University of Oxford
St Edmund Hall

August 2026

**Honour School of Jurisprudence**

From the Law Tutors, St Edmund Hall

Dear all,

We hope this letter finds you well. We are very much looking forward to you joining the St Edmund Hall community in October.

The structure of the BA Jurisprudence degree means that there is a period of less than six months between the start of your course in October and your first University examinations (Moderations) in the middle of March. We therefore recommend that you undertake some preliminary reading before you arrive at Oxford, and that you make your plans for the December/January vacation on the assumption that you will need to undertake serious revision during this period.

In the first two terms you will study Constitutional Law, Criminal Law, and A Roman Introduction to Private Law. University-wide lectures on all three papers will be offered by teams of lawyers and academics delivering these lectures to the entire first year group.

So far as the scheduling of college tutorials in these three subjects is concerned, we currently envisage that you will study a set of eight tutorials in Constitutional Law in the first term (Michaelmas Term). Your tutor will be Dr Joanna Bell. You will also study around half of the tutorials in Criminal Law in this term with Mr Alexander Hughes. In the second term you will study the second half of the Criminal Law topics and a full set of tutorials in Roman Law.

As indicated above, lectures for all three courses run across the two terms, so that for some topics, most particularly Roman Law, you will attend lectures in one term and have tutorials in the other: this is normal in Oxford, and the fact that you give your attention to a topic at two distinct points in the year will often mean that it is easier to understand.

For all subjects, regardless of when you study tutorials in them, it will be helpful to undertake preparatory reading over the summer. For Constitutional Law, we would recommend reading Sam Freedman, *Failed State* (2024) (Failed State : Sam Freedman : 9781035026593 : Blackwell's) which offers an engaging introduction to many of the themes on the courts. There is no need to take notes: simply enjoying reading and thinking about some of the issues raised. It may also be useful to purchase a copy of Mark Elliott & Robert Thomas, *Public Law* (5th edn, OUP 2024), which is the main textbook you will use for the course. It would be particularly useful to read chapters 1-3 if you are able.

So far as the course in Roman Law is concerned, if you choose to buy a textbook, it is recommended that you buy the 2013 reprint of Thomas, *Textbook of Roman Law* (North-

Holland, The Hague 1976) by Philip McDonald. Copies are hard to come by, so searching online for a second-hand copy is a good idea. The St Edmund Hall Library has numerous copies once you arrive in Oxford, so do not worry if you cannot find one to buy. We will draw upon this book frequently throughout the course. At this stage, it is advisable that you read pages 15-30, as background, and pages 31-60, 67-72, on sources, in preparation for the start of the academic year. These pages have been scanned for you to read over the summer. The current translations of the set texts, from the Institutes of Gaius and Justinian, will be provided by the Law Faculty once you arrive in Oxford.

For Criminal Law, Ormerod, Laird and Gibson (eds), *Smith, Hogan, and Ormerod's Criminal Law* (17th edition, 2024) is the text that you will use. To familiarise yourself with some of the issues you will encounter at the beginning of the course, you should read chapters 1 to 3. Do not worry if you find some of the concepts complex, as we will examine them in detail during your first weeks at Oxford. When preparing for tutorials on certain topics of the syllabus, some students find it helpful to supplement their reading by referring to other textbooks, especially Jonathan Herring, *Criminal Law: Text, Cases and Materials* (12th edition, 2026); the latest edition is hot off the press. There is no need to buy these further textbooks as copies will be available to read, if you wish, in the Law Library once you arrive in Oxford.

With regards to the purchase of textbooks it may help to know that Teddy Hall permits all undergraduate students to apply for an Academic Grant every year. Up to £300 is available, and £100 of this can be put towards books. (Details: Scholarships and Prizes | Undergraduates | St Edmund Hall (ox.ac.uk))

Accompanying this letter, you will also find a document entitled 'Law Induction Course.' It explains **how to prepare for an introductory class which will be scheduled to take place during Freshers' week** with Dr Brooke Marshall, before the start of term. Make sure you read this document carefully; it is important that you complete the reading and go about the activities prescribed in it **before** arriving in Oxford. Please do not assume that you will have time to do it during Freshers' Week (you will not have the time).

There should also be some Faculty-based lectures and classes right at the start of term which seek to provide the necessary orientation: you will, of course, attend these.

Finally, we, your tutors, will be on hand to answer questions and give guidance during Freshers' week and during all terms; do not hesitate to ask whatever appears to you to need asking. It makes all the difference to the success of your study.

We look forward to meeting you, or meeting you again, in October.

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Dr Brooke Marshall
Mr Alexander Hughes



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# LAW INDUCTION COURSE

## 1. AIMS AND STRUCTURE OF THE INDUCTION COURSE

This brief induction course is designed to introduce you to some important aspects of studying law.

The Faculty of Law induction afternoon from 2pm on Friday of Week 0 will also provide some guidance on studying law at Oxford.

During Week 0 of Michaelmas Term, there will be an introduction to the Bodleian Law Library – your college will organise this and tell you the date and time.

The compulsory Legal Research & Mooting Skills programme will introduce you to the skills you will need to access legal materials and conduct legal research.

The tutorial system requires you to study independently. You will be given reading lists with sources of information that you will be required to locate, read and understand. Although you may be familiar with reading textbooks and, perhaps, academic journals, a large proportion of the material that you will need to read may well be unfamiliar to you – in particular reports of case law and statutes. Case law and statutes are primary sources. Textbooks and articles are secondary sources: they aim to describe, comment upon and evaluate the primary material. You need to be able to read these primary materials for yourself.

The induction course is designed to help you develop:

(a) a general overview of the primary sources of law and the relationship between case law and statutes; and

(b) a basic understanding of the system of precedent and the difference between *ratio decidendi* and *obiter dicta*; and

(c) the skills necessary to read and take notes on cases and statutes; and

(d) an initial strategy for approaching essay and problem questions for tutorials; and

(e) an understanding of how to refer to legal materials in your work.

In addition to some introductory guidelines and readings in relation to these topics, the induction course includes two exercises, requiring you to read and interpret, respectively, statute law and case law. The course is designed to take approximately two hours. Some colleges may conduct the course over two one-hour sessions, dealing with the exercises separately.

Please read the material comprised in this induction pack before your induction session(s). All of the required readings are attached. Listed after the material for each section, but not attached to this induction pack, are additional sources that you may find useful later in your legal studies, explaining approaches to studying law and suggesting approaches to answering problem questions and writing essays.

# 2. APPROACHING READING LISTS

There is no single way of approaching a reading list. Different tutors may have different advice concerning the best way to read the material in their subject. Some reading lists may be divided into essential and additional reading; others may indicate the order in which material should be prioritised; still others may simply present a list of references in alphabetical or chronological order (or no particular order at all).

When faced with a reading list, it is tempting to read everything in the order it is found on the list, concentrating on text book reading, hoping to memorise these facts, reproduce them in the exam and obtain a 2(i). Tempting as this path may be, there is no guarantee of success in following this path and it is not the way to tackle a reading list if you wish to engage with the material presented and enjoy the reading. Instead, consider the following tactics:

(a) Read the textbooks to obtain an overview of the subject you are studying and understand the main issues that are raised in the reading material. Some of you may find it useful to take notes at this stage; others may not. It is generally not a good idea merely to paraphrase your entire textbook. You need to make sure you understand the subject the textbook is discussing, not merely memorise the information.

(b) Tackle the reading list by topic. Concentrate on understanding the key ideas and concepts, using your textbook to get an initial overview of the subject, which you can then supplement by further reading. Think about the arguments presented and the way in which facts are used to support or reject these arguments. Read the cases carefully and take detailed notes to make sure that you understand how the cases relate to one another. When you understand the law, read articles to further your understanding and to develop a critical approach to the law.

(c) Engage critically with the reading. Do you agree with the view presented? Are there any weaknesses in the arguments that you can exploit?

What follows is an introductory guide to understanding references to the different kinds of sources that may feature on your reading lists.

## (1) References to text books

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Bradley & Ewing, Constitutional & Administrative Law, ch 1
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Normally, the reference will indicate, first, the author of the work, then the title and, finally, the specific chapter or pages that you are required to read.

## (2) Reference to cases (pre-2001)

*Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 (CA)

The name of the case – '*Carlill v Carbolic Smoke Ball Co*' – appears in italics. '[1893] 1 QB 256 (CA)' is known as the 'citation'. You can search for this case electronically either by entering the name of the case or its citation.

The numbers in square brackets – '[1893]' – refer to the year that the case was reported. Where a series of law reports has consecutively numbered volumes, the year is given in parentheses (round brackets) and is followed by the volume number: e.g., '*Bailey* (1983) 77

Cr App R 76 (CA)'. Square brackets are used where the series has no consecutive volume numbers and the year is essential for finding the correct volume.

The number after the square brackets – '2' – refers to the volume of the law report series in which the case is reported. Even where law reports are numbered according to the year, there may nevertheless be more than one volume for each year.

The letters – 'QB' – refer to the series of law reports that the case is reported in. 'QB' stands for Queen's Bench. A good place to find out the name of the law report series to which an abbreviation corresponds is the Cardiff Index to Legal Abbreviations, which you can access online at http://www.legalabbrevs.cardiff.ac.uk/.

The number after the report abbreviation – '256' – refer to the first page of the report.

The letters in parentheses at the end (which are omitted in some citation systems) – 'CA' – indicate the court in which the case was determined: here, the Court of Appeal. Many law reports include cases decided in more than one court.

## (3) Reference to cases (post-2001)

*R(Roberts) v Parole Board* [2004] EWCA Civ 1031, [2005] QB 410

Judgments issued after 2001 have a 'neutral' (or 'medium neutral') citation: in this example, '[2004] EWCA Civ 1031'. The year in a neutral citation is always indicated in square brackets.

The letters that follow are an abbreviation identifying the court in which the case was decided. Some common court abbreviations include 'UKSC' (Supreme Court), 'UKHL' (House of Lords), 'UKPC' (Privy Council), 'EWCA Crim' (Court of Appeal of England and Wales, Criminal Division), and 'EWCA Civ' (Court of Appeal of England and Wales, Civil Division). Decisions of the High Court of England and Wales are identified by EWHC, with the various Divisions indicated in brackets after the judgment number. (QB) indicates the Queen's Bench Division, (Fam) indicates the Family Division, (Ch) indicates Chancery, etc.

The number following the court abbreviation is the judgment number.

If a judgment has been issued with a neutral citation and is then reported in a law report series, both citations may be given, as in the example above.

## (4) Reference to statutes

Human Rights Act 1998 (UK), s 6

The name of the statute is given first, followed by the year the statute was enacted.

The letters in parentheses – 'UK' – denote the jurisdiction of the statute. The jurisdiction is not usually indicated unless statutes from several jurisdictions appear.

's 6' refers to the section of the statute that you are required to read.

## (5) Reference to articles

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Wade, 'The Basis of Legal Sovereignty' [1955] CLJ 172
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The name of the author is given first, followed by the title of the article in quotation marks.

The numbers in square brackets – '[1955]' – refer to the year the article was published. As with cases, where the journal has numbered volumes, the year is given in parentheses and is followed by the volume number: e.g., '(1997) 113 LQR 445'.

The letters – CLJ – refer to the journal. 'CLJ' is a reference to the Cambridge Law Journal. You will find lists of standard abbreviations of law journals in the library and in the Cardiff Index to Legal Abbreviations (above). They may also be explained in your reading list. Further information on this topic will be covered in the Research & Mooting Skills tutorial.

The numbers after the (abbreviated) journal title – 172 – refer to the page where you will find the article.

## (6) Further reading

Your tutors will give you advice on how to tackle reading lists and approach your legal studies, and may suggest general reading on this topic. You may also find some of the following resources useful. The Bodleian Law Library (BLL) Call Number (i.e. the location of the item on the shelves) is given after the publishing details. Check in SOLO, the library catalogue, SOLO (ox.ac.uk) to see if your College also has any of these books.

- S Askey and I McLeod, *Studying Law* (4th edn, Palgrave Macmillan 2014) KL130.35.ASK 2014
- A Bradney et al, *How to Study Law* (9th edn, Sweet & Maxwell 2021) KL155.BRA 2021
- E Finch and S Fafinski, *Legal Skills* (9th edn, OUP 2023) KL131.35.FIN 2023
- T Frost, R Huxley-Binns and J Martin, *Unlocking the English Legal System* (7th edn, Routledge 2023) KL11.HUX 2023
- C Manchester and D Salter, *Manchester and Salter on Exploring the Law: The Dynamics of Precedent and Statutory Interpretation* (4th edn, Sweet & Maxwell 2011) KL32.MAN 2011
- N McBride, *Letters to a Law Student: A Guide to Studying Law at University* (5th edn, Pearson 2022) KL131.1.MCB 2017
- A Smith (ed), *Glanville Williams: Learning the Law* (17th edn, Sweet & Maxwell 2020) KL130.WIL 2020

# 3. APPROACHING ESSAYS AND PROBLEM QUESTIONS

## (1) Essays

You will need to write an essay for most tutorials. Ensure that you allocate sufficient time to prepare the essay. Before you tackle the reading, think about the question that the essay raises and the arguments that you will have to make in response to the question. You may find that it helps, when reading, to keep a note of the material that you can use to help you make the arguments you wish to make. You also need to make sure that you understand the law, including the material that is not relevant to the particular question you are asked to answer.

Do not approach the essay as an opportunity to provide a précis of your reading for the week. It is your chance to think and engage with the topic.

You may find the following discussion useful:

- E Finch and S Fafinski, *Legal Skills* (9th edn, OUP 2023), chs 10-14 KL131.35.FIN 2023
- S Foster, *How to Write Better Law Essays* (5th edn, Pearson 2019) ch 5 KL130.2.FOS 2019

## (2) Problem questions

When faced with a problem question, you need to make sure that you identify the legal issues raised in the question. Consider, too, what the particular claimant wishes to achieve – does she want to know whether she will be prosecuted for a criminal offence, or does she wish to obtain damages for harm that she has suffered? Think about how the law could help support her case. Again, you need to make sure that you provide a legal argument and avoid using your answer to the problem as an opportunity to give an account of everything that you have read.

The objective of problem questions is to identify the issues that arise on the facts, identify the applicable legal rules, apply those rules and reach a conclusion. That is not to say that the exercise will be mechanical or that there is no scope for evaluation of the legal rules but the key is application of the law to the facts in order to reach a conclusion on the issues presented.

For more information on approaching problem questions, see:

- E Finch and S Fafinski, *Legal Skills* (9th edn, OUP 2023) ch 15 KL131.35.FIN 2023
- S Strong, *How to Write Law Essays and Exams* (6th edn, OUP 2022) chs 3–6 KL130.2.STR 2022
- S Foster, *How to Write Better Law Essays* (5th edn, Pearson 2019) ch 6 KL130.2.FOS 2019

# 4. REFERRING TO LEGAL MATERIALS IN YOUR WORK

## (1) Plagiarism

It is important to ensure that you do not plagiarise the work of others. You must properly attribute the work of others that you use. It is important to bear in mind the following considerations when approaching your writing, to help to avoid plagiarism:

- Writing an answer to an essay or a problem question requires you not to merely give information, but to take a step back and to think critically about the law that you have read. It is an opportunity for you to develop your own ideas. It is not meant to be an opportunity for you to merely present information that you have found elsewhere.
- In forming your own ideas, it is not only acceptable, but also encouraged for you to be aware of the work of others and to use this to help develop your arguments further. It helps to strengthen your argument if you name the source of the information that you are using and explain how their work helps you to develop your own argument.

The Law Faculty's Law Moderations Handbook has more extensive advice about plagiarism and how to avoid it, as does the University website at: Plagiarism | University of Oxford

## (2) References

It is important to refer properly and accurately to legal materials in your essays and answers to problem questions, although different tutors will have different expectations in this regard. By and large, you should refer to sources in the manner described in section 2, above.

For statutes, give the short title, year and, if relevant, section number: e.g., Theft Act 1968, s 16 (2).

For cases, give the names of the parties (italicised if typed or underlined if handwritten), followed, at least on the first occasion, by the citation. Depending on your own preferences and those of your tutor, you may use footnotes if you wish. Note that, in criminal law, it is conventional to cite only the name of the defendant (e.g., *Vickers*), except in Divisional Court cases (e.g., *Rogers v Arnott*) and in House of Lords or Supreme Court cases (e.g., *DPP v Smith*). Otherwise, you should give the name of the case exactly as it appears in the relevant report.

If you are referring to books, journals or other sources, these, too, should be cited in the appropriate fashion. For comprehensive guidance on appropriate citation, you can consult OSCOLA (the Oxford Standard for Citation of Legal Authorities) at OSCOLA | Faculty of Law (ox.ac.uk)

There is advice about citing legal authorities in the online resource provided by Cardiff University, called 'Citing the Law' at https://ilrb.cf.ac.uk/citingreferences/oscola/tutorial/.

## (3) Courts

It is important to known in which court a case has been heard. If you refer to the court in your work, you can state the name in full, or else use an abbreviation. The following are standard abbreviations for different courts:

- SC (Supreme Court)
- HL (House of Lords)
- CA (Court of Appeal) – (Crim) or (Civ) as appropriate
- DC (Divisional Court of the Queen's Bench)
- HC (High Court) – (QB), (Fam), (Ch), (Admin), etc. as appropriate
- CC (Crown Court)
- CJEU (reference to one of three courts comprising the Court of Justice of the European Union in Luxembourg)
- ECtHR (European Court of Human Rights, based in Strasbourg)

## (4) Judges

When referring to judges, you should adopt the following standard styles and abbreviations:

| | | |
|---|---|---|
| Supreme Court | The President | Lord Smith [of Anytown*] PSC |
| | The Deputy-President | Lord Smith [of Anytown*] DPSC |
| | Lord Smith | Lord Smith [of Anytown*] JSC |
| | Lady Smith | Lady Smith [of Anytown*] JSC |
| | Lord Smith and Lord Jones | Lord Smith [of Anytown*] and Lord Jones [of Sometown*] JJSC |
| | Sir John Smith | Sir John Smith JSC |
| House of Lords | The Lord Chancellor | Lord Smith [of Anytown*] LC |
| | Lord Smith | Lord Smith [of Anytown*] |
| | Baroness Smith | Baroness Smith [of Anytown*] |
| | Lord Smith and Lord Jones | Lord Smith [of Anytown*] and Lord Jones [of Sometown*] |
| Court of Appeal | Lord Chief Justice | Lord/Lady Smith CJ |
| | Master of the Rolls | Lord/Lady Smith MR |
| | Lord/Lady Justice Smith | Smith LJ |
| | Lord Justices Smith and Jones | Smith and Jones LJJ |
| High Court | Mr/Mrs Justice Smith | Smith J |
| | Justices Smith and Jones | Smith and Jones JJ |

* Note that whether or not a territorial designation – the 'of Anytown' part – is needed depends on the letters patent creating the peerage, so you should follow the practice adopted in the law reports for each judge. You may choose to omit it altogether and, in any event, it is usually sufficient to include it only on the first reference.

# 5. READING CASES EXERCISE

## (1) Reading

*Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439 (DC) (page 13 of this pack) *R v Miller* [1983] 2 AC 161 (HL), 173–80 (Lord Diplock) (page 21 of this pack)

## (2) Preliminary questions

Please think about the following preliminary questions. The questions are guidelines only: although these will guide discussion in the class, it may be that your answers to these questions lead to further avenues of discussion.

(a) Which court decided *Fagan*? Could you tell that from the law report series in which the case is reported?
(b) How many judges presided?
(c) In which series of law reports, and in which volume, can the decision be found?
(d) On what page does the judgment begin?
(e) Which part of the report corresponds to the judgment of the court?
(f) What does the rest of the report contain? Who wrote the rest of the report?
(g) Was the court concerned with establishing the facts of the case? Why not?

## (3) Further questions

(a) With what offence had Fagan been charged?
(b) What aspect of the offence gave rise to controversy in this case (*Fagan*)?
(c) What is the meaning of *actus reus* and *mens rea*?
(d) Do James J and Bridge J reach the same conclusion? If not, what is the conclusion of the court?
(e) What is the *ratio* of the case?
(f) Can you give an example of *obiter dictum* found in this case?
(g) How would you summarise the differences in reasoning of James J and Bridge J?
(h) Who has the better conclusion in the case: James J or Bridge J?
(i) What would happen to Michelle, if she accidentally drives onto PC Jones's foot, gets out of the car when she realises what she has done, but leaves the engine running and runs down the road shouting, "Stay there, you pig!" Would it make any difference if Michelle had run away silently?
(j) Would *Fagan* still be decided in the same way today, following *Miller*?
(k) Would the case be easier to resolve if there were a general liability for omissions in criminal law?
(l) Why do you think that there is no general liability for omissions in criminal law?

## (4) Further reading

The sources below include exercises similar to the exercises provided in this induction course. At this stage, it may help you to read through guidance that they provide as to how to read and

take notes on a case and on the system of precedent. If you feel that you would benefit from more experience after the induction class, then you could work your way through one or more of the exercises provided in these reference materials.

- S Askey and I McLeod, *Studying Law* (4th edn, Palgrave Macmillan 2014) ch 8, 114–30
  KL130.35.ASK 2014
- A Bradney et al, *How to Study Law* (9th edn Sweet & Maxwell, 2021) Reading Chapters and Statutes chapter
  KL155.BRA 2021
- E Finch and S Fafinski, *Legal Skills* (9th edn, OUP 2023)
  chs 5-7 KL131.35.FIN 2023
- T Frost, R Huxley-Binns and J Martin, *Unlocking the English Legal System* (7th edn, Routledge 2023) chs 1.1-1.4, 2, KL11.HUX 2023

# 6. READING STATUTES EXERCISE

## (1) Reading

Confiscation of Alcohol (Young Persons) Act 1997 (as enacted) (page 29 of this pack)

Confiscation of Alcohol (Young Persons) Act 1977 (Commencement) Order 1977, SI 1977/1725 (page 31 of this pack)

Confiscation of Alcohol (Young Persons) Act 1997 (consolidated version) (page 32 of this pack)

Licensing Act 2003, ss 155, 191, 198, Sch 6 para 115 (page 35 of this pack)

Serious Organised Crime and Police Act 2005, ss 110, 111, Sch 7 Pt 1 para 33 (page 37 of this pack)

Policing and Crime Act 2009 s 29, 112(2), Sch 8 Pt 3 (page 40 of this pack)

## (2) Preliminary questions

(a) Is the Confiscation of Alcohol (Young Persons) Act 1997 is an Act of Parliament?

(b) Is the Act in force yet?

(c) Does the Act extend to Scotland?

(d) Where would you find detailed definitions of ‘intoxicating liquor’ and ‘licensed premises’?

(e) What effect on the Act do s 155(1) and s 198(1), Sch 6, para 115 of the Licensing Act 2003 have?

(f) What effect on the Act is created by sections 29, 112(2), Schedule 8, pt 3 of the Policing and Crime Act 2009?

(g) Consider the (unofficial) consolidated version of the Act. What does the ellipsis (...) next to s 1(5) indicate? What other amendments and repeals have been effected?

## (3) Further questions

(a) Does this Act make it an offence for a person under the age of 18 to drink alcohol in a public place?

(b) Is this statute an unmerited intrusion into civil liberties?

(c) If you were able to reform this statute, would you do so and, if so, how would you reform its provisions?

(d) The Licensing Act 2003 makes a number of amendments to the Act. Some of those amendments are effected by sections in the main body of the Licensing Act and others by paragraphs in one of the schedules. Why?

## (4) Discussion problem

Kevin is 20 and is drinking cider on the High Street. He is wearing his old school uniform, as he has just been to a fancy dress party. PC Plum is patrolling his beat and, seeing Kevin, asks Kevin to hand over the cider to him and to give his name and address. He also tells Kevin that he will be committing an offence if he refuses to hand over the cider or provide his name and address.

(a) Does PC Plum have the power to do this?

(b) Is there anything that PC Plum should have said to Kevin that he has not said?

(c) Kevin refuses to give his name and address, but does hand over the cider. PC Plum then arrests Kevin. Does he have the power to do so?

Sandra is sitting next to Kevin. Sandra is 15 years old. Whilst PC Plum was talking to Kevin, Sandra was giggling and shouting loud obscenities. There is a half-empty bottle of cider on the floor besides where she is sitting.

(d) Can PC Plum ask Sandra to hand over the bottle of cider and give her name and address?

(e) What would happen if Sandra were to refuse to hand over the bottle of cider?

(f) Would your answer be different if the bottle of cider did not belong to Sandra?

## (5) Further reading

- S Askey and I McLeod, *Studying Law* (4th edn, Palgrave Macmillan 2014) ch 8, 130–38 KL130.35.ASK 2014
- A Bradney et al, *How to Study Law* (9th edn, Sweet & Maxwell 2021) Reading Cases and Statutes chapter KL155.BRA 2021
- E Finch and S Fafinski, *Legal Skills* (9th edn, OUP 2023) Chs 2-4 KL131.35.FIN 2023
- T Frost, R Huxley-Binns and J Martin, *Unlocking the English Legal System* (7th edn, Routledge 2019) chs 1.5–1.6, 3, KL11.HUX 2023

1967

Barnett v. Chelsea and Kensington Hospital Management Committee

NIELD J.

Without going in detail into the considerable volume of technical evidence which has been put before me, it seems to me to be the case that when death results from arsenical poisoning it is brought about by two conditions; on the one hand dehydration and on the other disturbance of the enzyme processes. If the principal condition is one of enzyme disturbance—as I am of the view it was here—then the only method of treatment which is likely to succeed is the use of the specific antidote which is commonly called B.A.L. Dr. Goulding said in the course of his evidence:

> "The only way to deal with this is to use the specific B.A.L. I see no reasonable prospect of the deceased being given B.A.L. before the time at which he died"—and at a later point in his evidence—"I feel that even if fluid loss had been discovered death would have been caused by the enzyme disturbance. Death might have occurred later."

I regard that evidence as very moderate, and it might be a true assessment of the situation to say that there was no chance of B.A.L. being administered before the death of the deceased.

For those reasons, I find that the plaintiff has failed to establish, on the balance of probabilities, that the defendants' negligence caused the death of the deceased.

*Judgment for the defendants.*

Solicitors: *W. H. Thompson; Nigel Ryland.*

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## FAGAN *v.* COMMISSIONER OF METROPOLITAN POLICE

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*June* 28; *July* 1, 31

LORD PARKER C.J., JAMES and BRIDGE JJ.

*Crime—Assault—Police—Car driven on to policeman's foot—Doubt whether intentional or accidental—Deliberate delay in removing car—Mens rea—Actus reus—Whether subsequent inception of mens rea capable of converting original unintentional act into an assault.*

*Crime—Mens rea—Assault—Unintentional battery—Car driven on to policeman's foot—Supervening mens rea constituted by deliberate delay in removing car—Whether an assault.*

A police constable wishing to question the defendant driver directed him to park his vehicle at a precise space against the kerb, whereupon the defendant drove his car on to the police

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[Reported by MRS. JENNIFER WINCH, Barrister-at-Law.]

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constable's foot. After the latter had repeated several times, "Get off my foot!" the defendant reversed the car off the constable's foot. The defendant was convicted by justices of assaulting a police constable in the execution of his duty. He appealed to quarter sessions, who found that while they were left in doubt as to whether the initial mounting of the wheel was intentional or accidental, they were satisfied beyond all reasonable doubt that the defendant knowingly, provocatively and unnecessarily allowed the wheel to remain on the police constable's foot after he had been told to drive off, and that on those facts an assault was proved.

On appeal, on the ground that on the justices' finding the initial mounting of the wheel could not be an assault; that the act of mounting the foot came to an end without any mens rea and that, accordingly, there was no act done by the defendant which could constitute an actus reus:—

*Held*, dismissing the appeal (Bridge J. dissenting) (1) that where an assault involved a battery it could be inflicted through the medium of a weapon or instrument controlled by the action of the offender.

(2) That although the elements of actus reus and mens rea were necessarily present at the same time in an assault, it was not necessary for the mens rea to be present at the inception of the actus reus: it could be superimposed on an existing act provided it was a continuing act.

(3) That the defendant's act in mounting the policeman's foot with his car was an unintentional battery which his later conduct in purposely delaying the removal of the car from the foot rendered criminal from the moment the necessary intention to inflict unlawful force was formed.

*Per curiam*. An assault is any act which intentionally—or possibly recklessly—causes another person to apprehend immediate and unlawful personal violence (post, p. 444D).

*Per* Bridge J. There was no act done by the appellant after he had driven the car on to the police constable's foot which could constitute an assault (post, p. 446B–C).

CASE STATED by Middlesex Quarter Sessions.

On October 25, 1967, the appellant, Vincent Martel Fagan, appealed to Middlesex Quarter Sessions against his conviction at Willesden magistrates' court upon a charge preferred by David Morris, a constable of the Metropolitan Police Force, for and on behalf of the respondents. He had been convicted of assaulting David Morris when in the execution of his duty on August 31, 1967, contrary to section 51 of the Police Act, 1964. The appellant's appeal was dismissed.

On the hearing of the appeal the following facts were either proved or admitted.

(a) David Morris was at all material times in the execution of his duty.

(b) On August 31, 1967, the appellant drove a motor vehicle in Fortunegate Road, London, N.W.10, near the junction with Craven Park Road, London, N.W.10. While the appellant was in the course of reversing his motor vehicle from the said road on to a pedestrian crossing in Craven Park Road, David Morris asked the appellant to pull into the road against the north kerb so that he could ask the appellant to produce documents relating to the appellant's driving. First of all the vehicle stopped and it did not move. David Morris, who had walked into the middle of the road, pointed out to the appellant a suitable parking space against the kerb. The appellant drove the vehicle towards David Morris and stopped it with its rear side a substantial distance from the kerb. David Morris went up to the appellant and asked him to park the vehicle closer to the kerb. David Morris walked to a position about one yard in front of the vehicle and pointed to the exact position against the kerb. The appellant drove the vehicle in David Morris's direction and stopped the vehicle with its front off-side wheel on David Morris's left foot. David Morris said to the appellant, "Get off, you are on my foot!" The appellant's driving window was open. The appellant said "Fuck you, you can wait." The appellant then turned off the ignition or at least the engine stopped running. David Morris then said to the appellant several times, "Get off my foot!" The appellant then said very reluctantly, "Okay, man, okay." The appellant thereafter very slowly turned on the ignition and reversed the vehicle off David Morris's foot.

(c) As a result of the appellant's act or omission David Morris's left big toe was injured. The toe was swollen and slightly bruised.

It was contended for the appellant that David Morris was uncertain that the appellant deliberately mounted the wheel of his vehicle on to his foot. To establish the charge of assault the prosecution must prove that it was deliberate on the appellant's part. The incident might have been accidental. At any rate it was not proved to the satisfaction of the court that what the appellant was alleged to have done was done by him deliberately. It was further contended for the appellant that if one drove a vehicle over some part of a man's body that might be accidental but if one held it there it required a rather more positive act and if one did hold the vehicle in the said manner it was not an assault, because the actual assault, whether it was by accident or not, was that the vehicle got on to the foot; the fact that the

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driver might have taken a little longer to take it off—if the court accepted the time deposed by David Morris, that is to say twenty-five seconds—could not be an assault, because the assault had already taken place. It was also contended for the appellant that the continued pressure on David Morris's foot was not a fresh assault.

It was contended for the respondents that if the vehicle was deliberately left in a position where pressure was still being exerted and if the appellant had reasonable time in which to get the vehicle off David Morris's foot and if the appellant in those circumstances left the vehicle on his foot, an assault in law would commence as soon as the reasonable time had elapsed for the appellant to get the vehicle off altogether, if the appellant deliberately delayed in getting the vehicle off, that would be an assault in law. No authorities were cited to the deputy chairman and the justices.

On those facts the deputy chairman and the justices were left in doubt as to whether the initial mounting of the motor wheel on David Morris's foot was intentional on the part of the appellant or accidental. They were satisfied beyond all reasonable doubt that the appellant knowingly, provocatively and unnecessarily allowed the motor wheel to remain on David Morris's foot after the latter said, "Get off, you are on my foot." They came to the conclusion that the charge of assault on David Morris had been made out, and dismissed the appeal.

The question of law for the opinion of the High Court is whether upon the facts stated above the deputy chairman and the justices were right in dismissing the appeal.

*A. Abbas* and *A. Azhar* for the appellant. The actus reus consisted of the appellant driving his car on to the policeman's foot. The justices had been in doubt as to whether the mounting of the wheel on to the policeman's foot was intentional or accidental, accordingly there was no mens rea at the time of the actus reus and there could not be an assault. The continued pressure on the policeman's foot was not a fresh assault. The appellant's failure to remove the car from his foot could not be an assault in law: Stone's Justices' Manual (1968), Vol. 1, p. 651.

*James Rant* for the respondent. The actus reus was a continuing act and the intervention of mens rea turned that act into an assault: *Hunter* v. *Johnson*.[1] The essence of assault was an attempt to injure or put into fear. There was no reason why a sustained

[1] (1884) 13 Q.B.D. 225.

attempt should not be an assault. Alternatively, there might be a duty to act in which case an omission to act in breach of duty would amount to an assault.

*Cur. adv. vult.*

July 31. LORD PARKER C.J. I will ask James J. to read the judgment which he has prepared, and with which I entirely agree.

JAMES J. The appellant, Vincent Martel Fagan, was convicted by the Willesden magistrates of assaulting David Morris, a police constable, in the execution of his duty on August 31, 1967. He appealed to quarter sessions. On October 25, 1967, his appeal was heard by Middlesex Quarter Sessions and was dismissed. This matter now comes before the court on appeal by way of case stated from that decision of quarter sessions.

The sole question is whether the prosecution proved facts which in law amounted to an assault.

On August 31, 1967, the appellant was reversing a motor car in Fortunegate Road, London, N.W.10, when Police Constable Morris directed him to drive the car forwards to the kerbside and standing in front of the car pointed out a suitable place in which to park. At first the appellant stopped the car too far from the kerb for the officer's liking. Morris asked him to park closer and indicated a precise spot. The appellant drove forward towards him and stopped it with the offside wheel on Morris's left foot. "Get off, you are on my foot," said the officer. "Fuck you, you can wait," said the appellant. The engine of the car stopped running. Morris repeated several times "Get off my foot." The appellant said reluctantly "Okay man, okay," and then slowly turned on the ignition of the vehicle and reversed it off the officer's foot. The appellant had either turned the ignition off to stop the engine or turned it off after the engine had stopped running.

The justices at quarter sessions on those facts were left in doubt as to whether the mounting of the wheel on to the officer's foot was deliberate or accidental. They were satisfied, however, beyond all reasonable doubt that the appellant "knowingly, provocatively and unnecessarily allowed the wheel to remain on the foot after the officer said 'Get off, you are on my foot'." They found that on those facts an assault was proved.

Mr. Abbas for the appellant relied upon the passage in Stone's Justices' Manual (1968), Vol. 1, p. 651, where assault is defined. He contends that on the finding of the justices the initial mounting of the wheel could not be an assault and that the act of the wheel

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JAMES J.

mounting the foot came to an end without there being any mens rea. It is argued that thereafter there was no act on the part of the appellant which could constitute an actus reus but only the omission or failure to remove the wheel as soon as he was asked. That failure, it is said, could not in law be an assault, nor could it in law provide the necessary mens rea to convert the original act of mounting the foot into an assault.

Mr. Rant for the respondent argues that the first mounting of the foot was an actus reus which act continued until the moment of time at which the wheel was removed. During that continuing act, it is said, the appellant formed the necessary intention to constitute the element of mens rea and once that element was added to the continuing act, an assault took place. In the alternative, Mr. Rant argues that there can be situations in which there is a duty to act and that in such situations an omission to act in breach of duty would in law amount to an assault. It is unnecessary to formulate any concluded views on this alternative.

In our judgment the question arising, which has been argued on general principles, falls to be decided on the facts of the particular case. An assault is any act which intentionally—or possibly recklessly—causes another person to apprehend immediate and unlawful personal violence. Although "assault" is an independent crime and is to be treated as such, for practical purposes today "assault" is generally synonymous with the term "battery" and is a term used to mean the actual intended use of unlawful force to another person without his consent. On the facts of the present case the "assault" alleged involved a "battery." Where an assault involves a battery, it matters not, in our judgment, whether the battery is inflicted directly by the body of the offender or through the medium of some weapon or instrument controlled by the action of the offender. An assault may be committed by the laying of a hand upon another, and the action does not cease to be an assault if it is a stick held in the hand and not the hand itself which is laid on the person of the victim. So for our part we see no difference in principle between the action of stepping on to a person's toe and maintaining that position and the action of driving a car on to a person's foot and sitting in the car whilst its position on the foot is maintained.

To constitute the offence of assault some intentional act must have been performed: a mere omission to act cannot amount to an assault. Without going into the question whether words alone can constitute an assault, it is clear that the words spoken by the appellant could not alone amount to an assault: they can only shed

A a light on the appellant's action. For our part we think the crucial question is whether in this case the act of the appellant can be said to be complete and spent at the moment of time when the car wheel came to rest on the foot or whether his act is to be regarded as a continuing act operating until the wheel was removed. In our judgment a distinction is to be drawn between acts which B are complete—though results may continue to flow—and those acts which are continuing. Once the act is complete it cannot thereafter be said to be a threat to inflict unlawful force upon the victim. If the act, as distinct from the results thereof, is a continuing act there is a continuing threat to inflict unlawful force. If the assault involves a battery and that battery continues there is a C continuing act of assault.

For an assault to be committed both the elements of actus reus and mens rea must be present at the same time. The "actus reus" is the action causing the effect on the victim's mind (see the observations of Park B. in *Regina* v. *St. George* [1]). The "mens rea" is the intention to cause that effect. It is not necessary that D mens rea should be present at the inception of the actus reus; it can be superimposed upon an existing act. On the other hand the subsequent inception of mens rea cannot convert an act which has been completed without mens rea into an assault.

In our judgment the Willesden magistrates and quarter sessions were right in law. On the facts found the action of the appellant E may have been initially unintentional, but the time came when knowing that the wheel was on the officer's foot the appellant (1) remained seated in the car so that his body through the medium of the car was in contact with the officer, (2) switched off the ignition of the car, (3) maintained the wheel of the car on the foot and (4) used words indicating the intention of keeping the F wheel in that position. For our part we cannot regard such conduct as mere omission or inactivity.

There was an act constituting a battery which at its inception was not criminal because there was no element of intention but which became criminal from the moment the intention was formed to produce the apprehension which was flowing from the continuing G act. The fallacy of the appellant's argument is that it seeks to equate the facts of this case with such a case as where a motorist has accidentally run over a person and, that action having been completed, fails to assist the victim with the intent that the victim should suffer.

We would dismiss this appeal.

[1] (1840) 9 C. & P. 483, 490, 493.

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BRIDGE J. I fully agree with my Lords as to the relevant principles to be applied. No mere omission to act can amount to an assault. Both the elements of actus reus and mens rea must be present at the same time, but the one may be superimposed on the other. It is in the application of these principles to the highly unusual facts of this case that I have, with regret, reached a different conclusion from the majority of the court. I have no sympathy at all for the appellant, who behaved disgracefully. But I have been unable to find any way of regarding the facts which satisfies me that they amounted to the crime of assault. This has not been for want of trying. But at every attempt I have encountered the inescapable question: after the wheel of the appellant's car had accidentally come to rest on the constable's foot, what was it that the appellant did which constituted the act of assault? However the question is approached, the answer I feel obliged to give is: precisely nothing. The car rested on the foot by its own weight and remained stationary by its own inertia. The appellant's fault was that he omitted to manipulate the controls to set it in motion again.

Neither the fact that the appellant remained in the driver's seat nor that he switched off the ignition seem to me to be of any relevance. The constable's plight would have been no better, but might well have been worse, if the appellant had alighted from the car leaving the ignition switched on. Similarly I can get no help from the suggested analogies. If one man accidentally treads on another's toe or touches him with a stick, but deliberately maintains pressure with foot or stick after the victim protests, there is clearly an assault. But there is no true parallel between such cases and the present case. It is not, to my mind, a legitimate use of language to speak of the appellant "holding" or "maintaining" the car wheel on the constable's foot. The expression which corresponds to the reality is that used by the justices in the case stated. They say, quite rightly, that he "allowed" the wheel to remain.

With a reluctantly dissenting voice I would allow this appeal and quash the appellant's conviction.

*Appeal dismissed.*

Solicitors: *Clinton Davis, Hillman & Parkus; Solicitor, Metropolitan Police.*

hand there for about five minutes. He neither does nor says anything to encourage her: *Reg.* v. *Speck* [1977] 2 All E.R. 859.

Deception. (Section 15 of the Theft Act 1968.) (i) D and X go into a shop. D wants to purchase goods but is short of cash. X offers to pay for him by cheque. He makes out a cheque and hands it over. While the assistant is away wrapping the goods, X confides to D that there is no chance that the cheque will be met. D takes no steps to tell the assistant and receives possession of the goods: section 16 (2) (*a*) of the Theft Act 1968 before amendment by the Theft Act 1978. (ii) D goes into a restaurant and orders a meal intending to pay for it. Having eaten the meal, he dishonestly decides not to pay and seizes his opportunity to run out: contrast *Ray* v. *Sempers* [1974] A.C. 370.

*Gorman Q.C.* in reply. The Crown's appeal to "ordinary parlance" cannot be the proper canon of construction; ordinary parlance would not distinguish culpable from innocent action. A penal statute should not be construed to penalise conduct which under previous legislation was not culpable in the absence of clear words.

Their Lordships took time for consideration.

March 17. LORD DIPLOCK. My Lords, the facts which give rise to this appeal are sufficiently narrated in the written statement made to the police by the appellant Miller. That statement, subject to two minor orthographical corrections, reads:

> "Last night I went out for a few drinks and at closing time I went back to the house where I have been kipping for a couple of weeks. I went upstairs into the back bedroom where I've been sleeping. I lay on my mattress and lit a cigarette. I must have fell to sleep because I woke up to find the mattress on fire. I just got up and went into the next room and went back to sleep. Then the next thing I remember was the police and fire people arriving. I hadn't got anything to put the fire out with so I just left it."

He was charged upon indictment with the offence of "arson contrary to section 1 (1) and (3) of the Criminal Damage Act 1971"; the particulars of offence were that he:

> "on a date unknown between August 13 and 16, 1980, without lawful excuse damaged by fire a house known as No. 9, Grantham Road, Sparkbrook, intending to do damage to such property or recklessly as to whether such property would be damaged."

He was tried in the Leicester Crown Court before a recorder and a jury. He did not give evidence, and the facts as set out in his statement were not disputed. He was found guilty and sentenced to six months' imprisonment.

From his conviction he appealed to the Court of Appeal upon the ground, which is one of law alone, that the undisputed facts did not disclose any offence under section 1 of the Criminal Damage Act 1971. The appeal was dismissed, but leave to appeal to your Lordships' House was granted by the Court of Appeal who certified that the following question of law of general public importance was involved:

> "Whether the actus reus of the offence of arson is present when a defendant accidentally starts a fire and thereafter, intending to destroy or damage property belonging to another or being reckless as to whether any such property would be destroyed or damaged, fails to take any steps to extinguish the fire or prevent damage to such property by that fire?"

The question speaks of "actus reus." This expression is derived from Coke's brocard in his *Institutes*, Part III (1797 ed.), c. 1 fo.10: "et actus non facit reum, nisi mens sit rea," by converting, incorrectly, into an adjective the word "reus" which was there used correctly in the accusative case as a noun. As long ago as 1889 in *Reg.* v. *Tolson* (1889) 23 Q.B.D. 168, 185–187, Stephen J. when dealing with a statutory offence, as are your Lordships in the instant case, condemned the phrase as likely to mislead, though his criticism in that case was primarily directed to the use of the expression "mens rea." In the instant case, as the argument before this House has in my view demonstrated, it is the use of the expression "actus reus" that is liable to mislead, since it suggests that some positive act on the part of the accused is needed to make him guilty of a crime and that a failure or omission to act is insufficient to give rise to criminal liability unless some express provision in the statute that creates the offence so provides.

My Lords, it would I think be conducive to clarity of analysis of the ingredients of a crime that is created by statute, as are the great majority of criminal offences today, if we were to avoid bad Latin and instead to think and speak (as did Sir James Fitzjames Stephen in those parts of his judgment in *Reg.* v. *Tolson* to which I referred at greater length in *Sweet* v. *Parsley* [1970] A.C. 132, 162–163) about the conduct of the accused and his state of mind at the time of that conduct, instead of speaking of actus reus and mens rea.

The question before your Lordships in this appeal is one that is confined to the true construction of the words used in particular provisions in a particular statute, viz. section 1 (1) and (3) of the Criminal Damage Act 1971. Those particular provisions will fall to be construed in the light of general principles of English criminal law so well established that it is the practice of parliamentary draftsmen to leave them unexpressed in criminal statutes, on the confident assumption that a court of law will treat those principles as intended by parliament to be applicable to the particular offence unless expressly modified or excluded. But this does not mean that your Lordships are doing any more than construing the particular statutory provisions. These I now set out:

> "(1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence. . . . (3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson."

This definition of arson makes it a "result-crime" in the classification adopted by Professor Gordon in his work *The Criminal Law of Scotland*,

2nd ed. (1978). The crime is not complete unless and until the conduct of the accused has caused property belonging to another to be destroyed or damaged.

In the instant case property belonging to another, the house, was damaged; it was not destroyed. So in the interest of brevity it will be convenient to refer to damage to property and omit reference to destruction. I should also mention, in parenthesis, that in this appeal your Lordships are concerned only with the completed crime of arson, not with related inchoate offences such as attempt or conspiracy to destroy or damage property belonging to another, to which somewhat different considerations will apply. Nor does this appeal raise any question of "lawful excuse." None was suggested.

The first question to be answered where a completed crime of arson is charged is: "Did a physical act of the accused start the fire which spread and damaged property belonging to another (or did his act cause an existing fire, which he had not started but which would otherwise have burnt itself out harmlessly, to spread and damage property belonging to another)?" I have added the words in brackets for completeness. They do not arise in the instant case; in cases where they do, the accused, for the purposes of the analysis which follows, may be regarded as having started a fresh fire.

The first question is a pure question of causation; it is one of fact to be decided by the jury in a trial upon indictment. It should be answered "No" if, in relation to the fire during the period starting immediately before its ignition and ending with its extinction, the role of the accused was at no time more than that of a passive bystander. In such a case the subsequent questions to which I shall be turning would not arise. The conduct of the parabolical priest and Levite on the road to Jericho may have been indeed deplorable, but English law has not so far developed to the stage of treating it as criminal; and if it ever were to do so there would be difficulties in defining what should be the limits of the offence.

If on the other hand the question, which I now confine to: "Did a physical act of the accused start the fire which spread and damaged property belonging to another?" is answered "Yes," as it was by the jury in the instant case, then for the purpose of the further questions the answers to which are determinative of his guilt of the offence of arson, the conduct of the accused, throughout the period from immediately before the moment of ignition to the completion of the damage to the property by the fire, is relevant; so is his state of mind throughout that period.

Since arson is a result-crime the period may be considerable, and during it the conduct of the accused that is causative of the result may consist not only of his doing physical acts which cause the fire to start or spread but also of his failing to take measures that lie within his power to counteract the danger that he has himself created. And if his conduct, active or passive, varies in the course of the period, so may his state of mind at the time of each piece of conduct. If at the time of any particular piece of conduct by the accused that is causative of the result, the state of mind that actuates his conduct falls within the description of one or other of the states of mind that are made a necessary ingredient of the

offence of arson by section 1 (1) of the Criminal Damage Act 1971 (i.e. intending to damage property belonging to another or being reckless as to whether such property would be damaged) I know of no principle of English criminal law that would prevent his being guilty of the offence created by that subsection. Likewise I see no rational ground for excluding from conduct capable of giving rise to criminal liability, conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created, if at the time of such conduct one's state of mind is such as constitutes a necessary ingredient of the offence. I venture to think that the habit of lawyers to talk of "actus reus," suggestive as it is of action rather than inaction, is responsible for any erroneous notion that failure to act cannot give rise to criminal liability in English law.

No one has been bold enough to suggest that if, in the instant case, the accused had been aware at the time that he dropped the cigarette that it would probably set fire to his mattress and yet had taken no steps to extinguish it he would not have been guilty of the offence of arson, since he would have damaged property of another being reckless as to whether any such property would be damaged.

I cannot see any good reason why, so far as liability under criminal law is concerned, it should matter at what point of time before the resultant damage is complete a person becomes aware that he has done a physical act which, whether or not he appreciated that it would at the time when he did it, does in fact create a risk that property of another will be damaged; provided that, at the moment of awareness, it lies within his power to take steps, either himself or by calling for the assistance of the fire brigade if this be necessary, to prevent or minimise the damage to the property at risk.

Let me take first the case of the person who has thrown away a lighted cigarette expecting it to go out harmlessly, but later becomes aware that, although he did not intend it to do so, it has, in the event, caused some inflammable material to smoulder and that unless the smouldering is extinguished promptly, an act that the person who dropped the cigarette could perform without danger to himself or difficulty, the inflammable material will be likely to burst into flames and damage some other person's property. The person who dropped the cigarette deliberately refrains from doing anything to extinguish the smouldering. His reason for so refraining is that he intends that the risk which his own act had originally created, though it was only subsequently that he became aware of this, should fructify in actual damage to that other person's property; and what he so intends, in fact occurs. There can be no sensible reason why he should not be guilty of arson. If he would be guilty of arson, having appreciated the risk of damage at the very moment of dropping the lighted cigarette, it would be quite irrational that he should *not* be guilty if he first appreciated the risk at some later point in time but when it was still possible for him to take steps to prevent or minimise the damage.

In that example the state of mind involved was that described in the definition of the statutory offence as "intending" to damage property belonging to another. This state of mind necessarily connotes an apprecia-

A tion by the accused that the situation that he has by his own act created involves the risk that property belonging to another will be damaged. This is not necessarily so with the other state of mind, described in the definition of the statutory offence as "being reckless as to whether any such property would be damaged." To this other state of mind I now turn; it is the state of mind which is directly involved in the instant case. Where the state of mind relied upon by the prosecution is that of "intend-
B ing," the risk of damage to property belonging to another created by the physical act of the accused need not be such as would be obvious to anyone who took the trouble to give his mind to it; but the accused himself cannot form the intention that it should fructify in actual damage unless *he himself* recognises the existence of some risk of this happening. In contrast to this, where the state of mind relied upon is "being reckless,"
C the risk created by the physical act of the accused that property belonging to another would be damaged must be one that would be obvious to anyone who had given his mind to it at whatever is the relevant time for determining whether the state of mind of the accused fitted the description "being reckless whether such property would be damaged": *Reg.* v. *Caldwell* [1982] A.C. 341, 352. See also *Reg.* v. *Lawrence* [1982] A.C. 510, 526 for a similar requirement in the mental element in the statutory
D offence of reckless driving.

In *Reg.* v. *Caldwell* this House was concerned with what was treated throughout as being a single act of the accused: viz., starting a fire in the ground floor room of a residential hotel which caused some damage to it; although, if closer analysis of his conduct, as distinct from his state of mind, had been relevant, what he did must have been recognised as con-
E sisting of a series of successive acts. Throughout that sequence of acts, however, the state of mind of Caldwell remained unchanged, his acknowledged intention was to damage the hotel and to revenge himself upon its owner, and he pleaded guilty to an offence under section 1 (1) of the Act; the question at issue in the appeal was whether in carrying out this avowed intention he was reckless as to whether the life of another would be thereby endangered, so as to make him guilty also of the more serious
F offence under section 1 (2). This House did not have to consider the case of an accused who although he becomes aware that, as the result of an initial act of his own, events have occurred that present an obvious risk that property belonging to another will be damaged, only becomes aware of this at some time after he has done the initial act. So the precise language suggested in *Caldwell* as appropriate in summing up to
G a jury in the ordinary run of cases under section 1 (1) of the Criminal Damage Act 1971 requires some slight adaptation to make it applicable to the particular and unusual facts of the instant case.

My Lords, just as in the first example that I took, the fact that the accused's intent to damage the property of another was not formed until, as a result of his initial act in dropping the cigarette, events had occurred which presented a risk that another person's property would be
H damaged, ought not under any sensible system of law to absolve him from criminal liability, so too in a case where the relevant state of mind is not intent but recklessness I see no reason in common sense and justice why mutatis mutandis a similar principle should not apply to impose criminal

liability upon him. If in the former case he is criminally liable because he refrains from taking steps that are open to him to try to prevent or minimise the damage caused by the risk he has himself created and he so refrains because he intends such damage to occur, so in the latter case, when as a result of his own initial act in dropping the cigarette events have occurred which would have made it obvious to anyone who troubled to give his mind to them that they presented a risk that another person's property would be damaged, he should likewise be criminally liable if he refrains from taking steps that lie within his power to try and prevent the damage caused by the risk that he himself has created, and so refrains either because he has not given any thought to the possibility of there being any such risk or because, although he has recognised that there was some risk involved, he has nonetheless decided to take that risk.

My Lords, in the instant case the prosecution did not rely upon the state of mind of the accused as being reckless during that part of his conduct that consisted of his lighting and smoking a cigarette while lying on his mattress and falling asleep without extinguishing it. So the jury were not invited to make any finding as to this. What the prosecution did rely upon as being reckless was his state of mind during that part of his conduct after he awoke to find that he had set his mattress on fire and that it was smouldering, but did not then take any steps either to try to extinguish it himself or to send for the fire brigade, but simply went into the other room to resume his slumbers, leaving the fire from the already smouldering mattress to spread and to damage that part of the house in which the mattress was.

The recorder, in his lucid summing up to the jury (they took 22 minutes only to reach their verdict) told them that the accused having by his own act started a fire in the mattress which, when he became aware of its existence, presented an obvious risk of damaging the house, became under a duty to take some action to put it out. The Court of Appeal upheld the conviction, but their ratio decidendi appears to be somewhat different from that of the recorder. As I understand the judgment, in effect it treats the whole course of conduct of the accused, from the moment at which he fell asleep and dropped the cigarette on to the mattress until the time the damage to the house by fire was complete, as a continuous act of the accused, and holds that it is sufficient to constitute the statutory offence of arson if at any stage in that course of conduct the state of mind of the accused, when he fails to try to prevent or minimise the damage which will result from his initial act, although it lies within his power to do so, is that of being reckless as to whether property belonging to another would be damaged.

My Lords, these alternative ways of analysing the legal theory that justifies a decision which has received nothing but commendation for its accord with commonsense and justice, have, since the publication of the judgment of the Court of Appeal in the instant case, provoked academic controversy. Each theory has distinguished support. Professor J. C. Smith espouses the "duty theory"; Professor Glanville Williams who, after the decision of the Divisional Court in *Fagan* v. *Metropolitan Police Commissioner* [1969] 1 Q.B. 439 appears to have been attracted by the duty theory, now prefers that of the continuous act. When applied to cases

where a person has unknowingly done an act which sets in train events that, when he becomes aware of them, present an obvious risk that property belonging to another will be damaged, both theories lead to an identical result; and since what your Lordships are concerned with is to give guidance to trial judges in their task of summing up to juries, I would for this purpose adopt the duty theory as being the easier to explain to a jury; though I would commend the use of the word "responsibility," rather than "duty" which is more appropriate to civil than to criminal law, since it suggests an obligation owed to another person, i.e., the person to whom the endangered property belongs, whereas a criminal statute defines combinations of conduct and state of mind which render a person liable to punishment by the state itself.

While in the general run of cases of destruction or damage to property belonging to another by fire (or other means) where the prosecution relies upon the recklessness of the accused, the direction recommended by this House in *Reg.* v. *Caldwell* [1982] A.C. 341 is appropriate, in the exceptional case, (which is most likely to be one of arson and of which the instant appeal affords a striking example) where the accused is initially unaware that he has done an act that in fact sets in train events which, by the time the accused becomes aware of them, would make it obvious to anyone who troubled to give his mind to them that they present a risk that property belonging to another would be damaged, a suitable direction to the jury would be: that the accused is guilty of the offence under section 1 (1) of the Criminal Damage Act 1971 if, when he does become aware that the events in question have happened as a result of his own act, he does not try to prevent or reduce the risk of damage by his own efforts or if necessary by sending for help from the fire brigade, and the reason why he does not is either because he has not given any thought to the possibility of there being any such risk or because, having recognised that there was some risk involved, he has decided not to try to prevent or reduce it.

So, while deprecating the use of the expression "actus reus" in the certified question, I would answer that question "Yes" and would dismiss the appeal.

LORD KEITH OF KINKEL. My Lords, for the reasons given in the speech of my noble and learned friend, Lord Diplock, which I have had the benefit of reading in draft and with which I agree, I too would dismiss this appeal.

LORD BRIDGE OF HARWICH. My Lords, for the reasons given by my noble and learned friend, Lord Diplock, I would dismiss this appeal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Diplock. I agree with it, and for the reasons which he gives I would answer the certified question "Yes" and dismiss the appeal.

LORD BRIGHTMAN. My Lords, I would dismiss this appeal for the reasons given by my noble and learned friend, Lord Diplock.

*Appeal dismissed.*

Solicitors: *Lee, Bolton & Lee for Michael T. Purcell & Co., Birmingham; Sharpe, Pritchard & Co. for Ian S. Manson, Birmingham.*

J. A. G.

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[HOUSE OF LORDS]

CHEALL . . . . . RESPONDENT

AND

ASSOCIATION OF PROFESSIONAL EXECUTIVE CLERICAL AND COMPUTER STAFF . . . APPELLANTS

1983 Feb. 21, 22; March 24

Lord Diplock, Lord Edmund-Davies, Lord Fraser of Tullybelton, Lord Brandon of Oakbrook and Lord Templeman

*Trade Union — Membership — Wrongful termination — Member resigning from union and joining another union — Former union complaining to T.U.C. disputes committee — Finding that union accepting member in breach of Bridlington agreement — Union giving notice under its rules terminating membership — Whether membership validly terminated*

The plaintiff, a security officer for a motor manufacturing company, was secretary of the local branch of the union, A.C.T.S.S., a subsidiary of the T.G.W.U. Disenchantment led the plaintiff to resign from the A.C.T.S.S. and to join the defendant union, A.P.E.X. Although the plaintiff had not, on his application form, stated that he had been a former member of the A.C.T.S.S. the local officials of A.P.E.X. were aware of that fact. In breach of the T.U.C. Disputes Principles and Procedures known as the Bridlington principles, in particular, principle 2 which governed the recruitment of former members of any affiliated union, A.P.E.X. had failed to inquire whether the plaintiff's former union objected to the transfer prior to accepting the plaintiff into its membership. The T.G.W.U. having complained to the T.U.C., the T.U.C. disputes committee found that A.P.E.X. had contravened principle 2 and directed A.P.E.X. to exclude the plaintiff and to advise him to rejoin his former union. Accordingly, the A.P.E.X. executive council, relying on rule 14 of its membership rules (which permitted the expulsion of an individual member in order to comply with a decision of the T.U.C. disputes committee) purported to terminate the plaintiff's membership. The plaintiff, who had not at any stage of the dispute been accorded a hearing, brought an action for a declaration that the notice terminating his membership of A.P.E.X. was invalid. Bingham J. dismissed the plaintiff's action. On appeal by the

# Confiscation of Alcohol (Young Persons) Act 1997

**1997 CHAPTER 33**

An Act to permit the confiscation of intoxicating liquor held by or for use by young persons in public and certain other places; and for connected purposes. [21st March 1997]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

## 1 Confiscation of intoxicating liquor

(1) Where a constable reasonably suspects that a person in a relevant place is in possession of intoxicating liquor and that either—

(a) he is under the age of 18; or

(b) he intends that any of the liquor should be consumed by a person under the age of 18 in that or any other relevant place; or

(c) a person under the age of 18 who is, or has recently been, with him has recently consumed intoxicating liquor in that or any other relevant place,

the constable may require him to surrender anything in his possession which is, or which the constable reasonably believes to be, intoxicating liquor and to state his name and address.

(2) A constable may dispose of anything surrendered to him under subsection (1) in such manner as he considers appropriate.

(3) A person who fails without reasonable excuse to comply with a requirement imposed on him under subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding level 2 on the standard scale.

(4) A constable who imposes a requirement on a person under subsection (1) shall inform him of his suspicion and that failing without reasonable excuse to comply with a requirement imposed under that subsection is an offence.

(5) A constable may arrest without warrant a person who fails to comply with a requirement imposed on him under subsection (1).

(6) In subsection (1) "relevant place", in relation to a person, means—

(a) any public place, other than licensed premises; or

(b) any place, other than a public place, to which the person has unlawfully gained access;

and for this purpose a place is a public place if at the material time the public or any section of the public has access to it, on payment or otherwise, as of right or by virtue of express or implied permission.

(7) In this section "intoxicating liquor" and "licensed premises", in relation to England and Wales, have the same meanings as in the Licensing Act 1964 and, in relation to Northern Ireland, have the same meanings as in the Licensing (Northern Ireland) Order 1996.

## 2 Short title, commencement and extent

(1) This Act may be cited as the Confiscation of Alcohol (Young Persons) Act 1997.

(2) Section 1 shall not come into force until such day as the Secretary of State may by order made by statutory instrument appoint.

(3) This Act extends to England and Wales and Northern Ireland.

1997 No. 1725 (C. 73)

# POLICE

## The Confiscation of Alcohol (Young Persons) Act 1997 (Commencement) Order 1997

*Made 18th July 1997*

In exercise of the power conferred upon him by section 2(2) of the Confiscation of Alcohol (Young Persons) Act 1997([a]), the Secretary of State hereby makes the following Order:

**1.** This Order may be cited as the Confiscation of Alcohol (Young Persons) Act 1997 (Commencement) Order 1997.

**2.** Section 1 of the Confiscation of Alcohol (Young Persons) Act 1997 shall come into force on 1st August 1997.

Home Office
18th July 1997

*Alun Michael*
Minister of State

(a) 1997 c.33.

### EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order brings into force on 1st August 1997 section 1 of the Confiscation of Alcohol (Young Persons) Act 1997. Section 2 came into force on Royal Assent (21st March 1997).

ISBN 0 11 064645 2

Enabling power: Confiscation of Alcohol (Young Persons) Act1997, s. 2 (2). Bringing into operation various provisionsof the 1997 Act on 01.08. .97.. -

Effect: None.. -

Issued: 24.07.97.

Territorial extent & classification: E/W/NI. General.

# Confiscation of Alcohol (Young Persons) Act 1997

## 1997 CHAPTER 33

*An Act to permit the confiscation of intoxicating liquor held by or for use by young persons in public and certain other places; and for connected purposes.*

[21st March 1997]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

### 1 Confiscation of intoxicating liquor

(1) Where a constable reasonably suspects that a person in a relevant place is in possession of [alcohol] and that either—

(a) he is under the age of 18; or

(b) he intends that any of the [alcohol] should be consumed by a person under the age of 18 in that or any other relevant place; or

(c) a person under the age of 18 who is, or has recently been, with him has recently consumed [alcohol] in that or any other relevant place,

the constable may require him to surrender anything in his possession which is, or which the constable reasonably believes to be, [alcohol] [or a container for [alcohol] . . .] . . ..

[(1AA) A constable who imposes a requirement on a person under subsection (1) shall also require the person to state the person's name and address.

(1AB) A constable who imposes a requirement on a person under subsection (1) may, if the constable reasonably suspects that the person is under the age of 16, remove the person to the person's place of residence or a place of safety.]

[(1A) . . .]

(2) A constable may dispose of anything surrendered to him under subsection (1) in such manner as he considers appropriate.

(3) A person who fails without reasonable excuse to comply with a requirement imposed on him under subsection (1) [or (1AA)] commits an offence and is liable on summary conviction to a fine not exceeding level 2 on the standard scale.

(4) A constable who imposes a requirement on a person under subsection (1) shall inform him of his suspicion and that failing without reasonable excuse to comply with a requirement imposed under that subsection [or (1AA)] is an offence.

(5) . . .

(6) In subsection (1) [. . .] "relevant place", in relation to a person, means—

(a) any public place, other than licensed premises; or

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(b) any place, other than a public place, to which the person has unlawfully gained access;

and for this purpose a place is a public place if at the material time the public or any section of the public has access to it, on payment or otherwise, as of right or by virtue of express or implied permission.

[(7) In this section—

"alcohol"—

(a) in relation to England and Wales, has the same meaning as in the Licensing Act 2003;

(b) in relation to Northern Ireland, has the same meaning as "intoxicating liquor" in the Licensing (Northern Ireland) Order 1996; and

"licensed premises"—

(a) in relation to England and Wales, means premises which may by virtue of Part 3 or Part 5 of the Licensing Act 2003 (premises licence; permitted temporary activity) be used for the supply of alcohol within the meaning of section 14 of that Act;

(b) in relation to Northern Ireland, has the same meaning as in the Licensing (Northern Ireland) Order 1996.]

**NOTES**

**Initial Commencement**

***To be appointed***

To be appointed: see s 2(2).

**Appointment**

Appointment: 1 August 1997: see SI 1997/1725, art 2.

**Extent**

This Act does not extend to Scotland: see s 2(3).

**Amendment**

Sub-s (1): word "alcohol" in square brackets in each place it occurs substituted by the Licensing Act 2003, s 198(1), Sch 6, para 115(1), (2)(a).

Date in force: 24 November 2005: see SI 2005/3056, arts 1(2), 2(2).

Sub-s (1): in para (b) word "alcohol" in square brackets substituted by the Licensing Act 2003, s 198(1), Sch 6, para 115(1), (2)(b).

Date in force: 24 November 2005: see SI 2005/3056, arts 1(2), 2(2).

Sub-s (1): words in square brackets beginning with the words "or a container" inserted by the Criminal Justice and Police Act 2001, s 29.

Date in force: 1 September 2001: see SI 2001/2223, art 4(b).

Sub-s (1): word "alcohol" in square brackets substituted by the Licensing Act 2003, s 198(1), Sch 6, para 115(1), (2)(c).

Date in force: 24 November 2005: see SI 2005/3056, arts 1(2), 2(2).

Sub-s (1): first words omitted repealed by the Licensing Act 2003, ss 155(1)(a), 199, Sch 7.

Date in force: 10 September 2003: see SI 2003/2100, art 2.

Sub-s (1): final words omitted repealed by the Policing and Crime Act 2009, ss 29(1), (2), 112(2), Sch 8, Pt 3.

Date in force: 29 January 2010: see SI 2010/125, art 2(f), (q), (u).

Sub-ss (1AA), (1AB): inserted by the Policing and Crime Act 2009, s 29(1), (3).

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Date in force: 29 January 2010: see SI 2010/125, art 2(f).

Sub-s (1A): inserted by the Licensing Act 2003, s 155(1)(b).

Date in force: 10 September 2003: see SI 2003/2100, art 2(a).

Sub-s (1A): repealed by the Policing and Crime Act 2009, ss 29(1), (4), 112(2), Sch 8, Pt 3.

Date in force: 29 January 2010: see SI 2010/125, art 2(f), (q), (u).

Sub-s (3): words "or (1AA)" in square brackets inserted by the Policing and Crime Act 2009, s 29(1), (5).

Date in force: 29 January 2010: see SI 2010/125, art 2(f).

Sub-s (4): words "or (1AA)" in square brackets inserted by the Policing and Crime Act 2009, s 29(1), (6).

Date in force: 29 January 2010: see SI 2010/125, art 2(f).

Sub-s (5): repealed by the Serious Organised Crime and Police Act 2005, ss 111, 174(2), Sch 7, Pt 1, para 33, Sch 17, Pt 2.

Date in force: 1 January 2006: see SI 2005/3495, art 2(1)(m), (t), (u)(xli).

Sub-s (6): words "and (1A)" in square brackets inserted by the Licensing Act 2003, s 155(1)(c).

Date in force: 10 September 2003: see SI 2003/2100, art 2(a).

Sub-s (6): words omitted repealed by the Policing and Crime Act 2009, ss 29(1), (7), 112(2), Sch 8, Pt 3.

Date in force: 29 January 2010: see SI 2010/125, art 2(f), (q), (u).

Sub-s (7): substituted by the Licensing Act 2003, s 198(1), Sch 6, paras 115(1), (3).

Date in force: 24 November 2005: see SI 2005/3056, arts 1(2), 2(2).

**2 Short title, commencement and extent**

(1) This Act may be cited as the Confiscation of Alcohol (Young Persons) Act 1997.

(2) Section 1 shall not come into force until such day as the Secretary of State may by order made by statutory instrument appoint.

(3) This Act extends to England and Wales and Northern

Ireland. **NOTES**

**Initial Commencement**

***Royal Assent***

Royal Assent: 21 March 1997: (no specific commencement provision).

**Extent**

This Act does not extend to Scotland: see sub-s (3) above.

**Subordinate Legislation**

Confiscation of Alcohol (Young Persons) Act 1997 (Commencement) Order 1997, SI 1997/1725 (made under sub-s (2)).

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# Licensing Act 2003

### Section 155 Confiscation of sealed containers of alcohol

(1) In section 1 of the Confiscation of Alcohol (Young Persons) Act 1997 (c 33) (right to require surrender of alcohol)--

(a) in subsection (1), omit "(other than a sealed container)",

(b) …

(c) …

(2) …

### Section 191 Meaning of "alcohol"

(1) In this Act, "alcohol" means spirits, wine, beer, cider or any other fermented, distilled or spirituous liquor [(in any state)], but does not include--

(a) alcohol which is of a strength not exceeding 0.5% at the time of the sale or supply in question,

(b) perfume,

(c) flavouring essences recognised by the Commissioners of Customs and Excise as not being intended for consumption as or with dutiable alcoholic liquor,

(d) the aromatic flavouring essence commonly known as Angostura bitters,

(e) alcohol which is, or is included in, a medicinal product [or a veterinary medicinal product],

(f) denatured alcohol,

(g) methyl alcohol,

(h) naphtha, or

(i) alcohol contained in liqueur confectionery.

(2) In this section--

"denatured alcohol" has the same meaning as in section 5 of the Finance Act 1995 (c 4);

"dutiable alcoholic liquor" has the same meaning as in the Alcoholic Liquor Duties Act 1979 (c 4);

"liqueur confectionery" means confectionery which--

(a) contains alcohol in a proportion not greater than 0.2 litres of alcohol (of a strength not exceeding 57%) per kilogram of the confectionery, and

(b) either consists of separate pieces weighing not more than 42g or is designed to be broken into such pieces for the purpose of consumption;

"medicinal product" has the same meaning as in section 130 of the Medicines Act 1968 (c 67); and

"strength" is to be construed in accordance with section 2 of the Alcoholic Liquor Duties Act 1979;

["veterinary medicinal product" has the same meaning as in regulation 2 of the Veterinary Medicines Regulations 2006].

**Section 198 Minor and consequential amendments**

(1) Schedule 6 (which makes minor and consequential amendments) has effect.

(2) The Secretary of State may, in consequence of any provision of this Act or of any instrument made under it, by order make such amendments (including repeals or revocations) as appear to him to be appropriate in--

(a) any Act passed, or

(b) any subordinate legislation (within the meaning of the Interpretation Act 1978 (c 30) made, before that provision comes into force.

**Schedule 6**

**115**

(1) Section 1 of the Confiscation of Alcohol (Young Persons) Act 1997 (confiscation of alcohol) is amended as follows.

(2) In subsection (1)—

(a) for “intoxicating liquor”, in each place it occurs, substitute “alcohol”,

(b) in paragraph (b) for “liquor” substitute “alcohol”, and

(c) for “such liquor” substitute “alcohol”.

(3) For subsection (7) substitute—

“(7) In this section—

“alcohol”—

(a) in relation to England and Wales, has the same meaning as in the Licensing Act 2003;

(b) in relation to Northern Ireland, has the same meaning as “intoxicating liquor” in the Licensing (North ern Ireland) Order 1996; and

“licensed premises”—

(a) in relation to England and Wales, means premises which may by virtue of Part 3 or Part 5 of the Li censing Act 2003 (premises licence; permitted temporary activity) be used for the supply of alcohol within the meaning of section 14 of that Act;

(b) in relation to Northern Ireland, has the same meaning as in the Licensing (Northern Ireland) Order 1996.”

# Serious Organised Crime and Police Act 2005

**Section 110 Powers of arrest**

**(1)** For section 24 of PACE (arrest without warrant for arrestable offences) substitute--

"24 Arrest without warrant: constables

(1) A constable may arrest without a warrant--

(a) anyone who is about to commit an offence;

(b) anyone who is in the act of committing an offence;

(c) anyone whom he has reasonable grounds for suspecting to be about to commit an offence;

(d) anyone whom he has reasonable grounds for suspecting to be committing an offence.

(2) If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it.

(3) If an offence has been committed, a constable may arrest without a warrant--

(a) anyone who is guilty of the offence;

(b) anyone whom he has reasonable grounds for suspecting to be guilty of it.

(4) But the power of summary arrest conferred by subsection (1), (2) or (3) is exercisable only if the constable has reasonable grounds for believing that for any of the reasons mentioned in subsection (5) it is necessary to arrest the person in question.

(5) The reasons are--

(a) to enable the name of the person in question to be ascertained (in the case where the constable does not know, and cannot readily ascertain, the person's name, or has reasonable grounds for doubting whether a name given by the person as his name is his real name);

(b) correspondingly as regards the person's address;

(c) to prevent the person in question--

(i) causing physical injury to himself or any other person;

(ii) suffering physical injury;

(iii) causing loss of or damage to property;

(iv) committing an offence against public decency (subject to subsection (6)); or

(v) causing an unlawful obstruction of the highway;

(d) to protect a child or other vulnerable person from the person in question;

(e) to allow the prompt and effective investigation of the offence or of the conduct of the person

in question;

(f) to prevent any prosecution for the offence from being hindered by the disappearance of the person in question.

(6) Subsection (5)(c)(iv) applies only where members of the public going about their normal business cannot reasonably be expected to avoid the person in question.

24A Arrest without warrant: other persons

(1) A person other than a constable may arrest without a warrant--

(a) anyone who is in the act of committing an indictable offence;

(b) anyone whom he has reasonable grounds for suspecting to be committing an indictable offence.

(2) Where an indictable offence has been committed, a person other than a constable may arrest without a warrant--

(a) anyone who is guilty of the offence;

(b) anyone whom he has reasonable grounds for suspecting to be guilty of it.

(3) But the power of summary arrest conferred by subsection (1) or (2) is exercisable only if--

(a) the person making the arrest has reasonable grounds for believing that for any of the reasons mentioned in subsection (4) it is necessary to arrest the person in question; and

(b) it appears to the person making the arrest that it is not reasonably practicable for a constable to make it instead.

(4) The reasons are to prevent the person in question--

(a) causing physical injury to himself or any other person;

(b) suffering physical injury;

(c) causing loss of or damage to property; or

(d) making off before a constable can assume responsibility for him."

**(2)** Section 25 of PACE (general arrest conditions) shall cease to have effect.

**(3)** In section 66 of PACE (codes of practice), in subsection (1)(a)--

(a) omit "or" at the end of sub-paragraph (i),

(b) at the end of sub-paragraph (ii) insert "or (iii) to arrest a person;"

**(4)** The sections 24 and 24A of PACE substituted by subsection (1) are to have effect in relation to any offence whenever committed.

**Section 111 Powers of arrest: supplementary**

Schedule 7, which supplements section 110 by providing for the repeal of certain enactments (including some which are spent) and by making further supplementary provision, has effect.

**Schedule 7 Part 1 Specific Appeals**

**33**
**Confiscation of Alcohol (Young Persons) Act 1997**

In section 1 of the Confiscation of Alcohol (Young Persons) Act 1997 (confiscation of alcohol), omit subsection (5).

# Policing and Crime Act 2009

### Section 29 Confiscating alcohol from young persons

(1) Section 1 of the Confiscation of Alcohol (Young Persons) Act 1997 (c 33) (confiscation of alcohol from young persons in a public place etc) is amended as follows.

(2) In subsection (1) omit "and to state his name and address".

(3) After subsection (1) insert--

"(1AA) A constable who imposes a requirement on a person under subsection (1) shall also require the person to state the person's name and address.

(1AB) A constable who imposes a requirement on a person under subsection (1) may, if the constable reasonably suspects that the person is under the age of 16, remove the person to the person's place of residence or a place of safety."

(4) Subsection (1A) is omitted.

(5) In subsection (3) after "subsection (1)" insert "or (1AA)".

(6) In subsection (4) after "that subsection" insert "or (1AA)".

(7) In subsection (6) omit "and (1A)".

### Section 112 Minor and consequential amendments and repeals and revocations

(1) Schedule 7 (which contains minor and consequential amendments and repeals and revocations of provisions which are superseded or no longer required or which have not been brought into force) has effect.

(2) The provisions listed in Schedule 8 are repealed or revoked to the extent specified.

(3) The Secretary of State may by order make such supplementary, incidental or consequential provision as the Secretary of State considers appropriate for the general purposes, or any particular purpose, of this Act or in consequence of any provision made by or under this Act or for giving full effect to this Act or any such provision.

(4) The power conferred by subsection (3)—

(a) is exercisable by statutory instrument, and

(b) includes power to make transitional, transitory or saving provision.

(5) The power conferred by this section may, in particular, be exercised by amending, repealing, revoking or otherwise modifying any provision made by or under an enactment (including this Act and any Act passed in the same Session as this Act).

(6) An instrument containing an order under this section may not be made unless a draft of the instru-

ment has been laid before, and approved by a resolution of, each House of Parliament.

(7) Subsection (6) does not apply to an instrument containing an order under this section if the order does not amend or repeal a provision of a public general Act.

(8) An instrument containing an order under this section to which subsection (6) does not apply is subject to annulment in pursuance of a resolution of either House of Parliament.

(9) For the purposes of subsection (7), an amendment or repeal is not an amendment or repeal of a provision of a public general Act if it is an amendment or repeal of a provision which has been inserted (whether by substitution or otherwise) into such an Act by a local Act or by any other Act which is not a public general Act.

**Schedule 8**

**Part 3**

**Alcohol Misuse**

| *Reference* | *Extent of repeal* |
|---|---|
| Confiscation of Alcohol (Young Persons) Act 1997 (c 33) | In section 1--<br><br>(a) in subsection (1), "and to state his name and address",<br>(b) subsection (1A), and<br>(c) in subsection (6), "and (1A)". |
| Licensing Act 2003 (c 17) | Section 155(1)(b) and (c). |

obvious; even though his code contains elements not derived from it, it is part of his national legal history. It has not the same claim upon the English lawyer and that is why this book is concerned with the first life of Roman Law; but it has not been wholly without influence for it has given jurisprudence a universal terminology, as it were a legal lingua franca. As has been earlier mentioned, the making of the law which provided Justinian with his material has a claim on the attention of any would-be lawyer and especially the English lawyer.

was adopted by Japan, that of Switzerland by Turkey.



# 2. The Roman Constitution and the Roman Empire

Some knowledge of the history of the political and social context in which it developed is essential to the study of any system of law. An exhaustive survey, however, would be both out of place here and beyond the competence of the writer. The following pages are concerned with what are considered to be the important institutions and elements of Roman history and society during the development, decline and compilation of Roman Law.

Tradition has it that Rome was founded in 753 B.C.;[1] the Emperor Justinian died in A.D. 565: there is thus involved a span of over thirteen hundred years which may conveniently be divided into four periods – the Monarchy, the Republic, the Principate and the Dominate.

(i) The Monarchy

According to Roman historians of a much later age,[2] Rome had, from her foundation by the first of them, Romulus, seven kings: the last three were Etruscan and it was the despotic behaviour of the last of these, Tarquinius Superbus, which caused the abolition of the monarchy in 509 B.C. Ethnically, the Roman people was not of one stock: Latins, Sabines and Etruscans were the forebears of the nation which was to make first Italy and then the known western world its own. Always according to tradition, the ancient Roman people was divided into three tribes, *Ramnes, Tities and Luceres*, which more recent historians have endeavoured to identify with the different elements in the composition of the population. Be that as it may and however great the scepticism with which the detailed accounts of the regal period related by the historians may justly be received, it can be confidently accepted that there was originally a monarchy at, and a period of Etruscan domination of, Rome.

Knowledge of the regal period is necessarily uncertain; but it would appear that there were three main elements in the constitution: the King (*rex*), the

[1] This is not to deny that there were pre-existing settlements in the area on the Tiber that was to become Rome; but the pre-history of Rome and central Italy is a matter for controversy between historians and beyond the scope of the present work.
[2] Notably Livy (59 B.C.-A.D. 17) and Dionysius of Halicarnassus (c. 25 B.C.).

senate (*senatus*) and the popular assembly (*comitia*). The King[3] was the supreme magistrate, chief priest,[4] commander of the army and chief judge. He was advised by the senate, composed of heads of families (*patresfamilias*) selected by the king and, still according to tradition, one hundred in number. The popular assembly was the *comitia curiata*: the three ethnic tribes were divided into ten *curiae* each, the *curia* comprising a number of *gentes*, i.e., groups of families having a name (*nomen*)[5] in common, and representatives of the *curiae* constituted the *comitia curiata*.[6] The senate was already the important body. In the event of the death of a king without an apparent successor, power resided in the hands of the senate, members of which successively held the position of *interrex*[7] for five days until the new king was nominated. The functions of the *comitia curiata* are uncertain. It acclaimed and thus ratified the appointment of the new king and, in the light of its activity in later periods, probably already had responsibilities in the fields of family and succession law.[8] As a political body, it was, one may suppose, consulted by the king as and when he felt it desirable or necessary.

In talking of the people and senate, it must be noted that there were two orders or classes of society, the patricians and plebeians. The basis of the distinction is unclear and there are numerous hypotheses on the subject.[9] What is clear is that the patricians were the citizens from whom the senate and assembly were constituted; the plebeians were very much second-class citizens with no political and few social rights. The first two centuries of the Republic were to be occupied with the struggle for the emancipation of the plebeians.

(ii) The Republic

(a) Where the first two and a half centuries of her existence had been concerned with, so to speak, the internal consolidation of Rome as an entity, the remainder of the pre-Christian era saw her establish herself, in the first two centuries or so of the Republic, as the mistress of Italy and thereafter, through an almost unbroken series of wars against foreign enemies, as a

[3]See Coli, 17 SDHI 1ff.; De Martino, 4 IURA ISlff.; Kunkel, Pestgabe Gutzwiller 3ff.; Heuss, 70 ZSS 427ff.; De Francisci, Primordia Civitatis, 511ff.; Gaudemet, Institutions de l'antiquité, 264ff.

[4]His title survived, in this respect, in the *rex sacrorum* of later times.

[5]Romans had a forename (*praenomen*), a gentilician name (*nomen*) and a particular family name within the *gens* (*cognomen*). Thus Gaius Julius Caesar, for example, the great dictator, was the individual member (Gaius) of the Caesar family within the Julian *gens*.

[6]The precise nature of the *curia* is a matter of uncertainty.

[7]See Biscardi, 48 BIDR 403ff., 57/58 ibid. 213ff.; Guarino, Studi Solazzi, 21ff.; Wolff, 65 BIDR Iff.; Branca, 20 IURA 49ff.; Friezer, 12 Mnemosyne (4th series), 30lff.

[8]See Chapters XL(i) and XLVII(i), post.

[9]Cf. e.g. Arangio Ruiz, Storia del diritto romano[7], 43ff., 412ff.; De Martino, Storia della costituzione romana I, 54ff.



world power whose empire was to attain its widest dimensions before the middle of the second century of the Christian era.

Tyranny having been the cause of the downfall of the monarchy, the king was replaced by two magistrates who were eventually – and relatively early-known as consuls (*consules*)[10] and who held office for a year at a time. The extent of the erstwhile kingly power (*imperium*) was not limited but it appears to have been the belief of the founders of the Republic that to have two officers of co-equal power, each able to place a veto on the proposed conduct of the other, would effectively prevent a recrudescence of despotism; and this principle of collegiality, of the multiple exercise of office and power, was to characterise the development of the subsequent other magistracies of the Republic. In times of national emergency, however, a *dictator* might be nominated by the consuls with supreme power but limited tenure thereof, since the period for which a *dictator* could hold office was six months.

Gradually, other magistracies were created to relieve the burden of the consuls. Quaestors (*quaestores*) probably[11] first appeared in 447 B.C., principally to act as financial officers under the consuls and, as the area of Roman domination expanded, under magistrates with *imperium* outside Rome. Originally two, their number was raised to four in 421 B.C. and, in the time of Sulla's dictatorship (82-79 B.C.), to twenty.

Two censors (*censores*)[12] were first appointed in 443 B.C., primarily to take over from the consuls the duty of compiling the *census* on the basis of which the citizenry was divided into (geographical) tribes (*tribus*) and centuries (*centuriae*) and the military rôle of each of its members, when it became necessary to raise a levy, was determined. With time, however, their office became more august than even that of the consuls. By affixing their mark of disapproval (*nota censoria*) to the name of an enrolled person, they could degrade him in rank and remove him from his tribe; and there was no limit to the grounds on which a citizen might incur their disapproval. They made the contracts under which the state revenue was raised by tax-farmers (*publicani*), let out public land and the contracts for public works such as the building of roads and viaducts and, after the enactment of the *lex Ovinia* (c. 312 B.C.), became responsible for the selection of new members of the senate. Censors were appointed every five years but in fact held office only for eighteen months. The censorship and dictatorship were the two exceptions to the general Roman principle of annual magistracies.

[10]Originally *praetores*. There is much controversy over the dual magistracy as the original form of Republican government, especially since, at times, there were more than two chief officers, known as military tribunes. For a convenient summary, see Jolowlcz & Nicholas, pp. 8/9, n. 2 and literature there cited.

[11]See Latte, 67 TAPA 24ff., PW Suppl. 7, 161off.

[12]See F. Cancelli, Studi sui censores.

In 367 B.C., there were created the two magistracies of relevance for the development of the law, the praetorship and the curule (patrician) aedileship. From the standpoint of the law, incomparably the more important magistrate was the praetor who was appointed to take over the administration of civil process from the consuls. At first, there was only one praetor but, with the establishment of the first provinces in 242 B.C., a second praetor was created to administer process between citizens and non-citizens.[13] This magistrate was accordingly known as *praetor peregrinus* while his senior colleague who controlled litigation, etc., between citizens was styled *praetor urbanus*. Two more praetors were added in 227 B.C., and a further two in 197 B.C., to act as provincial governors: finally, Sulla raised the number to eight, those other than the *urbanus* and *peregrinus* acting as presidents of the permanent criminal courts (*quaestiones perpetuae*).

The original aediles were plebeians, assistants to the tribunes who will be mentioned hereafter. With the introduction of the curule office, however, the now four aediles (two curule and two plebeian) became true magistrates with essentially municipal functions. They supervised the cleanliness of the city, the water supply, the preservation of roads and public buildings, the corn supply and the public market in connexion with which they exercised a certain civil and criminal jurisdiction.

The tribunes (*tribuni*)[14] were a product of the struggle between the patricians and plebeians. They were the first plebeian officers and tradition has it that the first two were created in 494 B.C.; by 449 B.C., their number had risen to ten. Their original function was probably to protect plebeians from arrest and punishment by (inevitably) patrician magistrates, the *ius auxilii ferendi*; they certainly acquired, however, the right of convening assemblies of the *plebs* (*consilium plebis*) and obtaining resolutions (*plebiscita*) from them i.e., the *ius agendi*, and also *intercessio*, the power to veto acts by any magistrate. This last made the tribunate an office of great influence and power – and may also be the reason for the personal inviolability and sacrosanctity of tribunes. Spawned of strife and insurrection, the tribunes were essentially quasi-revolutionary watchdogs of the rights (such as they were) of the plebeians. With the passing of the strife between the two orders of society, they became an integral part of the magisterial machinery of the Republic and, apart from their political functions, played a key rôle in the administration of criminal justice, notably in trials for treason (*maiestas*).

(b) In theory, the senate[15] continued to be a consultative body. In fact,

[13] See Daube, 41 JRS 66ff.; Serrao, La 'iurisdictio' del pretore peregrine; Wieacker, Vom römischen Recht², 83ff.; Hübner, Gedächtnisschrift Peters, 97ff.

[14] See Niccolini, Il tribunato della plebe; Bleicken, Das Volkstribunat der klassischen Republik; Ross Taylor, 52 JRS 19ff.

[15] See Willems, Le Sénat de la république romaine; De Martino (*op. cit.*, n. 9), 40ff.; Nicolet, 36 RHDFE 26off.; Gabba, 63 BIDR 221ff.; De Dominicis, Studi Grosso I, 251ff.; Guarino, Sein und Werden im Recht, 281ff.

[16] See Crifò, 71 BIDR 31ff.; Watson, Law Making, 21ff.



by reason of the brevity of tenure of the annual magistrates, it became the one stable executive body of the Republic with powers, in real terms, far beyond those to which, in principle, it had claim. Its prestige was inevitably enhanced when the *lex Ovinia* required that new recruits – now selected by the censors – should be at least ex-aediles, so ensuring that the senate was a body of men with at least some magisterial experience; Sulla later made quaestors eligible for membership. For the greater part of the Republic, the senate comprised three hundred members; Sulla increased the number to six hundred, a maximum to which it was restored by Augustus after a brief period in which Julius Caesar had raised it to nine hundred. The original senators of the regal days were exclusively patrician but, it would seem, quite early in the Republic plebeians became eligible for membership: nonetheless, a distinction long existed between the hereditary senators (*patres*), probably the heads of *gentes*, and those recruited to the ranks of the senate (*patres conscripti*).

The functions of the senate were wide-ranging. Though not itself a legislative body in the Republic,[16] the senate had important functions in connexion with law-making. Originally, no legislation passed by one of the popular assemblies, to be discussed hereafter, was operative without ratification by the senate (*auctoritas patrum*); then a *lex Publilia Philonis* (339 B.C.) provided that senatorial approval should be given to a measure before it was put to the relevant assembly which thus, in effect, ratified a proposal endorsed by the senate. Since, as will be seen, legislation could be enacted only on the proposal of the magistrate convening an assembly, it follows that such magistrate would have deliberated with his fellows in the senate before putting forward his measure for the vote of the assembly. Again, the senate assumed the power, confirmed by a *lex Cornelia* of 67 B.C., of dispensing persons from the provisions of a particular law or laws.

In relation to the magistrates, quite apart from its surveillance of their legislative proposals, the senate also allotted them their spheres of activity (*provinciae*) and, by extending their *imperium* in the case of the senior magistrates, as pro-consuls and pro-praetors, provided governors for the territorial provinces of the expanding Empire. It established the convention that the consuls would nominate a *dictator* only on its suggestion and, by a resolution of last resort (*senatusconsultum ultimum*), could charge the consuls to 'save the Republic', in effect, arm them with dictatorial powers after the dictatorship itself fell into disuse after the Second Punic War.

In addition, the senate kept a firm control of public finance and revenue and conducted foreign affairs: it was the senate which declared war and peace, received ambassadors and made treaties in the name of the Roman people.

(c) Turning to the popular assemblies, the *comitia curiata* still existed but had no real political significance, merely ratifying the election of the senior magistrates and conferring upon them their *imperium*. As the *comitia calata*, it was convened twice a year by the *pontifex maximus* for the making of wills (so long as the *testamentum in comitiis calatis* existed)[17] and for effecting adrogations.[18] Its lack of real power is reflected in the fact that the *curiae* were, in historical times, represented by thirty lictors (*lictores*), attendants on the magistrates.

The real assemblies of the Republic were the *comitia centuriata*, *comitia tributa* and *concilium plebis*;[19] the two former comprised all males on the *census* roll, while the last was exclusively plebeian. These bodies had certain features in common: they could meet only when convened by the appropriate magistrate; their decisions were made on a block vote system not by individual head-count; they were decision-making not deliberative assemblies – they could say only 'yea' or 'nay' to the magistrate's proposal, any discussion having been conducted in a prior informal meeting (*contio*) or series of meetings; and, rather like the old English shire courts, they dealt with varied business, electing magistrates, criminal jurisdiction and legislation.

The most august of these assemblies was the *comitia centuriata* based upon reforms ascribed to the penultimate King, Servius Tullius.[20] The population was divided into five classes according to wealth, with a view to the rôle of each citizen when a levy had to be raised, ranging from the richest who would be cavalry (*equites*) to those who had nothing but what they stood up in (*capite censi*). To each class again, there were allocated centuries (*centuriae*) which were the voting units. The allocation of the centuries, one hundred and ninety three in all, was such as to give an absolute majority to the wealthiest members of society, since eighteen centuries were ascribed to the first class and eighty to the first class of prospective infantry. This assembly, consistently with its military basis, met on the field of Mars (*campus Martius*). It could be convened only by a consul, elected the magistrates with *imperium*, i.e., the consul and the praetor (and, while the office existed, the *dictator*), and enacted *leges*, statutes binding upon the whole citizenry. It was also the final court of criminal appeal since no capital sentence pronounced by a magistrate against a citizen could be executed without his right of appeal to the people (*provocatio ad populum*).[21]

Servius Tullius is also credited with having replaced the three old ethnic tribes with geographical tribes based upon citizens' place of residence. These tribes constituted the voting units of the *comitia tributa*. Originally, four in the actual city and sixteen in the outlying areas, these tribes had increased in number by 241 B.C. to thirty five, a total that thereafter remained constant. The *comitia tributa* could be convened by either consul or praetor; it elected the curule aediles and quaestors, heard criminal appeals against a fine of three thousand and fifty *asses* or more, and enacted *leges*. The extent of its legislative activity, however, is uncertain by reason of the legislative activity of the *concilium plebis*.

It will be obvious that, so long as strife between the orders of society existed, the constitution of the *comitia centuriata* placed a powerful, even invincible, weapon in the hands of the patricians and that, though the constitution of the *tributa* was apparently more democratic, it was decidedly inferior to the *centuriata* in prestige. Details of the plebeians' eventually successful struggle for equality are impossible to unravel from the colourful accounts of the annalists and historians of developed Rome; but it would appear that, in desperation, the inferior citizens resorted to a series of secessions from the city, withdrawing to the Aventine hill and so wringing concessions from their more fortunate fellow-citizens. The First Secession, ascribed to 494 B.C., brought them recognition as an entity with the right to appoint their own officers, the tribunes already discussed. Their right to meet for this purpose and the sacrosanctity of their assembly and of their officers was guaranteed by the *lex Icilia* (c. 456 B.C.) which may be said to have confirmed the validity of the gathering which may be now defined as the *concilium plebis*. It met normally when summoned by a tribune, elected the tribunes and plebeian aediles, had a criminal jurisdiction, notably – as said – in treason cases, and passed resolutions (*plebiscita*) which originally were binding only on the *plebs* itself.

Three statutes of widely differing dates are credited with giving general legislative force to *plebiscita* – a *lex Valeria Horatia* of 449 B.C., a *lex Publilia Philonis* of 339 B.C. and a *lex Hortensia* of 287 B.C.[22] It should also be mentioned that, after a *lex Publilia* of 471 B.C.,[23] the *concilium plebis* was mustered on the basis of tribes so that it was, in effect; the *comitia tributa* without the patricians. That the *lex Valeria Horatia* should have had this effect is most improbable since another century and a half was to elapse before

[17] Chapter XLVII(i), post.

[18] Chapter XL(i), post.

[19] See Nocera, Il potere del comizi e i suoi limiti; Tibiletti, 27 Athenaeum 210ff.; Dell'Oro, 25 SDHI 94ff., 144 AG 58ff.; De Visscher, 29 RHDFE 1ff.; Gallo, 18 SDHI 127ff.; De Martino (op. cit., n. 9), 391ff.; Staveley, 74 AJP 1ff., 3 Historia 193ff., 11 ibid. 299ff.; Ross Taylor, 78 AJP 337ff., Roman voting assemblies from the Hannibalic war to the dictatorship of Caesar; De Francisci, Studi Arangio-Ruiz I, 1ff.; Schönbauer, Studi Albertario I, 699ff.; Coli, 21 SDHI 181ff.; Sumner, 13 Historia 125ff.; Hall, ibid. 267ff.; Nicolet, 39 RHDFE 341ff.; Magdelain, 20 IURA 281ff.; Jolowicz & Nicholas (op. cit., n. 10), 17ff.; Grelle, NNDI 3, 601ff.

[20] Traditional dates, 578-535 B.C.

[21] See Grosso, Studi De Francisci II, 1ff.; Kunkel, Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit; Crifò, Ricerche sull'exilium I, 29 SDHI 288ff.

[22] Livy, *III.55, VIII.12*; Pliny, *Nat. His. 16.15(10); G.I.3; Inst.I.2.4; D.1.2.2.8.*

[23] So Livy, *11.58*.

the plebeians could be regarded as fully emancipated: it is more probable that the *lex* reaffirmed the validity of the *concilium plebis* on the restoration of the constitution after the passing of the Twelve Tables.[24] The *lex Publilia Philonis* is probably that already referred to in connexion with *leges*: by 339 B.C., the *plebs* would already have been in the majority as an element of the Roman citizenry and it would not have been unreasonable that proposals to be put before it should have required senatorial scrutiny. In all probability, it was the *lex Hortensia*, coming virtually at the end of the struggle of the orders, which gave general validity to resolutions of the *concilium plebis*. Certainly thereafter, doubtless because of the similarity of constitution of the *concilium* and the *tributa*, *plebiscita* came to be described as *leges*: Ulpian[25] tells us that the *lex Aquilia*,[26] which became the foundation of the law concerning damage to property, was in fact a *plebiscitum* and most of the *leges Juliae* of Augustus were enacted in the *concilium plebis*.

It may be summarily observed that the strife between the orders of society had, by the time of the *lex Hortensia*, virtually ceased. In consequence of plebeian pressure and secessions, a statement of the law had been promulgated c. 451/450 B.C., a *lex Canuleia* of c. 445 B.C. had authorised intermarriage between patricians and plebeians; in 421 B.C., the plebeians became eligible for the quaestorship; by the *leges Liciniae Sextiae* of 367 B.C., one of the consuls was to be a plebeian and a *lex Publilia Philonis* of 339 B.C. provided that one of the censors too must be plebeian; a *lex Ogulnia* of 300 B.C. enacted that half the college of pontiffs was to be plebeian and in 254 B.C. Tiberius Coruncanius was to become the first Plebeian *pontifex maximus*.

It should, however, be added that, with the passing of the struggle between the orders of society, there emerged a regrouping of citizens, the wealthier plebeians who attained to magistracies, etc., joining forces with the hereditary elite as the Optimates, while the poor and their champions, such as Tiberius Gracchus and his brother, Caius, became the Popular party. It should also be observed that, with the growth of the Roman empire and with persons of senatorial rank forbidden to engage in trade and commerce, there developed a new capitalist class, the equestrian order, which in general had an identity of interest with the senatorial class, though there were issues which clearly – and bitterly – divided them. It may further be noted that, in the course of the third century B.C., a change was made in the constitution of the *comitia centuriata*, linking the centuries more closely with the tribes of the *tributa* and so reducing the timocratic character of the assembly.

For the greater part of three centuries after the enactment of the *lex Hortensia*, Rome thus had three bodies all capable of passing legislation of general

[24] Chapter III(i), post.
[25] *D.9.2.1.1*
[26] Chapter XXIX, post.



binding force. While national peril, as in the period of the Second Punic War, united the population and so long as the political situation remained fairly stable, this presented no real problem. Which assembly would be asked to legislate depended on the magistrate who had a proposal to put forward and the requirement of *auctoritas patrum* would ensure that conflicting measures were not put before different assemblies. In practice, it would appear, the *comitia tributa* was little used as a legislative body; the *comitia centuriata* was convoked to enact measures of constitutional and political importance while enactments in the field of private law emanated from the *concilium plebis*.

But potential chaos was there; and, generally, it can be seen that the checks and balances of the Republican constitution were of the most elementary character; brevity of tenure and the principle of collegiality were the only real restraints on magistrates. By the last century of the Republic, when Rome had become a prize worth winning for an ambitious man, the frailty of the constitution was exposed. Generals fighting wars of conquest abroad kept tribunes in their pay to guard their interests at home; bribery not merit determined the outcome of elections in the assemblies; the populace grew out of hand; armed bands supported rival political factions; only the senate retained some vestige of dignity as Rome drifted helplessly and, seemingly, inevitably into the Civil War of which the final consequence was the emergence of Augustus and the Principate.

(d) The time has come to say something of the empire which was already extensive at the end of the Republic, especially after the feats of Pompey in the east and of Julius Caesar in the west.[27] Like that of Britain, the Roman empire was a product of slow growth and its Republican organisation was unsystematic, almost haphazard. Three principal methods of association with the sovereign city were utilised – alliance or federation, incorporation into Roman citizenship and the establishment of colonies (*coloniae*). Roman predominance and expansion began in Italy in her own immediate environment with the creation of the Latin League. According to tradition,[28] by the *foedus Cassianum* of 493 B.C., Rome established an alliance with the cities of Latium in which all were equal and pledged mutual assistance in times of war; it would appear also that Latins could acquire Roman citizenship by taking up permanent residence at Rome and renouncing their former citizenship (*ius migrandi*). In the fourth century B.C., however, the

[27] See Reid, The Municipalities of the Roman Empire; Täubler, Imperium Romanum: Studien zur Entwicklungs geschichte des römischen Reiches; Tenny Frank, Roman Imperialism; Arnold, The Roman system of provincial administration[3]; Stevenson, CAH 9, Ch. X; Badian, Foreign Clientelae; Romanelli, Storia delle province romane dell'Africa; Manni, 47 RHDFE 66ff.; Torrent, La iurisdictio de los magistrates municipales; Jolowicz & Nicholas (op. cit., n. 10), 58ff.; Sherwin-White, The Roman Citizenship[2].
[28] On which, see Last, CAH 7, 487ff.

Latins became disenchanted with Rome; in 340 B.C. they rebelled and in 338 B.C. were suppressed and the League was dissolved. Some cities were incorporated into full Roman citizenship; others were given citizens' rights in private but not in public law (*civitas sine suffragio*); others again became allies as Latins with private law rights at Rome, the *prisci Latini* having the rights of *maius Latium*; subsequently, the *ius migrandi* was discontinued and Latins had to remain with their citizenship of origin, having the rights of *minus Latium*.[29] All the Latin communities, while retaining their own internal administration, had to accept Rome's hegemony in state affairs and, as allies, to furnish troops for her armies. This system of unequal alliance (*foedera iniqua*) was extended to other Italian communities with Roman expansion.

In other cases, Italian territories were annexed and their inhabitants incorporated into Roman citizenship, whether *cum* or *sine suffragio*, while the internal organisation of the community (*municipium*) remained autonomous. Rome took also to establishing colonies, usually with the rights of *maius* or *minus Latium*, up and down Italy with a broadly Roman constitution.

By the beginning of the last century of the Republic, there were thus in Italy communities of full citizens, those *sine suffragio*, Latins with *maius* or *minus Latium* and allies (*socii*). It must also be added that there were also communities that Rome had conquered and who remained free but had no rights save those open to all freemen under the *ius gentium*;[30] these were the *dediticii* , notably the Campanians whose lack of *status* was a punishment for their defection to Hannibal in the Second Punic War.

With her supremacy, however, Rome had become increasingly jealous of and sparing with her citizenship while the allies and others who had shared her dangers and hardships wanted the citizenship. From the time of the Gracchi, the popular party supported their aspirations but in vain. It took the dreadful Social War (91-88 B.C.) which Rome finally won to induce her to confer citizenship on all Italians. *Municipia* continued to administer themselves but, in effect, Rome had graduated from a city-state to a nation-state.

Meanwhile, Rome's overseas empire had also been developing. Success in the First Punic War brought the first province, Sicily, in 241 B.C.; by the end of the Republic, there were fifteen provinces comprising modern France, Spain and Portugal, Greece and the Near East, northern Africa and the Mediterranean islands. The organisation of a province, once it had been annexed, was usually set out in a *lex data*, in effect a constitution furnished by Rome herself, laying down the various classes of inhabitants, the bases of taxation, local government and the administration of justice. In some cases, the relationship of Rome and the province was professed to be one of alliance

[29] See further Chapter XXXVI, post.
[30] Chapter IV(ii), post.



with Rome, of course, as the dominant partner: in others, there was a unilateral declaration by Rome of the free status of the community concerned; others again were merely subjects. All were foreigners (*peregrini*). In all cases, where there was an already existing civic structure, it was generally left unaltered. For the rest, the development of *municipia* ensured Roman supremacy. At first, as has been said earlier, praetors were appointed to be provincial governors but, in the course of the second century B.C., it became the rule that magistrates with *imperium*, unless conducting campaigns, remained at Rome during their year of office and subsequently went, with proconsular or pro-praetorian *imperium* to a provincial governorship as appointed by the senate. A law moved by Pompey in 52 B.C. provided that five years should elapse between office at Rome and a provincial governorship and this was revived by Augustus after the Civil War. The governor was accompanied by a quaestor, legates (*legati*) whom he could use as deputies in any of his functions and aides (*comites*) whom he employed as he saw fit. As the representative of Rome, the governor had autocratic powers in his province, military, administrative and judicial.

(iii) The Principate[31]

(a) The last century of the Republic had been one of constitutional irregularities; mention need only be made of the successive consulships of Marius, the dictatorships of Sulla and Julius Caesar and the triumvirates. Victory at Actium in 31 B.C. made Octavian Caesar – soon to be known as Augustus – undisputed master of the Roman world and he sought to restore regularity to political and social life.

In early 27 B.C., he purported to 'transfer the state from his power to the direction of the senate and people of Rome'.[32] In form, the Republican assemblies, senate and magistracies remained – at this time, Augustus himself held the consulship – but in fact all real power was concentrated in the hands of one man, theoretically merely first among equals (*primus inter pares*). Augustus clearly considered very carefully the bases on which his pre-eminence was to rest and in 23 B.C. made his final settlement, taking proconsular *imperium* for life, which gave him control of the armies and of the outlying provinces which had not yet been fully acclimatised to the *pax Romana*, and also *tribunicia potestas* for life which made him personally inviolable and sacrosanct and enabled him to convene assemblies and the senate, to veto

[31] The literature is vast. See, e.g., Mazzarino, L'impero romano; Hammond, The Augustan Principate, The Antonine Monarchy, PW 22, 1998ff.; Nörr, 'Imperium' und 'Polls' in der hohen Prinzipatszeit; Schulz, Das Wesen des römischen Kaisertums der ersten zwei Jahrhundert; Schönbauer, 47 ZSS 264ff.; Siber, Zur Entwicklung der römischen Prinzipatsverfassung; De Martino, Lo stato di Augusto; Magdelain, Auctoritas Principis; Dell'Oro, 13/14 SDHI 316ff.; De Visscher, Nouvelles Études, 3ff.; Jones, Studies in Roman Government and Law, 1ff.; Grenade, Essai sur l'origine du Principat; Wieacker, Vom römischen Recht[2], 38ff.
[32] *Res Gestae Divi Augusti, 34*, edited by Brunt & Moore.

the acts of others, etc. Naturally, his tribunician power was superior to that of other tribunes; and other honours and privileges were showered upon him; he was leader of the senate (*princeps senatus*), father of his country (*pater patriae*), *pontifex maximus*, etc.: but proconsular *imperium* and tribunician power remained ever after the foundation stones of imperial authority.

Inevitably, as time passed, the autocratic power of the emperor became more and more apparent and the form of the constitution a sham so that, by the time of the Severine emperors, there was already a military monarchy which Diocletian was to legitimate; already by the reign of Hadrian, the emperor's power to legislate was manifest: but the outward trappings of the Republic remained.

Consuls and other magistrates were still elected but they were usually the emperor and/or his nominees whom he 'commended' to the elective body; under Augustus himself, still the relevant assembly but, already on his death in A.D. 14, the senate. The office became essentially honorific and it became the norm to have six pairs of consuls a year, each holding office for two months: the first pair gave their name to the year in the old Republican manner while the others (*consules suffecti*) provided a pool of potential provincial governors. Praetors were still appointed, usually between ten and eighteen in number, but were principally concerned with judicial work, notably in the criminal courts; the edict of the urban praetor which, it will be seen, was so potent a source of new law in the Republic ceased to be so when Hadrian commissioned the great jurist Salvius Julianus to consolidate the edict; when he had completed his task, c. A.D. 130, the edict was promulgated as a statute and no further change could be made in its content without the emperor's approval. The censorship disappeared when Domitian incorporated its functions into the imperial powers. Aediles had a minor criminal jurisdiction and quaestors continued to act as assistants to consuls and provincial governors but their financial duties diminished as a new treasury, the imperial fisc (*fiscus*) came to exist beside and subsequently to supersede the old public treasury, the *aerarium*.

The realities of public life were reflected in the fate of the assemblies and the senate. Though Augustus himself actively employed the assemblies for legislation, they fairly rapidly declined after the transferral of the elections to the senate; the last recorded *lex* – and the first for some time – was an agrarian law (*lex agraria*) of A.D. 98. The senate initially received an enhanced prestige. Augustus, in 29-28 B.C., revised its composition and established its membership at six hundred. The pre-eminence of the emperor, the system of *commendationes* which meant that new members would be from among those that the emperor had nominated for office, the decimation of the hereditary senators which was a feature of the Julio-Claudian era and the assumption of the censorship as an attribute of the principate made the senate an imperial catspaw. Though at first proclaimed as a partner in government with the emperor and assuming the task of legislation by *senatusconsulta* with the decay of the assemblies, it became increasingly the rubberstamp of imperial proposals and, by the end of the Principate, it was accepted that imperial proposal in itself had the legislative force.



(b) The great development was that of the imperial civil service. In origin members of the imperial household, usually of equestrian rank, there developed a body of officials who became the real organisers and administrators of the Roman state, usurping the functions and jurisdiction previously exercised by the Republican magistrates. There were, in the first place, the *legati Caesaris pro praetore*, who were the governors of the imperial provinces, in the first century of senatorial, but thereafter usually equestrian, rank. The prefect of the city, *praefectus urbi*, was at first the purely temporary delegate of the emperor during the latter's absence from the city but the prolonged self-exile of Tiberius on Capri made the office a permanent one. He was in effect the chief officer of Rome with criminal jurisdiction in the city and within a hundred miles thereof and was normally a senator of consular rank. The praetorian prefect (*praefectus praetorio*) was originally the captain of the emperor's bodyguard but in practice, and quite early, became the highest officer in the empire after the emperor himself, the chief executive in both military and civil matters, and, certainly in the later Principate, he was often a jurist of high distinction. The praetorian prefect was normally of equestrian rank. The prefect of the corn supply (*praefectus annonae*) was created to ensure an adequate supply of reasonably-priced corn for the Roman market. Of equestrian rank, he acquired a considerable criminal jurisdiction, notably in connexion with such offences as forestalling and regrating, under the prefect of the city. The prefect of the watch (*praefectus vigilum*), created in A.D. 6, was the head of the fire brigade, an official of equestrian rank who was second only to the prefect of the city and who also had a criminal jurisdiction under him. There were also equestrian prefects, from the reign of Claudius styled *procuratores*, as governors of lesser imperial provinces and the great office of *praefectus Aegypti*, in effect viceroy of Egypt, which again was always equestrian; indeed, persons of senatorial rank were not allowed to set foot in Egypt without imperial permission.

There were also imperial procurators to manage the various elements of imperial property and public finance, equestrians who again acquired a jurisdiction in connexion with their respective spheres of activity, and the secretaries of state.[33] The secretary *ab epistulis* dealt with imperial correspondence and the appointment of imperial officials; that *a libellis* with petitions addressed to the emperor: both were normally held by equestrians.

Another development was that of the imperial council (*consilium principis*),[34]

[33] See Millar, 57 JRS 9ff.
[34] See Crook, Consilium Principis.

at first a group of the emperor's trusted friends and advisers which had, by the time of Hadrian, become a thoroughgoing cabinet with salaried officials, including jurists, participating in its deliberations. The reign of Hadrian was in many ways a turning point in the development of the Principate with open legislation by the emperor, the consolidation of the praetorian edict and reorganisation of the *consilium* as a working cabinet, though it should be regarded as the focal period in a development which had been in progress for some time rather than as the age of an innovation.[35]

(c) The reigns of Trajan and Hadrian also saw the empire at its widest extent; the fifteen provinces of the end of the Republic had now grown to forty five, covering most of the known western world. Throughout the Principate, the provinces were in principle distinguished into two classes, the imperial and the senatorial;[36] the former paid a tribute (*tributum*) to the imperial fisc and, as already indicated, were normally governed by a *legatus Augusti pro praetore*; the latter paid a *stipendium* to the old *aerarium* and were governed by proconsuls appointed by the senate in the Republican manner. Needless to say, long before the end of the Principate, the emperor in fact appointed all governors and all taxes went to the imperial treasury.

Within the provinces, the *municipium* which had been evolving in the later Republic was the stable unit and the distinction between *municipia* and colonies virtually disappeared. In effect, Rome projected the Italian pattern into her overseas possessions. *Municipia* had a constitution fashioned on that of Rome herself, with a popular assembly, a body of *decuriones* corresponding to the senate and annual magistrates, the chief ones, corresponding to the consuls, being the *duo viri iure dicundo*. These municipalities had a considerable degree of internal autonomy, especially in matters of local finance, but inevitably the shadow of the governor was everywhere.

A notable feature was the progressive extension of the Roman citizenship to provincials, now to particular cities, now to whole provinces, until the famous *constitutio Antoniniana* of Caracalla,[37] usually ascribed to A.D. 212,[38] which is generally held to have conferred citizenship on all free inhabitants of the empire except *dediticii*.[39]

(iv) The Dominate[40]

[35] Pace Pringsheim, 24 JRS 134ff.

[36] On provincial administration, see the literature in n. 27; Abbot-Johnson, The Municipal Administration in the Roman Empire; Dessau, Geschichte der römischen Kaiserzeit II, 2; Stevenson, Roman Provincial Administration till the Age of the Antonines[2]

[37] The literature is enormous; see Sasse, Die Constitutio Antoniniana, 14 JJP 109ff., 15 *ibid.* 329ff., with bibliography in chronological order; D'Ors, Atti XI Congresso Internazionale di Papirologia 408ff.; Segrè, 17 IURA 1ff.

[38] But see Millar, 48 JEA 124ff., who suggests A.D. 214.

[39] The principal source of knowledge is P. Giessen 40 which is defective.

[40] See Stein, Geschichte des spätrömischen Reichs I; Baynes, The Byzantine Empire;



The fifty years from the assassination of Alexander Severus in A.D. 235 until the accession of Diocletian in A.D. 284 were an almost continuous period of anarchy and war with rival emperors proclaiming themselves in different parts of the empire. The Principate, like the Republic, perished in blood and strife. Not the least cause was the absence of any regular provision for succession to the Principate; it had been an extraordinary office born of extraordinary circumstances and never wholly lost this characteristic. At varying times, dynastic succession, adoption, choice by the senate and imposition by an army all determined the identity of a new emperor.

Diocletian (A.D. 284-305) restored order, internal and external, by a variety of measures. The emperor's position was deliberately converted into a patent monarchy with all the trappings of kingship to put the throne beyond the aspirations of ordinary mortals: the emperor and all to do with him was 'sacred'; he was *dominus et deus*. To ensure the succession to the throne, Diocletian adopted a system that was not without precedent in the Principate; he associated Maximian with himself as co-Augustus and each had a Caesar as his intended successor who, when he became Augustus, would in turn appoint a new Caesar. The territory of the empire was shared four ways between the two emperors and the two Caesars so that in each quarter of the Roman world there was an imperial figure to deter insurrection.

Further to the same end, he completely reorganised the provinces into smaller units of more or less equal size, grouped to provide tighter direct control by imperial officials. There were now one hundred and twenty provinces, each governed by a *praeses*; ten provinces constituted a vicariate under a *vicarius* and three vicariates in turn were placed under a praetorian prefect; there were thus four praetorian prefects, one to each Augustus and Caesar. The western and eastern capitals, the latter eventually Constantinople, were under a *praefectus urbi*. Above all were the Augusti in whose joint names all legislation was issued.

There were modifications in time; there were periods of unitary government, notably by Constantine, and from A.D. 395 the eastern halves of the empire were finally divided until the fall of the west in A.D. 476. But collegiality was usual and, even after the separation of east and west, the legislation of each emperor was promulgated in the territory of the other.

The senate – or rather two senates, for the eastern capital also had one – continued to exist and was hereditary, numbers being kept up by imperial nomination to offices which carried senatorial rank. The vast administrative machine of the Dominate provided many such posts carrying honorific titles – *illustris, clarissimus, spectabilis*. In practice, only *illustres* took part in the senate and Justinian confined the vote to them.

Vasiliev, Histoire de l'empire byzantin; Bury, History of the later Roman Empire (2 vols.); Jones, The Later Roman Empire (3 vols.); Vogt, Der Niedergang Roms.

The consulship was now purely honorific but expensive; for the consul was required to provide games. Apart from the praetorship which was held by the sons of senators for eligibility for membership of the senate which again had no duties, the other old Republican magistracies, the tribunate, quaestorship and aedileship had become obsolete by the fifth century. In their place was the bureaucratic pyramid of imperial officials distinct from the army and at the peak thereof the emperor's council, now become the *sacrum consistorium*. Within the provinces, the municipal system continued but was subject to the close scrutiny of the governor so that there was no real local government, though the *decuriones* continued to have a function, being responsible for raising the taxes which made life so hard in the later empire. Society was stratified and hereditary and son followed father into his profession or trade by obligation or, as a *colonus*, on the land on which he laboured. Absolutism had returned after a thousand years.



# 3. The Sources of Law

The term 'source of law' can be used in a variety of ways.[1] It can denote the occasion for the introduction of a particular rule or precept, the so-called 'material' source of law; the basis on which the applicability of law rests – the fact that it is laid down by a recognised body or bodies or the fact that it is accepted by the society for which it is fashioned, the so-styled 'authoritative' source of law; or the materials to which practitioners of a legal system – judge, barrister, solicitor and jurist alike – resort to ascertain the rule which governs the problem before them, i.e. the 'legal' source of law. It is this last sense of the expression with which the present chapter is concerned: for the English lawyer, it connotes statute and delegated legislation, judicial precedent and local custom; of Roman Law, Justinian says:[2] *Constat autem ius nostrum aut ex scripto aut ex non scripto, ut apud Graecos* . (Our law exists either in writing or in unwritten form, just as among the Greeks some laws were written, others unwritten.)

(i) *Ius non scriptum*

In the *Corpus Iuris Civilis*, it is clear, *ius non scriptum* signifies custom.[3] Here again it is necessary to particularise what is meant by custom. In modern society, there are practices and conventions which are generally observed though they have no legal, only a social, sanction – there are, for example, many men who think nothing of, say, income tax avoidance but who would rather be seen dead than attend, in other than evening dress with white tie, a function at which ladies were present; there are observances, such as trade practices, which are given legal effect – but only by reason of their incorporation, express or implied, in some transaction such as a contract which is the really effective legal relationship;[4] and finally there are those practices, become obligatory by long observance, which, once established as existent, are regarded as law in themselves – the English local custom presents itself

[1] See, e.g. Allen, Law in the Making[7], 1ff.
[2] *Inst.1.2.3*; cf. *D.1.1.6.1*; *Ulp.Reg.1.4*
[3] See Schiller, An American Experience in Roman Law (= 24 Virginia Law Review), 268ff.; Schulz, Principles of Roman Law 14ff.; Gaudemet, La formation du droit séculier et du droit de l'église aux IVe et Ve siècles 106ff.; Stühff, Vulgarrecht im Kaiserrecht; Thomas, 31 TvR 39ff., 14 RIDA 469ff.; Schmiedel, Consuetudo im klassischen und nachklassischen römischen Recht (rev. Nörr, 84 ZSS 454ff.); Bove, La consuetudine in diritto romano.
[4] Cf. e.g. Smith & Thomas, A Casebook on Contract[5], 295ff.

as an example.[5] It is with this last category of usage that the present chapter is concerned.

It is clear that, in the confinement of *ius non scriptum* to custom so understood, there had been a development in Roman juridical thinking. Originally, *ius scriptum*, as in modern English Law, had denoted statute law, legislation as against that part of the civil law, *ius civile*, which was undeclared.[6] Before the enactment of the Twelve Tables, it is probable that Roman private law was wholly undeclared and the Tables themselves not being a complete code of law, there remained much law that was to be pronounced first by the pontiffs and thereafter by the jurists. This law was founded in the practice of the past, *mores maiorum*, and, though he does not discuss custom as a source of law, Gaius does mention legal institutions which derived from *mores maiorum*.[7]

It is doubtless the fact of exposition of this Roman unwritten law by the jurists which accounts for the treatment of *ius non scriptum* in the *Corpus Iuris Civilis* where *ius scriptum* is clearly used in a literal sense to indicate any exposition of law in writing. For the jurists, of course, put their expositions in writing and Pomponius[8] says that unwritten law has force as adopted and expounded by the jurists (*compositum a prudentibus*) and again that unwritten law exists only in the interpretation of the jurists (*sine scripto (ius) in sola interpretatione prudentium consistit*). And, in this context, the law was regarded as already in existence; *mos maiorum* was not a source of law – it was law. The writings of the jurists were, like the decisions of common law judges, declaratory in form, even if they were constitutive in effect. Clearly, however, if unwritten law was law only as stated in the writings of the jurists, there was little point in regarding it as unwritten. Hence, the distinction became no longer, within Roman Law itself, one between legislation and law deriving from another source but one between Roman Law as a whole and provincial practices, found indigenously in the empire and not deriving from Roman statute or juristic writing. The relationship between Rome and other territories was normally that of conqueror and conquered so that it is understandable that the jurists should not regard as law the observances of Rome's subjects but should speak rather of the custom of the region, province, etc. (*consuetudo regionis/provinciae*) and speak of its being accepted *pro iure*, i.e., in place of law.

The rationalisation of custom as law was probably a late, post-classical development.[9] Certainly it is accepted as law by Justinian.[10] The texts, as they

[5] See, e.g. Allen (*op. cit.* n. 1).
[6] Cf. Stein, Regulae Iuris, 3ff.
[7] *G.III.82, IV.27*
[8] *D.1.2.2*
[9] See Thomas (*cit.*, n. 3)
[10] *Inst.I.2.9; D.1.3; C.8.52*



appear in the *Corpus Iuris Civilis*, were originally concerned with local customs[11] and give rationales which are derived from rhetoric and *D.1.3.32-40* makes a determined effort to equate custom with *lex*. This, it is thought, is not insignificant. The *constituto Antoniniana* made, at any rate, most free inhabitants of the empire *cives* and, after the anarchy which preceded the accession of Diocletian, only imperial legislation remained as a creator of law; it is understandable, therefore, that any other body of effective rules should be equated with *lex*.

The earliest pointer to this equation would appear to be a sentence of the lay Christian apologist, Tertullian, who says,[12] '*Consuetudo ... etiam in civilibus rebus pro legre suscipitur, cum deficit lex*' (Custom is accepted even in civil law matters in place of statute, when there is no statute on the matter). Thereafter, the assimilation became increasingly apparent.[13]

The strongest text in favour of custom as law is *D.1.3.32.1* (Julian, 84 *Dig.*):

*Inveterata consuetudo pro lege non immerito custoditur et hoc est ius quod dicitur moribus constitutum. Nam cum ipsae leges nulla alia ex causa nos teneant quam quod iudicio populi receptae sunt, merito et ea quae sine ullo scripto populus probavit tenebunt omnes: nam quid interest suffragio populus voluntatem suam declaret an rebus ipsis et factis , Quare rectissime etiam illud receptum est ut leges non solum suffragio legislatoris sed etiam tacito consensu omnium per desuetudinem abrogentur.* (Long established custom is not undeservedly accepted in place of statute and this is the law said to be created by usage. For, since statutes themselves bind us for no other reason than that they were accepted by the decision of the people, it is right that what the people has approved without any writing should also bind everyone; for what does it matter whether the people declares its will by a vote or by acts and deeds? In consequence, it is very properly accepted also that enactments may be abrogated not only by the vote of the legislator but also by the tacit agreement of all in their desuetude.)

Many[14] regard at any rate the last sentence of the passage as interpolated. The constitutive effect of custom could be explained by the exposition by Pomponius of unwritten Roman Law and artificially justified on the grounds which appear in the earlier parts of the passage.

Abrogation, however, is a different matter. The sources speak of *leges* going into desuetude;[15] but that was non-observance in fact of legal provisions with no hint that they had been deprived of legal efficacy through their non-enforcement; any more than were the statutes on Sunday observance which

[11] Cf. Lombardi, 18 SDHI 21ff.
[12] *De Corona 4*
[13] *Cf. C.8.52.2; C.Th.15.2.45; D.1.3.32-40.*
[14] But not Schmiedel and Nörr (cit., n. 3); and see the caution of Jolowicz & Nicholas, Historical Introduction to the Study of Roman Law[3], 354.
[15] E.g. *Inst.IV.3.12*

long disfigured the English statute-book.[16] Despite *D.1.3.32.1* in its present form, there are passages later than the age of Julian, and notably in imperial constitutions, that cast serious doubt upon the efficacy of contrary practice or custom to abrogate a *lex*: in particular, a constitution of Constantine[17] says that custom is of authority when not contrary to statute or to reason; while others indicate the revival of custom when an imperial enactment had ceased to be applicable, again suggesting the paramountcy of legislation.[18] Again, Justinian, who ordained that his compilation was to have exclusive force, is unlikely to have countenanced the possibility that contrary practice could effectively revoke his provisions.

In sum, it would appear, within Roman Law itself, custom was law but presented no problem, being accepted only as expounded in the juristic literature which thus gave it efficacy. In the great period of Roman jurisprudence, broadly the period of the Principate, provincial rules and practices had only peripheral validity through incorporation into contracts, etc., and thus needed no justification as a form of law. With the generalising of citizenship, however, and the predominance of imperial legislation in the postclassical period, the Dominate, the provincial norms and practices which had hitherto lain outside the sphere of Roman Law – but which had naturally continued to exist: a man did not cease to be, e.g. a Bithynian by reason of receiving Roman citizenship – had to be accommodated to Roman reality. Where there was no Roman rule on a given topic but there was a provision in the relevant province, the latter could and did operate; and the explanation given is that it was a tacit *lex*. That abrogation of express legislation by contrary custom was ever admitted is improbable in the extreme.

(ii) *Ius scriptum*

As already mentioned, for Roman jurisprudence, 'written law' was a literal expression signifying any exposition of law in writing. Gaius[19] and Justinian[20] give virtually the same list of sources of written law – *leges, plebiscita, magistratuum edicta, senatusconsulta, principum placita* (the will of the emperors) and *responsa prudentium* (the answers of the learned). By reason of the long history of Roman Law, naturally, not all these sources were of equal age and concurrent importance; though Justinian gives the full list, only *principis placita* operated in his time as a source of law and had long done so. Broadly speaking, *leges* and *plebiscita*, enactments of the popular assemblies, were Republican sources of law; the edicts of magistrates – principally of the praetor – were creative from the second century B.C. to about A.D. 130; resolutions of the senate constituted legislation during the

[16] Tertullian, *Apologeticum* 5.9.6
[17] *C.8.52.2*
[18] Cf. *C.Th.6.29.10; 15.2.45*
[19] *G.I.2*
[20] *Inst.I.2.3*



Principate; manifestations of the emperor's will became recognised as law certainly by the first half of the second century of the present era and became the exclusive source of new law from about A.D. 250. All law needs interpretation to be operative so that, in a sense, there were *responsa prudentium* from earliest times; but, in the accepted sense, the term applies to the jurisprudence of the lay jurists who were becoming prominent by the end of the third and beginning of the second century B.C., were clearly established by the end of the Republic and reached their apogee in the Principate, particularly in the period from about A.D. 100 to 250.

There is a variety of ways of dividing the periods of the history of Roman Law.[21] For present purposes, it is sufficient to point to the historical landmarks, the passing of the Twelve Tables which marks the real beginning of Roman Law and its summation in Justinian's compilation; between lay the period of constitutional development in the Republic, the classical period which corresponded with the Principate and the postclassical period of decline which occupied the Dominate.

(a) *Leges*[22]

(i) In the present context, a *lex* was an enactment of the *comitia*, giving its assent to the proposal of the convening magistrate,[23] i.e. *lex publica*.[24] The composition of the assemblies, the magistrates who could convene them and their methods of voting have been discussed in the previous chapter. In general, a *lex* bore the name of the magistrate who proposed it as e.g. with the *lex Genucia*; when it was a consular measure, it bore the names of both consuls as with, e.g. the *lex Fufia Caninia*.

Such *leges* are known as *leges rogatae*. There were also *leges datae*, enactments not for the Roman people themselves but for their colonies and *municipia*, as, e.g. the *lex Malacitana*[25] for the modern Malaga in Spain, giving the community its organisation and legal order.

*Leges rogatae* could always repeal and replace previously enacted legislation, just as can a modern statute of the United Kingdom Parliament, however

[21] Cf. e.g. Jolowicz & Nicholas (*op. cit.* n. 14), 1ff.; D'Ors, Derecho Privado Romano[2], 10ff.
[22] See Rotondi, *Leges Publicae Populi Romani*, Scritti I, 1ff.; Peterlongo, 49 Annali Perugia 275ff.; Arangio Ruiz, Rariora 231ff.; Schwind, Zur Frage der Publikation im römischen Recht 145ff.; Gioffredi, 13/14 SDHI 1ff.; Gaudemet, 1 IURA 233ff.; Guarino, Festschrift Schulz I, 458ff.; Tibiletti, Studi De Francisci IV, 593ff.; Daube, Forms of Roman Legislation; Broggini, Coniectanea 55ff.; Biondi, 67 BIDR 39ff., 12 RIDA 169ff.; Petschow, 82 ZSS 24ff.; Robleda, Studi Volterra I, 637ff.; Morel, Études Macqueron 545ff.; Watson, Law Making Iff.
[23] Cf. Aulus Gellius, *N.A.10.20.2 – generale iussum populi, rogante magistratu* (a general order of the people at the reguest of the magistrate); and see *D.1.3.1*
[24] The expression *lex privata* is used of terms of a contract, e.g. *lex commissoria, lex contractus*, etc.
[25] See, e.g. FIRA I, 208.

improbable, and possibly impolitic, the repeal of a particular measure might be. This did not, of course, deter assemblies from attempting to influence subsequent legislation. Already, the Twelve Tables provided,[26] '*privilegia ne inroganto*' ('laws directed against an individual are not to be sought').[27] And the *lex Caecilia Didia* (98 B.C.) purported to ban *leges saturae*, i.e. measures containing miscellaneous provisions whereby an unpopular proposal might perforce be adopted because other contents of the projected law were acceptable to the populace. Nonetheless, a subsequent *lex* did repeal a previous statute, if not expressly, to the extent that any inconsistency existed between the provisions of the two.[28]

As has been earlier indicated, *leges* were originally declarations of the law (*ius*) rather than alterations of it and, even in late Republican times,[29] every statute contained a clause, '*si quid ius non esset rogarier, eius ea lege nihil rogatum*' ('If there be anything conflicting with the law to enact, it is not contained in this enactment'), which would appear to prevent implied repeal of existing law of any kind: only what was expressed in the *lex* was operative; though the looser drafting, in general, of Roman *leges* may have permitted more liberal interpretation of its provisions than would be legitimate for the modern English judge construing an Act of Parliament.

A further indication of the gradual progress of legislation towards supremacy in the law-making process of the Republic is the triple classification of *leges* as *perfectae*, *minus quam perfectae* and *imperfectae*.[30] A *lex perfecta* both forbade an act and invalidated it, if performed; one *minus quam perfecta* did not invalidate the prohibited act but imposed a penalty upon the doer or doers; a *lex imperfecta* forbade an act but neither invalidated nor penalised it. It seems probable that the progress of legislation was from *leges imperfectae*, via those *minus quam perfectae*, to *perfectae*. It has to be added that, though there were, as will be seen in subsequent chapters, important *leges* in the field of private law, legislation nonetheless played overall a relatively insignificant part in the history of Roman private law. The great bulk of recorded legislation[31] is concerned with public matters – constitutional issues, setting up criminal courts, giving of military commands and the like. Not the least reason for this comparative dearth of private law legislation was the development of the praetorian edict to be considered later in this chapter.

(ii) The Twelve Tables

[26] *Tab. IX.1*

[27] Contrast the Act of Attainder of Tudor England.

[28] Twelve Tables, *Tab.XII.5*; Livy, *7.17*

[29] See Cicero, *Pro Caecina*, 95.

[30] *Epit.Ulp.I.2.* See Di Paolo, Synteleia Arangio Ruiz 1075ff., Contributi ad una teoria della invalidità e della inefficacia in diritto romano, 39ff.; Stein (op. cit. n. 6), 14ff.

[31] Cf. Rotondi, first work cited in n. 22 ante.



The Republican legislation *par excellence* was the Twelve Tables.[32] Though passed by the *comitia centuriata*, however, they derived their real validity from their being a first expression of the law[33] and, in substance, a settlement of a political crisis by an extraordinary body: still, they would have acquired an added prestige from their enactment by the senior assembly on the restoration of the constitution.

The strife between the two orders of society in the earlier Republic has already been mentioned in the previous chapter as also the secessions of the plebeians to wrest concessions from their privileged fellow-citizens. Again, it has been observed that early Roman Law was unwritten and expounded by the pontiffs, then exclusively patricians. Though their First Secession had won them their tribunesand recognition of their assembly, the *concilium plebis*, the plebeians were still severely handicapped by their ignorance of the law and agitated for its written expression.

The story of the Twelve Tables given by the historians is a romantic one. C. Terentilius Arsa, a tribune, in 462 B.C. proposed that a body of five men be appointed to draw up a code of law, a proposal on which the patricians contrived successfully to procrastinate until 454 B.C., when they gained yet a further respite by sending ambassadors to study the laws of the cities of Greece, in particular the code of Solon, the celebrated law-giver of Athens.[34] On the return of the emissaries, at last in 451 B.C., the constitution was suspended and ten men with consular authority were elected to draw up the law (*decemviri consulari imperio legibus scribundis*). The commission duly produced ten tables in a year but, it being thought that the work was still not complete, a second commission of ten was appointed in 450 B.C. The second commission compared ill with its predecessor: it produced only two tables and behaved despotically; in particular, one of its members, Appius Claudius, lusting after a girl called Virginia, got one of his dependents to claim her as his slave. Rather than see her dishonoured, her father killed her and there followed the Second Secession of the Plebs which resulted in the overthrow of the *decemviri* and the restoration of the constitution whereupon all twelve tablets were ratified by the assembly.

The manifest improbabilities of parts of this story have led some modern scholars to suggest that the compilation is a legend[35] or, at least, that it dated from a much later period, in the fourth century, than that to which

[32] See Voigt, Die XII Tafeln; Coleman-Norton, The Twelve Tables[3]; Cancelli, Leggenda e storia dei dodici tavole; Wieacker, Vom römischen Recht[2], 46ff.; Jolowicz & Nicholas (op. cit. n. 14), 13ff., 108ff.

[33] There is a tradition of regal legislation, *leges regiae* (cf. e.g. FIRA I, 1-18); but it is more probable that what is in question is rather rulings on religious matters by the kings in their capacity as heads of the state religion.

[34] Solon's code dates to c. 594/3 B.C.

[35] See Lambert, 26 Revue générale du droit, 385ff., 480ff., 27 ibid. 15ff.; Mélanges Charles Appleton 303ff.; La fonction du droit civil comparé I, 398ff.

it is ascribed by tradition.[36] The matter is not helped by the fact that no complete text of the legislation has survived. Though the story has it that the laws were engraved on bronze and set up in the forum, the market place, it also has it that the tablets were destroyed when the Gauls sacked Rome in 390 B.C. What survives is a not inconsiderable number of fragments – in some at least of which the language will have been modernised – and reports of contents of the laws by both legal and lay writers.[37]

The circumstantial account can be rejected without denying the likelihood of a statement of the law around the period to which tradition assigns it. That the enactment was a fiction is most improbable – Cicero says that boys learned the Twelve Tables at school[38] – while, if it dated from the fourth century, it would contain anachronisms.[39] The plebeians had already won their officers and assembly; within less than a century, they would be eligible for the highest offices in the state; by the end of the fourth century they were to be admitted to the pontificate: against this general background, a statement of the law about the middle of the fifth century is very plausible. The emphasis on procedure, again, which is manifest in the fragments which survive confirms the probability of an early declaration of the law.

Later Romans understandably looked back to the Twelve Tables with pride and exaggeration rather as Englishmen have attributed much to *Magna Carta*; Livy[40] speaks of them as 'the source of all law, public and private', which they were not. The evidence being fragmentary, it is not possible definitively to determine their scope but they appear to have been concerned with matters which would have previously been unknown or obscure to the plebeians; thus the process of getting a defendant to court and of executing judgments is dealt with in considerable detail as is the law of theft while nothing is said of the content of *patria potestas*[41] and the conveyance known as *mancipatio*[42] is merely confirmed; both, it may be assumed, were well-known. For the rest, there were some provisions of public law, notably the rule that a citizen could not be executed without the vote of the *comitia centuriata*, of sacral law, restrictions on luxury and provisions of family law. The extent of Greek influence, if any, on the content of the Twelve Tables is a matter of debate.[43] Possible similarity with some provision of a Greek system does not of itself establish that there had been borrowing; and, generally, any Greek influence would be more likely to have come from the cities of *Magna Graecia* in southern Italy than from Greece itself. The probability

[36] So Pais, Storia di Roma I.I, 550ff., I.2, 546ff., 631ff.; Storia critica di Roma II, 217ff., Ricerche sulla storia e sul diritto pubblico di Roma I, Iff.

[37] Cf. FIRA I, 21ff.; Bruns, *Fontes* I, 15ff. The order and assignment of the fragments to particular tables is that adopted by Dirksen in A.D. 1824.

[38] *De legibus 2.9*

[39] E.g. the *lex Canuleia* 445 B.C. allowed intermarriage of patrician and plebeian.

[40] *Bk. III.34*

[41] Chapter XXXVII(iii) post.

[42] Chapter XII(i)(a), post.

[43] Cf. Wieacker, Entretiens Hardt 13, 330ff., Studi Volterra III, 757ff.



however, is that the Twelve Tables contained a statement of native unwritten law: the plebeians wished to know the law that ruled their lives, not to have a new system introduced. The overall impression left by the fragments is of an agricultural society in which commerce was not prominent and in which formality of procedure and transactions compensated for semi-literacy – a not unfair description of fifth century Roman society.

(b) *Plebiscita*

As already seen, plebiscites were resolutions of the plebeians made in the *concilium plebis*. Originally binding only on plebeians, they acquired general legislative effect under the *lex Hortensia* 287 B.C., whereafter they became the usual instrument of reform of private law by legislation in the Republic.

(c) *Magistratuum Edicta*[44]

The higher magistrates – the consuls, praetors and curule aediles – had the *ius edicendi*, that is, the right to issue proclamations intimating to the citizenry the manner in which they proposed to exercise their respective offices. Though, as said earlier, the edict of the curule aediles is not without relevance to the body of Roman Law, it was unquestionably the edict of the praetor – more particularly, the *praetor urbanus*[45] – which contributed to the development of the *ius honorarium* which grew up beside, and in many instances supplanted, the *ius civile*; its name derives from the fact that a magistracy was an honour, *honos*:[46] *ius honorarium* is thus magisterial law.

As seen in the previous chapter, a praetor was first appointed in 367 B.C. to take over the administration of justice from the consuls. He accordingly issued an edict on his assumption of office, stating his policy for the grant, etc., of actions and other legal redress. In strict law, the praetor was not a law-giver; his function was to administer, not to alter or abrogate, the existing statutory and unwritten law: in fact, his edict became the chief source of new law for virtually three centuries or so by reason of two factors: (i) the introduction of the peregrine praetor in 242 B.C. and (ii) the enactment of the *lex Aebutia* (c. 140-120 B.C.).

(i) The conquest of Italy and the First Punic War made Rome perforce a Mediterranean power with foreign possessions, residents and trade; but the old concept of Roman Law, the *ius civile*, was of a law for citizens

[44] Lenel, Das Edictum Perpetuum[3]; Pringsheim, Symbolae Friburgenes, 1ff.; Guarino, Salvius Julianus, 26ff., Studi Albertario I, 623ff., Atti Verona II, 167ff.; Wieacker, Vom römischen Recht[2], 116ff.; Fuenteseca, Investigaciones de Derecho Procesal Romano, 67ff.; Kelly, 1 IJ 341ff.; Watson, Law Making, 31ff. on the provincial edict, see Buckland, 13 RHDFE 81ff.; Chalon, L'édit de Tiberius Julius Alexander; Martini, Ricerche in tema di editto provinciale; Pugliese, Synteleia Arangio Ruiz, 972ff.; Guarino, 20 IURA 154ff.; Katzoff, 37 TvR 415ff.

[45] See Watson, cit., n. 44.

[46] D. 1. 8. 10: *honorarium dicitur quod ab honore praetoris venerat* ('honorary' is the term given to what issued from the honour (the office) of the praetor).

only. Inevitably, the *praetor peregrinus* had to develop a procedure and, for that matter, a substantive law which could be utilised in dealings between foreigners and between foreigners and citizens which would have given him great latitude in both matters from the start. In principle, the urban praetor was restricted to the *ius civile* with its formality of transactions and to the cumbrous procedure of the *legis actiones*.[47] It may, however, be too simple to adopt the widespread assumption that, so to speak, the peregrine praetor led the way and the urban followed in the development of a flexible law and procedure. Often during the long struggle with Hannibal, the same individual filled both offices and there can be no doubt of the use of written process by citizens before the enactment of the *lex Aebutia*.

(ii) The probable exact scope of the statute may be postponed until the consideration of the procedure *per formulam*[48] but the consequence of its passing was the legitimation, at first alternative to the ritual of the *legis actiones*, of a written *formula*, a synopsis of the case to be tried addressed to the intended judge, which became virtually the exclusive initiation of litigation under the *leges Juliae iudiciariae* of Augustus (17/16 B.C.). This gave the praetor great power. For the essence of the new system was to persuade the praetor to grant a *formula* without having to assert a right existing at civil law.

In consequence, by reason of his control of procedure, the praetor could, in fact, change the law and introduce innovations – not directly but by declaring in his edict that in such-and-such circumstances he would give an action; again, by declaring that specified conduct on the part of a potential plaintiff would constitute a defence to his opponent, he could give substantive effect to matters which had hitherto been irrelevant in the civil law; then, by the granting of the magisterial orders called interdicts (*interdicta*),[49] he could protect the possession of or grant possession to one person even as against the civil law owner of the thing in dispute. In short, substantive law was to be developed and improved by the manipulation of procedure. And in this way great bodies of praetorian law developed alongside the civil law: it will suffice merely to mention here, as illustrations, the institution of 'bonitary' ownership and the praetorian scheme of inheritance to be more fully discussed hereafter.[50]

(iii) Such praetorian creativity was not immediately curtailed with the advent of the Principate; but it was inevitable, as imperial autocracy became increasingly pronounced, that the emperor should brook no rival source of law-making. In any event, from quite early in the new order, the praetor was a nominee of the emperor 'commended' to the elective body so that it is

[47] Chapter VI, post.
[48] Chapter VII, post.
[49] Chapter VIII post.
[50] Chapters XI (i) and L(i)(b) post, respectively.



likely that he would be circumspect in his activity; and thus probable that edictal changes would be made only at the suggestion of the senate. Finally, Hadrian commissioned the great jurist, Salvius Julianus (Julian),[51] to consolidate the edict and, when his work was completed, it was promulgated (c. A.D. 125-130) and no changes could thereafter be made in it without imperial authority.

Julian's edict is styled *edictum perpetuum*; but, in fact, through the creative period, the edict that a praetor issued on taking office was known as his *edictum perpetuum* and a *lex Cornelia* of 67 B.C. forbade praetors to depart from their *edictum perpetuum* (if in the course of the year an emergency arose, the praetor could issue an *edictum repentinum*). A great advantage of the edictal system was that each year's *edictum perpetuum* was, in principle, a new one and the incoming praetor could in theory scrap the edict of his predecessor. Practice, naturally, was different; praetors were practical politicians who would doubtless aspire subsequently to the highest office and, acting on juristic advice, would have introduced in their edict what was thought to be desirable in the public interest. Of course, an innovation which had proved unsatisfactory might be excised by the new praetor, additions made, etc.; but inevitably much hardened over the years and passed down from praetor to praetor – this core of the edict is styled *tralatitium* (handed down) – without extensive alteration. Already in the early Principate, the jurist Labeo could write a commentary on the edict. It is thus probable that for this reason, and that mentioned in the previous paragraph, the bulk of the edict was already traditional when Julian set to work.

The annual character of the edict, however, meant that its development was gradual with accretions being inserted or added where they seemed to fit best from a practical – not a scientific – standpoint. This made for a seemingly impossible order of treatment of topics, a feature not eliminated in Julian's consolidation.

However, the definitive reconstruction of Julian's work by Lenel[52] reveals a basic groundplan with four main parts. The first deals with the stages of an action from institution to grant of the *formula* – in effect, how to assert a right. The second and third parts reveal the issues in respect of which claims might be presented – in effect, the rights to assert which the steps indicated in the first part might be taken. The reason for the distinction is that the second part concerns rights at civil law and the third those that derived simply from magisterial *imperium*; and this is reflected in their presentation.

All the Edict is divided into titles with a rubric and appropriate content: but in the second part, the rubric is followed simply by the relevant specimen *formula* whereas, in the third part, the rubric is followed first by the edictal

[51] Pace Guarino, cit. n. 44.
[52] Op. cit., n. 44

provision from which the claim arises and then by the specimen *formula*. The fourth part concerns the manner of enforcing judgments (i.e. how to execute a successful assertion of a right) and is followed by an appendix of purely praetorian remedies that are not direct assertions of right as such – praetorian stipulations, interdicts, etc.[53]

(d) *Senatusconsulta*[54]

The general nature of the senate has been already considered, as also its lack of legislative functions in the Republic; though its approval of prospective legislation was already necessary. In the early Principate, however, its existing prestige as the one stable executive body, the decline of the *comitia*, the absence of any claim by the emperor personally to legislate and the emperor's domination of the body made the senate the natural organ for amendment and alteration of the law, as a kind of bridge between comitial legislation and legislation by the emperor in person.

Initially, the resolutions of the senate took the form of instructions to magistrates, as in the Republic, rather than that of direct changes in the law or else extended the ambit of some exist-comitial legislation; examples of the former are the *senatusconsulta Velleianum* and *Macedonianum*[55] and, of the latter, the *senatusconsultum Libonianum* (A.D. 16) extending the scope of Sulla's *Lex Cornelia de falsis*. But inevitably the factors adverted to in the previous paragraph made the senate, in due course, a true legislature. Perhaps the first real legislative senatusconsult, effecting a change in the law of intestate succession, was the *senatusconsultum Tertullianum*,[56] not insignificantly of the reign of Hadrian when, as already noted, the realities of the constitution of the Principate were fully appreciated.

It was, of course, the predominance of the emperor in the senate which gave its resolutions their ever-increasing authority. He, or a magistrate on his behalf, put forward a proposal (*oratio*) which, on an affirmative vote, became a *senatusconsultum*. Doubtless, in the earlier days of the Principate, there was genuine discussion and it was the vote of the senate which gave the resolution its validity. But, with the passage of time, the affirmative vote of the senate became a formality and the *oratio* in itself came to be regarded, even by the jurists, as the real source of law. And, as the emperor came to manifest his will in other ways, *senatusconsulta* waned as a form of legislation. The last recorded senatusconsult was in the reign of Probus (A.D. 276-282);[57] in the Dominate, *senatusconsulta* had wholly disappeared.

[53] Chapter VIII, post.
[54] See Loreti Lorini, Studi Bonfante IV, 379ff.; Schiller, 33 Tulane LR 491ff.; Crifò, ??
BIDR 31ff.; Volterra, NNDI 16, 1047ff.; Watson, Law Making, 21ff.
[55] Chapter XVII, post.
[56] Chapter L(i)(c), post.
[57] *Vita Probi* 13.1



(e) *Principum Placita* [58]

It has been already seen that comitial legislation died out in the first century of the empire, the Edict lost its creative potential in the first quarter century or so of the second century of the present era and *senatusconsulta* declined in the third century. This left the emperor as the sole source of new law though, in fact, emperors had been manifesting their legislative wills since the days of Hadrian. The technical justification of the validity of imperial legislation is obscure as is also its legal standing. Gaius says[59] that 'there has never been any doubt that (the emperor's will) is as good as a statute since he himself received his *imperium* by statute'; but the conferment of *imperium* by statute would not of itself confer the power to legislate. Again, while Gaius says that the emperor's will is as good as a statute and Ulpian[60] that it has the force of law, the passage of the latter author goes on to say that it is settled that it is law.[61] The explanation lies not in judicial nicety but in political reality.The forms in which the emperor might manifest his will were manifold and the general term *constitutio* is found to cover all. In the first place, like any magistrate with *imperium*, he could issue an edict; but, unlike an ordinary magistrate, he held power for life and with worldwide authority so that the imperial Edict had the force of a universal statute and, it would seem, continued valid after the death of its promulgator unless varied by his successor or successors. Perhaps the best known imperial Edict is the *constitutio Antoniniana* of Caracalla.[62]

*Mandata*[63] were directions, usually to provincial officials, for the conduct of their functions and, though not of great importance in the field of private law, they did occasionally lay down rules of law. A famous *mandatum* is that which absolved soldiers from observing the formalities obligatory on civilians in the matter of observation.[64] Unlike *edicta*, they were valid only for the life of the issuing emperor – unless repeated by his successor – and in the province to which they pertained. The *oratio* which became a senatusconsult and which, already in classical law, was regarded as the true legislative

[58] See Kreller, 41 ZSS 262ff.; Orestano, 44 BIDE 219ff., Il potere normative degli imperatori; Volterra, Studi Besta I, 449ff., Mélanges Lévy-Bruhl 325ff.; De Robertis, 4 Annali Barl 1ff., 62 ZSS 255ff.; Luzzatto, Scritti Ferrini Pavia 263ff.; Massei, ibid. 401ff.; Brasiello, Studi De Francisci IV, 471ff.; Gualandi, 156 AG 5ff., Legislazione imperiale e giurisprudenza (2 vols.); De Francisci, 70 BIDR 187ff.; Nardi, 9 Labeo 182ff.; Dell'Oro, '*Mandata*' e '*litterae*': Contributo allo studio degli atti giuridici del '*princeps*'.
[59] *G.1.5*: *Nec umquam dubitatum est quin id legis vicem obtineat, cum ipse imperator per legem imperium accipiat.* Cf. *D.1.4.1pr., 1*; *1.2.2.11.*
[60] *D.1.4.1pr.*: *Quod principi placuit legis habet vigorem.*
[61] *D.1.4.1.1*: *legem esse constat.*
[62] Ante p. 28.
[63] That they counted as *constitutiones* is denied by Dell'Oro, *cit.*, n. 58; but see Orestano, 12 BURA 451ff.
[64] *D.49.1.1*. See further Chapter XLVII(i), post.

instrument has been already discussed.

More directly connected with private law were imperial *decreta* and *rescripta*. The emperor had great power in legal proceedings; he could hear a case at first instance or on appeal or intervene with a ruling (*interlocutio*) in a case before an official. Such rulings of the emperor were *decreta* and were regarded as definitive interpretations of the law. Though the Romans at no stage had a doctrine of judicial precedent like that of the common law,[65] imperial *decreta* were regarded as statements of the law binding in subsequent cases. In general, however, the *decreta* of which a record exists[66] were concerned with relatively minor matters; this, no doubt, because the emperor's principal methods of settling legal points was by *rescripta* and, in the later empire, by general constitutions.

*Rescripta* were answers made by the emperor to petitions on points of law by his subjects and were of two kinds, *epistulae* and *subscriptiones*. The former were answers to queries from officials incorporated into a separate letter, issuing from the office of the imperial secretariat known as *ab epistulis*, addressed to the official concerned. *Subscriptiones* were answers to enquiries from private persons, appended to their original petition and issuing from the office *a libellis*; in fact, the original petition and answer were retained in the imperial archives but the petitioner could obtain a certified copy of the ruling. Inevitably, many rescripts would have been particular to the case in respect of which they were issued but there were others which elucidated or declared general principles of law and, after earlier rulings,[67] Justinian provided that, even if there was no express intimation in a rescript that it was to be binding thereafter, it would nonetheless have such effect if it laid down a general rule.[68] It remains to add that, though rescripts issued in the name of the emperor, they were, of course, principally prepared by the jurists of the emperor's *consilium*, in the later period, *consistorium*,[69] and that Justinian's Code bears impressive testimony to the accessibility of the emperor to his subjects of every rank and degree and on questions both weighty and trivial.

(f) *Responsa Prudentium*[70]

[65] Cf. still Justinian in *C.7.45.13*: *non exemplis sed legibus iudicandum est* (judgment is to be delivered according to laws not examples).

[66] Paul made a collection of *decreta*; on which see Sanfilippo, *Pauli Decretorum Libri Tres*.

[67] Cf. *C.Th.1.2.2, 11; C.1.14.3*

[68] *C.1.14.11*

[69] For a fascinating instance of the *consilium* in session, see *D.49.14.50*.

[70] The literature on Roman jurisprudence and on individual jurists is already enormous and ever-increasing; a highly selective bibliography follows. See Krüger, Geschichte der Quellen und Literatur des römischen Rechts[2]; Kreller, Das Problem des Juristenrechts in der römischen Rechtsgeschichts; Schulz, Principles of Roman Law, 23ff., History of Roman Legal Science (an amplified version in German, Geschichte der römischen Rechtswissenschaft, was seen through the press by W. Flume); La Pira, Studi Virgili,



Hitherto, the concern has been with direct modes of creating and changing law. But, as observed earlier, until interpreted, law would remain merely a set of words on a tablet or paper or an unformulated practice. It follows that, from earliest times, there were recognised repositories of legal learning whose function it was to expound the law for their fellow-citizens. After the period of priestly interpretation of the law, there were the lay jurists who, emerging by the end of the third century B.C., were clearly visible as a class by the beginning of the last century B.C. and whose great period was the first two and a half centuries of the empire, especially the period, to be arbitrary, from about A.D. 100 onwards. From the middle of the third century of the present era, there was a sudden decline in the quality of Roman jurisprudence which was never halted; and finally Justinian, in the Digest, compiled the quintessence of the achievements of the great lawyers, the last of whom had died nearly three hundred years before his day.

It is thus possible to make a somewhat arbitrary – but, it is thought, convenient – fourfold plan of the history of Roman jurisprudence: the period of pontifical legal interpretation; the period of the veteres or Republican jurists; the classical period of Roman jurisprudence; and the postclassical period of Roman legal science.

(i) Although the early enactment of the Twelve Tables testifies to the Roman genius for distinguishing the legal from the moral and religious, it is a credibly accepted tradition that the interpretation of the law, written and unwritten, was, in the earlier centuries of the Republic, a function of the pontiffs (*pontifices*), a body of priests, then wholly patrician of caste. As earlier mentioned, despite their sacerdotal character, the pontiffs were essentially men of affairs for whom their priesthood was but another honour. They advised on and interpreted the law and though, so long as there was strife between the orders of society, the patrician monopoly of the pontificate could have been arduous for the plebeians, the priestly interpreters of the law are to be credited with at least two beneficent institutions, namely emancipation,[71] whereby the power of the head of a family could be extinguished, and *mancipatio nummo uno*,[72] a formal conveyance for a trifling sum which constituted an effective form of gift. They also fashioned the *legis*

158ff., 42 BIDR 336ff., 1 SDHI 319ff.; Kunkel, Herkunft und soziale Stellung der römischen Juristen; Schiller, 58 Columbia LR 1226ff.; Wieacker, Vom römischen Recht[2], 138ff., 161ff.; Stein, Regulae Iuris; Schmidlin, Die romische Rechtsregeln; Maschi, Il diritto romano I[2]; Carcaterra, Le definizioni dei giuristi romani; Martini, Le definizioni dei giuristi romani; Wesel, Rhetorische Statuslehrre und Gesetzauslegung der römischen Juristen; Vonglis, La lettre et l'esprit de la loi dans la jurisprudence classique et la rhetorique; Horak, Rationes decidendi I; Bretone, Techniche e ideologie dei giuristi romani; Lombardi, Saggio sul diritto giurisprudenziale.

[71] Chapter XLI(i), post.

[72] Chapter XII (i), post.

*actiones*,[73] the ritual forms of words in which claims in litigation had to be formulated, and, since the smallest slip in the formulation of his assertion would cost a litigant his claim,[74] they consequently had great influence in the field of litigation.

According to tradition, the pontifical monopoly of legal knowledge was broken when Gn. Flavius, at the instigation of Appius Claudius Caecus (censor in 312 B.C.), acquired and published, somewhere about 305 B.C., a collection of the *legis actiones*, the so-called *ius Flavianum*. Whether or not this tradition has any validity,[75] the patrician stranglehold was certainly released by the *lex Ogulnia* (300 B.C.) which laid down that henceforth half the number of the pontiffs must be drawn from the ranks of the plebeians. Doubtless, the final stroke was the practice of the first plebeian *pontifex maximus*, Tiberius Coruncanius (254 B.C.), of giving legal advice and opinions in public.[76]

The mystery of the law was thus dispersed and there developed a class of men who came to be known as *iuris prudentes* or *iuris consulti*, men who specialised and thus were learned in the law. The first reliably documented legal work was that of Sextus Aelius Paetus (consul, 198 B.C.) who produced, about 204 B.C., the so-called *ius Aelianum* or *tripertitum*[77] which comprised the text of the Twelve Tables, their interpretation and the forms of the *legis actiones*.

(ii) The last two centuries of the Republic saw the steady development of the body of jurists, affectionately styled the *veteres* by their later successors. They had no official standing as such but acquired considerable prestige and authority and their opinions and rulings were readily accepted by their fellow-citizens by reason of their social position. For the early jurists were men of aristocratic rank, usually holders, potential or past, of the highest offices in the state, wealthy and public-spirited.[78] They advised litigants and judges alike and also magistrates, in particular, the praetor on the content of his Edict.

Jurists of repute and legal literature began quite early. Apart from Sextus Aelius already mentioned, his brother Publius (consul 201 B.C.) was a lawyer of distinction as were Marcus Porcius Cato, the famous censor of 184 B.C. and his identically-named son. Then came three great figures who, according to Pomponius, founded the civil law (*qui ius civile fundaverunt*): Publius Mucius Scaevola (consul 133 B.C. and subsequently *pontifex maximus*); Marcus Junius Brutus (praetor 142 B.C.) who wrote a work *de iure civili* [on

[73] Chapter VI, post.
[74] *G.IV.30*
[75] Cf. Schulz, History of Roman Legal Science, 9ff.
[76] *D.1.2.2.35, 38*
[77] But see Watson, 19 Labeo 26ff.
[78] Cf. Kunkel, *op. cit.*, n. 70; 66 JR 148ff.



the civil law);[79] and Manius Manilius (consul 149 B.C.) whose *monumenta* survived into classical times and who also probably produced a collection of forms of sale. But the greatest names of the Republic probably belong to its last century. Quintus Mucius Scaevola, son of the aforementioned Publius and – like his father – consul (95 B.C.) and *pontifex maximus*, wrote the first scientific legal treatise, a *Ius civile* in eighteen books; his pupil, Caius Aquilius Callus (praetor, 66 B.C.) was the inventor of the *exceptio* and *actio doli*[80] and of the *stipulatio Aquiliana*;[81] and Servius Sulpicius Rufus (consul, 51 B.C.), according to Pomponius, left some hundred and eighty books, many of which survived into classical times, and also had a number of illustrious pupils.

By the last century of the Republic, the functions of the jurists could be summarised as *scribere*, *agere*, *cavere*, *respondere*.[82] *Scribere* denotes the drafting of documents; *agere*, the preparation of cases for court – advising on evidence, etc. – not appearance in court which was a task for the lesser breed of orators and advocates;[83] *cavere* indicates the jurists advising clients on the safeguards, etc., that they should seek in contemplated transactions; *respondere*, however, was the jurist's most important function, giving advice upon points of law and on their applicability in the case at issue, whether it was raised by a lay client, so to speak, or by a judge trying the issue. There might also be added *docere*, for it was an accepted duty and privilege of the jurists to educate their successors, not by direct instruction as such but by allowing their attendance at consultations and the like and discussing with them the problems raised. Most young Roman men of aristocratic background would have contemplated a magisterial career, for which some legal learning would be valuable and they might even, like Aquilius Gallus, abandon the *cursus honorum* to devote themselves to the law.[84] They would be admitted to attendance by the jurists to whose social class they belonged and, for the same reason, would be accepted by their clients. Jurisprudence, in short, was a gentlemanly pursuit.

(iii) The classical period of Roman jurisprudence can be fairly said to have begun with the coming of the Principate. If anything, the early empire brought the jurists enhanced prestige. Before going further, however, in the nature of classical jurisprudence arid the work and careers of some of the great jurists, something should be said of two particular phenomena which made their appearance in the early empire, viz., the *ius publice respondendi*

[79] Cicero, *Pro Cluentio* 141, *de Oratore, 2.142, 224*
[80] Chapter XVII(1), post.
[81] Chapter XXVI, post.
[82] Cicero, *De Oratore 1.212*
[83] Earlier jurists had been advocates no less than legal luminaries. The breach between the two professions would appear to date from the last century of the Republic; for evidence of the rupture, see especially Cicero, *Pro Murena* passim.
[84] Cicero, *Ad Atticum 1.1.1*

and the Schools of jurists.

a) As has been earlier stated, the earlier emperors, especially Augustus, claimed no independent legislative power; but the position of the *princeps* and the powers that he did have enabled him effectively to control the assemblies while they lasted and the senate; and the praetor was an imperial nominee commended for election to the appropriate electing body. It would have been obviously out of phase with the spirit of the new regime that the jurists, so influential in the legal life of society, should preserve an untramelled independence; but any steps that were taken would have to be circumspect – it would ill have become the self-styled restorer of the Roman Republic overtly to impose constraints upon the jurists.

Instead, if an unsatisfactory passage of Pomponius[85] be reliable, Augustus introduced the *ius (publice) respondendi*,[86] the right of giving opinions under his authority and seal, conferred on certain jurists, and from the time of its inception[87] such right came to be asked for as a favour by jurists. While ostensibly leaving the practice of jurisprudence open to anyone who chose to hold himself out, the *ius* would inevitably have made for some imperial supervision of juristic activity; for litigants and the like would understandably be inclined to consult a jurist honoured by the emperor than one who was not and it would require a judge of great spirit to ignore the *responsum* of a patented jurist. It may further be plausibly conjectured that, at any rate in the early stages, the right was conferred mainly on jurists sympathetic to the new régime and, where granted to those who were not, that it would at least make them circumspect in *responsa* on issues that had policy aspects. The creation of the *ius* would appear also to have been part of Augustus's general policy towards the senate in that it was initially conferred only on senatorial jurists: Pomponius, again, says that Massurius Sabinus was the first jurist of the equestrian order to receive the *ius* at the hands of Augustus's successor, Tiberius.[88]

Obscurity surrounds the purport and effect of the *ius respondendi* as also the number of jurists upon whom it was conferred and how long the privilege

[85] *D.1.2.2.48-50*

[86] See De Visscher & Nicolau, 26 RHDFE 615ff.; Kunkel, 66 ZSS 423ff.; Guarino, 2 RIDA 401ff.; Lévy-Bruhl, 40 RHDFE 5ff.; Provera, 28 SDHI 343ff.; Horvat, Synteleia Arangio Ruiz, 710ff.; Pólay, 16 IURA 42ff.; Bretone, 12 Labeo 23ff.; Wieacker, 37 TvR 381ff.; Jolowicz & Nicholas, 359ff.

[87] ... *ex illo tempore* ...

[88] Pomponius also says that Sabinus was the first to give public *responsa*. This seems improbable if the *ius* was introduced by Augustus. The usual explanation is that he was the first *eques* to do so. The possible objection that, as reported in Inst.II.25[7], Augustus, in consulting jurists on the validity of codicils (Chapter XL(ii), post), included among them the equestrian Trebatius 'who was then of the greatest authority' may be met by the conjecture that, at that time, Augustus had not introduced the *ius*.



continued to be conferred. Taking the latter two points first, the only classical jurist of whose work anything survives on whom the right is said to have been conferred is Sabinus.[89] It may be conjectured that the distinguished jurists of, at any rate, the first century of the empire received the honour but there is no evidence.[90] In connexion with the latter point, Pomponius[91] says that Hadrian, when approached for permission to make *responsa* by some men of praetorian rank, replied that to make response was something to be done not to be asked for and that it would please him if those who had faith in their ability would prepare to do so. This could mean that the emperor was indicating that he was not conferring the right any longer and that confident lawyers should give opinions without more. Such an interpretation would be compatible with historical developments from the time of Augustus; by the end of the first century A.D., certainly by the time of Hadrian, the emperor was firmly in control of the means of law making and jurists were fast becoming a professional class linked with the government machine – the independence that the *ius* had been designed to control no longer existed.[92]

Turning to the purport and effect of the *ius*, it has been opined[93] that Augustus not only instituted the right but also made *responsa* by privileged jurists binding upon the judge who received them. If this be the correct inference from Pomponius, difficulty is then occasioned by Gaius[94] who says: '*Responsa prudentium* are the rulings and opinions of those who are authorised to lay down the law (*iura condere*). If they be unanimous, their content is valid as though it were a statute but, if they differ, the judge may follow the opinion which most commends itself to him: and this was ordained by the divine Hadrian.' If Pomponius and Gaius are to be taken as using *responsa* in the same sense, the respective provisions of Augustus and Hadrian would need to be reconciled.

On any view, it is improbable that Augustus made the rulings of privileged jurists binding upon the judge who received them; that would indeed have been a legislative act. But it would be natural that a judge receiving such a *responsum* would in fact follow it so that such responsa acquired a *de facto* authority; problems could then arise if more than one patented jurist were

[89] There is mention of an unknown Innocentius of uncertain date: cf. Schulz, History of Roman Legal Science, 114, n. 6.

[90] That a lawyer be referred to as *iuris consultus* is not evidence that he had the *ius*, *pace* Magdelain, 40 RHDFE 20.

[91] *Loc. cit.*, n. 85. See Daube, 67 ZSS 511ff.; Honoré, Gaius 82ff.

[92] An alternative interpretation of the relevant Latin reply of Hadrian, '*hoc non peti sed praestari solet*', i.e., 'The right should not be asked for but conferred' accords ill with the earlier statement that such requests had been made from the moment that Augustus introduced the *ius*. On the question whether *G.I.7* is authority that the ius still existed under and after Hadrian, see further in the text.

[93] Cf. Kunkel, Herkunft und soziale Stellung der römischen Juristen, 282ff.

[94] *G.I.7*. See De Zulueta, 22 Tulane LR 173ff., Gaius II, 21ff.

consulted and conflicting opinions were presented to the judge. If Gaius be using *responsa* in the sense of opinions in a particular case, it could be that Hadrian converted the *de facto* authority of privileged *responsa* into *de iure* validity where the jurists consulted were unanimous and relieved the predicament of judges by confirming their legal right to choose between conflicting opinions. It could obviously be objected to this interpretation that there must have been differences of privileged opinions well before Hadrian. But this objection is not so formidable as it might appear. So long as opinions were only of *de facto* authority, a judge could and would have to choose between contrary views; and, in any case, it may be assumed that the development of *de facto* authority was not immediate, that not always were more than one jurist consulted and that, when they were, they did not regularly give conflicting opinions. Furthermore, the celebrated points of dispute between the Sabinians and Proculians stem only from the second half of the first century.

Another possibility is that Gaius is speaking not of *responsa* in the individual case but of the invocation of the works of jurists at large, and that *iura condere* refers to the innate creative force of interpretation and of jurisprudence. If the *ius respondendi* was no longer granted in the time of Hadrian and in the light of the relations between the jurists and government service, it is far from implausible that the practice of resorting to informed literature generally had begun to establish itself and that Hadrian confirmed and regulated its validity. On this view, Hadrian's would have been a legal innovation in no way requiring explanation vis-à-vis that of Augustus and Gaius would be guilty of nothing 'except the loose use of *responsa prudentium*'.[95]

b) The schools of jurists became apparent in the first century of the Principate. They are traditionally known as the Sabinians and the Proculians but they are not named after their respective alleged founders; for the first of the Sabinians was C. Ateius Capito (consul, A.D. 5) while the first Proculian was Marcus Antistius Labeo: still in classical law, the Sabinians were known alternatively as *Cassiani* after Sabinus's successor as head of the school. Certainly, all the great lawyers of the first one hundred and fifty years of the empire belonged to one or other of the schools: Gaius proclaims himself a Sabinian but in truth the schools seem to have disappeared with the ascendancy of Julian, the consolidator of the Edict. Pomponius says[96] that Capito and Labeo were the respective founders of the schools and then lists the successive heads of each. The obscurity of the origin of the schools and their names may be explained by the supposition that they had no recognisable form until the time of Sabinus and Proculus and then came attempts to trace themselves back to the beginning of the empire.[97]

[95] Jolowicz & Nicholas, 362.

[96] *D.1.2.2.47-53*

[97] The Italian scholar, Arnò, in a series of works, endeavoured to identify all subsequent



It has been maintained[98] that the schools were places of instruction in law but this is highly debatable. Though such establishments did emerge in the early empire[99] as rivals to the schools of rhetoric, they appear to have been profit-making concerns, with which it is impossible to associate men of the social and political standing who appear in Pomponius's list of the heads of the schools. Massurius Sabinus was clearly exceptional in that he took fees from his pupils and reached equestrian rank only in middle age, having previously lacked the necessary property qualification. But all the others were of the highest standing: Nerva the elder, for example, was a friend of Tiberius and accompanied him on his retreat to Capri; Cassius, a descendant of the conspirator, was consul (A.D. 30) and subsequently governor of Africa (A.D. 40) and of Syria (A.D., 47-9); even Pegasus, though reputedly the son of a helmsman, rose to be *praefectus urbi* under Vespasian. Such men would scarcely have conducted establishments of the kind indicated. On the other hand, the university-type law school did not make its appearance before the second century of the empire and then outside Italy.

It is probable that the schools were rather like law clubs which attained a definite existence though without any formal constitution,[100] centred around a succession of distinguished jurists, who allowed interested persons to attend at their consultations and discussions in the old manner of the Republic. This would also help to explain the difficulty of finding any clear difference of principle between the schools. On the basis of Pomponius's statement[101] that Labeo was an innovator while Capito was traditionalist in his approach, it has been suggested that the Proculians were progressive lawyers while the Sabinians were reactionary; but, in fact, in several matters the Sabinian solution was the more forward-looking.[102] Nor can they be distinguished on the ground that the Proculians were followers of Peripatetic philosophy while the Sabinians were Stoics.[103]

It is not unlikely that, in origin, other factors than the individual jurist's legal renown determined to whom a student would go for his education. Labeo was not only an extremely versatile lawyer but an aggressive upholder of the republican ideals while Capito was a committed supporter of the new regime.[104] Political loyalties could have determined the allegiance

jurists as followers of either Q. Mucius Scaevola or Servius Sulpicius Rufus.

[98] Schulz, History (*cit.* n. 71), 121ff.

[99] Cf. Aulus Gellius, *Noctes Atticae* 13.13.

[100] Cf. the obscurity surrounding the origins of the Inns of Court.

[101] *D.1.2.2.47*

[102] Cf. e.g. their approach to substituted performance of contracts (Chapter XXVI, post) and their readiness to widen the concept of sale (Chapter XXI(i), post).

[103] So Sokolowski, Die Philosophie im Privatrecht. Only their difference over the question of *specificatio* (Chapter XII(ii)(c), post) could give any credence to this view: but see Thomas, 21 CLP 145ff., Hägerström, Der römischen Obligationsbegriff I, 246ff.

[104] Cf. Tacitus, *Annals* 3.75; see Rogers, Synteleia Arangio Ruiz 123ff. Labeo's father,

of the early adherents of the schools; it is indeed possible that the Proculians broadly continued the freer, independent tradition of the old republican aristocratic jurisprudence while the Sabinians foreshadowed the professional class, associated with government service, of the high classical period.[105] Subsequently, doubtless, personal considerations – family, etc., association with one or the other school – determined the choice of the young man seeking a legal education.

The differences which arose between the schools seems to have dated from some time after their probable foundation (the views of Labeo, in general, coincide with those of Sabinus)[106] and were on particular legal problems – whether exchange could be regarded as a form of sale, etc. – rather than on the concept of the legal system as such. Inevitably, the views of the master were transmitted to and by his pupils, making for the notorious controversies that will become apparent in the following treatment of the substantive law. But there would appear to have been no rigid rivalry or hostility; for example, Javolenus, a Sabinian, made an epitome of the *Posteriora*, a posthumous work of Labeo, and the *Ius Civile* of Sabinus became the basis of all commentaries on the civil law of Rome.

Though, as earlier mentioned, Gaius styles himself a Sabinian, there is no real record of the schools after his somewhat older contemporary, Julian. Not the least reason, perhaps, for their disappearance was the tremendous personal prestige of Julian himself who appears to have enjoyed among his contemporaries and successors a position similar to that of Coke C.J. in English legal history.[107] There was also the now clear association of the leading jurists with government service, often as members of the emperor's *consilium* or cabinet; it is not the practice of civil servants, and only occasionally that of cabinet ministers, to indulge in open dispute one with the other. And, though the great jurists continued an extensive consultative practice until the end of the classical period, the era of imperial legislation had begun in which the jurists had to put as much of their expertise into the preparation of *rescripta* and the like as into their own individual works. The position of the jurists in the political structure probably made the disappearance of the schools inevitable.

c) The great period of classical jurisprudence was, in broad terms, from about A.D. 120 to A.D. 250, more precisely, from the time of Celsus the younger and Julian who were prominent in the reign of Hadrian to the death of Mod-

Pacuvius, had taken his own life on hearing of Julius Caesar's victory at Philippi.

[105] Though Cassius was exiled by Nero for having a bust of his ancestor, the conspirator against Julius Caesar; Tacitus, *Annals 16.9*; Suetonius, *Nerva 37*.

[106] Cf. Pernice, Labeo I, 88.

[107] Though he did not go wholly unchallenged. In particular, the somewhat younger Ulpian Marcellus was a frequent critic of his opinions.



estinus in, probably, A.D. 244.[108] During this period, with the exception of the contemporaries Gaius and Pomponius, all the celebrated jurists were men of distinction in the imperial service and the holders of high office. Already, Javolenus, who had the distinction of being Julian's teacher, had been consul in A.D. 87 and subsequently governor in turn in Germany, Syria and Africa. Now, for example, Celsus was consul for the second time in A.D. 129; Julian crowned a glittering career with the consulship in A.D. 148, was governor successively in Germany, Spain and Africa and was a member of the *consilium* under Hadrian, Antoninus Pius and Marcus Aurelius; Maecian – Lucius Volusius Maecianus – was prefect of Egypt and teacher to Marcus Aurelius; at the end of the classical period, Papinian, Ulpian and Paul successively held the exalted office of *praefectus praetorio*. The association of the practice of jurisprudence with imperial service, foreshadowed by the institution of the *ius respondendi* by Augustus, was complete.

Moreover, jurisprudence had become, so to say, internationalised and its exponents representative of the vicissitudes of political and social life in the history of the Principate. Though men of lesser origin, notably Servius Sulpicius Rufus, had begun to practise in the later Republic, in the main the jurists of the Republic and the earlier empire were members of the senatorial aristocracy and Roman, or at any rate Italian, by birth. But, by the middle of the first century of the present era, the senate was receiving recruits from other strata of society and from the provinces. The changing social structure can be seen in the year of the five emperors, A.D. 68-9. While Nero and Galba were of aristocratic lineage, the ultimately triumphant Vespasian was of merchant equestrian stock from an Italian town. Among the jurists, while Sabinus was a glaring oddity in the company of Labeo, Nerva, Cassius and the like, the self-made Pegasus rose to eminence under Vespasian. In the great period presently under discussion, it is scarcely coincidental that Julian, who hailed from Hadrametum in Africa, should have come to prominence under the provincial emperor, Hadrian, who was of Spanish origin or that the great eastern jurists, Papinian, Ulpian and Paul, attained high office under the Severine dynasty which shared their origin; their very names betray the Greek descent of Callistratus and Tryphoninus. Manifestly, there was a broad identity of pattern in the diversifying of the exponents of the law and in the occupancy of the Principate.

And yet the basis of juristic development of the law without overmuch recourse to legislation remained the same as it had always been. Different in origin and background from their predecessors though they were, the jurists were still men of affairs, at the centre of power, in an essentially stable and responsible political society, commanding respect for their opinions and rulings by the authority and prestige which their position conferred upon them

[108] For the jurists mentioned hereafter, see Kunkel, Herkunft (*cit.* n. 70); Jolowicz & Nicholas, 380ff.

and founding those opinions and rulings upon the exigencies of practical experience. Tradition was further preserved in that there was maintained a continuous uniformity of thought, aim and style, objective and impersonal. Such personal references as Ulpian's mention of his birthplace, Tyre,[109] or Paul's allusion to his practice in the courts[110] are extremely rare. Though centuries apart in time, background and, perhaps, temperament, Servius Sulpicius and Labeo and Ulpian and Paul were parts of an unbroken tradition.

d) Some attempt should now be made to explain why the jurisprudence of the last one hundred and thirty years or so of the Principate is regarded as truly classical.

The earliest jurists had been wholly practical, providing information on the rules of law, specimen *formulae* and simple rulings that, e.g. an action did or did not lie, often unreasoned with merely the observation that some earlier jurist or jurists had said the same.[111] But, especially from the second century B.C., Greek scientific and cultural influence made educated Romans familiar with the methods of dialectic and logical analysis into *genera* and *species*, the observation of *differentiae*, the quest for underlying principles and the like. By the last century of the Republic, these techniques were coming into jurisprudence: Q. Mucius Scaevola, for instance, is credited with a work entitled (Definitions)[112] and enumerated the forms of possession found in Roman Law;[113] Servius Sulpicius formulated a definition of *tutela*, guardianship,[114] and collated types of 'Act of God' (*casus* and *vis maior*);[115] in the early empire, the interest of Labeo in definitions is abundantly testified.[116]

But, so long as the Edict was a creative force, introducing new remedies and perhaps removing others, etc., exhaustive definition and classification was impossible; and jurisprudence was consequently characterised by a caution that it never lost. One of the most famous passages in the Digest is an excerpt from Javolenus: D.50.17.202: *Omnis definitio in iure civili periculosa est: parum*[117] *est enim ut non subverti possit.*[118] (Any definition in the civil law is a dangerous thing for there is scarce a one which cannot be faulted.)

For all this wariness, however, the consolidation of the Edict meant that by the time of Julian, the jurists could at last treat of their material as a

[109] *D.50.15.1pr.*
[110] *D.32.78.6*: and see, earlier, Julian in *D.40.2.5*.
[111] Cf. Cicero's teasing letters to the jurist, Trebatius, *Ad familiares VI.17, VII.10.*
[112] See Scherillo, 3 IURA 150ff.; but see the suspicions of Lenel, *Palingenesia*, Q. Mucius
[113] *D.41.2.3.22*
[114] *Inst.I.13.1*
[115] Cf. e.g. *D.19.2.15.2*
[116] See e.g. *D.4.3.1.2* and *D.50.16* passim.
[117] Qu. *rarum*.
[118] See also *D.44.3.14pr.*; and cf. Francis Bacon's likening a common law decision to a compass needle, ever pointing towards the north but never constant and settled.



whole and were, by their education, technically equipped to do so. While remaining practical and casuistic in their approach, they could and did have a broader aim than the plain solution of individual cases. They had clearly in mind the desirability of consistency and the implications of one decision for another.[119] A greater abstraction of thought enabled them to discern the general concept which underlay varied instances and to formulate it so that it could in turn be applied to differing sets of facts; the treatment of *dolus* and the perception of contumely as the essence of the manifold forms of *iniuria*[120] are typical of this inductive process which also characterises the method of the common lawyer. The function of the high and late classical jurists was no longer the amplification of the sphere of the law, particularly praetorian law, as such but the interpretation and exploitation of the existing *corpus* of law, the harmonising of the *ius civile* and *ius honorarium* and the elucidation of existing difficulties, the formulation of legal concepts and the delimitation of the scope of available remedies; that and the preparation of rescripts within the framework of the law and consonant with it.

If there be one quality above all others which typifies the classical jurists of the great age, it was the quest for *elegantia*, elegance.[121] In the Digest, which, as will be seen hereafter, represents but a small fraction of the full literature of the classical age, the noun, *elegantia*, the adverb, *eleganter*, and the adverbial double negative, *non ineleganter* appear some sixty times; and it is not without interest that the self-confessed Syrian, Ulpian, the symbol of the internationalised jurisprudence of the great days, should be responsible for well over half the employments of these approbative terms.[122]

*Elegantia* was a term not only of legal but also of rhetorical and philosophical significance. In rhetoric, it denoted the careful simplicity and precision of language, the *genus tenue*, of which, among literary stylists, Julius Caesar was so illustrious an exponent.[123] This certainly was characteristic of the jurists in general:[124] Pomponius observes[125] that the Republican jurist Tubero, though extremely learned in the law generally, affected archaisms in his works and on that account these works were found displeasing. Indeed, nothing so completely emphasises the essential simplicity of juristic language as to contrast it with the rhetorical rhodomontade of the constitutions of the emperors of the postclassical period.[126]

But there was also that sense of *elegantia* in which there was an affinity with

[119] See Daube, 12 IURA 83ff.
[120] Chapters XXX and XXXI, post.
[121] See Philonenko, Studi De Francisci II, 516ff.; Radin, 46 LQR 311ff.; Stein, 77 *ibid.* 242ff., Regulae Iuris 65; Sciascia, 51/52 BIDR 372ff.
[122] Cf. *V.I.R. s.h.v.*
[123] Cf. e.g. Cicero, *De Oratore 5.20*; Quintilian, *Inst.Or.12.10, 21.59*
[124] Quintilian, *Inst.Or 5, 14, 34*; cf. Cicero, *De Oratore* 21.70
[125] *D.1.2.2.46*
[126] Cf. e.g. *D.18.1.34.1* and *C.4.40.4*

*subtilitas*, an elegance not only of language but also of thought, with an element of paradox, certainly of ingenuity, finding the point of distinction of one situation from another so as to leave a general principle unaffected by demonstrating that the question under discussion either did not raise the issue or else was just the exception which confirmed the general rule.[127] In short, *elegantia*, as a quality of Roman legal thought and literature, comprised not only clarity and brevity of language but also subtlety and ingeniousness of ideas; but firmly grounded in the practical.

The practicality of Roman jurisprudence was manifested in its literature, which was copious not only in terms of overall volume but also in respect of the individual output of particular jurists: Labeo, for example, perhaps the most original precursor of the superlative Julian, left, at his death, some four hundred volumes[128] and Paul, praetorian prefect under Alexander Severus, was responsible for at least three hundred and seventeen volumes. The Digest, as it exists, represents but a fragment of the total legal literature: Justinian himself says that some two thousand books were used by the compilers, not a few known only from the collection of his minister, Tribonian, and reduced to one twentieth of their original volume.[129]

In the first place, there were commentaries on the civil law (*ad Sabinum*) or on the Edict (*ad edictum*) or on individual *leges* or *senatusconsulta*. Such commentaries were not schematic treatises of the modern style but enunciated the principle, edict or clause in question with the interpretations that had been placed upon it. *Digesta* or Digests were comprehensive treatises of similar character on the law as a whole, both civil and praetorian – usually with the latter treated first – and with some consideration of criminal law: such works made an early appearance – already the Republican Alfenus Varus published a Digest, of which two epitomes, one by Paul and the other by an anonymous scholar, reached Justinian's compilers; though *Digesta* proceeded from the pens of other prestigious jurists, notably Celsus and Marcellus, the classic example of this literary genre was the Digest of Julian in ninety books, much used by later jurists and in Justinian's compilation. *Responsa*, *Quaestiones* and *Epistulae* were related forms of so-called problematical literature, i.e. collections of cases, actual or hypothetical, on which the jurist had given a reasoned opinion; though many other jurists published such works, the most celebrated and highly regarded thereafter were the *Quaestiones* (thirty seven books) and *Responsa* (nineteen books) of Papinian. *Regulae*, which again appeared relatively early, were essentially short statements of legal principles rather than full commentaries, convenient

[127] See, e.g. *D.1.16.6.3; 2.14.1.3; 3.5.9.1.* The quality would appear to be that which Aulus Gellius admired in Aristotle's *Problemata: Noctes Atticae 14.4.1.*

[128] *D.1.2.2.47*

[129] *Const. Tanta* §1. In fact, according to Honoré and Rodger, 87 ZSS 314ff some one thousand, five hundred and twenty eight books were utilised.



for practitioners of the law. *Institutiones* (or *Enchiridia*) were elementary manuals, giving the neophyte a picture of the law generally, and tended to be relatively late in appearing, from broadly the middle of the second century of the empire; the Institutes, *par excellence*, of classical law are those of Gaius.

e) It would not be practicable here to attempt a survey of all the known jurists individually or even of only the more distinguished of them; but, by reason of his great importance in the later and modern study of Roman Law, something must be said of Gaius.[130] 'Of Gaius we know at the same time more and less than of any other classical jurist.'[131] Only his *praenomen* has survived; no contemporary or subsequent classical jurist mentions him;[132] the details of his life are a mystery. He would appear to have been born not later than the early years of the reign of Hadrian and lived at least to A.D. 178[133] and is generally believed to have held no public offices and to have had no *ius publice respondendi.* From the days of Mommsen,[134] it has been widely conjectured that he was provincial and a teacher of law in one or more of the nascent law schools of the eastern provinces: this is, however, not easy to reconcile with his universally-admitted excellent Latin, his constant references to the Romans in the first person plural[135] and his self-proclaimed Sabinian allegiance. He may have been a citizen, educated at Rome, who then went to teach in the provinces.

It was his Institutes – more correctly, Commentaries – which brought this shadowy figure posthumous popularity and repute in the postclassical period. The clarity of their style and the systematic character of the exposition – whatever the defects of that system to modern eyes – made the Institutes the ideal introductory manual for first-year students in the law schools for centuries until they were superseded by Justinian's own Institutes. And the success of the Institutes rescued the jurist's other works also from oblivion. It is a measure of his standing in the later empire that he found a place in the illustrious company of Papinian, Paul, Ulpian and Modestinus in the Law of Citations[136] – the only jurist before the third century so honoured –

[130] See Kniep, Der Rechtsgelehrte Gaius; Glasson, Études sur Gaius; Honoré, Gaius; De Zulueta, Institutes of Gaius II, 3ff.; Kunkel, Herkunft (cit. n. 70, ante), 190ff.; Gaio nel suo tempo.

[131] Jolowicz & Nicholas, 386.

[132] Honoré (*op. cit.* n. 30), 58ff., holds that the reference to *Gaius noster* in a passage of Pomponius (D.45.3.39) is to this jurist; but it is generally held either to refer to Gaius Cassius Longinus,the successor of Sabinus, or – more commonly – to be part of a sentence, the whole of which is interpolated.

[133] He wrote a commentary on the *senatusconsultum Orfitianum* which was passed in that year.

[134] Gesammelte Schriften II, 26ff.

[135] E.g. *G.1.55; IV.37*

[136] *C.Th.1.4.3*

while Justinian speaks of him affectionately as *Gaius noster*.[137]

With the publication of Justinian's Institutes, those of Gaius understandably fell into disuse and disappeared. But in A.D. 1816 the historian Niebuhr discovered in the cathedral library at Verona a manuscript of, probably, the fifth century which contained the bulk of the work and a further discovery in A.D. 1933 means that some four fifths of the Institutes are available to scholarship. The survival of a virtually complete classical work, independent of the Justinianic *corpus*, has an importance that needs no emphasis: in particular, it affords priceless information on the legal procedure of classical jurisprudence which had been expunged as obsolete from the excerpts incorporated in the Digest. No other book so short could have had a greater influence upon the study of Roman Law. No less than Justinian, the modern Romanist can speak of *Gaius noster*.

f) As has been previously.observed, the great tradition of classical jurisprudence came to a sudden end with the death of Modestinus, the pupil of Ulpian, in A.D. 244; and, though there is mention of lesser men such as Hermogenian and Arcadius Charisius in the later third and early fourth centuries and the subsequent flowering of the law schools, legal science became steadily debased in quality.

No single explanation of this phenomenon can be put forward but a number of factors which may be thought to contribute to the decline may be advanced. In the first place, there was the nature of classical, especially late classical, jurisprudence itself. With the harmonising of the *ius civile* and *ius honorarium* and the great commentaries of Ulpian and Paul which aimed at comprehensiveness, recording everything of value from the past to their own time, there was little room left for anything but the taking of refined distinctions, superfluous classifications and the production of more manageable literature. The two former characteristics are present already in the work of Marcian, a younger contemporary of Paul;[138] Hermogenian produced the first *epitome iuris*.[139] Then there was the collapse of the Principate. The jurists of the classical period owed their influence to their association with a strong central government; but, when the anarchy of A.D. 235-284 ended with the triumph of Diocletian, the bureaucracy of the Dominate, in which everything was done in the name of the emperor – in particular pronouncements of and on law – independence of opinion and comment was stifled. Individual initiative was further discouraged by imperial legislation on the use of juristic literature: already Constantine in A.D. 321[140] purported to abolish the notes of Ulpian and Paul on Papinian and, six years later, confirmed the other works of Paul with particular mention of the *Pauli Senten-*

[137] *Const. Imperatoriam* §6.
[138] See Buckland, Studi Riccobono I, 275ff.
[139] See Liebs, Hermogenians Iuris Epitome.
[140] *C.Th.1.4.1.* See Schulz, History (*cit.*, n. 70), 220ff.; Santalucia, 68 BIDR 49ff.



*tiae*.[141] Men of intellect and ambition accordingly look elsewhere than law for advancement and found an outlet for their energies in the theology and episcopacy of the emergent Christian church.

Whatever the cause or causes, the quality of juristic science was permanently lowered, despite the development of schools of law in both the western[142] and the eastern empire. Understandably, those of the west suffered in the general misfortunes which culminated in A.D. 476; those of the east appear to have been relatively inactive in the fourth and early fifth centuries – their burgeoning coinciding with the decline of their western counterparts.

Evidence of the lowering of juristic standards is the fact that the works of their classical predecessors were accepted as a kind of canon by the lawyers of the period. Literary production in the west was limited to the making of abridgments, such as the *Epitome Gai*, and the collection and collation of extracts of greater or lesser extent like the *Pauli Sententiae*, *Tituli ex corpora Ulpiani*, *Fragmenta Vaticana* and the like. And, inevitably, with the ever-increasing domination of the west, the codes of the barbarian conquerors, making provision for their Roman subjects, came to replace even such mediocre works, albeit that they may have used them inter alia. The kind of work presently under consideration is such a production as the *Lex Romana Visigothorum* of Alaric II or the *Lex Romana Burgundiorum* of Gundobad, king of Burgundy (A.D. 474-516).[143] The eastern schools seem to have contended themselves with the exegetical exposition and annotation of the law of the classical masters, if the *Scholia Sinaitica* may be accepted as a reliable guide.[144]

Certainly after the third century of the empire, nothing was heard of the *ius respondendi*; the use of abridgments and the like would have made for decreased familiarity with the great works of the past in themselves while the complete disappearance of the formulary system of procedure and the inevitable superseding of parts of their contents by subsequent imperial legislation would have made them correspondingly more difficult to utilise. The great canon was, in short, in the hands of those increasingly unfitted to handle it. An attempt to alleviate the difficulties of the legal profession which by its arbitrariness and 'counting of heads' in itself illustrates the debased state of jurisprudence was the Law of Citations issued by Theodosius II and Valentinian III in A.D. 426.[145] Under this enactment, the works of Papinian,

[141] *C.Th.1.4.2.* Modern scholarship, however, is of opinion that the *Sententiae* are not a genuine work of Paul: see, especially, Levy, Gesammelte Schriften I, 99ff.
[142] See Volterra, 10 CLJ 196ff.
[143] On pre-Justinianic postclassical literature generally, see conveniently Jolowicz & Nicholas, 455ff. with reffs.
[144] For the Syro-Roman Law Book, see Jolowicz & Nicholas, 459-60 and the authorities cited.
[145] *C.Th.1.4.3.*

Paul, Ulpian, Gaius and Modestinus became the principal authorities for use and citation in the courts. Jurists to whom any of the five referred might also be cited if the quotations were confirmed on collation with the originals. If there was any variance in the opinions of the five, that of the majority was to be followed: if two made one ruling and two another with the fifth silent, the view favoured by Papinian was to be followed; only if Papinian was the silent one, could the judge choose the view that he thought best. Even this lamentable measure seems not to have had the desired effect.[146]

Whatever the justification of the selection of the chosen five on the ground that current manuscripts of their works might be more dependable than those of the works of their predecessors, the rulings on the possibility of conflict between the five were manifestly deplorable: the validity of an opinion should be determined by the cogency of its argument and not by the numbers of those who shared it; and the implicit assertion that the opinion of Papinian should countervail the opinion of any one other jurist but not that of any other two, regardless of the current prestige of each of the others as legal scholars, was derisible. It can scarce occasion surprise that, a century later, Justinian directed his compilers not to adopt a given view merely because there was a majority of opinion in its favour.[147]

(iii) The Compilation of Justinian

(a) Preliminary to an assessment of the magnitude of Justinian's compilation, it is essential that a summary of the achievements of the centuries that lay between the death of Modestinus and his own accession to the throne should be attempted.

Something has already been said of the nature of postclassical juristic literature in the west and of the Law of Citations, as also of the compilations of the barbarian monarchs for their Roman subjects in the former western empire; but, so far as imperial legislation of the classical period and thereafter is concerned, nothing has hitherto been said. Of its character, it is sufficient, in the present context, to observe that the rescripts of the emperors of the classical period and still of Diocletian were formulated within the framework of developed classical law and with the simplicity of classical language but that, certainly from the reign of Constantine, alien elements – notably of Hellenistic and of Christian origin – were increasingly frequently incorporated into general enactments characterised by ever more grandiose verbosity.

For present purposes, however, the important thing is the conservation of imperial legislation. As was the case with the post-classical *florilegia* of juristic writings, the earliest collections of imperial legislation were of private origin

[146] Cf. the plaintive, although elaborate, language of *Novella Theodosiani I* which introduces the *Codex Theodosianus*.

[147] *Const. Deo auctore* §6.



About A.D. 291, there appeared the *Codex Gregorianus* of an unknown author, a collection of imperial constitutions from about A.D. 196 to date, seemingly in fifteen books divided into titles based on the pattern followed in the *Digesta* of the classical jurists. There followed a *Codex Hermogenianus*,[148] probably in A.D. 295,[149] also divided into titles, which collected together constitutions of the period A.D. 293 and 294; neither has survived but both were utilised by Justinian's compilers.[150] The first official collection of imperial legislation before that of Justinian was that of Theodosius II, the *Codex Theodosianus*.[151]

The author of the Law of Citations, still exercised about the state of legal learning, first appointed in A.D. 429 a commission to compile a collection of all laws of general application from the time of Constantine and of principles from the earlier *Codices Gregorianus* and *Hermogenianus* and from the writings of the jurists. The project came to nothing and in A.D. 435 a new commission was set up which, in A.D. 438, produced the Theodosian Code.[152] This is a collection, in sixteen books divided into titles, of imperial legislation currently in force covering the fields of constitutional, administrative, ecclesiastical, criminal and private law. Where a constitution had dealt with several topics in one enactment, the commissioners were instructed to divide it up and arrange the various parts in the appropriate titles of the work; and, within each title, the *leges* were arranged in chronological order of enactment. Justinian himself was to follow this plan.

However, the *Codex Theodosianus* was already nearly a century old when Justinian came to the imperial throne and nothing had been done about the bulk of juristic literature since the Law of Citations. In terms of Roman Law as a whole, therefore, Justinian may properly be regarded as both the first and the last codifier.

(b) The aim of Justinian was greatly more ambitious than that of Theodosius and not only in the field of law. Ascending the throne in A.D. 527 (though he had been effectively head of state throughout the reign of his predecessor, his aged uncle, Justin), he aspired to restore the glory of the great days of

[148] Qu. by the author of the *Epitome*. On the work, see Cenderelli, Ricerche sul Codex Hermogenianus, which attempts to reconstruct the Code.

[149] Cf. Rotondi, Scritti Giuridici I, 131ff.

[150] *Const. Haec. pr.*; *Summa* §1.

[151] The standard edition is that of Mommsen in two volumes. On the *Codex*, see Gradenwitz, 34 ZSS 274ff., 38 ibid. 35ff.; Scherillo, Studi Ratti 247ff., Studi Albertoni I, 515ff., 6 SDHI 408ff., 8 ibid. 5ff.; Archi, 2 ibid. 44ff., Symbolae David I, 33ff., Giustiniano Legislatore 71ff.; M.A. De Dominicis, 57/8 BIDR 383ff., 15 IURA 117ff.; Gaudemet, 4 RIDA 253ff.; Volterra, Mélanges Lévy-Bruhl 325ff.; Bonini, 163 AG 120off.; Cannata, 26 SDHI 292ff. For other pre-Justinianic official collections, see Jolowicz & Nicholas, 464ff.

[152] Though always known by this name, the Code had the backing also of the co-emperor, Valentinian III.

east before Justinian's legal activity?[173] Another view was that alterations of substance and text originated in the west[174] and thus before the fall of the western empire.

Caution is needed between the extreme views. While subsequent developments undoubtedly made necessary the modernising of much that was stated by the classical writers, to attribute to their successors such developments as insistence on the importance of the will of the parties in matters such as testation and contract and so forth would be indirectly to condemn the classical lawyers as legal pedants whose work needed liberalising; an improbability in the light of the admitted intellectual inferiority of the later lawyers. It is now generally accepted that much more of the *Corpus Iuris Civilis* is authentic than would have been asserted three decades and more ago.

[173]Cf. Collinet, Histoire de l'école de droit de Beyrouth.

[174]So Schulz, History (*cit.*, n. 70, p. 38). It is unnecessary here to go into the further refinements for which the definitive work is Wieacker, Textstufen klassischen des ristern.



# 4. Classifications of Law

The development of juristic science brought forth a variety of classifications and distinctions of the content of the law. That between *ius scriptum* and *ius non scriptum* constituted the basis for the discussion of sources of law in the previous chapter; and, in the course of that discussion, the distinctions between ius, juristic law, and *lex*, enacted law, and between *ius civile* and *ius honorarium*, the creation of the magistrates, were inevitably alluded to. Another distinction which is not without importance is that between *ius commune* and *ius singulare*.[1] As their names suggest, the distinction is between the rules of general application and those which applied only to a particular person or class of persons.[2] in general, for instance, anyone could make a gift to anyone else but, with trifling exceptions, gifts between husband and wife were forbidden;[3] similarly, though normally anyone could become a surety, the *Senatusconsultum Velleianum* forbade '*intercessio*' , i.e., the assumption of obligations for another, by a woman.[4] A singular provision, however, was not perforce of a restrictive nature; it might place a class of persons in a privileged position; such was the rule that soldiers on service could make a valid will by any manifestation of their wishes without having to observe the formalities which were obligatory for civilians.[5]

Three other classifications merit more expanded discussion: *ius publicum* and *ius privatum*; *ius civile*, *ius gentium* and *ius naturale*; and the law of persons, of things and of actions.

(i) *Ius publicum and ius privatum*[6]

In D.1.1.1.2, Ulpian says: 'public law is that which pertains to the Roman state; private is that which concerns the welfare of individuals'.[7] It might be inferred from this that the nature of a legal provision was determined according as it is drawn in the interest of the community as such or for the benefit of

[1]See Orestano, 11 Annali Macerata 39ff., 12/13 *ibid.* 89ff.; Arabrosino, *Ius singulare*; G. Longo, Etudes Macqueron, 451ff.

[2]For a definition of *ius singulare*, *D.1.3.16.*

[3]*D.24.1.1, 3*: see further Chapter XIV, post.

[4]*D.16.1.2.1*: see further Chapter XVII(iv), post.

[5]*D.29.1.1*: see further Chapter XLVII(i), post.

[6]See S. Romano, Scritti Santi Romano IV, 159ff.; Nocera, Ius publicum, Studi Rossi 39ff., Grosso, Studi Solazzi 461ff.; Kaser, 17 SDHI 267ff.; Berger, 1 IURA 102ff.; Lauria, his 128ff.; Bonifacio, 16 Justitia 67ff.; Lombardi NNDI 5, 1020ff.

[7]*Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem*, followed in *Inst.I.1.4*.

individual members thereof. But such a distinction is in truth untenable. All law is for the good of the community as a whole and the individual benefits therefrom as a member of that society: rules, etc., which appear primarily to affect individuals are law because they have been thought necessary or at least desirable for successful corporate life. The law of contract might, perhaps, be regarded as private law *par excellence*; but a society could scarce survive without provisions to ensure that undertakings correctly entered into would be honoured and be enforceable.[8]

Nonetheless, broad differences can be seen rather as in the popular modern concept of 'lawyer's law' as against, in particular, the bulk of delegated legislation and the growing discretion-conferring legislation; and Ulpian in fact goes on to say that public law comprises religion, the priesthoods and the magistracies: and thus, by implication, private law comprises family law and succession, the law of property and obligations. Further particularisation is, however, necessary of 'the law of religion, the priesthoods and magistracies'.

In modern law, it is thought, it would be acceptable to think of public law as those provisions of the general body of law applicable in relations between the individual citizen and state and other officials which differ from the provisions applicable to relations between individuals themselves. It is, in short, the peculiar nature of a provision which makes it one of public law: local authorities have powers of compulsory purchase of property that are not available to the private citizen, the police officer has powers of arrest beyond those of the ordinary man in the street and so forth.

By contrast, in Roman Law, the participation in any transaction (in the broadest sense) of an official, magistrate or priest, acting in his official capacity, made the matter one of public law. The *populus Romanus* was a juristic entity endowed with a sovereignty such that any relation into which it entered through one of its officials was perforce outside the sphere of the law pertaining to the ordinary citizen and beyond the jurisdiction of the ordinary courts; in brief, the matter was one of public law.

(ii) *Ius civile, ius gentium, ius naturale*[9]

These terms are to be found used in varying senses rather as, in modern English legal thought, 'common law' is used, now to characterise the Anglo-Saxon legal order as distinct from civilian codified systems of law; now,

[8]Hence some modern jurists deny the existence of the distinction: cf. Kelsen Pure Theory of Law.

[9]See C Longo, 40 RIL 632ff.; Maschi, La concezione naturalistica del diritto e degli istituti giuridici romani; Kaser, 59 ZSS 67ff.; Kunkel, Festschrift Koschaker II 1ff.; Lauria, *ibid.*, I, 258ff. . Lombardi, Ricerche in tema di 'ius gentium', Sul concetto di 'ius gentium', 16 SDHI 254ff.; Frezza 2 RIDA 259ff.; Grosso, *ibid.* 395ff., Studi Donatuti I, 439ff.; Levy, 15 SDHI 1ff. Voggensperger, Der Begriff des 'ius naturale' im römischen Recht; Villey, 31 RHDFE 475ff.; Burdese, 7 RISG 407ff., Nocera, Jus naturale' nella esperienza giuridica romana; Jolowicz & Nicholas, 102ff.



within the Anglo-Saxon legal order, to mark off judge-made law from statute; now, within judge-made law, to differentiate between the law deriving from the decisions of the common law courts and that emanating from the courts of equity: the term remains constant but the point of reference changes.

In Roman legal science, a distinction can be taken between the rules and institutions which are peculiar to a given legal system, any legal system, and those institutions which it shares with other legal orders.[10] To take Roman Law as an example, institutions like *mancipatio* and *confarreatio*[11] are peculiarly Roman but, though the rules relating to them are Roman, institutions like marriage, guardianship, contract, slavery and the like had their parallels in other legal systems. In this, so to say, jurisprudential sense, *ius civile* signifies the law particular to a given legal system and *ius gentium* institutions of general prevalence; and, from this standpoint, any legal system may constitute *ius civile*. As Justinian says: 'If a man chooses to call the laws of Solon or Draco Athenian civil law, he will not be wrong'.[12]

If, however, Roman Law be taken as *ius civile* in this jurisprudential sense, then, within Roman Law, the terms *ius civile* and *ius gentium* had another narrower and more concrete connotation. *Ius civile* was that body of rules, principles and institutions, including that which derived from the Edict and was thus *ius honorarium*, which was applicable to Roman citizens only; originally, there was only *ius civile* and a foreigner at Rome was without legal rights and standing, subject to treaty provisions between his own state and Rome.[13] Rome's emergence as a Mediterranean power made a continuance of this insularity impracticable and the creation of the *praetor peregrinus*[14] was recognition of the fact. This magistrate had to build up a body of rules and institutions which could be utilised by foreigners no less than citizens. The sources of this body of law are a matter of conjecture;[15] doubtless international mercantile customs and observances and the less formal elements of Roman Law itself were pressed into service. At all events, there developed within Roman Law, alongside the *ius civile*, a body of law which was applicable to foreigners no less than to citizens and this is known as *ius gentium*. *Stipulatio*, the Roman contract by oral question and answer,[16] was made available to foreigners in general but the promissory verb, *spondere*,

[10]*G. I. 1*

[11]Chapters XII(i)(a), XXXVIII(ii), post.

[12]*Inst. I. 2. 2.*

[13]See Bongert, Varia I, 99ff.; Schmidlin, Das Recuperatorenverfahren; Pugliese, NNDI 14, 1076ff.; Kaser, Das römische Zivilprozessrecht, 124ff.

[14]Chapter II ante.

[15]See Wenger, 3 Labeo 227ff.; Catalano, Synteleia Arangio Ruiz 373ff., Linee del sistema sovranazionale romano; Dahlheim, Struktur und Entwicklung des römischen Völkerrecht im 3 und 2 Jahrhundert vor Christus.

[16]Chapter XVIII(i), post.

could be used only by citizens;[17] thus, though *stipulatio* generally was *iuris gentium* in the concrete sense of the term, in its *sponsio* form it was *iuris civilis*.

The concrete sense of *ius gentium* lost its importance with the grant of universal citizenship by the *constitutio Antoniniana*[18] so that, in later classical law, only the jurisprudential sense of the terms *ius civile* and *ius gentium* could have any relevance; and the jurists generally use *ius gentium* in the juristic sense – but in contrast with the Roman *ius civile* in its concrete sense; e.g. the real and consensual contracts as against *sponsio*, the informal modes of acquisition of property as against *mancipatio* or *in iure cessio*.[19]

Introducing the juristic distinction, Gaius[20] described the law 'in force equally among all men' as 'that which natural reason has appointed'. The reference to *naturalis ratio* derives from Greek philosophy, more particularly from Aristotle, who distinguished law into that which was 'common' (koinon) and that which was man-made (nomikon); the former was 'natural' (physikon) and had equal validity everywhere.[21] This equates with the jurisprudential senses of *ius civile* and *ius gentium*. But, for Aristotle, to koinon was a veritable concrete law of nature: analysis of human society demonstrated that, though their particular ordering in each was a matter for the individual legislator, the institutions of marriage, guardianship, contract, etc., were universal and thus natural. It was from this standpoint that he could assert that slavery was natural. It is this sense that Gaius used the expression *naturalis ratio*.[22] However, Aristotle's essentially practical *ius naturale* passed into the hands of philosophers who interpreted to koinon rather in a moral sense as that which ought to direct human conduct. The consequences may be seen in the writings of Cicero for whom natural law was eternal and immutable and no enactment could prevail against it;[23] revealingly, he also wrote that natural law was the conscience of the philosopher.[24] Roman jurisprudence did not follow this line; an unfair rule or statute would nonetheless be law unless and until repealed: there was, for example, no questioning of the validity of the horrific *senatusconsultum Silanianum* of the early empire under which if a master was murdered in his own home, all his slaves living under the same roof – including those who happened to be away for the moment –

[17] *G.III.93*
[18] Page 28, ante.
[19] Chapter XII(i)(b), post.
[20] *Loc. cit.*, n. 10.
[21] *Nicomachean Ethics 5.7.1; Rhetorica 1.13.2.*
[22] See also, e.g., *G.I.156* where agnates (relatives *iure civili*) are distinguished from cognates (relatives *iure naturali*) and *G.II.65* distinguishing acquisition of property *iure civili* from that *iure naturali*: see further Chapters XXXVII and XII, post.
[23] 23 Cicero, *De Republica 3.33*; echoed in *Inst.I.2.11.*
[24] Cf. *De Legibus 1.6.7, 12; II. 4.*



were to be put to death.[25] For the jurists, *ius naturale* was a synonym for *ius gentium* in its jurisprudential sense.

However, in Justinian's compilation, there appear two deviations from this general principle; one based upon the moral philosophical – or rather, by then, Christian[26] – concept of natural law and the other seeking to give *ius naturale* a concrete content of its own distinct from *ius gentium*. Though Aristotle could find men who were slaves by nature,[27] there were philosophers for whom man was by nature free; and this naturally found favour in the Christian ethic. Hence, Justinian defines slavery as an institution of the *ius gentium* whereby one man was subject to ownership by another contrary to natural law.[28] And, in a passage allegedly of Ulpian,[29] natural law is identified with the instincts which man shares with other animate creatures – mating, procreation and the rearing and care of the young. Though the passage is copied in the Institutes,[30] it is probable that this expression of view was not the work of Ulpian himself[31] but rather that it is the conceit of a pre-Justinianic annotator, perhaps an eastern schoolman. It appears nowhere else than in the two texts just cited and, save for the definition of slavery above, Justinian himself identifies natural law with the jurisprudential *ius gentium*.[32] In summary, to the Roman jurists, *ius civile* always meant Roman Law, though the term might be used without distinction in either its jurisprudential or its concrete sense; the concrete connotation of *ius gentium* had no relevance for the later classical jurists and thereafter; and, save for Justinian's definition of slavery, the terms *ius naturale* and *ius gentium* in its jurisprudential sense were interchangeable.

(iii) The Law of Persons, Things, Actions

This distinction, which applies exclusively within the *ius privatum*, is the basis on which the Institutes of both Gaius and Justinian were composed.[33] Though first found in Gaius, the scheme may well not be his;[34] more important, however, is its interpretation.[35] One interpretation is that Gaius

[25] For a particularly ghastly case of its invocation – which scarcely shows the jurist Cassius in a favourable light – see Tacitus, *Annales 14.42-45*. Inevitably, there were some exceptions both in the senatusconsult itself and through juristic interpretation: cf. Lebigre, Quelques Aspects de la Responsabilité Pénale en Droit Romain Classique, 58, n. 2; see *D.29.5.3.8-11*.
[26] In *Inst.I.2.11*, Justinian says that natural laws are furnished by a divine providence (*divina quadam providentia constituta*).
[27] *Politics 1.2.13*
[28] *Inst.I.2.2*
[29] *D.1.1.1.3*
[30] *Inst.I.2pr.*
[31] Cf. his view of animals in *D.9.1.1.3.*
[32] Cf. e.g. *Inst.II.1.11*
[33] *G.I.8, Inst.I.2.12*
[34] But see H.J. Mette, Ius civile in arte redactum.
[35] See Buckland, Textbook, 56ff.

subdivided the law into three branches within which he would discuss the relevant rights and duties, etc. But, though this is not true of the later work of Justinian, the fact is that, especially on the law of persons and things, Gaius says virtually nothing of the content of rights and duties. No definition appears of, for instance, *patria potestas* or of *dominium*:[36] after dealing with succession, Gaius writes simply, 'Now let us turn to obligations; all obligations arise either from contract or from delict'[37] with no indication of what is meant by any of these terms.

Another and more attractive interpretation is that every legal situation can be considered from three points of view: the persons involved, the subject matters in issue and the remedies available.[38] On this interpretation, the law of persons is a catalogue of the classes of persons capable of being affected by Roman Law and how they enter and leave their categories; the law of things is a list of rights and duties that such persons may have, their creation and extinction; and the law of actions tells of the various legal processes and where they apply. This interpretation accords with the manner of Gaius's work. If the treatment of slavery be taken as an illustration, there is no comprehensive discussion of the institution and its consequences for slave and master: but in the law of persons, the ways in which a person may become and cease to be a slave are narrated; in the law of things, the reader learns how a master can acquire property, possession, rights and liabilities through his slave; and in the law of actions, he is told of the processes by which a master may be made liable upon the acts of his slave. That the whole work has, in effect, to be read in order to obtain a rounded view of a particular institution is not perhaps a commendation for the scheme adopted; but it is a scheme and any other plan would doubtless have afforded the modern critic other grounds of objection. As already indicated, the Institutes of Justinian provide more of the substance of the law under the different heads but, since the scheme is first found in Gaius, it is its meaning in the earlier Institutes which is important.

[36] Chapters XXXVII(iii) and XI(i), post.

[37] *G.III.89*

[38] This is the view of the trichotomy adopted in Theophilus, *Paraphrase I.3pr.*



# Part II.

# The Law of Actions