i. 7.

See Introd. sec. 15. 22–28. 31.

It is to the change in the position of the jurists effected by Augustus (sec. 22), that allusion is made in the words *quibus a Cæsare jus respondendi datum est*, and to the constitutions of Hadrian (sec. 22) and Theodosius (sec. 31), that the words *judici recedere a responso eorum non liceret, ut est constitutum*, refer.

9. Ex non scripto jus venit, quod usus comprobavit: nam diuturni mores consensu utentium comprobati legem imitantur.

9. The unwritten law is that which usage has established; for ancient customs, being sanctioned by the consent of those who adopt them, are like laws.

D. i. 3. 32.

Quid interest suffragio populus voluntatem suam declaret, an rebus ipsis et factis? (D. i. 3. 32.) Customs not less than written laws spring from, or rather are sanctioned by, the national will. Besides determining cases not within the provisions of written law, customary law acts as an exponent of the meaning of written law (*optima legum interpres consuetudo*, D. i. 3. 37), and among the Romans was considered as abrogating laws fallen into desuetude. (D. i. 3. 32).

10. Et non ineleganter in quas species jus civile distributum esse videtur; nam origo ejus ab institutis duarum civitatum, Athenarum scilicet et Lacedæmonis fluxisse videtur. In his enim civitatibus ita agi solitum erat, ut Lacedæmonii quidem magis ea quæ pro legibus observarent, memoriæ mandarent; Athenienses vero, ea quæ in legibus scripta comprehendissent, custodirent.

10. The civil law is not improperly divided into two kinds, for the division seems to have had its origin in the customs of the two states Athens and Lacedæmon. For in these states it used to be the case, that the Lacedæmonians rather committed to memory what they observed as law, while the Athenians observed as law what they had consigned to writing, and included in the body of their laws.

It is hardly necessary to say, that the distinction between written and unwritten law must always exist where laws are written at all, and where no attempt has been made to express all law in positive terms; and that this Greek origin for the two branches of Roman law is quite imaginary.

11. Sed naturalia quidem jura quæ apud omnes gentes peræque servantur, divina quadam providentia constituta, semper firma atque immutabilia permanent. Ea vero quæ ipsa sibi quæque civitas constituit, sæpe mutari solent, vel tacito consensu populi, vel alia postea lege lata.

11. The laws of nature, which all nations observe alike, being established by a divine providence, remain ever fixed and immutable. But the laws which every state has enacted, undergo frequent changes, either by the tacit consent of the people, or by a new law being subsequently passed.

Gai. i. 1; D. i. 3. 32. 1.

Justinian, abandoning the threefold division of Ulpian, which he had adopted in the earlier paragraphs of this chapter, now follows the twofold division of Gaius (1. 1), into *jus naturale* and *jus civile*. This twofold division is the one prevailing in, and proper to, the general system of the jurists. (See Appendix 1. to vol. i. of Savigny's *Droit. Rom.*) It may be useful here to state the different uses of the terms denoting the divisions of law. 1. *Jus naturale, i. e.* the law based on natural reason (we may omit Ulpian's use of *jus naturale, i. e.* the law man shares with beasts, as being quite unsystematic). 2. *Jus gentium*, used (α) in the same sense with *jus naturale*, as in paragraph 1, (β) meaning the usages regulating the dealings of civilized societies, as in paragraph 2, in which sense it may be at variance with *jus naturale*. 3. *Jus civile*, meaning municipal law, as in paragraph 2; and also used in a narrower sense, either when it was opposed to *jus pontificium*, and meant secular law; or to *jus prætorium*, in which sense it most frequently occurs, and then means the old strict law of Rome, both the old customary law and the law of the Twelve Tables, and the law created by *leges*, *plebiscita* and *senatus-consulta*, as opposed to the law as modified by the prætors, the jurisprudents, and the imperial constitutions.

Tit. III. DE JURE PERSONARUM.

Omne autem jus quo utimur vel ad personas pertinet, vel ad res, vel ad actiones. Et prius de personis videamus: nam parum est jus nosse, si personæ quarum causa constitutum est, ignorentur. Summa itaque divisio de jure personarum hæc est, quod omnes homines aut liberi sunt, aut servi.

All our law relates either to persons, or to things, or to actions. Let us first speak of persons; as it is of little purpose to know the law, if we do not know the persons for whose sake the law was made. The chief division in the rights of persons is this: men are all either free or slaves.

Gai. i. 8.

With respect to the division of private law. (See Introd. sec. 40). Whether rights against persons are here meant to be included under *res* or *actiones*, will be discussed when we arrive at Obligations in the third book. Every being capable of having and being subject to rights was called in Roman law a *persona*. Thus not only was the individual citizen, when looked at as having this capacity, a *persona*, but also corporations and public bodies. Slaves, on the contrary, were not *personæ*. They had no rights. (See Introd. sec. 41). The word *persona* has also another sense. It was used not only for the being who had the capacity of enjoying rights and fulfilling duties, but also for the different characters or parts in which this capacity showed itself; or, to borrow the metaphor suggested by the etymology of the word, for the different masks or faces which the actor wore in playing his part in the drama of civic and social life. Thus, for instance, the same man might have the *persona patris*, or *tutoris*, or *mariti;* that is, might be regarded in his character of father, tutor, or husband.

1. Et libertas quidem, ex qua etiam liberi vocantur, est naturalis facultas ejus quod cuique facere libet, nisi si quid vi aut jure prohibetur.

2. Servitus autem est constitutio juris gentium, qua quis dominio alieno contra naturam subjicitur.

1. Freedom, from which men are said to be free, is the natural power of doing what we each please, unless prevented by force or by law.

2. Slavery is an institution of the law of nations, by which one man is made the property of another, contrary to natural right.

D. i. 5. 4. 1.

The Romans referred the origin of slavery, as an institution, to the *jus gentium;* but peculiarities in the position of their slaves, as that they could hold no property of their own, belonged to the *jus civile*, the municipal law of Rome.

3. Servi autem ex eo appellati sunt, quod imperatores captivos vendere, ac per hoc servare nec occidere solent: qui etiam mancipia dicti sunt, eo quod ab hostibus manu capiuntur.

4. Servi autem aut nascuntur aut fiunt. Nascuntur ex ancillis nostris: fiunt aut jure gentium, id est ex captivitate; aut jure civili, cum liber homo, major viginti annis, ad

3. Slaves are denominated *servi*, because generals order their captives to be sold, and thus preserve them, and do not put them to death. Slaves are also called *mancipia*, because they are taken from the enemy by the strong hand.

4. Slaves either are born or become so. They are born so when their mother is a slave; they become so either by the law of nations, that is, by captivity or by the civil law, as

pretium participandum sese venumdari passus est.

when a free person, above the age of twenty, suffers himself to be sold, that he may share the price given for him.

D. i. 5. 5. 1.

Children born out of the pale of lawful marriage always followed the condition of the mother; and as slaves were incapable of contracting a lawful marriage, in the peculiar sense of "lawful" adopted by Roman law, the children of a female slave were necessarily slaves. They were called *vernæ* when born and reared on the property of the owner of their mother. (See Introd. sec. 42.)

In order to prevent a fraud, by which a person, having allowed himself to be sold, turned round on the purchaser and claimed his liberty as being free-born, a law, perhaps the *Senatus consultum Claudianum* (D. xl. 3. 5), enacted that the perpetrator of the fraud should be bound by his statement, and be held to be a slave. In the early law of Rome, it may be observed, a citizen could really sell himself so as to lose his freedom; but he always retained a right of redemption.

There were other modes by which slavery could arise under the Roman law, as (1) when a free woman had commerce with a slave, or (2), when malefactors were condemned to the amphitheatre or the mines, the guilty parties were held in law to be slaves. These latter modes of legal slavery were abolished by Justinian. (Bk. iii. 12. 1. Nov. 22. cap. 8.) Lastly, (3) an emancipated slave, if guilty of ingratitude towards his master, might be reclaimed to slavery. (D. xxv. 3. 6.)

In the older law, *addictio*, that is, delivery of the person to a creditor by way of execution for a debt, being detected in *furtum manifestum*, and omitting to be inscribed in the tables of the census in order to defraud the revenue, were each a cause of slavery; but these causes had become obsolete long before the time of Justinian.

5. In servorum conditione nulla est differentia, in liberis multæ differentiæ sunt: aut enim sunt ingenui aut libertini.

5. In the condition of slaves there is no distinction; but there are many distinctions among free persons; for they are either born free, or have been set free.

D. i. 5. 5. 5.

In the later empire there was introduced what may be almost termed a difference in the condition of slaves by the institution of *coloni*, that is, persons attached to the soil, *ascripti glebæ*, passing with it, and bound to remain on it, but entitled to retain for their own use all they could gain from it beyond the value of a yearly payment, which they had to make to the owner of the soil, and enjoying also all the family rights of freemen.

TIT. IV. DE INGENUIS.

Ingenuus est is qui, statim ut natus est, liber est, sive ex duobus ingenuis matrimonio editus est, sive ex libertinis duobus, sive ex altero libertino et altero ingenuo. Sed etsi quis ex matre nascitur libera, patre servo, ingenuus nihilominus nascitur: quemadmodum qui ex matre libera et incerto patre natus est, quoniam vulgo conceptus est. Sufficit autem liberam fuisse matrem eo tempore quo nascitur, licet ancilla conceperit. Et e contrario si libera conceperit, deinde ancilla facta pariat, placuit eum qui nascitur liberum nasci; quia non debet calamitas matris ei nocere, qui in ventre est. Ex his illud quæsitum est, si ancilla prægnans manumissa sit, deinde ancilla postea facta peperit, liberum an servum pariat? Et Marcellus probat liberum nasci; sufficit enim ei qui in ventre est, liberam matrem vel medio tempore habuisse: quod verum est.

A person is *ingenuus* who is free from the moment of his birth, by being born in matrimony, of parents who have been either both born free, or both made free, or one of whom has been born and the other made free; and when the mother is free, and the father a slave, the child nevertheless is born free: just as he is if his mother be free, and it be uncertain who is his father; for he had then no legal father. And it is sufficient if the mother is free at the time of the birth, although a slave when she conceived; and conversely, if she be free when she conceives, and is a slave when she gives birth to her child, yet the child is held to be born free; for the misfortune of the mother ought not to prejudice her unborn infant. The question hence arose, if a female slave with child is made free, but again becomes a slave before the child is born, whether the child is born free or a slave? Marcellus thinks it is born free, for it is sufficient for the unborn child, if the mother has been free, although only in the intermediate time; and this is true.

GAI. i. 11. 82. 89, 90; D. i. 5. 5.

If a child was born *in matrimonio*, a tie which could only, in the eyes of the civil law, be contracted between two free persons, the child was free from the moment of conception. If it was not born *in matrimonio*, then it followed the condition of the mother; and it was her condition at the time of birth, not at that of conception, which decided the *status* of the child. It was only by a departure from the strict theory of law that the enjoyment of liberty by the mother before the birth was allowed to make the child free.

1. Cum autem ingenuus aliquis natus sit, non officit illi in servitute fuisse, et postea manumissum esse; sæpissime enim constitutum est, natalibus non officere manumissionem.

1. When a man has been born free he does not cease to be *ingenuus*, because he has been in the position of a slave, and has subsequently been enfranchised; for it has been often settled that enfranchisement does not prejudice the rights of birth.