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THE  
HISTORY  
OF THE  
LAW  
OF CIVIL LAW.



145-03 THE 175  
HISTORY

OF THE

*Roman or Civil LAW.*

SHEWING

Its ORIGIN and PROGRESS; how, and  
where the several Parts of it were first com-  
piled, and some Account of the Principal  
Writers and COMMENTATORS  
thereon, and of the METHOD to be  
observed in studying the same.

originally in *French*,

By M. CLAUDE JOSEPH de FERRIERE.

to which is Added,

Dr. D. [Name] of the Use and Authority  
of the CIVIL LAW in *England*.

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To the Honourable

*Charles Colvear, Esquire.*

**I**VE ne leave to in-  
roduce to the Ho-  
nce of your Ac-  
ntance a *French*  
Author, in Plain *English*  
Cloaths; which, tho' not quite  
so Genteel, render him more  
Familiar and Useful in this  
A-3 Coun-



## \ DEDICATION. \

. Countrey, than he can be in his Foreign Dress. ,

*He* and I, Sir, join in inviting you to the Study of the *Civil Law*; for which you are qualified by all the Advantages of a liberal Education, bright Natural Parts, and a Maturity of Judgment rarely to be met with at your Age.

• 'Tis in this Treasury, and no where else, you may find the most perfect Collection of Natural Reason and Equity, applied to all the various Transactions and Intercourses between Man and Man: And therefore, all Gentlemen; tho' they

## DEDICATION.

they do not design to make it their Profession, ought to understand so much of the *Civil Law*, as may serve for a Rule to govern their Actions.

You are, Sir, already Considerable by your Birth and Fortune, and 'tis in your own Power to make your self much more so, by applying some part of your Time to the Study of a Science, the Usefulness and Excellency whereof is universally allow'd.

Forgive me, Sir, the Freedom I have taken in furnishing you, with a Guide to shew the Way, and make your Entrance

## DEDICATION.

easy ; since I assure you, it proceeds from my Natural Inclinations to serve, and earnest Desire to see you both Great and Happy. I am

SIR,



*Moj.*

John Beaver.

THE

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THE  
HISTORY  
OF THE  
ROMAN LAW.

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INTRODUCTION.



IT is an establish'd Maxim, that no Man can arrive at a perfect Knowledge of any SCIENCE, without having first examin'd its *Rise* and *Progress*: But tho' this generally holds true, it is in no Case so naturally applicable, as in the Study of the *CIVIL LAW*: Whether it be owing to the great Variety of *Laws* made upon the same Subject, or the different Qualifications of the *Legislators*, who have govern'd *Rome* at several times.

FOR,

FOR, notwithstanding Justice be in it self Im-  
mutable, the Administration of it is subject to  
great Changes; the *Laws* themselves, which  
ought to encourage this Vertue in Mankind, are  
the very Cause thereof: The Disputes which  
generally give birth to *Laws*, never happen  
all at the same time; nor is it in the Power  
of Man, to foresee all the Consequences of those  
General Rules they prescribe, or to adapt them  
to every Case that may arise; from whence it  
follows, that so profound a Science as the *Law*,  
could not possibly be brought to that Perfection  
in which we now see it, but by Degrees and  
Length of time. Besides, as our Understanding  
of the *Roman Law*, depends on the History of  
knowing what kind of Government they  
were under at the time they lived, it is not  
plain, nothing more than to be a  
progress of the *Law*.

THIS Book therefore, which is generally  
collected from several Authors, that is re-  
markable or material to the Subject, and which  
lies dispers'd, or rather buried in a vast Number  
of Places, will serve those that apply themselves  
to the *Civil Law*, as an Introduction; and at  
once make them Masters of several Things,  
which are apt to discourage Beginners for a time.

THIS *History of the Roman Law*, is so closely link'd to that of the different Forms of their Government, that I flatter my self, it will be no less curious than useful to such as have already any Knowledge of either; it will be highly pleasing to them to have a Prospect of both as it were at one View, and to recollect the *Laws* themselves by comparing them with their Origine. In a Word, it will enable them to form a just Idea of what they had before but a confus'd Notion; and to dive into the Bottom of those Causes, of which they were before contented to admire the Effects only.

THE Force of the *Roman Arms*, and Extent of the Empire, render'd them formidable throughout the world; and as much more were they so by the Force of their *Laws*, which bore in their very name, the Authority of a *Roman*. Every Work of this Nature is necessary to its Subject, but this has had a more than ordinary Reception from the Public.

BUT I have not confin'd my self to treat only of the manner in which the *Roman Laws* were first establish'd; I propose to shew what success the Body of *Law* compos'd by *Justinian*, had after his Death in the Eastern and Western Empires.

IN the next Place, the Love of Truth engages me to shew the Excellency of the *Civil Law*, and how far 'tis receiv'd in this Kingdom: Nor would it have been just, to write the *History of the Law*, without giving it the Praises it deserves; and

and shewing that most of the Maxims upon which our *Common Law* is grounded, are borrow'd from it.

As haughty a People as the *Romans* were, they made no scruple to own their Obligation to the *Grecians*, for the *Laws* they had from them. How then can we admire and follow the *Romans*, and not imitate their Gratitude?

To make this Work the more compleat, I have added, the true Explanation of the famous Decretal Epistle *Super-specula, titulo Decretalium Privilegiis*; and that of the Sixty ninth Article of the *Ordonnance* of *Blois*, concerning the Prohibition to teach the *Civil Law* in the University of *Paris*; which was a Point, I thought, had not been hitherto sufficiently cleared up, tho' it seem'd to deserve the Curiosity and Notice of the Learned.

LASTLY, The Conclusion of this History, will direct young Students how to apply themselves usefully to the Study of the *Civil Law*, so necessary for those who are design'd to defend Causes or determine Disputes; and also shew, what Dispositions they ought to have, who make this Study their Choice.


HAVING thus given the Reader a View of the Plan of this Work, and inform'd him what it is contain, I shall enter upon the *History of the Roman Law*, and pursue that People through all the different Forms of Government.





## CHAP. I.

### *Of the different Forms of Government in R O M E.*

HE *Roman Law*, having an inseparable Relation to the different Constitutions of the Nation to whose Wisdom it is owing; one cannot arrive at a full and exact Knowledge of it, without being first well acquainted with the several Kinds of Government to which the *Roman People* were subjected. That I shall endeavour to unfold, after having traced upon the Origine of that Empire, which, under Beginning, came in time to be the Greatest and Most Powerful that ever was known.

*Rome*, was so called from ROMULUS; who, in the Eighteenth Year of his Age, laid the Foundations of the City, round about *Mount Palatine*. This was Seven Hundred and Fifty Years before the Nativity of Christ; reckoning Three Thousand Two Hundred and Fifty three Years from the Creation of the World; upon the Twenty first of *April*: A Day celebrated by the Shepherds in Honour of the Rural Goddess *Palilia*.

The *Roman People*, who at first were under the Domination of ROMULUS, became afterwards subject to Three different Forms of Government.

The First was the *Regal Government*; which lasted Two Hundred and Forty Years, under Seven Kings, viz. ROMULUS, NUMA-POMPILIUS, TULLIUS, HOSTILIUS, ANCUS MARTIUS, TARQUIN

the First of that Name, **SERVIUS TULLIUS**, and **TARQUIN** the **PROUD**.

After the Expulsion of the last King, *Rome* erected itself into a Republick, and pass'd into a quite different kind of Government, that of *Consuls*, who were annually chosen. This Consular State lasted about Five Hundred Years, from the first Consulate of *C. Junius Brutus*, to the time of *Augustus Cæsar*.

The Third Form of Government was the *Imperial*, under the Emperors; which continued Five Hundred and Fifty eight Years, from the Beginning of the Reign of **AUGUSTUS**, to that of the Emperor **JUSTINIAN**; to whose successful Endeavours, we are beholden for the Compilation of the Body of the Civil Law, in the Order it has been transmitted to Us.

## CHAP. II.

### *Of the Roman Law under the Regal Government.*

**N**O sooner had **ROMULUS** fix'd his Authority, by an Alliance which the *Sabines* were forc'd to contract with him, but he divided the People into Three Parts, which were called *Tribes*, and each *Tribe* into Ten *Curie*; and appointed Priests to offer Sacrifices to the Gods. But the most remarkable Act of his Reign, was the Establishment of that august Assembly, which afterwards became the most awful of all Tribunals; I mean the *Senate*, which he chose out of the most Ancient and Venerable Citizens, to assist him in his Administration.

This *Senate* at first consisted of a Hundred only; but their Number was afterwards much increased.

To these, he committed the Care of the most important Affairs of State, but with certain Restrictions. There were three Things, which he thought not proper to submit to their sole Determination; The Creation of *Magistrates*, the making *Peace* and *War*, and *Enacting* of *Laws*. These he referr'd to be debated and decided in a full Assembly of the People.

Nor

Nor did ROMULUS ever after the Establishment of this Great Council, attempt to make any Law, before he had first concerted it with them, and afterwards revis'd it in a General Assembly.

NUMA POMPILIUS, who succeeded Romulus, turn'd his Thoughts chiefly to settling Religion; his creating of Priests and Augurs, &c. were the Effects of his Zeal for the Establishment of exterior Worship. He made many good Laws, appointed Punishments for Homicides, and regulated the Ceremonies of Funerals. Whatever he propos'd, was eagerly embrac'd by the People; whose Credulity and Superstition he knew so well how to turn to his own Advantage, that he made them believe, he had frequent Interviews with the Nymph *Egeria*, and did nothing but by her Inspiration.

Military Discipline was the chief Study of TULLIUS HOSTILIUS.

AND MARCIUS applied himself particularly to adorn the Roman City.

TARQUINIUS afterwards Sirnam'd PRISCUS, did likewise apply himself towards strengthening or settling the Authority of the Laws. He only invented the Ornament of Distinction, which the Senators ever after preserv'd as a Mark of Superiority, the *Laticlave*; which was a Gown or *Tunique*, sew'd about the Edges with pieces of Purple like great Nails.

SERVIUS TULLIUS did not only cause the Laws of ROMULUS and NUMA, which time had almost abolish'd, to be reviv'd, but enacted himself several new ones, which were transcrib'd into the Law of the *Twelve Tables*.

He was at abundance of Pains to dive into the Knowledge of every Man's Estate and Circumstance, in order to make him contribute proportionably to the Necessities of the Government: And this was the Reason of his instituting the *Census*, or general Review of the People every fifth Year; when all were oblig'd to give in a faithful Particular of

their Estates : Which Review was at first made by the *Kings* themselves, afterwards by the *Consuls*, and lastly by the *Censors*.

The Laws, according to the Rules prescribed by *ROMULUS*, were proposed by the *Kings*, to the Senate, whose Approbation was requisite ; and then carried down to be confirm'd by the Votes of the People, divided into Thirty *Curia* : From whence those Laws so pass'd, were called *Leges Regales & Curiales*.

But after the People came to be divided by *SERVIUS TULLIUS* into Six Classes, and a Hundred Ninety four Centuries, the Laws got the Name of *Centuriales*.

The first Class or Division, which was compos'd of the Richest and Principal Citizens, consisted of Four-score and Eight Centuries ; and as it was far the most Numerous, their Consent only was sufficient, unless they happen'd to be divided in Opinion.

After the Death of *Servius Tullius*, *TARQUIN* the *PROUD* ascended the Throne, whose predominant Qualities were Pride, Inhumanity and Avarice. He subdued *Rome* intirely to his Tyranny : He govern'd with a Rod of Iron ; and his Will, howsoever unjust, was the only Law.

He utterly extinguisht the Laws of *Servius Tullius*, and neglected to enforce the Execution of those enacted by his Predecessors, even of *Romulus*. He held the ancient Custom of advising with the Senate and People in such Contempt, that he hearkned only to the Advice of Confidants and his own Caprice. His immeasurable Desire of Ruling absolutely, blinded him to all other Views, and never suffer'd him to examine whether his Commands were agreeable to the Rules of Justice : So that having neither Goodness enough to govern reasonably, nor Spirit enough to make his Tyranny obey'd, the People waited only for a proper Conjuncture to shake off the Yoke of their Slavery, with which, the Death of the unhappy *LUCRETIA* soon supply'd them.

It is well known how *Sextus Tarquinius* this Tyrant's Eldest Son surpriz'd her alone, what Threats and Violence he offer'd, to force her in some measure to condescend to his Criminal Desires : But she had not Courage enough to survive the Affront. She called for her Relations ; and having recited

recited to them her Agonies and Misfortune, and recommended the **Revenge** of the Injury done her, she stabb'd her self with a Dagger.

So remarkable a Death, the Body of this unfortunate Lady which was expos'd to Publick View, and the Harangue *Brutus* made to the People, excited in them so much Pity and Indignation, that they abandon'd themselves wholly to Rage, and meditated nothing else but Arms and Revenge; And *Brutus* improv'd the Occasion so well, that *Rome* set it self at Liberty, and chang'd the Monarchical into Republican Government; and a Law was made, for perpetual Banishment of the Kings of *Rome*. This Law was called *Tribunaria*, because it was made at the Instigation of the same *Brutus*, who was then Tribune of the Cavalry.

But before I end this Chapter, I must take notice, *First*, that under this King's Reign, *Sextus Papius* had collected the Laws of the preceding Kings, and digested them into a Volume, which was called, *Jus Civile Papianum*.

Secondly, understanding the Aversion of the Romans to King, and the time of TARQUIN's Expulsion, they repealed the *Regal Laws*, but the greatest part of them were Obsolete; and such as retain'd any shadow of Authority, were made use of only as *Usages*: So that it is a mistake to assert, that the *Tribunian Law* repealed the *Regal Laws*; for the Word *Exolescere*, which signifies to grow Obsolete, the Law, 2 §. 3 ff. de *Origine Juris*, does not signify to Abolish or Repeal, but to grow Obsolete or into Disuse.

But in order to let us into the true meaning of the Law in this Paragraph, we must read it thus, *Exacis deinde Regibus Lege Tribunitia, omnes Leges hæ exoleverunt*; with the Comma after the Word *Tribunitia*, and not after *Regibus*, as some will have it. In short, *Brutus* was so far from abolishing the *Regal Laws* by the Law *Tribunitia*, that many Authors affirm, the Law *Tribunitia* restor'd the Laws of *Servius Tullius*, which *Tarquin the Proud* had abrogated.

However this be, the *Regal Laws*, some time after the Establishment of the Republican Government, ceased to be in use; nor are there the least Footsteps of any of them to be found in the Books of the *Roman Law*.

## C H A P. III.

*Of the Free State of ROME in its Infancy ; and the Creation of Consuls.*

**T**ARQUIN the PROUD being thus Banish'd from Rome, which happen'd in the Year Two Hundred Forty four after the Building of the City, the State of Affairs and Government were quite changed. In the Place of Kings, whose Authority had degenerated into Tyranny, they chose Two Magistrates, for the Administration of Publick Affairs ; whose Power, tho' very great, was not unlimited, nor inconsistent with their new-purchas'd Liberty.

These Two Magistrates were called *Consuls*, à *Consulendo* ; because it was incumbent upon them to take care of the Republick ; or because they were oblig'd to give Advice for its good Government, and not to Rule according to their own Fancy.

The first Consuls were *Junius Brutus* and *Tarquinius Collatinus*, Husband to *Lucretia* ; but the latter was forced not long after, to resign his Place, and go into voluntary Exile, only for the sake of bearing the Name of *Tarquinius*, which became odious to the People ; and because they had made a Law, not to suffer any of that Name to live in Rome.

Thus the Sovereign Power was divided between Two, to prevent the ill use a single Person might make of it. Besides, the Limitation of their Office to the Term of a Year, did not give them room to imagine they might act without Controul ; tho' they were in full Possession of all the exterior Ornaments used by the Kings, as the *Purple Robe*, the *Twelve Lictors*, the *Fasces*, and other Marks of Distinction. But to avoid giving Jealousie to the People, who might think their Condition rendred Worse rather than Better, by having Two Masters instead of One, they agreed to govern alternately by Months ; and that he only who was in Power, should be attended by the *Lictors* and *Fasces*, with the *Axes* ; the other, by One Gentleman-Usher only, and Twelve *Lictors*, without either *Axes* or *Fasces*.

But altho' these *Magistrates* had all the outer shew of the ancient *Regal* Majesty, their Power was not the same. Those had no other Law than their own unbounded Wills, and acknowledg'd no Superior: On the contrary, the *Consuls* were only Depositories and Guardians of the Laws, whose Duty it was to see them duely put in Execution. It belong'd to them to call together the Assemblies of the People and Senate, but not to conclude any Thing, without the Deliberations of the one, or Decrees of the other. And they were oblig'd to render an Account of their Administration as soon as it ended.

But notwithstanding all the wise Precautions the People of *Rome* could take, to establish their new-gotten Liberty; the good Effects of it were soon interrupted, by some enterprizing Citizens, supported by the *Magistrates*; which gave occasion to the making several New Laws, to retrench the *Consular* Power. When the Law *Valeria* was enacted, and took place in the Year 44. by which Liberty was given to the People, the *Magistrate* to the People\*. After that the Law *Sacra* was made, concerning the Liberties of the People, to protect them from the Tyranny of the Nobility†. And in the Year 45, the Law *Terentia* was propos'd, to keep the *Consuls* within Bounds, which was grown exorbitant, within Bounds; but was oppos'd by the *Tributors*, because the Right of Law-making was taken from the People‡.

As for the *Regal* Laws, during the first Seventeen Years of the *Free State*, they were no otherwise regarded than as Ancient Usages; nor had all of them even that Force, but such only as were reputed the most Just and Equitable.

All this time, there was no fix'd Law at *Rome*; which occasions that Obscurity we observe in the History of the Civil Law, from the Beginning of the *Consular State*, to the Time of forming the Law of the *Twelve Tables*.

\* Livy, Book 2, Chap. 8. † Book 2, Chap. 32. ‡ Book 3, Chap. 8.

## C H A P. IV.

*Of the Creation of Tribunes of the People.*

**T**HE *Consuls* themselves aiming 'at Arbitrary Government, encourag'd the *Patricians* to usurp a Tyrannical Power over the *Plebeians*, and invade their Liberty daily by new Attempts. The People, on the other hand, being no longer able to support the extravagant Pride and Insolence of the Nobles, nor suffer the insatiable Avarice of the Rich, who oppress'd them to death with excessive Usury, thought of nothing else, but how they might shelter themselves from all Violences, and throw off the Yoke of their Slavery and heavy Calamities.

Wherefore, about the Year 261, under pretence of marching against the *Æqui* and *Sabines*, getting Arms, they retir'd to *Mons Crustumerinus*, afterwards called *Sacer*, from the Law *Sacrata* there made. Upon this, the Senate having held several Meetings and Consultations about the Retreat of the Commons, resolv'd to Commission some of the most Reverend and Popular Senators to treat with the People; of which number was *Appius Menenius*, who address'd himself to them in this manner. *Once upon a time the Members and Parts of Man's Body fell out with the Belly, alledging, That they were all forced to toil and moil to provide Necessaries for the Belly, whilst that lived Idle, and did nothing but enjoy its Pleasures: Whereupon, they resolv'd the Hands should not lift the Meat to the Mouth, nor the Mouth receive, nor yet the Teeth chew it; by which means, whilst they endeavour'd to famish the Belly, they themselves, and the whole Body were all starv'd, for want of the Nourishment they received from it. In the same manner, said he, the Senate and People, making but one Body, must perish by this Disagreement; as they will live and flourish, whilst they maintain a mutual Friendship and good Understanding.*

The People seem'd highly satisfy'd with his Story and ~~being~~ Application, but being desirous of securing themselves against the future Attempts of the Senators, and to put a stop to the career of their Violences, would not agree to de-  
part



part and return to the City, till the Senate had consented to the creating of five new Officers yearly, out of their own Body, with the Title of *Tribunes*, whose sole Power should be to give Relief to such *Plebeians* as were injur'd, and suffer none to be oppress'd by the *Senate* or *Consuls*.

The *Law Sacrata*, by which these new Magistrates were created, was made on *Mons Crustumerinus*, in the Year 261: By it, the Persons of the Tribunes were made Sacred, and none was to offend them upon Pain of Death.

Their Authority was very considerable; they might assemble the People whenever they pleas'd, and summon any Magistrate of what Degree or Quality soever, to appear at their Tribunal. No *Senatus-Consultum* was of force, till it had their Confirmation. They were not allow'd to sit in the Senate-House, but stood without; where they examin'd all Decrees pass'd within, and either gave their Approbation, by adding them with the Letter *T*, or rejected them with the *Veto*: without being oblig'd to give any Reason for their Refusal.

At first, only out of the Body of the People: but afterwards the *Senators* and *Patricians* were admitted to sit with them, and accounted it a great Honour to be of this Assembly: which, in the beginning was Five: but that being found too small for the Business, was afterwards increased to Ten. [L. 2. §. 2. ff. de Origine Juris.]

The Senate quickly perceiving the Tribunes Design was to divide the Government, neglected nothing to elude their Authority, and render it useless: And the People, pursuing their Drift of sharing in the Management of Affairs, enacted several Laws, which they called *Plebiscita*, without acquainting or consulting the Senate: Which Misunderstandings were often the cause of dangerous Seditions and Tumults in Rome.

The particular Meetings in which these *Plebiscita* pass'd, were assembled at the Command of the Tribunes, and called *Curiata Comitia*, to distinguish them from the General Assemblies of all the Citizens, when the Senate and whole Body of the People were summon'd to meet, by Order of the Consul, which were call'd *Centuriata Comitia*.

The *Senate* could by no means be induced to submit to the *Plebiscita*: They urg'd, that the *Tribunes* were created only to protect the People, and not to make Laws. On the other side, the People refus'd to acknowledge the Laws made by the Senate: Which Disputes, occasion'd many Conferences for settling a certain Law, that might be obligatory to all, and put Matters upon such a footing, that the meaner sort might be in no Danger, from the absolute Power which the Senators pretended to.

At the same time there arose a Dispute between the *Patricians* and *Plebeians*, whether the Republick should be govern'd by fix'd Laws, or the Authority of the Magistrate.

The Senators maintain'd, that the Power of the Magistrates join'd with the Law, was most advantageous to the Publick; that the Laws themselves were in many Cases unjust, and being inexorable, shut the door to all Mercy and Favour.

The People on their parts, pleaded, that the Laws were preferable to any Dependence upon the arbitrary Pleasure of a Magistrate; because as they are free from all Passion, whatever they prescribe must be Just, and ought to be regarded as the Dictates of Heaven: That notwithstanding they might seem to contain some unjust Decisions in particular Cases, that Inconvenience might be easily remedy'd, by giving them an equitable Construction.

The Peoples Argument prevail'd; so they fell to work — make a General Law, for a Rule to Great and Small.

## C H A P. V.

## Of the Decemviri, and Law of the Twelve Tables.

NOTwithstanding the strong Opposition made by the Magistrates and Senators, whom nothing would satisfy but an Arbitrary Government, it was resolv'd about the Year of Rome 299, to send Embassadors into Greece, to bring such Laws from thence, as the Wisdom of that flourishing Nation had establish'd.

Upon their Return, in the Year 302, of the same Date, the People being assembled in *Centuries*, created Ten Magistrates, who were call'd by the Name of *Decemviri*. The Method they us'd was, that they should govern the Republick for a Year, and have the same Power with the *Consuls*.

He only who was in *Patrician*, had the *Fasces* and *Axes*, with other *Consular* Emblems; the other Nine attendants being *Patricians*, having only an *Accensus* or sort of Beadle.

At length having with great Exactness made a Model, partly from such Laws as were brought from Greece, and partly from the *Regal* Laws and Customs of their own City, they were approv'd of, and by a *Senatus-Consultum* or Decree of the Senate, ratify'd by a *Plebiscitum*, order'd to be every where obey'd. This done, they were reduc'd into order, and engraven on Ten Tables of Brass, which were expos'd to publick View, in the most conspicuous part of the *Forum*, in the Year of Rome, 303.

All Parties seem'd extremely pleas'd with the Conduct of the *Decemviri* for the first Year; but something was still wanting to make the Laws compleat, and therefore the necessary Supplements were agreed to be made. In order to bring this Work to Perfection, they proceeded to a new Election of *Decemviri*; of whom, Seven were chosen out of the *Patricians*, and Three out of the *Plebeians*; whereas the whole Number of the former Ten were all *Patricians*, to the great Dissatisfaction of the People.

These

## 12      *Of the Consequences that attended*

These added Two Tables of Law to the Ten that were made the Year before, which together went by the Name of the *Law of the Twelve Tables*, and were look'd upon as the Fountain of all Law both Publick and Private. *Cicero*, in his Book *de Oratore*, commends them highly, and says, *They are a Summary of all that is excellent in the Libraries of the Philosophers.*

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### C H A P. VI.

#### *Of the Consequences that attended the Law of the Twelve Tables.*

THE Laws contain'd in the Two last Tables, were in no Degree so favourable to the People as those before published; which was owing to the Contrivance of *Appius Claudius*, one of the *Decemviri*. Besides, every one of them laid hold of all Occasions to shew their Tyranny and Violence, having previously agreed and promis'd each other by Oath to be of one Mind, never to assemble the Senate or People, to retain the Power in their own Hands, and to be of equal Authority among themselves.

In a word, *Appius Claudius*, one of the *Decemviri*, fell desperately in love with *Virginia*, Daughter of *Virginus*, a *Plebeian*, at that time *Lieutenant* or *Legate* in the Army, on Mount *Algidum*. This Great Man, having no hopes of gaining her Affections, suborn'd one of his Clients to challenge her for his Slave, assuring him of success in his Cause, since the Trial was to be before him. As soon as *Virginus* heard the news, he hastened to *Rome*, where he found his Daughter condemn'd for a Slave; and despairing of any Relief, desir'd he might speak a Word with her, before he parted from her; which being granted, he led her aside, and stabb'd her to the Heart with this Expression, *This Child, is the only way I have to set thee at Liberty.*

The Disgust with which the People were prepossess'd by the violent and sanguinary Proceedings of the *Decemvirate*, made them look upon this unjust Sentence pass'd by *Claudius*, as an Invitation to extinguish and destroy their Power.

Accordingly, *Appius Claudius* was arraigned, as well as his Collegue *Spurius Oppius*, for correcting a Soldier immoderately. The rest of the *Decemvirate* banish'd themselves, and suffered their Estates to be confiscated.

In a Word, the Consular Government was restored; and from the Year 304, the People by the Law *Horatia* decreed, that such Laws as the Commons enacted, call'd *Plebiscita*, should to all intents and purposes have the Force of Law. By this Law it was provided, that whatever the People ordain'd separately from the Senate, should be of the same Force and Authority, as if it had been done in the *Comitia Centuriata*, or general Assembly.

But as there afterwards happen'd two other Disputes between the Senate and People, which occasion'd the latter to revolt, the first to *Publius Valerius Publicola*, and afterwards to the *Fanatic*, who entice them to return, were again oblig'd to consent that the *Plebiscita* should be received as Laws, which was settled by the Law *Publia*, in the Year 287, and by the Law *Hortensia*, in the Year 478.

Thus, after the Law of the *Twelve Tables* was established, Laws were made, not only by the whole Body of the People in their *Centuriata Comitia*, but many *Plebiscita* in the *Centuriata Comitia*.

Moreover, the Interpretation and Determination of the Learned, bred another kind of Law, call'd *Jus Civile*, Civil Law, the Practice of the Bar, or the Customary Law.

About the same time, certain Forms were compos'd by the Lawyers call'd *Actiones Juris*, or Cases at Law, which were in a set and solemn Style, and to be follow'd in all Proceedings, as well as Acts of Court. Of these Forms or Cases at Law, *Appius Claudius* made a Collection, about the Year 473, which his Secretary *Gneus Flavius* publish'd, under the Title of the *Flavian Civil Law*: But as this Collection was imperfect, *Sextus Aelius* put out soon after a more compleat one, which went by the Name of the *Aelian Law*; [*L. 2. §. 6. & 7. ff. de Origine Juris.*] But the Emperors took away the necessity of keeping to the Words of those Forms,

Forms, still preserving that of bringing the Action proper to the Suit commenced. [L. 1. & 2. Cod. & Formul. & impetrat. Action. sublat.]

Several Regulations were also made in the time of the Republican Government, by the Magistrates, particularly the *Prætors*; of which, after having first spoken something of the *Laws*, the *Plebiscita* and *Interpretation of the Laws*, the Reader shall have an Account.

## C H A P. VII.

## Of the LAWS.

THE Emperor JUSTINIAN, in the Fourth Paragraph of the Second Title of the first Book of his *Institutes*, defines a *Law* to be that which is enacted by the Roman People, upon the Requisition of a Magistrate of the Senatorian Order; as for instance, of a *Consul*:

During the time of the Republican Government, when the People were their own Law-givers, the Laws were propos'd by the Consuls, or some other Magistrate of the Senatorian Degree, in a General Assembly of the People, who either pass'd or rejected them, as they saw convenient.

The Method observ'd was this; When a Consul or other Magistrate of the Senatorian Order, moved to have a Law enacted, he first represented the Advantage it would bring to the Publick, and then read it openly on Three different Days to the People, that being Masters of the Heads of it, they might the more easily give their Opinions, when it came to be debated in the General Assembly, or if they foresaw any Inconvenience, inform the Magistrate who had the Management of it.

On those Three Days publick Notice was given, of the time the Law was to be put to the Votes of the People; which being come, the Magistrate demanded in these Words, *Veliſti, Jubeatis Quirites?* That is, *Is it your Pleasure, O Romans, this Law shall pass or no?* If it went in the Affirmative, their Answer, was *Uti Rogas, Be it as thou hast ask'd.*

ask'd. But if in the Negative, *Antiquo* was the Word, i. e. *I forbid it.*

Here we must observe, it was at first customary among the *Romans*, to give their Votes *viva voce*; but afterwards, to avoid Tumults, they proceeded in another manner, by giving every Voter two Tables, in one of which were these Two great Letters *U. R.* in the other a great *A.* one of which they deliver'd into a little Box for that purpose, according as they voted for or against the Law propounded.

If the Law pass'd, it was immediately engraven on Brass Tables, which were hung up at the Doors of their Temples and Corners of their Cross Streets. And it was a Rule constantly observ'd, that all Laws should be first expos'd to Publick View, and examin'd, that no Offender might escape unpunish'd, under pretence of Ignorance.

This was the Custom observ'd in making Laws, during the Republican Government, which also continu'd for some time under the Emperors, as I shall shew anon, when I come to treat of the *Law* in their Reigns.

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## BOOK VIII.

### Of the Plebiscita.

**A** *Plebiscitum*, according to JUSTINIAN's Definition, in the Fourth Paragraph of the Second Book of his *Institutes*, is what is enacted by the People, without the Concurrence of the Senators, upon the Request of one of their own Magistrates, that is, of a *Tribune*.

How the *Plebiscita* were first introduc'd, and afterwards obtain'd the Force of *Laws*, is particularly set down in the Sixth Chapter.

As for the Difference between a *Plebiscitum* and a *Law*, it consists in Four Things. The First is, That a *Law* was made by the whole Body of the People; but a *Plebiscitum* was the ACT of the People only, without the Knowledge of the *Patricians* and Senators.

The Second is, That a *Law* had in it self a coercive Power, whereas a *Plebiscitum* had no such Power, but by the Authority of those Three Laws before mention'd.

The Third is, That a *Law* was made at the Request of some Magistrate of the Senatorian Order; for instance, of a *Consul*, *Dictator*, *Decemvir*, or *Military Tribune*; whereas a *Plebiscitum*, was made only at the Request of the Tribunes of the People, whose sole Business it was, to protect them from being oppress'd by the *Patricians* and *Senators*, as is said before.

The Fourth is, That a *Law* was made in the General Assembly of the People, call'd *Centuriata Comitia*; but a *Plebiscita* pass'd in a Particular Assembly of the People, separate from the *Patricians* and *Senators*, which they call'd the Tribunes Assembly, or *Curiata Comitia*.

## C H A P. IX.

### *Of the Interpretation of the Lawyers.*

THE Obscurity of the Law of the *Twelve Tables*, occasion'd by its too great Conciseness soon appear'd, and made the Interpretation of the Lawyers necessary; by which, being accommodated to the Practice of the Bar, and receiving a convenient Extent and proper Restrictions, 'twas thought it might be brought to answer Expectation.

For how Judicious and Sagacious soever a *Law giver* may be, 'tis impossible but something will escape his Foresight. The Inconveniencies of Laws are rarely discover'd till they come to be put in Execution. Every one must agree, the Foundation of all Laws is Equity; but the great Variety of Circumstances, are frequently the Cause that the Decisions of the Law have little of Equity in them, when they are to be apply'd to Private Cases. For as the Law, in regulating Matters goes commonly upon general Principles, and according to the usual Course of Things; it easily happens, that a Law which in General is very Just, proves quite otherwise in Private Cases that may naturally arise.

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Therefore it is necessary the Law should be mitigated by Equity; which depends upon the Diversity of Circumstances: And this is the Reason the Laws are seldom in that Perfection the Authors of them intend, till they have receiv'd an Equitable Construction.

The Lawyers, whose Right it naturally was to interpret the Laws, by common Consent, undertook to explain those Passages of the Law of the Twelve Tables, which were either Obscure, or liable to a Double Acceptation. They agreed upon Rules for limiting the Disposition of the Law, where it was Vague, or too General, and giving it an Extent to Cases omitted; and how the Severity and Rigour of its Decisions, was to be temper'd with Equity: Which Method they have ever since follow'd, in explaining other Laws.

This Interpretation of the Lawyers, created a new kind of Law, so much approv'd of in Practice, that it was call'd *The Civil Law, or Usage of the Bar.*

It of Law, by the tacit Consent of all those who were highly pleas'd to find their Sence in reconciling the strict Literal of Equity the Practice of the Bar, and Rules

Ther Interpreters was so much the greater, as Rank and Fortune; whose Wealth, and Learning in the Laws, very much added to the Dignity of their Profession as well as Merit. So true it is, that the Gifts of Fortune will command and increase Respect; which bare Merit can but faintly attract.

In making their Interpretations, they follow'd these Two Rules. The first was, to adhere to the Design of the Law, rather than the Words in which it was conceiv'd. Thus, when the Law was conceiv'd in General Terms, the Interpreters sometimes confin'd it to Certain Cases, excluding all others. At other times, when the Law mention'd only Certain Cases, they extended it to others by parity of Reason; of which the Titles in the *Institutes* (*De Pupillari Substitutione* & *de Acquisitione per adrogationem*,) furnish us with Examples; the Construction whereof, being drawn directly from the Spirit and Design of the Law, is with Justice regarded as the Law it self. [*Argumento Legis* 1. ff. de *Legibus* & L. 68. ff. de *Verborum Significatione*.]

The other Rule observ'd in Interpreting, was by the Rule of Equity, without regard to the Letter or Disposition of the *Law*: But this could not be done openly by the Interpreters, who had no Power to make or directly abrogate *Laws*; so that they could not go against the *Law*, but under some Colour, indirectly, and by Inferences drawn from the *Law* it self; by which they made it evident, that their Interpretation agreed with the Spirit and True Sence of the *Law*; altho' it seem'd in some measure, contrary to the Terms thereof.

Of this manner of Interpreting the *Law*, there are some Instances in the Titles of the *Institutes*: *De Exheredatione Liberorum*, & *De Inefficaci Testamento*.

One thing worth observing, in this last Way of Interpreting, is, That as it seem'd to be contrary to the most obvious Sence of the *Law*, it was not so readily receiv'd as the other, which was taken from the true Meaning of it: The Truth was, the *Lawyers* could not go against the Disposition of the *Law*, but under some Colour, that their Interpretation was agreeable to the Spirit of it.

Nor were the Interpretations of the *Lawyers* admitted, how Equitable soever, when they were so directly opposite and contrary to the formal Determination of the *Law*, as not to be reconcil'd by any Colour whatever: And therefore, when the *Law* it self was clear, and its Determination evident, the Authority of the *Lawyers* could not alter it; because that would not be to Interpret, but in Effect to Abrogate the *Law*; which is not to be done, but by the Supream Power. Besides, 'tis certain, Interpretations were not intended to destroy or elude the Force of the *Law*, but to preserve its Vigour, and quicken its Execution; confining it, however, within the Bounds of Equity, according to the Diversity of Circumstances.

From what is said, it must be concluded, that when the *Law* is absolutely Unjust in its Principle, or becomes so by subsequent Circumstances, so that it can receive no Interpretation, without rendring it utterly useles; there is no other Remedy, but to have recourse to the Sovereign Authority, which alone has the Power of giving Relief, by making another to Repeal it. And 'tis to this Case we must apply the Maxim, *That the Power of Interpreting the Laws, is reserv'd for him who has the Right of making them.* [L. 1. Cod. de Legibus.]

## C H A P. X.

### *Of the PRÆTOR's Edicts.*

THE Interpretation of the *Laws*, did not only belong to the *Lawyers*, but the *Magistrates*; particularly to the PRÆTORS. Let us examine what was the first Occasion of their Creation.

The Two *Consuls*, who were chosen principally to fill the Magistracy, were afterwards often interrupted in the Exercise of their Civil Duty, by the Wars, where their Presence became indispensably necessary.

This was the Reason, that in the Year 387, the Republick created a Magistrate to supply the Place of the Consul, in the Administration of Justice. He was call'd *Prætor*, from *Præstare*, because he partook of the most considerable part of the Consuls Office, had the same Honour and Authority as the Consuls themselves, and was allow'd the same Privileges as the Consuls themselves.

At first the *Prætors* were call'd *Prætores*; afterwards *Prætorum*; and at length, the Name became *Prætor*, whose Office it was to administer Justice in the City of *Rome*.

Afterwards another *Prætor* was created, to decide Controversies between Foreigners, who resorted in great Multitudes to *Rome*: And to distinguish these *Magistrates*, one was call'd *Prætor Urbanus*, the other *Prætor Peregrinus*.

In short, as Business multiply'd, in proportion to the Increase of the Empire, the Number of *Prætors* was augmented at several times; and at last, they came to Twelve; who had each of them different Employments: One was call'd *Tutelarius*, another *Fidei-Commissarius*, and so the rest, according to the principal Object of their respective Duties.

The *Prætor* himself did not judge ordinary Matters, but only certain Causes, such as the *Restitution of Minors*: Things that were to be decided in the Common Form, he committed to Persons of his choosing, and prescrib'd Forms of Writs or Actions to the Complainants.

Tho' the Institution of a *Prætor*, was design'd rather to see former *Laws* put in Execution, than to make *new Ones*; yet, as he had the Power of amending the *Laws*, when they prov'd Defective, the People submitted to his Decisions; and his *Edicts*, had in some measure the Authority of *Laws*.

In reality, as the different Kinds of *Laws*, of which we have here unravel'd the Original, did not take in all Cases, nor were always Equitable in their Determinations; the People tacitly allow'd the *Prætors* to propose their *Edicts*, for mitigating the Rigour of the *Law*, and adding their Decisions, where the *Law* was not explicit. Hence it is, that the Emperor JUSTINIAN says, *The Prætor aids the Civil Law, supplies the Defects in its Disposition, corrects it, and even sometimes opposes its Decisions.* [Tit. 9. Instit. in principio.]

It is also in this Sense CATO is to be taken, when he says in his *Disticks*, *We must have Recourse to the Magistrate, when the Law is Unjust*; and that *the Laws themselves desire to be govern'd by Law*; that is, by the Judge who is the Voice and Interpreter of the *Law*.

Besides the *Prætors*, there were other Officers who had the Power of making *Edicts* and *Regulations*, in Explanation of the *Laws*: These were the *Ædiles Curules*, who had the Direction of all Publick Sales, the Care of the Watch, and cleansing of the Streets.

Of these, I shall only observe, they had their Names from *Ædibus*; being at first chiefly appointed to look after the Publick Buildings; but in process of Time, their Office was much enlarg'd, and the Regulation of the Market, Gaming-Houses, Publick Shews, and generally the whole Civil Government of the City, was put under their Care. They had the Addition of *Curules* from *Curru*; because they rode in Chariots, wherein there was a Chair adorn'd with Ivory, which denoted their being in the Rank of Chief Magistrates.

To return to the *Edicts* of the *Prætors*: Many of them yielding to Favour, or following their own Caprice, made several *Regulations* contrary to Equity, and the most receiv'd Maxims: Wherefore, in the Year 686, the *Plebiscitum Cornelianum*, oblig'd them to specify at their entering into the Office, the Method they intended to observe in administering

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Justice, through the whole Course of their Magistracy; from which they could not deviate. And 'tis from these *Edicts*, the Law call'd, *Jus honorarium* & *viva vox Juris Civilis*, is deriv'd. [L. 7. §. 1. & L. 8. ff. de *Justitiâ* & *Jure*.]

The Force of these *Edicts* expir'd with the Prætor's Office, which was Annual, unless they were renew'd by their Successors. This Limitation to a Year, got them the Name of *Leges Annales*; and as the Prætors caus'd them to be wrote on a White Table, that was call'd *Album Prætoris*.

Among these, there are some *Edicts* so very Just, that they have been perpetuated as *Laws*; from which there is no departing, without an Offence to Equity and Right Reason.

It must, however, be allow'd, that the vast Number of them, diffus'd a great Uncertainty through the whole Law. To remove this, Emperor ADRIAN order'd *Julian*, a celebrated Lawyer, to collect all these *Edicts*, to form a Perpetual Code, which might serve the Prætors for a constant Rule in their Judgments and Administration; at the same time, took from them all that was superfluous for the future. [L. 3. §. 18. *enucleando*.]

This Code was divided into Fifty Books, containing the most useful Matters of all the Prætor's *Edicts*; and the Roman Lawyers have made fine Commentaries thereon.

## C H A P. XI.

*Of the Roman Law under the Emperors.*

THE Independant State and Liberty of the Romans, receiv'd its first shock from JULIUS CÆSAR, who laid the Foundation of a *new Monarchy*, in the Ruins of the *Republick*. He dispos'd of all as if he had been *sole Master*, got himself to be created *Perpetual Dictator*, against all Rule and order'd the chief Marks of Sovereign Power to be given him.

But the Republick was utterly extinguisht under AUGUSTUS, in the Year 731, from the Building of Rome, at which time, the Sovereignty was translated from the People to his Person. It was done by a Decree of the *Senate*; which, with the Consent of the *People*, reviv'd the *Law Regia*; first pass'd, as 'tis pretended, in favour of ROMULUS, and now renew'd in favour of AUGUSTUS. The Thing happen'd thus;

AUGUSTUS's Ambition made him passionately desirous of the Empire, but his Discretion directed him to pursue his Aims after such a manner, as not to forfeit the Good Will of the People. His Design was not only not to appear desirous of the Government, but to bring them in petition him to accept of it. In this View, he pretended to be unable alone to support the Weight of so great an Empire; but the more he strove to Disqualifie himself, the more eagerly the People begg'd he would take it upon him. At last he consented to the passing of the *Law Regia*, by which the Sovereignty was transferr'd to him; that is the Right of Law making, of commanding Generally, and forcing Obedience. This *Law* was always renew'd upon the Accession of the Emperors, to the Reign of VERUS SPASIAN.

Thus the Power of *Law making*, being transferr'd from the People to the Prince, by the *Law Regia*, we may observe, that in the Emperors Reigns, their Determination had the same Authority as those of the People under the

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Free State; which produc'd a new Kind of Law, call'd, *The Edicts or Constitutions of the Emperors.*

But this was not brought about all at once; for notwithstanding the Sovereign Power had shifted from the People to the Emperors, He was too politick not to leave them some Marks of their late Freedom, in order, the better to establish and strengthen his Government. Wherefore, he kept up the Use of General Assemblies, in which he order'd all his *Edicts* to be publish'd, and that they should still retain the Name of *Laws*.

This faint Mark of the Ancient Liberty, displeas'd TIBERIUS, who succeeded *Augustus*: He suppress'd those Assemblies, under Pretence, that they could not be conveniently held, in Respect of the prodigious Increase of the People, which made it impossible for them to meet any longer in one Place.

This Contrivance he made use of to gain their Consent, that he might be consulting with the People upon making new *Laws*. The People could be consulted: But his Designs were not. He was a Jealous of his own Power, he resolv'd to take away the least Shadow of the Ancient Liberty, and to take away, or rather abolish the Rights of the People, and to give those of the Senate, with any other Advantages, all the Advantages and Prerogatives of the People, should by degrees, at last center in

He never he had a mind to publish a new *Edict*, he consult'd his Privy Council, and then sent it to the Senate, who never fail'd to make a Decree according to his Pleasure: And by this imaginary Deference to the Judgment of the Senate, his *Edicts* got the Force of Law, without the Peoples Approbation.

His Successors practis'd the same Artifice, and got their *Edicts*, by an affected Moderation, pass'd for the real *Senatus-Consulta*; tho' in truth, they were no less the meer Will and Pleasure of the Emperor, in which the People had no Part.

But in after Ages, the Emperors publish'd several *Edicts*, without the Formality of the Senate's Approbation; most of which, they commanded, should go under the Tide of *Imperial Constitutions*, in order to give the greater Lustre to their Sovereignty.

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In this manner, the Emperors *Edicts* establish'd a new kind of *Law*.

There are also many *Senatus-Consulta* and *Responsa Jurisconsultorum*, to be met with under the Monarchical Government of the Emperors, which are to be spok<sup>d</sup> of in this Place; but I think it proper, first to trace, as one may say, the Succession of the *Roman Emperors*, in order to give the Reader some *Idea* of the *Laws* made by them: In doing which, 'tis not my Design to write a History of them, but only to take notice of the Time they Reign'd; and, by the way, of the *Laws* they publish'd: Being convinc'd, that many Difficulties arise in the Study of the *Civil Law*, which cannot be resolv'd, without knowing when the *Laws* were made.

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## C H A P. XII.

### *The Succession of the Emperors to JUSTINIAN.*

AUGUSTUS came to the Empire in the Year of *Rome* 711, in the manner describ'd in the foregoing Chapter. He made several *Laws*; of which the Chief are, The Law *Julia de Adulteriis*, for punishing *Adulterers*; which also prohibits in another Chapter the Alienation of *Lands* given in *Dowry*. The Law *Julia Peculatus*, to prevent the Misapplication of *Publick Money*. The Law *Julia de Residuis*, to oblige *Receivers* and *Managers of Publick Treasure* to Account. The Law *Julia de Ambitu*, against *Bri- guing* for Employments in the Government. Many other *Laws* were made in this Emperor's Reign, which are too long to give an Account of here.

TIBERIUS succeeded him, in the Year of *Christ* 23, and Died in 38 of the same Date. He did nothing without first consulting the Senate; and by that means, gave the *Senatus-Consulta* the Force of *Law*.



**CALIGULA** came to the Empire in the Year of Christ 39, and was Killed in 42.

The Emperor **CLAUDIUS** began his Reign in the Year 43, after Christ, and continued to the Year 55. He was the Author of many *Laws*, and Repeal'd the *Clause* in the Law *Papia Poppæ*, relating to the Marriage of Men of Sixty, and Women of Fifty Years old. Being dispos'd to marry his Neice *Agrippina*, Daughter of his Brother *Germanicus*; he caus'd a *Senatus Consultum* to be made for that Purpose, that his Marriage might not be Unlawful.

**NERO** succeeded him in the Empire, in the Year of Christ 56, and Kill'd himself in 69. The *Senatus Consultum Trebellianum* was made in his Time, with several other *Laws*; among which, One provides, *Ne quis alienum scribens Testamentum Legatum sibi adscriberet*, that The *Writer* or *Maker* of another's will not make himself a Legatee therein.

**GALBA** and **VITELLIUS**, were received Emperors; The First held the Government but Six Weeks; the Second, Twenty five Days; the Third, Three Days; the Fourth, Eight. So that by the shortness of their Reigns, they had no Opportunities to make many

**VESPASIAN** was chosen Emperor in the Year 71, and Reigned Nine Years. The *Law Falcidia*, and the *Senatus Consultum Pegasianum*, were both made in his Time.

**TITUS** his Son, and Successor in the Empire, govern'd Two Years and Two Months, and Died in the Year 80.

**DOMITIAN** his Brother, who succeeded him, Reigned Fifteen Years, and was Kill'd in 97.

Upon his Death, **NERVA** was rais'd to the Empire, and Died Sixteen Months after, in the Year 99. He enacted many *Laws*; one of which, fully empower'd the Soldiers

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diers to make *Military Testaments* without any Formality of Law. [L. 1. ff. de Testament. Milit.]

The Emperor **TRAJAN**, his adopted Son, was his Successor. He Reign'd Eighteen Years, to the Year 118. This Emperor made some *Laws*, which are Instances of his Mildness and Justice: Among the rest, one obliges the Father who has been too severe to his Son, to emancipate him.

Before I proceed, it will not be amiss to inform the Reader, that none of the Emperors *Edicts*, from *Augustus* to *Trajan*, are to be found in *Justinian's Code*; which Collection, consists only of *Edicts* pass'd by those Emperors that came afterwards to the Empire; that is, from *Adrian* to *Justinian*.

**ADRIAN**, who was *Trajan's* Cousin-German, was declared Emperor in the Year of Christ 118. He Reign'd Twenty Years and Ten Months, and Died in 139. He made several *Laws* upon different Subjects: One was concerning the Property of *Treasure Treve*, (§ 39. *Instit. de rer. Divisione*.) He declar'd Children *Legitimate* that were born in the *Eleventh Month*. He forbid *Masters* to kill their *Slaves*. He granted the *Twelfth of the Estate*, to the Children whose Parents were condemn'd to Die. The *Perpetual Edict* was compos'd in his Reign by *Salvianus Julianus*, in the Year of Christ 132. As also, the *Senatus Consultum Tertullianum* or *Tertullianum*; which provides, That the *Childrens Estates* shall revert to their *Mother*s, in Default of *Heirs Descendants*.

**TITUS AURELIUS ANTONINUS**, surnam'd **PIUS**, succeeded *Adrian*. He Reign'd Twenty two Years and Seven Months, and Dy'd in the Year of Christ 161. Among the many *Edicts* which he made, there is One prohibiting *Legacies*, *Pura nomine*: Upon which, see my *Commentaries* on the last Paragraph of the Title of *Legacies*, in the *Institutes*.

The two Brothers, **MARCUS AURELIUS**, surnam'd the **PHILOSOPHER**, and **LUCIUS VERUS** succeeded, and Reign'd jointly about Eighteen Years, *Lucius Verus* dying in the Year 170. After which, *Marcus Aurelius* Reign'd alone till 177; and from that Time, took his

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his Son **COMMODOUS** for a Partner in the Empire; with whom he Reigned till the Year 181, in which he Died.

These two Brethren, *Marcus Aurelius* and *Lucius Verus*, are call'd in many *Laws*, *DIVI FRATRES*. [*Vid. L. 3. ff. de Jure Fisci.*] And there are many *Laws* of their making, reported in the *Code*.

The Emperor *Marcus Aurelius* also enacted several, whilst he sat alone in the Throne; many of which are to be seen in the *Code*, under the Title *Ne de Statu defunctorum*. He created a *Prætor* to determine Matters relating to *Tutorship*. In his Time, the *Senatus-Consultum Orphitianum* was made, which admits *Children* to succeed as *Heirs at Law* to their *Mothers*: Upon which, see my *Commentaries* on the Fourth Title of the Third Book of the *Institutes*.

After the Death of *Marcus Aurelius*, the Emperor **COMMODOUS** reigned till the Year 193, in which he was Killed.

**ÆLIUS SEVERUS** was chosen Emperor in his Place, and accepted of the Government. And tho' he reigned but Two Months after, there are several of his *Laws* in the *Code*.

**JUSTINUS** was the Son of the Famous *Lawyer*, who was Author of the *Edict*, succeeded *Pertinax*. He held the Empire but Two Months, yet some of his *Laws* are in the *Code*.

After him, **SEPTIMIUS SEVERUS** was elected Emperor, in the Year of Christ 193. He Reign'd Eighteen Years, and Died in 212. He was the Author of the *Senatus-Consultum*, which provides, *Ne prædia rustica aut suburbana minorum alienarentur sine decreto Magistratus &c. ff. de rebus eorum qui sub Tutela, &c.* Tho' this Emperor was Cruel and Irreligious, he had many Good Qualities: He took Pleasure in doing *Justice*, and had a particular Esteem for the celebrated *Papinian*.

**ANTONINUS CARACALLA** and **GETA**, both Sons of *Severus*, were by their Father made *Associates* in the Empire: Which is the Reason we find some *Laws* in the *Code*, bearing the Names of *Severus* and *Caracalla*.

About a Year after *Severus* dy'd, *Caracalla* Kill'd his Brother *Geta*, in the Presence of his Mother *Julia*. He Reign'd alone Six Years, and was then Kill'd. We meet with several *Laws* of his making, dispers'd in the *Code*.

**MACRINUS** was proclaim'd Emperor, after the Death of *Caracalla*. His Reign lasted only a Year and Two Months, being put to Death in 219. None of his *Laws* appear in the *Code*.

**VARIUS ANTONINUS HELIOGABALUS**, was in *Macrinus*'s Life-time proclaim'd Emperor by the Army. He was reported to be the Natural Son of *Caracalla*. The Name of *Hellogabalus*, was given him; because he was a *Priest of the Sun*, which is denoted by that Word. His Reign lasted only Four Years, being Kill'd in the Year of Christ 213: Yet there are some of his *Laws* in the *Code*.

**AURELIUS SEVERUS ALEXANDER**, was his Successor. He Reign'd Thirteen Years, and was Kill'd in 236. He was one of the Greatest and Best Princes in the World; equally to be admir'd in War and Peace. His chief Care was to see Justice impartially administer'd. He was the *Author* of abundance of *Laws*; the *Wisdom* and *Equity* of which, give us an *Idea* of his sound *Judgment*, and the *Uprightness* of his Heart. There are no less than Four Hundred and Sixty one in *Justinian's Code*; upon which, *Montfaucon de Chassante* has made very Learned *Commentaries*.

After this Emperor, **MAXIMINUS**, some of whose *Laws* are to be seen in the *Code*, Reign'd Two Years, and was Kill'd in 238.

*The Succession of the Emperors to Justinian.* 29

Then follow'd GORDIANUS, who Reign'd One Month and Six Days. And after him, ABBINUS\* and PAPIENUS, elected Emperors by the *Senate*, Reign'd about a Year; and were then both put to Death by the *Soldiers*.

GORDIANUS, the Younger Son of the Emperor just mention'd, succeeded them. He govern'd Six Years, and Died in 245. There are some of his *Laws* in the *Code*.

MARCUS PHILIPPUS, who came after him, Reign'd about as long as his Predecessor. He Died in 250. Some of his *Laws* also, are to be found in the *Code*.

DECIUS, who succeeded him, Reign'd only Two Years, and Died in the Year 252. The *Code* has some of his *Laws*.

GALIENUS succeeded him: Their Reigns ended by their Death, only Two Years, ended by their Death. Some of their *Laws* are to be seen in the *Code*.

After GALIENUS, VALE-  
RIANUS, and his Son GALIENUS, reigned seven Years. In the *Code* we see several of their Names.

Valerianus being dead, GALIENUS Reign'd with VALERIANUS the Younger; but they were both Kill'd in the Year of Christ 269. There are some *Laws* in the *Code* of their making.

CLAUDIUS the Second, who succeeded them, Reign'd but Two Years, or thereabouts; yet we have some of his *Laws*.

After this, AURELIANUS Reign'd Six Years, and was Kill'd in 276. We find many *Laws* of his making, in the *Code*.

After

### 30 *The Succession of the Emperors to Justinian.*

After him **TACITUS** Reign'd Six Months ; **FLO-  
RIANUS**, about a Year : And then **PROBUS** was  
rais'd to the Empire, who was Kill'd Six Years after, in 282.

Then follow'd **CARUS**, with his Sons **CARINUS**  
and **NUNNERIANUS**, whom he made Partners  
with him in the Empire. After about a Year, the Father  
being Slain, *Carinus* and *Nunnerianus* Reign'd together for  
a Year ; and then were both Kill'd, in 285. There are  
some *Laws* in the *Code*, which have the Names of *all Three* ;  
and others, those only of *Carinus* and *Nunnerianus*.

**DIOCLETIANUS** and **MAXIMIANUS HER-  
CULIUS**, Reign'd together for the Space of Eighteen or  
Twenty Years : When *Diocletianus* Resign'd the Empire in  
favour of **CONSTANTIUS CHLORUS**, in the  
Year 304. *Maximianus Hercules* did the same Two Years  
after in favour of **MAXIMIANUS GALERIUS**.

*Constantius* was satisfy'd with *England* and the *Gauls* ; and  
*Maximianus* had all the rest of the Empire for his Share.  
There are some *Laws* in the *Code*, made by *Diocletianus*  
alone ; others by Him and *Maximianus* ; and some by *Con-  
stantius*, *Maximianus* and *Galerius*.

**CONSTANTINUS**, Surnam'd the **GREAT**, suc-  
ceeded his Father *Constantius*, the Year 308 ; and Reign'd  
several Years with the Emperors *Galerius*, and *Maxentius*  
Son of *Maximianus*, the First of that Name : After which,  
he govern'd the Empire alone for Thirteen Years, and  
Died in 339.

*Constantine the Great*, was the first *Christian* Emperor.  
After conquering *Maxentius* : He enter'd *Rome* in Triumph  
with a *Cross* ; and labour'd to perswade the *Senate* and  
*People* to embrace the *Christian Faith*. There are abundance  
of his *Laws* in *Justinian's Code* ; most of them relating to  
*Religion* and the *Catholick Faith*, *Bishops* and other *Ministers*  
of the *Church*, and *Places* dedicated to the Service of *God*.  
All which are uncontestable Proofs of this Emperor's great  
Piety and Zeal.

CONSTANTINUS the Younger, CONSTANTIUS and CONSTANS, all three Sons of *Constantinus* the Great, after their Father's Death, divided the Empire between them.

*Constantinus* the Younger, was Kill'd Three Years after; *Constans* in the Year 352: After which, *Constantius* enjoy'd the Throne alone, till the Year 365. There are in the Code some Laws, by the Names of all Three; some also have the Names of *Constantius* and *Constans*, and others that only of *Constantius*.

JULIANUS, call'd the *Apostate*, because he fell from the Faith of Christ, was Nephew to *Constantinus* the Great. He came to the Empire in the Year 365, and was Kill'd two Years after. There are some of his *Laws* extant in the Code.

ANNO 365. JOVIANUS who succeeded him, Months.

VALERIANUS and VALENS, Brothers, were Kill'd the Year 367; and GRATIANUS, the Year following. Thus we find the Empire was divided by *Valentinianus* and *Valens*; and afterwards by *Valens* and *Gratianus*.

After the Death of *Valens*, and VALENTINIANUS, the Empire was divided together in 378. And there are several *Laws* made by these three Emperors Names in the Code. But *Valens* was Kill'd Five Months after. So the Two Brothers, *Gratianus* and *Valentinianus*, Emperors of the East, with THEODOSIUS, whom *Gratianus* associated in the Empire, Reign'd together, from the Year 382 to 386. We have several *Laws* made in their Reigns.

After the Death of *Gratianus*, *Valentinianus* the Second, *Theodosius*, and ARCADIUS his Son, Reign'd till 394. The Code has many *Laws* under their Names.

Then *Theodosius* with his Two Sons, *Arcadius* and HONORIUS; some of whose *Laws* we meet with in the Code, Reign'd till the Year 398, in which *Theodosius* Died.

After

### 32 *The Succession of the Emperors to Justinian.*

After his Death, *Arcadius* and *Honorius*, Reign'd together till 404; and made several *Laws*, whereof some are in the *Code*.

*Theodosius* the Great being Dead, *Arcadius*, *Honorius*, and **THEODOSIUS** the Younger Son of *Arcadius*, Reign'd jointly till 410. Then *Honorius* and *Theodosius*, to the Year 425. From which time, the latter Reign'd till 427: And then, taking **VALENTINIANUS** the Third, for a Co-partner in the Government, Reign'd till 452, in which he Died.

Here the Reader must be inform'd, that *Theodosius* the Younger, in the Year 438, made a *Code* call'd after his Name; in which he insert'd all his own *Edicts*, with those of *Constantinus* and his Successors; the greatest part of which, were transcrib'd into *Justinian's Code*. The excellent *Notes* publish'd by *Gothofredus* upon the *Theodosian Code*, may be of very great Use towards the right understanding of all the *Constitutions*, from the Reign of *Constantinus*, to the End of that of *Theodosius* the Younger.

*Valentinianus* the Third, having held the Empire alone, for some time after the Death of his Collegue, Reign'd in Conjunction with **MARTIANUS** to the Year 457: From which, *Martianus* Rul'd alone till 460. In the *Code* we find several *Laws*, by *Valentinianus* the Third alone; others by him and *Martianus*, and some by *Martianus* only.

**LEO** succeeded *Martianus*: He govern'd the Empire with **MAJORANUS** till 463: After that with **SEVERUS**, till the Year 468. And then with **ANTHEMIUS**, who being Dead, he Reign'd alone till 475. There are *Laws* in the *Code* which bare the Names of them both, and some that of *Leo* alone.

**LEO** the Younger and **ZENO** Reign'd together till 476; and *Zeno* alone, till 494. We have *Laws* that go under both their Names, and others of *Zeno* only.

**ANASTASIUS** succeeded *Zeno*, and Reign'd Twenty seven Years, till 521. There are many of his *Laws* in the *Code*.



His Successor was JUSTIN, a *Thracian* by Birth, of low Extraction; having in his Youth been a *Herdsmen*: When he grew older, he betook himself to the Wars; where, after passing thro' several Military Offices, he came to the Empire, upon the Death of *Anastatius*, in the Year 527. He Reign'd alone for above Six Years, and we find many *Laws* in the *Code* which go under his Name only.

In his Seventh Year, he adopted his Nephew JUSTINIAN, and made him his Co-partner in the Empire; which is the Reason, that in the *Code* we meet with several *Laws* under both their Names; but there are a vast Number of *Justinian's* alone; and even some made by him, after his *Code* was first Compos'd, which were added when he Corrected and Enlarg'd it: Particularly, his *Fifty Decisions*; upon which *Beaudeau* has made an excellent Commentary.

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And i  
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was always design'd to give an  
aterials, out of which *Justinian's*  
*ivil Law*; I thought it incum-  
little upon his Life; and there-  
are Chapter.

to blame to speak of so excel-  
ishing the Reader with some  
whole Care it has been trans-  
State.

## C H A P. XIII.

*Of the Emperor JUSTINIAN.*

JUSTINIAN, born in the Year of Christ 483, was the Son of *Sabarius* and *Nigilantia*, both of Obscure Families; but *Justinian* receiv'd much Honour from his Parentage: For his Mother was Sister to the Emperor *Justin I.* who notwithstanding his base Extraction, happily came to the Empire. By this means also *Justinian* was in his Uncle's Reign advanc'd to the Degree of a Patrician, and successively made Consul and General of the Army. At length, being solemnly adopted by *Justin*, he was made Copartner in the Empire, on the First of April 527, which happen'd to be *Easter-Day*, and four Months after, became sole Master of the Empire, by the Death of his Uncle and Adoptive Father.

The constant Success which attended this Prince in all his Undertakings, his Piety and Courage, were alone sufficient to attract the Love and Admiration of his Subjects, and even of Foreign Nations; but Providence was pleas'd to second all these in giving him great Generals, and most Skilful Lawyers, by whose Assistance he perform'd so many Wonders both in Peace and War.

*Belisarius* conquer'd the *Partians*, drove the *Goths* out of *Italy*, and the *Vandals*, with all the *Barbarians*, out of *Africa*. *Tribonianus*, *Dorotheus* and *Theophilus* assisted the Emperor in framing his Law, and compiling his *Institutes*, *Code* and *Digest*, which have not a little contributed towards the Glory of his Memory.

And tho' *Suidas* maliciously reports, with an Intent to blast this Prince's Reputation, that he was of a dull phlegmatick Constitution, and utterly unacquainted with Polite Learning, it would be highly unjust to give an implicit Credit to what he says, in opposition to all Historical Evidence to the contrary.

'Tis not to be question'd, but this Emperor was endow'd with most of those great Qualities which raise a Man a-

bove

bove the Vulgar, especially an undaunted Courage, with exemplary Piety. Besides, 'tis plain, he was ever successful in his Wars, and very knowing in Affairs of all kinds.

*Procopius* tells us, (*Lib. 1. de Bell. Goth.*) that *Justinian* shew'd always great Resolution and Magnanimity in all his Enterprizes. This he reports fairly: And 'tis highly probable, that many things he says of him in his Secret History, proceeded from the Disgust the Emperor had given him.

*Paulus Diaconus* speaks of him in these Terms: "This Prince was fortunate in War, and skilful in managing Civil Affairs: He profess'd the Catholick Faith, was upright in all his Actions, just in all his Judgments, and all his Undertakings succeeded to his Wish." *Jordanet*, *Lib. de Rebus Gothicis*, in fine, adds, that by the Valour of *Belisa* and over many Nations, and that glory he has acquir'd.

If we and 22. *Isidorus* reports in his *Epistles* 19, himself, King of the *Goths*, addresses in this manner: "All Nations v thing to hear an Emperor praise; but very particular, to see in their Wishes, which, we may and sincere, since they are not

No E *Justinus*, has shewn more Zeal for the Chr his Sentiments were Orthodox. His Co at the Beginning of his *Code*, and truly worthy of him. The Magnificent Temple which he caused to be built at *Constantinople*, is another Mark of his Piety.

These, and many other evident Testimonials of the Virtues and good Qualities of this Great Man, are of too much Weight to be over-balance'd by the single Authority of one *Greek* Historian, who, perhaps, was guilty of the same Fault, with which *Cicero* in his Oration for *Flaccus*, reproaches the Authors of that Nation. 'Tis believed, *Justin II.* Son of *Dulcissimus* and *Vigilantia*, *Justinian's* Sister, accus'd him of some things for which he had no grounds. However, 'tis not to be denied, but this Great

Man was too much devoted to the Fair Sex; and we see he always inclin'd to countenance them, and made several Laws in their Favour.

To conclude, 'tis agreed he was Two and Forty Years old, when he began to Reign, and that he Died the Thirteenth of November, 565. He left *Justinus* the Second for his Successor; who, as we said before, being Jealous of his Predecessor's Glory, endeavour'd to tarnish his Memory, by spreading many False and Scandalous Reports of him.

Having before observed, that under the Monarchical Government of the Emperors, besides their *Constitutions*, several *Senatus-Consulta*, and *Answers* of the Learned in the Law appear'd; I am now to explain these Two new kinds of Law, according to the Method of Justinian in this History.

But, as the *Senatus-Consulta* were made in the Senate always the greatest Share of Affairs, I thought my self it in this Place, in order to it. Besides, it must be allow'd towards informing us, wh understanding of some Pa *Senate* and *Senators* are me.

## C H A P. XIV.

## Of the Roman Senate.

THE Institution of the *Senate*, follow'd soon after the Establishment of the City of *Rome*; whose Founder, rightly considering, that nothing is so unstable as *Force* without *Wisdom*, resolv'd to govern his State, in Concert with some of the Members which compos'd it.

His Majesty usually appear'd in the Design and Execution. He drew Three Counsellors out of the Thirty *Curie*, at the Thirty *Curie*, should also choose Three out of the *Curie* of One only, whom he plac'd in Council: Thus his Council consist'd of Sixty Members: But he took particular Care to choose Men of his Eminent Dignity, but his Majesty chose them by their great Age and Experience.

He call'd them *Senators*, and gave them the Name, *Quasi senes*; and were call'd *Senes*, to mark out the Respect due to their Age, and their Application to Business. Their Black Robe, made them regarded as *Senes*, were enfeebled by great Age, but were fortified with *Wisdom* and Experience.

At first, there were but Sixty Members, as is before observ'd, to this Dignity; but their Number was afterwards considerably augmented: Upon which Increase, the Appellation of *Patres* became peculiar to the old Original *Senators*. The new Ones were call'd *Conscripti*; and in process of Time, both were join'd, and made use of to signify the whole *Senate*.

At first, none were admitted into the *Senatorian Order*, but *Patricians*; that is, such as were descended from the Antient *Senators* created by *Romulus*: Afterwards, the *Roman Knights* were receiv'd into it: Which is the Reason that *Perseus*, King of *Macedonia*, in *Livy*, calls the *Roman Knights*, *The Chosen of the Youth, and Seminary of the Senate*.

At length, in order to raise an Emulation, which might be advantageous to the Republick, such of the People as had born any Chief Offices, were admitted to be *Senators*; but not till they were first Ennobled.

The ordinary, as well as most important Part of the *Senators* Business, was to consult upon Emergencies, and the Situation of *Publick Affairs*. So the *Senate*, properly speaking, was at first the Prince's Council; and in time, became that of the Republick: Which makes *Cicero* call it, The *Guardian*, the *Defender*, and *Organ* of the *Commonwealth*; leaving the *Magistrates* the Honour of putting their Resolutions in Execution. In short, as the *Magistrate* had the Command over the People, so the *Senate* commanded the *Magistrate*.

"The *Senate*, says *Polybius*, had the Disposal and Distribution of the *Publick Treasure*; the whole Revenue of the Government was in their Power, and they order'd all Expences as they thought proper." He adds, "That the *Questors*, which are thought to have been at *Rome*, and had the Office of our modern *Comptrollers* of the Treasury, had no Power to dispose of a Penny of the Money in their Hands without a Warrant from the *Senate*, unless by order of the *Consuls*."

The Appropriation of the *Publick Treasure*, was so absolutely in the *Senate*, that the People never pretended to interfere in it; and it belong'd to them only to regulate all the *Publick Expences*, and comptroll the Accounts of such as farm'd the *Publick Revenue*.

When it was necessary to dispatch *Embassadors* to Foreign Princes or Nations, or appoint *Lieutenants* for *Generals* of Armies, or *Governors* of Provinces, the *Senate* made choice of whom they thought fit to fill those Employments.

It was also their Right to receive and give Audience to Foreign Ministers.

The Honours of Triumph could not be had, but by their Permission.

No new Religion or Worship could be introduc'd, till it had their Approbation.

In a Word, the *Senate* was to the Republick, what the Soul is to the Body: It directed all its Motions, warded off all Dangers, and kept it in Tranquillity, by prudently preserving an exact Harmony in all its Parts.

There

There were frequent Occasions of assembling the *Senate*. In the *Regal* Government, the Kings only had Power to call them together; but under the *Free State*, that Power devolv'd to the *Chief Magistrate* of the City: So that the *Prætor* had it only in the Absence of the *Consul*; and that too, upon very pressing Occasions.

There were Two Ways of calling the *Senate* together; one by Proclamation issued by the *Consuls*, or in their absence, by the *Chief Magistrate*: The other, by a Publick Crier, who proclaim'd in the Streets of the greatest Concourse, the Order of the *Consul* for the *Senate's* meeting: But this was us'd only upon sudden Emergencies, when speedy Resolutions were necessary.

move their Question, before put it to the Vote; and in long'd to the *Prætors* or *Censors*. *Senate*, upon giving his Opinion, Proposals.

re, were usually on the *Calends*, *Ides*: But in *September* and *October* manag'd by a *Committee* of the

from meeting on *Holydays*, but the same Days as the *People* as- on was very pressing; in which their Assembly, to make room

ng, were always in some of their *Buildings*, which had been Confe-

The *Magistrates*, Right it was to call them together, never met, till they had first offer'd *Propitiatory Sacrifices* to the *Gods*.

Such *Members* as made any Motion or Report in a full *Senate*, were to speak Standing; and when any one Voted, he was to be in the same Posture; after which, he was allow'd to sit down.

As their chief Business was to deliberate upon the *Necessities of the State*, and other *Publick Affairs*; so there were great Privileges annex'd to the *Senatorial Office*.

They had a Particular Dress, which distinguish'd them from other Citizens, as is before observ'd.

All Embassies and Honourable Commissions, were generally bestow'd upon the *Senators*, and not on the *Roman Knights*.

The Right of sitting in the Chief Places, at *Publick Shows* and *Ceremonies*, contributed very much towards gaining them Respect.

Whoever offended a *Senator*, was sure to be punish'd with greater Severity, than if he had done the same to a common *Citizen*.

*Cicero*, in one of his Letters to *Sulpicius*, gives us to know, That if a *Senator* had a Suit commenc'd against him in any of the *Provinces*, he could remove it to *Rome*; which seems to be very like our Privilege in *France*, granted by Letters of *Committimus*.

A *Plebeian*, had the Liberty of excepting only against Three Judges; but a *Senator*, by the *Law Cornelia*, of which *Sylla* was the Author, might reject a greater Number.

In the *Provinces*, *Senators* had the Right of being attended by *Lictors*; which belong'd to them from *Custom*; for no *Law* allow'd them that Prerogative.

All these Marks of Honour were common to every *Senator*; but many of them had peculiar Privileges. They were distinguish'd according to the Offices they had born.

For Example; Such as had been *Consuls*, were preferr'd to those that had been only *Prætors*; and he who was at their Head, took Place of all the rest: He was the Man, whose Nomination, as I have before observ'd, *Romulus* reserv'd to himself; and generally the most Ancient of all the *Senate*.

In after Ages, the Honour of Chief *Senator*, belong'd to that Person whom the *Censor* nam'd first, in reading over the *List* of the *Senators*: But he commonly gave it to an Old *Senator*, who had born some of the chief Offices, as that of *Consul* or *Censor*.

All these Privileges and Honours, were attended with Penalties, Labour, and Dangers.

No *Senator* was permitted to go out of the Confines of *Italy*, without leave, upon some Lawful Occasion.

They were every one oblig'd to give strict Attendance in the *Senate House*, upon Pain of being severely reprimanded.



No one could attain to the Degree of a *Senator*, unless he was possess'd of an Estate to a certain Value, to maintain the Dignity of his Office : And such as by squandering away their Money, were reduc'd to Poverty, were oblig'd to renounce and quit their Places in the *Senate* ; and therefore, to prevent their Extravagance, they were forbidden to run in Debt above Two Thousand *Denarii*, which makes about Two Thousand *French Livres*. In which, the Wisdom of the *Roman Commonwealth* is highly to be admir'd, for obliging the *Senators* to be Rich and Thrifty at the same Time.

But to entitle Men to be receiv'd into this Chief Order, several Conditions were requisite. The first was, that he should be absolutely necessary : And if he was not of the *Roman Commonwealth*, *Strangers*, and *Foreigners*, were not to be *Senators*, it was contrary to the Constitution. Therefore, History informs us, that *Scipio*, as soon as he came to the

utmost Precaution in advancing to a Power, and Exalted Dignity, he was oblig'd to a prudent Behaviour and Honourable Conduct, that led to it.

The second Condition was, that he should be born in the Choice of a *Senator*. The *Senate* was compos'd of *Patricians* only ; *Plébeians* were not admitted ; because the *Senate* was the Council, and most Honourable Order, and open to the Vertue and Me-

ritude. A Man who had discharged any great Office in the Magistracy, was a fair Pretension to be made a *Senator* : A Man's good Conduct and Behaviour in his first Employments, being, as it were, an Earnest of his future Fidelity.

They were also limited to a certain Age, before which, no one could be made a *Senator* : 'Tis not exactly known what that Age was, but generally believed to be *Thirty Years*.

As to the Right of chusing *Senators*, *Romulus's* Successors reserv'd it to themselves ; and the *Roman Emperors* likewise, kept it in their own Hands. In the Beginning of the *Free State*, the *Consuls* and *People* divided that Right between them ;

them; the *Consuls* nominating so many, out of which, the *People* chose such as they thought best qualify'd to fill so important an Office.

But after the Creation of *Censors*, who were the Reformers of all Orders in the State, they took upon them to elect *Senators*. As every Fifth Year they review'd the whole Body of the *People*, they then fill'd up such Vacancies in the *Senate*, as had happen'd by Death, or by Removal of those, whose ill Conduct render'd them unworthy of so eminent a Degree.

## C H A P. XV.

Of the *Senatus-Consulta*.

**T**HE *Senatus-Consultum*, according to the Definition of it by *Justinian*, (*l. 5. Tit. Inst. de Jure Natur. Gent. & Civ.*) is a Decree of the *Senate*, by which any Thing is ordain'd and establish'd.

This Ordinance of the *Senate*, is sometimes call'd plainly a Decree, or a *Senatus-Consultum* indifferently; altho' some Authors have observ'd, that we ought to distinguish these Words: For *Senatus Consultum*, in its proper Signification, is meant of those *Ordonnances* of the *Senate*, which concern'd the Affairs of the Government; whereas a Decree of the *Senate*, is only an *Act* that regards the Interest of Private Persons, and not the Publick.

Besides, a *Senatus Consultum* could not be made, but by the *Senate*, whereas a Decree might be pass'd by the Authority of any other Society; and sometimes, by that of a *Magistrate* only; as we see, there are Decrees of *Augurs*, *High-Priests*, &c. Nay the Word Decree, is often us'd in the Law, to signify the Judgment given by a Prince, with Cognizance of the Cause, and which had the Force of Law.

The Design of the Institution of a *Senate*, being for the Management of Publick Business, no doubt they made at all times *Senatus-Consulta* upon Affairs of Moment, in which the Good of the State was concern'd.

*Dionysius Halicarnassensis* mentions One made in the Time of *Romulus*, in order to end the War for restoring the *Sabine Women*, that had been Ravish'd by the *Romans*.

After *Romulus* died, there was a *Senatus-Consultum* made, to put the Government of the State into the Hands of *Commissioners*, during the *Interregnum*.

By another *Senatus-Consultum*, *Numa Pompilius* was chosen to succeed *Romulus*; the *People* having on that weighty Occasion, referr'd the Choice to the *Senate*.

In a Word, there have been abundance of *Senatus-Consulta* made, under all the different Governments of the *Romans*; how and when they obtain'd the Force of *Laws*, I shall here-  
see in what manner they were

the Matters taken into Con-  
ing of the highest Importance,  
quir'd to pass a Lawful *Senatus-*  
lumber was, *Historians* do not

likely in this Case, is, that the  
been greater or less at different  
them requisite for passing a Law-  
likewise encreas'd or diminish'd,  
umber, at the time of passing it.

The *President* of the Assembly,  
the *Senators*, and recapitulated  
to Resolve according to the *Plu-*

for the more easie counting the  
to separate into Two Parties, op-  
posite to each other, which he did in these Words, *Qui hoc*  
*consentis huc transite; qui alia omnia, in illam partem.*

After they had voted, any one might retract his Opinion,  
by passing over and ranging himself with the contrary Party.

The Majority carried the Question, and the Resolution  
pass'd accordingly, but sometimes Variety of Opinion, oc-  
casion'd the Determination to be put off till another Day.

When every particular *Senator's* Opinion was ask'd, it  
was call'd *Senatus-Consultum per relationem factum*.

But in regulating ordinary Matters, the *Senate* gave their  
Consent all at once, without going into Debates, or asking  
every Man's Opinion: And then it was a *Senatus-Consultum*  
per

*per discessionem factum & tum sententiam pedibus tulisse Senatores dicebantur.*

But a Majority of the Members present, called *discessio in sententiam*, was equally necessary to the passing both these kinds of Decrees. The Difference consisted only in debating, or not; because the *Senatus Consultum quod dicebatur fieri per discessionem*, was pass'd in a Moment, as soon as ever it was propos'd, without going into the Merits of the Question, or debating it, as they did when the *Senatus Consultum per relationem fieri dicebatur*.

As soon as a *Senatus Consultum* was agreed to by a Majority, one of the Clerks of the Senate, by order of the President, read the Resolution aloud; which being done, the President dismiss'd the Senate in these Words, *Patres Conscripti, nemo vos tenet, or Nihil vos moror, Patres Conscripti*. But notwithstanding this leave to depart, a Chief Magistrate might detain them, if he had any other Business to communicate.

Concerning the Form in which the *Senatus-Consulta* were written, it must be observ'd, they first set down the Time and Place where every one was made; then the Names of all that were present; after that, a short State of the Matter regulated and enacted by the Senate, with the Magistrate's Name who mov'd the Question; and lastly, the Resolution of the Senate thereupon, express'd by these Letters, *d. e. r. i. e.* that is, *de ea re ita censuerunt*.

When the Senate recommended the Execution of any Thing contain'd in the *Senatus Consultum*, to the Consuls, they inserted these Words, *Si eis videatur*.

In a Word, most of the *Senatus-Consulta*, especially those made under the Free State, ended with these Words, *Si quis huius Senatui Consulto intercesserit, Senatui placere, auctoritatem perferri, & de ea re ad Senatum populumque referri*: Which Clause was us'd, because of the Opposition frequently made to the *Senatus Consulta*, by some of the Principal Magistrates, especially the Tribunes of the People; who having been created to counter balance the Authority of the Senate, and preserve the Rights of the People, often oppos'd the Resolutions of the Senate; and sometimes, without any other View than to lessen their Power, and increase their own, by making themselves more Considerable.

Before these *Magistrates* were allow'd to enter into the *Senate-House*, they sat upon *Benches* over against the Door; and as soon as the *Senatus-Consultum* had pass'd the Forms within, it was brought out to them to examine: Such as were approv'd of, they mark'd with the Letter T. and when they rejected any, they wrote the Word *Veto* under it; nor were they oblig'd to give any Reason for their Refusal, as I have taken notice before in the Seventh Chapter.

On the contrary, all other *Magistrates* were oblig'd to shew Cause, and give Reasons for their Opposition to a *Senatus-Consultum*: As for Instance, That the *Senate* was call'd together by *Lawful Authority*, or held in a Place upon a Day prohibited by *Law*; as were to be first remov'd and then proceed upon the *Senatus-*

... of their Resolutions, and their Conduct to Posterity, in which, all their Debates admitting those that miscarried

... finess of one of the *Secretaries* as necessary to come to a *Resol-*  
... et, and not divulg'd till put in  
... ster or *Secretary*, was discharg'd  
... *Senatus-Consulta* made in this manner,  
... the *Officers* or other *Senators*,  
... *Consulta*.

... *Decrees* of the *Senate*, were for a long Time left in the Hands of the *Consuls*; but as they took upon them to suppress some, and alter others, it was thought proper to remove, and place them in the Temple of *Ceres*, under the Care of the *Ediles*: At length they were carried to the Temple of *Saturn*, where the Governments Money was lodg'd, as making part of the Publick Treasure.

They went under the Name of the *Magistrate* who presided in the *Senate* at the Time of their making: Thus we have *Senatus-Consultum Trebellianum*, *Pegesianum*, and others of the same kind.

Having

Having thus shewn the Method in making the *Senatus-Consulta*, I shall now speak of their Authority, and when they first acquir'd the Force of *Law*.

They were ever in use, both under the *Regal* and *Republican* Government; but far from having the Authority of *Law*.

During the *Free State*, as well as the *Regal* Government, the *Senate* was advis'd with, but it was only for their Opinion; and a *Senatus-Consultum* of it self, was of no Force, till confirm'd by a *Law* made with the Peoples Consent; which occasion'd that Form so much in use among the *Romans*, **POPULUS JUBET SENATUS AUTOR EST.**

But unforeseen Accidents, often plung'd the Government into so great Danger, that immediate Help was necessary; in administ'ring which, the Solemnity of calling a *General Assembly* of the People, and passing the *Laws* in Form, could not be observ'd: In which Cases, the *Decrees* of the *Senate* had the force of *Law*, provided the People tacitly consented.

The *Senatus-Consulta* began absolutely to obtain the Force of *Law* under the Emperor **TIBERIUS**; being made at his Request, and under his Authority: Therefore, it was call'd *Senatus-Consultum factum ad Orationem Principis*, and carried a full and perfect Authority. Upon which, it is to be observ'd, that notwithstanding the People lost the Power of making *Laws*, under *Tiberius* and the rest of the Emperors, the *Senate* preserv'd their Right of making *Ordonnances* a long Time. 'Tis in this Sence, and with Reference to these *Senatus-Consulta que fiebant ad Orationem principis*, we are to understand the Decision of the Ninth *Law* in the *Digest. de Legibus*, which has these Words, *Non ambigitur Senatum Jus facere posse*. The Author of this *Law* was *Ulpian*, who lived in the Reign of *Alexander Severus*. Besides the Definition which *Justinian* gives of a *Senatus-Consultum*, (3 *Tir. de Jure Natural. Gent. & Civil*;) shews plainly, the *Senatus Consultum* had the Force of *Law* under the *Roman* Emperors: *Senatus-Consultum*, (says he) *est quod Senatus jubet atque constituit*; not *constituebat*, as he defines a *Law* and a *Plébiscitum*.

These *Senatus-Consulta*, were a Contrivance of *Tiberius*; who instead of advising with the *People*, refer'd all Matters to the *Senate*; under pretence, that the Body of the *People* were grown too numerous to assemble all in one Place. So the Emperor, being invested with the Authority of the *People*, by the *Law Regia*, summon'd the *Senate* to meet, and propos'd to to them such *Laws* as he had a mind to Enact: Which *Laws* so pass'd, had the same Force as those made in the Time of the *Republick*, not in reality by the Power of the *Senate*, but in Consequence of the *Prince's* Authority.

Under the latter Emperors the *Senate* had the Power of Pleasure; but it was only such *sumptuary Laws*, to suppress the Luxury of the Nobles. [See *Unica Cod. de SenatusConsultis*.] by his Seventy eighth Novel, *Legibus*, and entirely divested making any *Edicts* or *Laws*.

Under the latter Emperors the *Senate* in those Times, was reduced to make *Laws* themselves, examining and approving those made by the Emperor. (See *L. 8. Cod. de Legibus*.) To string our *King's Edicts* and *Laws*, seems properly enough to

## C H A P. XVI.

*Of the Lawyers Answers.\**

**T**HE *Lawyers Answers*, are the Sentiments and Opinions of those, who were authoriz'd to give *Answer* upon *Law-Questions*; for which Purpose, there were Persons appointed under all the different Governments of *Rome*.

The first Interpreters of the *Law*, were the *Senators* and *Nobles*, whom *Romulus* enjoin'd to give Advice to their *Clients*; that is, such as were put under their Protection\*. The *Plebeians*, therefore, shelter'd themselves under some Powerful *Senator*, who was oblig'd, to assist them with his good Advice and Credit, in the Management of their Affairs, explain the *Law*, and do them all manner of good Offices.

These *Plebeians*, on their Parts, gave their *Patron*, under whose Protection they had put themselves, their *Votes*, in Elections of *Magistrates*; attended him in all Publick *Processions*, and engag'd in his Service, whenever there was Occasion.

This Relation between *Patrons* and *Clients*, was of *Romulus's* Invention; to establish a perfect Union among the Citizens, by a Correspondence between the Rich and Poor.

The Right of interpreting the *Laws*, was afterwards vested in the College of *Pontiffs* and *Priests*, when the *Romans* found it proper to mix *Law* with *Religion* and *holy Ceremonies*: For this Reason, *Dion. Cassius* observes, *Augustus* assum'd the Title of *Pontifex Maximus*. Nay, the very Christian Emperors, who abhor'd the *Pagan Ceremonies*, and Name of *High-Priest*, suffer'd themselves to be styl'd so in their *Addressses* and *Medals*.

All whose particular Application and Ability had render'd them knowing in the *Laws*, undertook to resolve such Questions as were brought to them; but their *Answers* were of no great Weight in the Time of the *Republick*, nor even under *Augustus*; altho' he allow'd them to give their Opinions publickly. [L. 2. §. 47. ff. de Origine Juris.]

\* *Dion. Halicarnas. Lib. 2.*



In reality, this Emperor, instead of authorizing every Lawyer by a particular Commission, to give his Opinion upon Questions in Law, empower'd all by a General One, but, as 'tis thought, limited their Number. However, this gave their Decisions no great Authority ; but they grew into considerable Credit in the Reign of *Tiberius* ; who order'd, no one should presume to give an Opinion in Law-Matters, but such as were licensed by his Special Favour so to do.

Yet for all this, the *Answers* of the *Lawyers* had not the same Force as *Law*: For *Tiberius* in his Licences to answer such Questions as should be proposed to them, laid no Injunction upon the Judges to regard them as *Laws* in their Determinations: Nor was it practicable, under his *Recess*, for the *Prætor* to exert his Authority, upon account of the *Opposition* of the *Calpurnians* and *Proculians*, who were wont to dispute Questions upon the same Questions.

undoubtedly confirm'd the Writings of others; and forbid the  
Judges from their Opinions.

...arose from the Difference of Opinion on the Question, He order'd, the Judge's Order to stand, as the Majority, and in case of an Appeal, as the Side which *Papinian* adher'd.

[*Lect. on Civil Law, p. 108.*]

But we must take care not to confound these *Answers*, or *Opinions* of the *Lawyers*, with That which in the *Laws* is call'd, *The Authority of the Interpreters*.

For the *Answers* of the *Lawyers* were nothing else, but the *Opinions* of particular Men, as *Papinian*, *Paul Ulpian*, &c. Whereas the *Interpretations* of the *Lawyers*, spoken of in the Ninth Chapter, were the Unanimous Opinion of the whole Society; or what is call'd the *Usage* of the *Bar*, and the *Law* introduc'd by *Practice*. Wherefore, every *Answer* of the *Lawyers*, having a certain *Author*, they are plac'd among the *Cases* of the written *Civil Law*; whereas the *Interpretation* of the *Lawyers*, having no particular *Author*, makes only a Part of the *unwritten*, or what we call the *Law* introduc'd by *Practice*.

But altho' it has been said, that the *Answers* of the *Lawyers* were not always Authentick, it must be allow'd they were ever in great esteem; and those that are reported in the *Pandects*, sufficiently set forth the *Learning*, *Wisdom*, and *Eloquence* of those Great Men, most of whom were rais'd to the highest Dignities of the *Roman Empire*; and many of them taken into the Emperor's Councils, to assist them with their *Knowledge* and *Experience*, in the Management of the most weighty *Affairs*.

They were justly stiled *Fathers of the Law*, since by their Industry it was brought to Perfection: And for that Reason, I look upon my self oblig'd to take notice of them in this History. Besides, there are a vast Number of *Laws*, which are not to be understood, without knowing the Time when they were made: So that I am perswaded, 'twill be no less Useful than Curious, to be appriz'd in reading a *Law* in the *Digest*, when the *Author* liv'd, and what Rank he held in the *Roman Empire*.

But as this Detail would lead me into too large a Field, it seem'd more advisable to make a separate Chapter of it, in which I shall give a brief Account of all the *Lawyers* that flourish'd in the *Republick*, or under the Emperors before *Justinian*.

And tho' there are no Books remaining that were written by the *Lawyers* who lived under the *Republick*, and but very few *Laws* in the *Digest* taken from their Writings; yet I shall not omit mentioning what is most remarkable of them.

## CHAP. XVII.

*Of the most celebrated Roman Lawyers.*

**PUBLIUS PAPYRIUS**, was the first *Roman*, that apply'd himself seriously to the Study of the *Law*. He made a Collection of the *Regal Laws*, in the Reign of *Tarquin the Proud*, as is already observ'd.

APPIUS CLAUDIUS was employ'd in digesting the [redacted] which was not finish'd till 304. After [redacted] As he was an expert Lawyer, [redacted] he did an excellent Work : But his [redacted] in him the Indignation of [redacted] to so deep a Melancholy, [redacted] 'd himself in Despair.

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Sirnam'd CENTIMA-  
the former, was likewise  
the highest Employments:

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ated *Lawyer*, was descended  
The People gave him the  
'd upon him the chief Em-  
He was *Consul* in the Year  
the *Army*.

**TIBERIUS CARONCANIUS** was the Author of several memorable *Answers*, but none of his Writings are extant. He was *Consul* in the Year 473: After which, he was *High Priest*, and the first of the *Plebeian Order* that was rais'd to that Dignity. He was also *Censor* and *Dictator*: famous for his great Prudence, that his Opinion was in the most important Cases, both of *Humane* and

MUTIUS, was not only an able *Law-  
yer*, and well vers'd in *Business*. It  
was sent *Embassador* to *Carthage*, to offer them  
peace or War. E 2 After

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After him came **SEXTUS ÆLIUS**, who was first *Ædile* and then *Consul*. He made a Book of the *Elements* of the *Law*, intitled *Tripartita*, because it consisted of the *Law* of the *Twelve Tables*, the *Interpretations* of the *Lawyers*, and *Cases* of *Law*.

**PUBLIUS ÆLIUS** lived about the same Time; that is, in 545. He was also *Consul*.

*Scipio Nasica*, *Publius Attilius*, *Marcus Porcius Cato* and *Marcus Manilius*, flourish'd about the Year of *Rome*, 600.

**SCIPIO NASICA** acquir'd great Reputation, as well by his Skill in the *Laws*, of which he was a perfect Master, as his upright Conduct in the Offices of *Prætor* and *Consul*; and the Signal Victories he got over the Enemy, obtain'd him a Decree for a Triumph. He was Surnam'd **OPTIMUS** by the *Senate*; who allow'd him a House in the *Holy Street* at the Expence of the *Publick*, that they might advise with him more conveniently.

**PUBLIUS ATTILIUS**, was of the Family of *Attilius Regulus*, who chose rather to undergo the Cruel Torments with which the Enemy threatn'd him, than break his Word. This *Attilius* the *Lawyer*, was the first that had the Title of *Prudent* given him by the People.

**MARCUS PORCIUS CATO** compos'd several *Law Books*; 'tis of him probably that *Paulus* speaks in the *Law* 4. §. *Cato. ff. de verb. oblig.* He is suppos'd to be the Author of the *Regula Catoniana*, treated of in the Seventh Title of the Thirty fourth Book of the *Digest*.

**MARCUS MANILIUS**, according to *Cicero's* Account, was a very great *Lawyer*, (*Lib. de Clar. Oratorib.*) "If any one should ask me, says he) who deserv'd the Name of a *Lawyer*; I would answer, 'twas that Man who had a perfect Knowledge of the *Laws* and *Customs* of the Place where he professes it; and knew how to put it in Practice: And if I must produce Examples, I would name *Sextus Ælius*, *Marcus Manilius* and *Publius Mucius*."

*Publius Mucius* and *Brutus*, flourish'd about the Year of *Rome* 630; and *Publius Rutilius* about 640. This

*Of the most celebrated Roman Lawyers.* 53

This PUBLIUS MUCIUS, of whom *Cicero* speaks in the Passage before cited, compos'd Ten Books upon Law-Subjects. He was descended from the famous *Mucius Scaevola*, so renown'd in History.

BRUTUS, equally celebrated for his Actions and Birth, made Seven Books upon the *Law*.

PUBLIUS RUTILIUS RUFUS, who came after him, was first *Tribune of the People*, then *Consul*, in the Year 648; and afterwards *Proconsul of Asia*. His Ancestors had been both *Censors* and *Consuls*. All that is related of Him, is, that he was in high Esteem with *Augustus*, who, with the Reasonings of this

*Julius Virginus, Quintus Tubero, Lucius Crassus and Quintus*

US, who was of a very ancient *Law-Books*, which are lost.

O was a *Stoick*, and a good

S, was Uncle by the Father's; is mightily commended by

TER applied himself more to the Art of *Speaking* than the *Knowledge of the Law*; therefore, all that *Pomponius* says of him, (*L. 2. §. 40. ff. de Orig. Jur.*) is, that he was an *Historian*. However, He was an able *Lawyer*; and *Cicero* gives him that Character, in the Place before quoted. *Quintilian* † says, He was a Man of great Parts; that his Discourse was solid, pure, correct, and very lively; and that he was one of the best Writers of his Time.

**PUBLIUS CRASSUS**, Brother to *Publius Mucius*, was *Quæstor*, *Ædile*, and afterwards *Consul*, and *High-Priest* at the same time. He was reckon'd an Able and Eloquent Lawyer.

**QUINTUS MUCIUS SCAEVOLA**, Son of *Publius*, was *Tribune of the People*, *Consul*, and *High-Priest*. He had the Art of expressing a great deal in a few Words, and was always a close Reasoner. He was Master of a pure, and very florid Style; and his Thoughts, tho' Sublime, were no less Substantial. There is reason to believe, that 'tis of him *Cicero* speaks, when he says, "That *Quintus* "*Mucius* was the most Eloquent among all the Lawyers, and "the best Lawyer among the Men of Eloquence." He compriz'd the whole Law in Eighteen Books; and was the Author of the *Cautio Muciana*, which provides, That if a Man has a Legacy left him, upon Condition of abstaining from a certain Act as long as he lives, he might require the Delivery of the said Legacy, if he would engage to surrender it in case of not performing the Will of the Testator. But his Merit, great as it was, could not protect him from the Fury of the Wicked: He was Murther'd in the Temple of *Vesta*, in the Year 672, by one *Simbria*, employ'd by the *Prætor Damasippus*; and 'tis reported that the Assassin should say, He was Criminal, because he was too Honest.

About the Year 680, *Aquilius Gallus*, *Balbus Lucilius*, *Sex-tus Papyrius*, and *Gaius Juventius* appear'd upon the Stage.

**AQUILIUS GALLUS** was a very Popular Man: Whilst he was *Tribune*, he got the Law *Aquilia* enacted; which is spoken of in the Third Title of the Fourth Book of the *Institutes*. He was *Prætor* with *Cicero*, who contracted a close Friendship with him. He was a Knight, and of a Noble Family; for several of his Ancestors had been *Tribunes*, *Consuls* and *Ambassadors*. He was look'd upon to be so Learned and Honest a Man, that the *Prætors* would often Depute him to give final Judgments in Private Causes; and his Vote was of great Authority in establishing Laws. He was Author of the *Novation per stipulationem Aquilianam*; and settled the Custom of instituting or appointing posthu-

*Of the most celebrated Roman Lawyers.* 55

mous Grandchildren to be *Heirs*, upon which we have the famous *Law Gallus*, 28 ff. *de Liber. & Posthum.*

**BALBUS LUCILIUS** was a considerable *Lawyer*, and admir'd both for his Eloquence and Learning.

**SEXTUS PAPYRIUS**, the Offspring of an Ancient and Illustrious Family, taught *Servius* the *Elements* of the *Law*; of which he makes grateful Acknowledgment in his Works, and thereby has preserv'd his Memory.

**GAIUS JUVENTIUS**, was a great and well-read *Lawyer*.

**SERVILIUS SULPICIUS**, Son of a Roman Knight, was the Disce-pole of one of the most Ancient Families of Rome. He was a great Orator of his Time except *Cicero*. After having been advis'd and advis'd him, he applied himself so constantly to his Studies, that he became a great and able *Lawyer*. He compos'd several Books, which he reduc'd to the Science of *Law* to an *Art*; which before was confus'd, and without Order or Method. After he had held the *Prætor's Office*, the *Republick* being without *Consul*, and fallen into great Disorder, the *Senate* of the *Senate*, the Government was put into his Hands. After that he was made *Consul*, then Governor of the *War*; in which Employments he acquitted himself so well, that being upon an Embassy, the People erected a Statue in honour of him, in the Place of Publick *Harbour*.

*Pomponius* (*Leg. 2. §. 44. ff. de origine juru*) says, that *Servilius Sulpicius* had **ALFENUS VARUS**, **GAIUS**, **AULUS GELLIUS**, **TITUS CÆSIUS**, **AUFIDIUS TUCCA**, **AUFIDIUS NAMUSA**, **FLAVIUS PRISCUS**, **GAIUS ATEIUS**, **PACUVIUS**, **LABEO ANTISTHIUS**, **CINNA**, *Labeo's Father*, and **PUBLIUS GELLIUS** for his Scholars: But *Cujacius* says, that the putting *Gaius* into this List, is a Mistake of *Pomponius*, and that he ought to be struck out.

All these lived under the Emperors *Julius* and *Augustus Cæsar*: Eight of them left some of their Works behind them; out of which *Aufidius Namusa* made a Body of *Law*, divided

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ded into Fifty Books. The most celebrated amongst them were *Alfenus Varus*, who was *Consul*, and wrote *Forty Volumes* upon the *Law*; and *Aulus Ofilius* a *Roman Knight*, and *Julius Caesar's* bosom-Friend.

Besides several Books which he wrote upon the nicest Points of *Law*, he reduc'd all the *Prætor's* Edicts, of which *Servius* had publish'd too short an Extract, into one Volume.

There were many other *Lawyers*, who lived and were eminent about the same Time, as *Trebatius*, *Aulus Cascellius*, *Quintus Ælius Tubero*, *Ateius Capito*, and *Antistius Labeo*.

**TREBATIUS** was Disciple to *Cornelius Maximus*; he labour'd hard at the *Law*, and 'twas at his Instigation that *Augustus*, who esteem'd him very much, introduc'd the Use of *Codicils*. He had been Banish'd for siding with *Pompey*; but *Cicero*, who lov'd him, got him leave from *Cæsar* to return home, when he afterwards served in Quality of a *Counsellor*; and was offer'd by him to be made a *Military Tribune*, and to have a Dispensation from attending the *Army*; which could not be an agreeable Life, to a Man that by choice had preferr'd the *Gown* to the *Sword*.

**AULUS CASCELLIUS**, who was a *Knight*, distinguish'd himself by his Knowledge, both in the *Law*, and all kinds of polite Learning. *Trebatius* was deeper than *Cascellius*, but in Eloquence he out-did *Trebatius*, and *Ofilius* excell'd them both, as *Pomponius* relates, (*L. 2. §. 43. ff. de orig. juris.*) *Antonius Augustinus* and *Cujacius* remark, that there is a Fault in the Beginning of this Paragraph, which ought not to be read as it is, but thus, *fuit Aulus Cascellius Quinri Mucii Volusii auditor.*

This *Cascellius* was contented with the *Quæstorship*, and refus'd to accept of any higher Office, altho' *Augustus* made him an Offer of the *Consulship*. There is only One of his Books remaining, entitled *Benedictorum*.

Altho' in the *Law*, *Pomponius* speaks of *Volusius* only by the Bye, as having been *Cascellius's* Master, yet it appears, he wrote upon the *Law*; and *Cujacius*, in his *Notes* upon *L. 21. §. 2. ff. de annuis Legatis*, speaks very advantageously of a Treatise written by him upon the *AS*; and advises all Beginners to read it, before they enter upon the *Institutes*.



**Q. ÆLIUS TUBERO**, who follow'd *Offilius*, was of an Ancient Family. After having run thro' the Study of *Rhetorick*, and pass'd to that of the *Law*, he wrote several Books of *Law*; but the antiquated Style they are in, makes them very disagreeable to the Reader.

**ATTEIUS CAPITO**, *Offilius's* Scholar, understood the *Publick* and *Private Law* perfectly well. He was *Consul* in the Year of *Rome*, 746. He wrote *Commentaries* upon the *Law* of the *Twelve Tables*; Seven Books of the *Sacerdotal Rights*. One of the *Senatorial Office*, and a *Commentary* upon *Publick Judgments*.

**LABEO**, was of a Noble Family; his Father *Laberius*, who was *Servius Sulpicius's* Disciple. This *Laberius* was educated in the *Law* by *Trebatius*; His Father receiv'd his Education from others. That he might apply himself wholly to the Study of the *Law*, he refus'd to be *Consul*, being offer'd it by *Augustus*. He spent six Months of the Year, in conversing with Learned Men, and the other six in writing of Books. He wrote *Commentaries* upon the *Law* of the *Twelve Tables*; Eleven Books of *Edicta*; *Precoris peregrini*; some upon the *Edicta* *Precoris* *Abent*, and Eight Books *Pithanon*, that is, *exhibitiones* of *Edicta* *Abent*.

As to these Two great Lawyers, 'tis to be observ'd, they were of two quite different Sects: For *Ateius Capito*, who follow'd the *Peripatetic Method*, went on still as he was taught, without any new Tittle; whereas *Labeo*, rely'd much on his own Judgment and Knowledge, innov'd and chang'd many Things, which Division was much improv'd by Two Lawyers that succeeded them, as will be seen hereafter.

Under *Tiberius*, *Claudius*, *Nero*, and *Vespasian*, there appear'd *Julius Nervæ*, *Masurius Sabinus*, *C. Cassius Longinus*, *Domitius*, and *Nervæ* the Son.

**COCCEIUS NERVA**, who was a very Eminent Lawyer, embrac'd *Labeo's* Party, and was in great Favour with *Tiberius*.

**MASURIUS SABINUS**, was a Roman Knight, and at length made a *Senator*. Among the rest of his Works, he compos'd Twelve Books call'd *Memorabilia*, Three *Commentaries de Indigenis*, and One Book *de Furtis*. Many Places of the *Digest* are taken from his Works. He was in great Credit with *Tiberius*. He list'd himself in *Ateius Capito's* Party, which from thence was call'd the *Sabinian* Sect.

**CAIUS CASSIUS LONGINUS** succeeded *Sabinus*. He was *Consul* with *Quirinus* under *Tiberius*, in the Year of Rome, 764; and Governor of *Syria*, under *Claudius*, in 782, according to *Tacitus*, *Annal.* 12. The high esteem he was in, as an excellent Lawyer, was the Reason that the Party he espous'd was call'd the *Cassian* Sect, as the other had the Name of the *Sabinian*.

**PROCULUS** succeeded *Nerva*. His profound Learning and Skill in the *Laws*, got him great Reputation under *Vespasian*. He adher'd to *Labeo's* Party, which afterwards went by the Name of the *Proculian* Sect.

**NERVA** the Son, was in play at the same Time; He follow'd his Father in embracing *Labeo's* Party. He has left several Books *de usu capionibus*. If we may believe *Ulpian*, he was so great and early a Proficient in the *Law*, that he answer'd Questions publicly at the Age of Seventeen.

There was at the same Time another **CASSIUS LONGINUS**, of the Order of Knighthood, who was *Prætor*: We find many *Laws* in the *Digest* taken from his Writings.

**CÆLEUS SABINUS**, who was *Consul*, was a great Favourite of *Vespasian's*. He succeeded *Cassius Longinus*, and was of the same Sect. He wrote a Book upon the *Edict* of the *Ædiles Cærules*.

**PEGASUS**, who lived also in *Vespasian's* Time, was Consul, and Governor of Rome. *Juvenal* calls him the Best and most Sacred Interpreter of the Laws. He was Author of the *Senatus-Consultum* which goes by his Name, and is spoken of in the *Institutes*, under the Title *de Fidei Commissar. hereditatib.* He succeeded *Proculus*; and the *Proculian* Sect, which he follow'd, was afterwards call'd by his Name, the *Pegasian*.

Under *Trajan*, *Adrian*, and *Antoninus Pius*, there appear'd *Favolenus Priscus*, *Celsus*, the Father and Son, *Neratius Priscus*, *Salvius Julianus*.

*Salvius Julianus* succeeded *Celsus* his Master, as appears by the

very much esteem'd by the of *Adrian's* Council: He follow'd.

follow'd his Father, and adher'd to the *Proculian* Sect, and left many

follow'd the same Sect; *Favolenus* Consul. He made many of the most valuable are, the Law.

**ALBURNUS VALENS**, **TUSCIANUS**, and **SALVIUS JULIANUS**, succeeded *Favolenus*, and adher'd to the opposite, that is, the *Sabinian* Sect.

*Alburnus Valens* wrote Seven Books upon *Fiduciary Trusts*. We read nothing of *Tuscius*, in any of our Books; which has made some to think, that in the Law 2. §. ult. in fine ff. de *hered. inst.*, instead of *Tuscius*, it ought to be *Fuscianus*; because there is a *Constitution* of *Antoninus Pius*, directed to *Fuscianus*, in the Law 7. ff. de *Legat. præstand.*

*Salvius Julianus*, Disciple to *Favolenus*, was Governor of Rome, and twice Consul. Whilst he commanded in *Aquitan*, the Emperor *Adrian* wrote to him. *Justinian* calls him an excel-

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excellent Lawyer. He was the Composer of the *Perpetual Edict*, whose Decisions were of so much weight; to which he added a *Clause* in favour of the Children of an *Emancipated Son*, to entitle them to a Part of their *Grandfather's* Estate, in Conjunction with their *Father*. The Pleasure he profess'd to take in Studying, and his great Desire to Learn, can never enough be commended: For he us'd to say, *Esti alterum pedem in Sepulchro haberem adhuc tamen addiscere vellem.*

Having thus finish'd the Account of all the Lawyers mention'd by *Pomponius*; let us now take a View of those he has said nothing of, and whose Writings have contributed to the Composition of the *Digest*. First, let us observe, that the greatest Number of them never made themselves Parties to either of the *Two Sects* before-mention'd; but form'd their *Decisions* according to the Rules of *Justice* and *Equity*.

Of these Lawyers not mention'd by *Pomponius*, there were Two who flourish'd in the Reign of the Emperor *Adrian*, *Tertullianus* and *Africanus*.

**TERTULLIANUS**, who was Consul under the Emperor *Adrian*, made Four Books of *Questions*, and One *de Castrensi peculio*. He was Author of the *Senatus-Consultum* which bears his Name, and is spoken of in the Third Title of the Third Book of the *Institutes*. *Cujacius* pretends He wrote upon *Religion*; for which Opinion he quotes *Eusebius*, who says, that *Tertullian* the Divine was also a Lawyer: But others think they were different Persons of the same Name.

**AFFRICANUS** lived also in *Adrian's* Time, and was Scholar to *Salvius Julianus*. 'Tis he that *Aulus Gellius* speaks of, under the Name of *Sextus Cæcilius*. *Cujacius*, in the Beginning of his *Commentaries* upon the Treatises written by this Author, confirms it, and blames those who have asserted that he lived in *Papinian's* Time, and was his Disciple: However that be, 'tis certain *Africanus* was the most intricate and unintelligible Author of all the *Roman Lawyers*; and no Commentator of less Learning and Penetration than *Cujacius*, could ever have explain'd his meaning.

**MARCELLUS**, who was one of the Council to *Antoninus Pius*, left several Books of *Law*, which are so many Proofs of his great Learning.

CEREI.

**CEREIDIUS** or **SERVIDIUS SCÆVOLA**, who liv'd under *Antoninus*, Sirnam'd the *Philosopher*, reduc'd that Emperor's *Edicts* into Writing. He was *Septimius Severus's* Master. 'Tis remark'd of him, that he took more Pains to resolve the Difficulties of any Question put to him, than any of the *Lawyers*.

**GAIUS**, one of the most celebrated *Lawyers* that *Rome* ever bred, made abundance of Books which help'd to compose the *Digest*. He flourish'd under the Emperors *Antoninus Pius* and *Marcus Aurelius*, as *Oiselius* proves in his Preface to that *Lawyer's Testimony*. Supposing there had been another of the *Republick*, as there had been another Man. There were many *Offices* he pass'd through, in his Life; but his Learned Praise.

*Under Scævola*, was Master of the Guard to *Septimius* steem'd. He was called the *Laws*: He was the of the Fraternity: There- than any Man to discover the *Dedicatory* to the *Theodo-* to great a *Lawyer* before,

me Genius, in the high- and the Honour conferr'd upon him by *Valerianus* etc. who order'd, that in case of an Equality of Opinions, *Papinian's* should turn the Scale; sufficiently teaches us, how great a Veneration we ought to have for his Memory.

The *Exactness* and *Perfection* which are in his Writings, and the great *Abundance* of them, would induce one to think, he exceeded the ordinary Term of Human Life: Yet, 'tis observ'd by all Historians, that He was not *Eight and Thirty* when he was taken off by a Violent Death; which cannot be imputed to any other Cause than his *Virtue*, and the *Gravety* of him who commanded it.

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After *Caligula* had murder'd his Brother, he would feign have perswaded *Papinian* to justify the Fact to the *Senate* and *People*; but he answer'd, 'twas much easier to commit *Parricide*, than to justify it: Which drew upon him the Emperor's Resentment, who order'd him to be Beheaded.

**ULPIAN** was at first Tutor to *Alexander Severus*, afterwards his *Secretary*, and much favour'd by him. Having been of the *Council of State*, his Merit quickly rais'd him to the Office of *Captain of the Guard*, which was the most considerable of all the Empire. We have many of his *Laws* in the *Digest*, and several *Fragments*, which are great Helps towards understanding the *Law*. All his *Remains* sufficiently shew, how greatly he had distinguish'd himself in the *Science of the Laws*. Many of the Emperors give him the highest Commendations, as well as *Justinian*, who in several Places speaks of his sublime Genius. But his over-great Attachment to the *Pagan Superstitions*, and his severe Persecution of the *Christians*, very much eclipse the Glory of his Memory. He was Kill'd by the *Prætorian Guards*, in the Year of Christ 226.

**JULIUS PAULUS**, *Papinian's* Scholar, was *Prætor*, *Consul*, and *Captain of the Guards*, to all which he attain'd by his singular Merit: He lived in the Reign of *Alexander Severus*. His *Statue* is to be seen at *Padua*, where he was born. No *Lawyer* has wrote so much as he; his *Stile* is clear, and his Determinations Judicious. Some will have it, that he was not only an excellent *Lawyer*, but a very good *Poet*: *Aulus Gellius* says thus of him, *Poeta vir bonus, & rerum literarumque veterum impense doctus*. Lib.19. Cap.7.

**POMPONIUS**, who was brought up under *Papinian*, was one of the *Council* to *Alexander Severus*. He apply'd himself closely to the Study of the *Law*, in which he had good Success. We have many of his *Laws* in the *Digest*, among the rest, that *de Origine Juris*, ff. 2.

**HERENNIUS MODESTINUS**, was *Ulpian's* Scholar, or, as some say, *Papinian's*: He was a perfect Master of the Beauties of the *Greek* and *Latin* Tongues. Under *Alexander Severus*, who made him one of his Counsellors.

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tellers, he was rais'd to be *Consul* with *Probus*, in the Year 228; and was afterwards nominated for *Tutor* to the young Prince, *Maximianus*. He made several Books of *Law*; among the rest Two *Greek* ones, of the *Excuses of Tutors*.

There is nothing remarkable in History of several other *Lawyers*, whose *Laws* are to be seen in the *Digest*; therefore I shall only set down their Names, after having first acquainted the Reader, that most of them liv'd under the *Antoninus's*, and their Successors.

SOME *TARUNTIUS PATERNUS*, *ÆMILIUS MACER*, *TI. CLAUDIUS CLEMENS*, *ARIUS MEXANDER*, *AURELIUS ANTONIUS*, *LICINIUS RUFINUS*, *PAPYRIUS JURGENS*, *SEPTIMIUS BLIUS FURIUS ANTHIANUS*, *MAXIMUS*, *MACRIANUS*, *FLORENTINUS*, *CLAUDII*, *CRISPUS*, *CALISTRATUS*, *VENULEIUS*, *SABINUS*, *SEVERUS*, *SEVERIUS MAURICIANUS*, *JULIUS ACRIDUS*, *SEVERUS GALLUS*.

*Justinian* has given us an Account of all the *Lawyers*, whose Works have contributed to the Composition of the *Digest*; and he may say something of *TRIBONIAN*, who was first commission'd, to reduce them into Order.

*Tribonian* was one of the Brightest and most Skilful Jurists of his Age; and to have had an universal Knowledge of the *Laws*, and great Parts quickly rais'd him to the Honour of *Consul*, and won him the Esteem and Confidence of *Justinian*. It was by his Advice, the Emperor undertook the Abridgment of the *Civil Law*, which till then lay dispers'd in an infinite Number of Books. And the Emperor's Success in that great Undertaking, was intirely owing to his Care and Labour.

*Tribonian* was not only a Man of a sweet and complaisant Temper, but of strict Morals; and his Life had been a compleat Pattern of Virtue, had it not been for his too great Love of Riches; which has made many of his *Laws* suspected of Self-Interest; and 'tis pretended, that Money has often made changes in the *Laws* of which he was the Author: *Auditus erat admodum & indefessus sed habendi cupidior.* *Scyllas* would have him pass for an Atheist and nauseous Sophant, whose only View was to govern the Empire, under

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der *Justinian's* Name and Authority. But *Procopius*, a Grave and Cotemporary Author, speaks of him in a quite different Strain, which seems to come nearer the Truth.

*Tribonian* was Master of the Household; the Emperor *Justinian*, in his Preface to the *Institutes*, speaks of him in these Terms; *Triboniano viro magnifico magistro & exquestore sacri palatii, nostri & Ex Consule.* (See my Explanation of the Word *Exquestor* in this Passage.)

Hitherto I have treated of the most remarkable Things in the several *Roman Laws*. I am now to give an Account of the chief Compilations of them, before *Justinian's* Time; after which, I shall speak of those made by his Order.

## C H A P. XVIII.

### *Of the Law-Books before Justinian's Time:*

AS soon as there were any *Laws* establish'd at *Rome*, care was taken to collect and reduce them to Order; the Chief of which I shall give an Account of in this Place: Because it will very much help towards understanding several Passages, wherein they are mention'd in the Books.

Under the *Regal* Government, they had Two principal Compilations.

The First consisted of the *Laws* made by *Numa Pompilius*; relating chiefly to Religion and Divine Worship: These *Ancus Martius* took out of the Pontiff's Registers, put them into Order, and then hung them up in the Publick Places.

The Second was that of the *Regal Laws*, made by *Papirius*, in the Time of *Tarquin the Proud*: This was called after the Author's Name, the *Papyrian Civil Law*, as I have observ'd before. During the *Republican* Government, all that remain'd in use of the *Regal Laws*, was collected with great Exactness; to which the most Wholesome *Laws* of the chief Cities of *Greece* were added: And out of them, the whole Body of the *Roman Law*, contained in the *Twelve Tables* before spoken of, was taken.

After



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After the Law of the Twelve Tables, the Lawyers compos'd certain Forms for regulating the Acts and Proceedings of the Court: Of these *Appian Claudius* made an exact Collection, which his Secretary stole from him, and publish'd as aforesaid.

Let us now see what Compilations of Law, were made from the Time of *Julius Caesar* to *Justinian's*.

First then, In *Julius Caesar's* Time, *Ofilius* the Lawyer undertook a Compilation of the *Prators Edicts*, which a long time after were made into a Perpetual one, by *Julianus*, at the command of the Emperor *Adrian*.

1<sup>st</sup> *Constantine the Great* Reign'd, *Gregorius* and *Hermogenianus* undertook each of them to compile the *Edicts* of the Emperors, from *Adrian* to *Constantine*: These were call'd by their Names the *Gregorian* and *Hermogenian Code*.

2<sup>d</sup> 10 Years after this, *Theodosius* the Great caus'd to be made of the *Constitutions* of the Emperors, from *Constantine's* to *Theodosius's* another Code, divided into five Books, which was publish'd in the Year of Christ 429.

3<sup>d</sup> 10 Years after this, *Theodosius* the Great caus'd to be made of the *Edicts* of the Emperors, from *Adrian* to *Theodosius*, another Code, which was publish'd in the Year of Christ 435.

4<sup>th</sup> 10 Years after this, *Theodosius* the Great caus'd to be made of the *Edicts* of the Emperors, from *Adrian* to *Theodosius*, another Code, which was publish'd in the Year of Christ 435.

5<sup>th</sup> 10 Years after this, *Theodosius* the Great caus'd to be made of the *Edicts* of the Emperors, from *Adrian* to *Theodosius*, another Code, which was publish'd in the Year of Christ 435.

It is a Work not altogether unworthy the Observation of the Learned, as containing the Decisions made upon various Points of Law, by several Emperors from *Constantine the Great* to *Theodosius the Younger*: Besides these Decisions, which are for the most part *Edicts* or *Rescripts*, given by those Princes to *Magistrates* who desir'd their Advice; there are many *Harangues* spoken in the Senate, *Ordinances* concerning their Proceedings, *Deliberations* of the Emperors Councils, and *Orders* hereupon, sent to the Deputies in those Provinces which depended on the Empire.

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bliss'd and receiv'd, and that the East and West were one Empire. The first *Novel*, which is the first of this Code, shews that the Emperor employ'd all his Authority, and how desirous he was to bring a Work underraken by his Orders, to a happy Conclusion.

*Valentinian* the Third, who govern'd in the West, soon made this *Code*, which his Father-in-Law *Theodosius* had order'd to be made, for the Advancement of the Law. Besides this Consideration of Alliance, and other Reasons he had to respect *Theodosius*, by whose Choice he was made *Cesar*, and Heir to the Empire, there was another Motive which induc'd *Valentinian* to make this *Code* the Law of his Dominions, which he himself sets forth in one of his *Novels*; viz. That as the Empire obey'd Two Princes, whose Will was equally obey'd, there ought likewise to be an exact conformity in their Laws.

If there be any that will dispute the Authority of the *Code* in the West, it would be an easy Matter to convince them by the Evidence of several Authors, either Contemporaries or that have written since; their Names and Quotations are to be found in the *Index* of the *Code's* Preface, at the Beginning of his *Collection* of the *Imperial Constitutions*.

Sometime after the *Theodosian Code* appear'd, about the Year 506; *Alarick* the Second, King of the Visigoths, made of these Three *Codes*, and especially of the *Theodosian Code*, a New Body of Roman Law, which he publish'd Twenty or Twenty-five Years before *Justinian's Code* came out, by the Advice

of his Lawyers, who were call'd *Doctores*. *Alarick*, an answer'd to the Name of the *Theodosian Code*; of which, by taking, it was an abridgement: This *Code* was for a long Time the Roman Law in France, and was cited in France.

There were to be written, and he had collected the best of the old Laws, which he has taken to make a new *Code*; but he has done so, he has added many new Laws, and a View of the old Laws, which he has abridg'd, and to others added new Laws.

Later

Of the Law-Books before Justinian's Time. 67

Interpretations; but one cannot avoid distinguishing his Language, which is not like the *Latin* of the Text of the *Roman Law*, but the Language of a *Chancellor* of a *Visigoth-King*: However, in Consideration of what is taken out of the *Ancient Law*, his Work is not totally to be rejected.

It is not to be deny'd, that *Amien's* Compilation was very favourably receiv'd by the *Goths*; it was not only called the *Theodosian Code*, but generally the *Roman Law*: And it is quoted by that Name in the *Capitulars* of our Kings, in *Marculfus*, in the *Laws* of the *Burgundians* and *Ripuarians*.

The Book called *Jurispudentia Vetus anti Justinianeæ cum Notis Schultingii*, has this whole Collection in it, and several *Feudal* and *Antient* *Laws*; it was printed at *Leyde* 1717.

Of the several *Collecti-*  
ian's Time; I shall now  
y that Emperor's Order;  
*Civil Law* in its present  
Motives which induc'd  
set them in a new Light.

ion'd, were rang'd in no  
bundance of *Constitutions*  
which occasion'd a terrible  
consulted them: Besides,  
of the Writings of the  
dy of them equally tedious

ick Collection before *Ju-*  
er Writings of the *Lawyers*,  
*Thousand Volumes*; and the  
Contradictions in them, were alone sufficient to render the  
Reading of them utterly useless.

To remedy these Inconveniencies, and facilitate the Know-  
ledge of the *Laws*, *Justinian* undertook to make a general  
Compilation of the best and most useful *Constitutions* of the  
Emperors his Predecessors, and all his own to that Time:  
He form'd also a Project of collecting the best of the Wri-  
tings of the *Lawyers*, and by that means, making a Com-  
pleat Body of *Civil Law*; to which alone, recourse might  
be had, without the trouble of consulting all those other Vo-  
lumes, which had introduc'd so much Confusion.

The Vastness of this Project, tho' the Emperor had no other Merit than the putting it in Execution in the manner he did, ought to transmit his Memory to the most remote Ages; and the rather, because before he undertook it, it was look'd upon as an impracticable and fruitless Attempt.

## C H A P. XIX.

## Of JUSTINIAN'S Code.

THE Body of the Law, as it has been convey'd to us, is compos'd of the *Code, Digest, Institutes and Novels*.

The Code, which is to be the Subject of this Chapter, was the First of these Four Collections undertaken by *Justinian*; who in 528, being the Second Year of his Reign, signified his Pleasure to *Tribonian*, and other celebrated Lawyers of the Time, to make choice of the best and most useful *Constitutions*, pass'd by the Emperors from *Adrian* to his Reign, and put them in better Order than they were in the Three Codes hitherto publish'd; which Order is set forth in this Emperor's *Constitution, De Novo Codice faciend.*, at the Beginning of his Code, and directed to the Senate of *Constantinople*.

*Tribonian* soon comply'd with the Emperor's Desire; the Compilation which he was order'd to make, came out the next Year, under the Name of *Justinian's Code*; as appears by the Emperor's Ordinance to confirm this Code, intitled, *De Justiniano Codice Cnfirmando*, and directed to the Governor of the City of *Constantinople*: By this Ordinance, which is also, at the Beginning of this Compilation, *Justinian* gives every Thing therein the Authority of Law; declaring, that he repeals all other *Constitutions* not compriz'd therein; and forbidding all Persons whatsoever the Use of them: And then, to recommend them the more, tells how he has remov'd the Contrarieties in the *Gregorian, Hermogenian and Theodosian Codes*.

But tho' *Justinian's Code* is justly accounted an excellent Work, I cannot deny but the Order observ'd in the Succession of the Titles, might have been more exact: Besides, *Tribonian*, who (if one may say so) was at the Head of this Work, has been guilty of several Considerable Faults, that have been very hurtful to the Study of the Law; and which would even extinguish the Knowledge of certain Principles, or render them very doubtful, if we could not have recourse to the *Theodosian Code*, for the Explanation of those Laws which *Tribonian* has taken from thence, and transcrib'd into his Collection of *Imperial Constitutions*.

In effect, it is certain, as *Gothofredus* has very rightly observed, Beginning of his Commentaries, that *Tribonian* has mutilated many Things in others, which he has put together, and putting them; and pass'd over many Things on the occasion to their being divided a Law into Two, and in short, made no scruple to take away many who were not the Author of the contrary Decisions; which might be wish'd, were not that in all other Respects, But by good Fortune, we are with the Learned *Gothofredus* may be of great use towards the Study of the Laws in *Justinian's Code*. It is that make up this Collection, the Style of many of their Decisions grounded on so good Reasons as one could wish; yet, we cannot sufficiently admire in most of them the Wisdom and Goodness of God, who made so many Wicked Princes his Instruments to establish such Just and Equitable Laws: *Nero*, *Domitian*, *Commodus*, *Heliogabalus*, and *Caracalla*, were no better than Wild Beasts in Human Shape, full of Iniquity and Cruelty: as well as *Trajan*, *Valens*, *Decius*, *Gallienus*, *Dioclesian*, and *Julian*; yet their Ordinances are so just, that they are with great Reason admir'd by all Nations at this Day.

The great Care these took to find out Expedients for appeasing and pacifying *Civil Commotions*, often hinder'd the most declar'd Enemies of the Christian Religion, to refuse the Christians their Assistance in supporting the Authority and Councils of the Bishops; as *Ambrosius* proves, *Lib. 1. de iudicator. tit. de Hæreticis*, Cap. 2. wherein the wonderful Effects of Divine Providence are visible, which often makes use of the very Persons to strengthen the Christian Religion, whose only View was to subvert it.

As long as the Seat of the Empire was at *Rome*, and disinterested *Lawyers* were employ'd by the Emperors in drawing up their *Constitutions*, they were Short, Sententious, and Elegant; but after *Constantine* had transported the Seat of the Empire to *Constantinople*, where the *Latin Tongue* was in less Perfection, the Emperors employ'd none but their Chief Officers to frame their *Constitutions*; and as these were not always very expert *Lawyers*, and often biass'd by Favour or Interest, the Imperial *Constitutions* carried but little in abundance of Words; and are remarkable for a *Barbæst Style*, fitter for an *Orator* than a *Prince*: In a Word, they were very short of the rest in *Eligence*, *Prudence*, *Reason*, and *Majesty*; this is plainly to be seen, by the *Constitutions* of *Marcianus*, *Leo*, *Zeno*, *Anastasius*, *Justin*, and of *Justinian* himself.

*Code*, in *Latin* *Codex*, is what we commonly call a *Book in Sheets*; which comes from a Custom among the *Ancients*, of writing upon the *Bark of Trees*, before the Invention of *Paper*; which Name was given by way of Excellence to the Collection of the Imperial *Constitutions*.

*Justinian's Code* is divided into *Twelve Books*, every Book into separate *Titles*, and each Title into *Laws*, each Law containing several *Parts*; the First is called *Principium*, being the Beginning of the Law, and those which follow, *Paragraphs*: The Part next the Beginning, is the First *Paragraph*, which we must observe, that *Paragraph* signifying a *Part* or *Section* of a Law, that the Sense whereof is compleat. The *Code* treats of the *Catholic Faith*, *Ecclesiastical Persons*, *Heresicks*, *Jews*, *Pagans*; then of *Laws*, and their different *Magistrates*.

The Second Book explains the *Forms* to be observ'd in commencing a *Suit*, then it treats of *Restitutions*, and after that of *Compromises*, *Sureties* that are to be given, and the *Oath of Calumny*.

The Third Book speaks of those who may *stand in Judgment*, of *Contestation* in the Cause, of *Holidays*, of the *Jurisdiction* wherein we are to pursue our *Rights*; after which, it treats of *undutiful Testaments*, *undutiful Donations* and *Dowries*, of the *Demand* of *Inheritance*, of the real *Action* of *Services*, of the *Law Aquila*, of *mix'd Actions*, of *Actions* for *Crimes* done by *Slaves*, of the *Action ad exhibendum*, of *Gaming*, of *Burying Places* and *Funeral Expenses*.

with the *Explanation* of *Persons* from the *Loan* and *other Causes*; *tions*, and *Actions*, with their *and other Persons* bound by *nominal* or *Written Evidence*, of *Contract* by *Pledge*, and the *v'd* from the *Senatus Consulta*; of *Compensation*, *Usury*, *Buying* and *Selling*, *Permutation*,

*pousals*, *Donations* in *Contem-  
pt* *Marriages*, *W mens Portions*, of *recovery* of the *Dowry*; of the *is join'd* in *Wedlock*; of *Estates* due from *Fathers* to their *their Fathers*; of *Concubines*; *ays* of making them *Legiti-  
f* *Testamentary*, *Legal* or *Da-  
tive Tutorships*; of those who have a *Power* to appoint, or be appointed *Tutors*; of the *Administration* of *Tutors*, and the *Action* arising thereon, as well against *Hairs* and *Bondmen*: Then it shews after w *Office* of a *Tutor* ceases; and lastly, it open *nation* of *Minors Estates*.

The Sixth Book, first treats of *Slaves*, an *Freemen*, and the *Rights* their *Patrons* have *their Goods*; then it explains at large the *Præ* called *Bonorum Possessio*; after which, it lays *Matter* of *Testaments*, as *Institutions* and *Subs* *ritious* and *Disinheritances*; the *Right* of *deiber*

fusal of an Inheritance; the opening of Wills; of Codicils, of Legacies, and Fiduciary Bequests; and lastly, of Successions to Intestates.

The Seventh Book begins with *Manumissions*, after which it treats of Matters relating to *Prescriptions*; and then of *Sentences* and *Appeals*, of the *Cession* of Estate or Goods, of the *Seizure* of the *Debtor's Goods*, and sale thereof; and lastly, of the *Privileges* belonging to the *Exchequer*, those of *Dowries*, and the *Revocation* of Goods alienated to defraud *Creditors*.

The Eighth Book begins with *Possessory Judgments* in Law, called *Injunctions*; then of *Plodges* and *Pawns*; of *Stipulations*, *Novations* and *Delegations*, of *Payments*, *Acceptations* and *Evictions*, after which, it treats of *Paternal Power*, *Emancipation* of *Children* and their *Ingratitude*; then it explains the *Right Postliminii*; what is meant by *Custom* or *unwritten Law*; *Donations*, their *different Kinds*, and their *Revocation*; and lastly, of taking away the *Penalty of Celibacy*.

The Ninth Book treats of *Criminal Judgments*, and the *Punishment of Crimes*: The First Title explains what relates to *Accusations*, *Publick* or *Private Prisons*; how the *Accusation* drops by the *Death* of the *Accuser* or *Accused*; the following Titles speak of *Criminal Judgments*, which are *Treason*; *Adulteries*, and other unlawful *Copulations*, *Publick* and *Private Violence*, *Ravishing*, *Homicide*; and under this last Head, of the *Correction of Slaves*. The rest of the Crimes which come under *Criminal Judgments*, and are explain'd in this Book, are *Parricide*, *Maleficium*, which comprehends *Poisoning*, *Sacrilege*, *Juggling*, *Sorcery* and *Witchcraft*. The *Robbing of Sepulchres*, making *false Certificates* or *false Wills*, *Extortion*, *Cheating the Publick*, *Sacrilege*, and raising *Sedition* and *Tumult*: Afterwards this Book treats of *Judgments* commended for *Private Offences*; such as *stealing* or *taking away* any thing out of another Man's *Inheritance*, before *Administration* be taken; *Rapine*, *Cozenage*, called *Crimen Follionatus*, *Injury*, and some others; then it speaks of *Abolition* of *Accusations*, which proceed either from the *Accused* or the *Accuser*; and lastly, of the *Explanation of Punishments*, in which Number is the *Confiscation of Goods*.



The Tenth Book treats of the *Rights and Prerogative of the Exchequer*; of *vacant Goods*, and how the same may be united to the *Princes Domain*; of those by whose means the *vacant Goods* are discover'd: After which it speaks of *Treasurers*, *Tributes* levy'd upon the *People*, *Tolls*, *Super-impositions*, *Magistrates* called *Decuriones*, and *Matters* relating to them; of the *Freedom of Citizens*, of the *Inhabitants of Cities*; of the *Domicil*, or *place of Abode*; of *Publick Offices*, and the *Causes* which exempt *Persons* from bearing them; of *Embassadors*; of the different *Kinds of Publick Offices*, and *Functions of Officers*; and of those who were intrusted with the *Civil* *Regulation of Manners*.

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## XX.

Of the Law Pandects.

**I**N the preceding Chapter it is said, that *Justinian* in the Year 528, gave Orders for compiling a *Code*, which should contain the most useful and best *Ordinances* of the Emperors, and that the said Work was publish'd the Year following.

As it was his Intention to make a complear Collection of the Roman Law, he made an Ordinance in the Year 520, *De conceptione Digestorum*, directed to Tribonian; empowering him to chuse a certain Number out of the most eminent Lawyers; who, together with Him, were to make a Collection of the best Decisions of the Ancient Lawyers, and

to reduce them into Fifty Books, in such a Method as there should be no Confusion or Contrariety therein: Sed hū quin-  
*quaginta libris, totum jui antiquum per millesimum & quadrin-*  
*gentesimum penē annum confusum, & à nobis purgatum, quasi*  
*quedam muro Vallatum, nihil extra se habeat.* §. 5. de conceptione  
*Digestorum.* He orders, that the Volume so composed,  
 should be called *Digestorum vel Pandectarum V lumen*; which  
 were Names given by many of the Ancient Lawyers to their  
 Works.

Then he proceeds to forbid all Lawyers making any *Com-  
 mentaries* upon that Volume, lest they should introduce the  
 same Confusion the Multiplicity of the Lawyers Writings,  
 which were very often contradictory to one another, had  
 occasion'd; but he allow'd them to make *Paratitles*, or Sum-  
 maries upon the Titles, to give a general Notion and serve  
 for a Preliminary to the reading of that Work.

Lastly, He orders that every Word should be wrote at full  
 length, and no Notes or Abbreviations made use of, which  
 had caused so much Obscurity and so many Doubts in the  
 Writings of the Ancient Lawyers.

In pursuance of this Ordinance, *Tribonian* made choice of  
 Sixteen able Lawyers, who are nam'd in the last *Confirmati-*  
*on* of the Digest: They all apply'd themselves to take out of  
 that Infinite Multitude of Volumes, which contained the  
 Writings of the Ancient Lawyers, such *Decisions* as in their  
 Opinions were the most Judicious and agreeable to Equity.

The Labours of these Great Men were crown'd with  
 Success; for in a very short time they finish'd the Work,  
 notwithstanding it had been often before in vain attempted.

*Suetonius*, in the Life of *Julius Caesar*, and *Cicero* in his  
 Book de *Oratore*, report, that *Julius Caesar* and *Pompey* had a  
 Design to reduce the Roman Law into a Method; which might  
 have been done then with much more ease, considering  
 the vast Number of Writings upon the Law, under the Em-  
 perors, down to *Justinian's* Time.

But the Emperor *Constantine*  
 did, but it proved abortive;  
 and the Honour of so great a  
 and Ability.

This excellent Collection of the *Writings* of the Ancient *Lawyers*, made by his Order, was not begun till 530; and was finish'd the Sixteenth of December 533: So that it was but Three Years in making; at the End of which, it was publish'd under the Emperor's Name and Authority, as may be seen by those *Ordinances* made for the Confirmation of this Work, to which he gave the Name of *Digests* or *Pandects*.

It was call'd the *Digest*, that is to say, *A Methodical Compilation*; and it had the Name of *Pandects*, as containing *Decisions* upon most of the Questions that can arise in the Law: In short, *in Greek*, is *Omne*, and *in Latin*, *completter*; so that *Pandecta* signifies a *comprehensive Collection*.

As to the *Authority* of *Tribonian* and the rest of the *Law*, it is very astonishing, and seem'd to be the chief fault to be found with it: but there was some reason to blame it, for so much Precipitation the Emperor was intrusted with; in which he was not to be blamed, as the Emperor had al- together neglected thereof. Nor was he over deliberately the vast *Writings* of the *Lawyers* before, many things in the *Digest* are Uncertain and contradict- ory, as affirm'd the contrary, 'tis the *Digest* which contradict otherwise to be reconcil'd, than the *Decisions* of the ancient *Dissention* *jurists*.

There are also many *Interpretations* which have been falsify'd by *Tribonian*, *Que manum Triboniani passe sunt*, in order to accommodate them to the *New Law*. Nay, some are of his own making, with a Design to pass them upon the World for Ancient ones; concerning which, *Cujacius* uses these Words, *In fragmentis Pandectarum constat ingentia Tribonianum admisisse flagitia, detorta saepe, exempli gratia* *in sententiam Justiniani*.

It must not however be ima- gined that all the *Body* of the *Civil Law* are of his making: for many *Places* have been alter'd by others, and many of those employ'd in copying

But be that as it will, it may be truly said, this Work is a Master-piece, exceeding all Commendation. Nor was it properly the Work of *Fifty* or a *Hundred*, but near *Six Hundred Years*; being compos'd of the *Writings* of the most Learned Men that had lived from the Times of the first *Roman* Emperors, to the Year 1282 of *Rome*; which was the Year of Grace 530, when it was first begun.

The *Style* of it is the finest that possibly can be, Elegant and Concise; all the Principles of *Law*, upon all kind of Matters are well establish'd; and the greatest part of the Resolutions are so exact, and at the same time so just, that it is impossible for the Mind of Man to go farther.

If the perusal of the *Digest* occasions so much Surprize and Pains, to those who are not yet in a Condition to understand it; what a Pleasure must it be to such as by their Study and Application, have made themselves able to comprehend and admire the Wise and Learned *Decisions* that are contain'd therein? The Advantage they reap, creates in them a particular Veneration for the Memory of those Great Men who were the Authors of it; and engages them insensibly to make it the chief Object of their Study, being perswaded, and with good Reason, that of all the Works produc'd by the Wit of Man, none can enter into Comparison with this.

Altho' the *Code* has its Merits, and contains abundance of excellent *Laws*, it is very far from being equal to the *Digest*: I have already taken notice that some of the *Laws* in the *Code* were made at *Constantinople*, where the *Latin* Tongue was not in Perfection; but there is a more general Reason to be given for the Inequality between the *Laws* of the *Code* and those of the *Digest*; which is, the different Characters and Employments of the *Authors* of both.

The *Laws* of the *Digest* are nothing else but the Meditations of *Lawyers*, who having no other Business to interrupt their Study, were greater Masters both of its Spirit and Language; and therefore, it is no Wonder if their *Decisions* comprehended much in a few Words, but very clear and decisive; and that the Nobleness and Shortness of their *Style*, was suitable to the Elevation and Exactness of their Thoughts: For being wholly taken up with the Love of *Justice*, they had no other View but the *Publick Good*, and the Desire of giving substantial Marks of their Learning;

so that their *Decisions* were neither ground'd upon nor govern'd by the *Favour* of Great Men, or an immoderate Desire of *Riches*, but by *Right Reason* and *Equity*.

On the contrar<sup>y</sup>, the *Laws* of the *Code* are often obscure, and contain but little in abundance of Words; because the greatest part of them were made by *Secretaries* or *Chancellors* to the Emperors; whole Heads being full of *State Affairs*, minded little else but to please their *Masters*, and advance the Interest of the *Exchequer*: So that being often bias'd by *Favour*, or their own *Interest*, their *Decisions* were not always agreeable to *Justice*.

But if the *Laws* of the *Code* are for this reason much inferior to the *Collection* of the *Imperial Edicts*, which is more methodical, that it is also on that account much inferior to the *Collection* of the *Writings* of the *Antient Lawyers*.

For the *Compilers* of the *Digest* follow'd at least the manner in which the *Antient Lawyers* were directed by many Learned Men: I am not so bold, I may say, it is without doubt, as they can justly be reproach'd with, for the Performance.

But this *Work*, containing only the *Decisions* of the *Antient Lawyers*, has been of very little use to the *Modern Lawyers*; and that it were to be of more use, it must come to our Hands in the *Original*, rather, because there are many *Corruptions* in the *Copy*, for want of having been carefully examin'd from whence they were taken.

For this Reason, some have propos'd *Justus* of suppressing the *Twelve Tables* and *Writings* of the *Antient Lawyers*; others say, that *Tribonian* enclosing all the *Roman Law* into the *Fifty Book* confin'd it within too narrow a Compass.

To this it is answer'd, that if the *Law* has been follow'd with some Inconveniences the *Law* has thereby receiv'd, a new *Table*: Besides, 'tis not certain whether the *Loss* of those *Books* to *Justinian* sufficient to believe, they were lost in the *Times*, the *IncurSIONS* of the *Barbarians* which could neither be foreseen:

over, the Choice which had been made of the best of these *Writings*, and which are plac'd in Order in the *Digest*, may very well compensate for their Loss; which, all things consider'd, is not so much to be lamented, in regard of the great Confusion they had introduc'd.

The Truth is, that before the Publication of the *Digest*, the *Roman Law* was like a great Sea, without any Port of Safety; it was dispers'd in so many Volumes, that the Life of the most Laborious Person, would hardly suffice to read them over. Besides, as they were the Works of particular Men, they had no absolute Authority; and as they contain'd many contradictory *Decisions*, all the use they were of, was to occasion Doubts, and keep Men in suspense about Opinions they were willing to embrace.

But the Case is far otherwise with respect to the *Digest*, which comprehends the whole Matter of the *Law*, reduc'd into good Order, and compos'd of the best Part of all those *Writings*: And as they are fortify'd by *Imperial Authority*, all its *Decisions* are so many *Laws*, which have a Right of fixing the Judgment of those who make it their Study. After this, I cannot conceive the Loss of so many Books, which by the Publication of the *Digest* are become utterly useless, is so much to be regretted.

*Hotoman* blames *Tribonian* and his Fellow-Labourers, for not giving those *Lawyers* a place in the *Digest*, who flourish'd in the Time of the *Republick*; and confining themselves only to those who liv'd under the Emperors.

But this Reproach, upon the least Reflection, falls of it self: For it was not *Justinian's* Design to revive the superannuated *Law* of the *Roman People*, but to methodize and reform the *Law* in use in his own Time: Besides, whatever Respect *Hotoman* may pretend for those Ancient *Lawyers*, it is certain they were too much addicted to Formalities and Punctilio's upon Words and Syllables: Besides, the *Lawyers* who succeeded them, took out of their *Writings* whatever they thought best; and made it useful to themselves, by giving it a shorter and more elegant Turn.

In short, some Commentators have affirm'd, that the *Digest* is not in good Order; but others say, it could not be more Methodically dispos'd, than by ranging the several Matters in the Order observ'd by *Salvius Julianus*, in his Compilation of the *Perpetual Edict*.

Cujacius speaks of it thus, in his *Paratitles* to the Title *Mandati*; "Every thing therein is rang'd with wonderful Art, not so much by the Skill of *Tribonian*, as that of *Julianus Hermogenianus*, and other Learned Men his Predecessors, whose Steps he follow'd: Those who are desirous of another Method, know not what they say, and are either Malicious, or ignorant of the Science of the Digest.

We have several Editions of the *Pandects*, that disagree in certain Places: The First is the *Vulgar*, which the Ancient Doctors made use of after *Jumerius*. The Second is that of *Holloander*, commonly called the *Novie* Edition; which he made from the Books of *Bolequinus* and *Politianus*. The Third is that after the *Original*, which the *Pisani* had first, as do of the *Florentines*, where in, that this last is the best; the Original, written intirely therefore, to decide all Passage, recourse ought to

be to the Emperor into *Fifty Books*; the first divided into *Laws*, and *Parts*; the First is called *the Law*, the rest are

laying down the general Principles of the different Kinds thereof; of *Action of Persons* and that of *Magistrates*; and lastly of *Magistrates*;

Account of *Magistrates*, and their jurisdiction; how brought into Judgment; and how it often Persons agree after an *Action* is common of the latter part of this Book, is *Covenants*.

The Third Book explains in the first Persons are that are allow'd to sue in Law such as are, *Infamous* are not admitted so Title treats of *Infamous Persons*: The those whose Ministry such as go to Law use of, as *Advocates*, *Practitors*, *Syndicks*, w stain from *Calumny*.

The Fourth explains the different Causes of *Restitution*; and because it often happens that such as have *Disputes*, are willing to avoid the Trouble of a *Law-Suit*. The next Subject it treats of, is *Compromises* and *Arbitrations*; after which, it speaks of *Inn-keepers*, and others into whose Custody we leave any thing.

The Fifth, after having spoken of *Judgments*, explains who ought to give an *Assignation*; then it treats of the *Demand* of *Inheritance*, and of the *Complaint* against an *undutiful Testament*.

The Sixth treats of *Real Actions*, by which Private Persons recover their own; which *Actions* may be *Civil* and *Direct*, or *Prætorian* or *useful*.

The Seventh is of *Personal Services*.

The Eighth treats of *Real Services*, both in *City* and *Country*.

The Ninth speaks of *Personal Actions*, which are in Imitation of the *Real*; as *Actions* for a Fault or Crime committed by a *Slave*, the *Action* of the *Law Aquilia*, and upon Occasion of this last, at the End of the Book, of the *Action* against such as throw out any thing into a *High-way*, by which any one is wounded or *damag'd*; and of the *Action* against such as hang any thing out of their *Window*, which may happen to damage such as pass by.

The Tenth Book treats of *mix'd Actions*; such as the *Action* of *Bounding* and *Buting*, the *Action* of *Partition* of an *Inheritance* or other particular Thing: After which, it treats of the *Action* called *Ad exhibendum*, which is preparatory to the *Real Action* above-mention'd.

The Eleventh Book speaks of *Interrogatories* upon *Facts* and *Articles*; after that, of such Matters as are to be heard before the same *Judge*: Then it treats of the *Slave* that is corrupted, or runs from his *Master*, or such as play at *Dice*, or such as *measure Land* and make a *false Report* of the *Quantity*; and last y, of *Burials* and *Funeral Expences*.

The Twelfth Book explains those *Personal Actions* by which it is concluded, that the *Defendant* shall be oblig'd to transfer the *Demesne* or *Inheritance* of any thing, such as the *Action* for a *Loan*, and some others, which go by the Name of *Condictio*, in its proper Signification.



The Thirteenth Book speaks also of some of these *Aliens*; and then of a Thing *lent*, and of the Action of *Pawning*.

The Fourteenth and Fifteenth Books, treat of Actions arising from *Contracts* by which we are bound, altho' they were made by other Persons; and lastly, of the *Senatus-Consultum Macedonianum*.

The *Senatus-Consultum Velleianum*, Compensation, and the Action of Deposites, are the Subject of the Sixteenth.

The Seventeenth treats of the *Mandate*, and of *Society*.

The Eighteenth explains the Meaning of the Contract of *Sale*, the Covenants that are generally us'd therein; the Recision of this kind of Contract, and for what Reasons one may go from it; and upon whom the Gain or the Loss of the Thing sold is to fall.

The Nineteenth, in the First Part treats of Actions of *Barter*, and *Sale*, of Actions of *Hiring*, of the Action called *Emptio*, of *Permutation*, of the Action called *Prescriptio*, proceeding from indeterminate Contracts.

The Twentieth Book treats of *Pledges* and *Pawns*, of the preference of *Creditors*, and the Subrogation of the *Rights* of the *Creditor*, of the Distriction or Sale of Things engag'd or pawn'd, and the Extinction of the *Pledge* or *Pawn*.

The Twenty first contains an Explanation of the *Edile's Edict*, concerning the Sale of *Slaves* and *Beasts*; then it treats of *Refusum*, *Mortuum*, and the *Exception* of the Thing bought and sold.

The First Part of the Twenty second, treats of *Usuries*, *Quasi-Deposites*, *Successories* to Things; then of *Proofs* and *Presumptions*, and of Ignorance of the *Law* or *Fact*.

The Twenty third is upon *Esponsals*, *Marriage-Dowry*, *Agreements* made upon that Subject, and *Lands* given in *Dowry*.

The Twenty fourth goes upon *Donations* between Husband and Wife, *Divorces*, and recovery of the *Marriage-Portion*.

The Twenty fifth treats of *Expences* laid out upon the *Dowry*; of Actions for the Recovery of Things carry'd away by a *Wife* or other Person, against whom there is no Action of *Theft*; of the Obligation to acknowledge *Children*, and provide for their Maintenance; and lastly, of *Concubines*.

The Twenty sixth and the Twenty seventh Books, treat wholly of *Tutorships* and *Curatorships*; of the Actions which result from *Tutorships*, of *Excuses of Tutors*, and the Alienation of Goods belonging to *Pupils* and *Minors*.

The Twenty eighth Book is employ'd on the Subject of *Testaments*, the Institution and Disinheriting of *Children*, of the Institution of an *Heir*, of *Substitutions*, of Conditions requir'd in *Institutions*, and of the Right of *Deliberating*.

The Twenty ninth Book treats of the *Military Testament*, of the Acquisition of an *Inheritance*, opening of *Wills*, &c. and of *Codicils*.

The Thirtieth, Thirty first, and Thirty second, treat of *Legacies* and *Fiduciary Bequests* in general.

The Thirty third, and likewise the first Titles of the Thirty fourth, treat of particular *Legacies*; after which follows the *Catonian Regulation*, concerning *Legacies* reputed never to have been made, and those that are taken away from unworthy Persons.

The Thirty fifth speaks of *Legacies* left upon Condition, and of the *Law Falcidia*.

The Thirty sixth Explains the *Senatus-Consultum Trebellianum*, made for the sake of *Fiduciary Bequests*; then it treats of the Time when *Legacies* and *Fiduciary Bequests* become due, and of the *Caution* the Heir is oblig'd to give for the Security of *Legacies* and *Fiduciary Bequests* left upon Condition; and of the *Seizure* thereof, for want of such *Caution*.

The Thirty seventh Book, speaks first of *universal Succession* to a deceased Person's Estate, to which any one is called by the *Prætor*, and goes by the Name of *Bonorum possessio*; after which it treats of the Collation of Goods and *Dowry*, and the Right of *Patronage*.

The Thirty eighth Book begins with the Explanation of the Services, due from *Freed Men* to their *Patrons*; then it treats of *Matters* which relate to the Succession of *Freed Men*; after that, of the Succession of *Intestates*, appointed by the *Prætor*; and lastly, of *Domestick* and *Legal Heirs*, and of the *Senatus-Consulta Tertullianum* and *Orfitianum*.

The Thirty ninth Book, first explains the Means which the *Law* or the *Prætor* furnishes to prevent any ones receiving Damage, where a *Personal*, *Real*, or *Mix'd Action* will not lye; these means are, Complaint of a New Work, *Cautio Damni*

*Damni infecti*, and the Action *De Aqua pluvia arcenda*; after which, it ends with the Explanation of *Donations*, that take Effect during the Life of the *Donor*; and such as are made in View of *Death*.

The Fortieth Book relates only to *Manumissions*, by which *Slaves* were set at Liberty.

The Forty first treats of the different Ways by which the Property of Things are acquir'd, according to the Law of Nations, and of the Acquisition of *Possession*; then of *Prescriptions*; and lastly, of *Lawful Causes* which authorize a *Possession*, and consequently make it capable of *Prescription*.

The Forty second treats in the first Place of Things adjudg'd, or determin'd, by Interlocutory Sentences, of Confessions, and Judgments, of the Estimation of Goods, of the Causes of Actions, and of the Privileges of Creditors; then of the Office of a *Curator* appointed for the Administration of Goods, and of the Revocation of Acts done in Error or Ignorance.

The Forty third treats of *Injunctions* and *Possessory Actions*.

The Forty fourth, of *Exceptions* and *Defences*, and of the *Defendants* and *Plaintiffs*.

The Forty fifth, of *Procurators*.

The Forty sixth, of *Novations* and *Delegations* of Debts, and of *Acceptilations*, *Stipulations*, and *Verbal Contracts*.

The Forty seventh, of *Private Faults* or *Offences*.

The Forty eighth begins with *Publick Judgments*, then follow *Accusations*, *Interrogations*, *Prisons*, and all *Publick Offences*; from thence it passes to the *Senatus-Consultum Turpillianum*, and Abolition of *Crimes*; and lastly, it treats of the *Torture*, *Punishments*, *Confiscation*, *Relegation*, *Deportation*, and of the Bodies of *Malefactors* executed.

The Forty ninth treats of *Appeals*, and Matters relating thereunto; after which, it gives an Account of the Rights of the *Exchequer*; of Matters relating to *Captives*, *Military Discipline*, *Soldiers* and *Veterans*.

The Fiftieth Book treats of the Rights of *Cities* and *Citizens*, of *Magistrates* and their *Children*; of *Publick Offices*, and the Causes which exempt Persons from them. And also of the Right of *Immunity*: After which, it speaks of *Deputies* and *Embassadors*, of the Administration of Things

belonging to *Cities*; of *Publick Works, Fairs, Pollicitations*. Judgments given in extraordinary Cases by *Magistrates*; of *Brokers and Factors*, of Taxes laid upon the *Provinces*; and lastly, it ends with the Interpretation and Signification of the *Terms*, and with the Rules of the *Law*.

Besides this Distribution of the *Digest* into Fifty Books, of which we have here given an Account, this Work was again divided into *Seven Parts*; but the Reason that induc'd the Emperor to make this Division is not known: Some pretend it was done to separate the different Matters, and take in all that related to one Subject into one Part, consisting of several Books. Others attribute it to the Superstitious Respect of the Ancients to the Number *Seven*, as the most perfect; [Vide *Macrobius in somnium scripionis*.] However that be, the First Part, containing the *Commencement of Suits*, makes up the first Four Books.

The Second begins at the Fifth, and ends at the Twelfth.

The Third goes from the Twelfth to the Twentieth.

The Fourth consists of Eight Books, and ends at the Twenty eighth.

The Fifth begins at the Twenty Eighth, and ends at the Thirty seventh.

The Sixth takes in Eight Books, ending at the Forty fifth.

The Seventh is compos'd of the Six last.

There has been another Division of this *Work*, made since the Emperor *Justinian's* Time, into the *Old Digest*, the *Infortiate Digest*, and *New Digest*.

According to this, the *Ancient Digest* goes as far as the Third Title of the Twenty fourth Book, where the *Infortiate* begins, and ends at the Thirty ninth Book; and the *New Digest* comprehends the Twelve last.

This Division had not the Emperor's Sanction, is imperfect, and without any Foundation: Nevertheless, it has been observ'd in those Editions of the *Digest*, which have Glosses. This is thought to be owing to some Writers, who not being able to write the whole Work in one Volume, divided it into Three, without care to make an exact Division, according to the Subject Matters and Titles; and the Names they have given them, would make

one believe, that they were not compos'd and publish'd all at the same Time; and contain'd the *Answers* of the *Lawyers*, with regard to the Order of the Matter, but not according to the Order of Time.

## C H A P. XXI.

Of JUSTINIAN'S *Institutes*.

WHILE the *Digest* was composing, the Emperor laid his Command upon *Tribonian*, *Theophilus* and *Dorotheus*, to make an Abridgement of the first Principles of the Law, for the Benefit of young Students, who should have a Mind to apply themselves to that Science.

These Three Persons were so diligent, that in the Year 528. the Collection was publish'd, under the Title of *Institutes*. It came out about a Month before the *Digest*; the *Institutes* being publish'd the Twenty first of November, 528; and the *Digest*, not till the Sixteenth of December following; which has given occasion to *Zoëzius* and some other Doctors, to be of Opinion, that the Law of the *Digest*, being publish'd after that of the *Institutes*, ought always to prevail whenever any contrariety appear'd.

The *Institutes* then, which are only the first *Elements* of the Roman Law, were compos'd at the Command of the Emperor JUSTINIAN, by *Tribonian*, *Dorotheus*, and *Theophilus*, who took them from the *Writings* of the Ancient *Lawyers*; and chiefly from the *Institutes* and other *Writings* of *Gaius*; especially from his Books called *Aureorum*, that is, *Of Important Matters*.

They had the Force of Law, given them by the same Emperor's *Constitution*, which is plac'd at the Head of the Work by way of Preface.

Why these first *Elements* of Law are called *Institutiones*, is obvious enough: I have translated it by the Word *Institutes*, because the French Word *Institut's*, is not expressive enough of the Signification of the *Latin*; the Reason whereof is, that by *Institutes* is naturally understood

the first Principles of a Science : So that as the *Latin Word Instituta*, which signifies the *Customs or Laws* of a Country, is not us'd in this Sence ; so the *French Word Instituts*, is never made use of to signify the first Principles of a Science, which are not to be express'd but by the Word *Institutes*, or *Institutions*.

This Work, as well as the *Digest*, is a Master-piece in its kind, which cannot be too often read, or too diligently study'd, by those who have already made some Progress in the Law: Nay, even such as are far advanc'd in it, always reap great Advantage by the perusal thereof, because it contains an Abridgment of the first Principles of that vast and sublime Science. Therefore it is a common Saying, that *He who is Master of the Institutes, bids fair to be a great Lawyer*. There is another thing, which is, That as it is impossible to retain all one reads, so 'tis a very great Advantage to one that Studies the Law, to have so precise and exact an Abridgment thereof. When once one understands it thoroughly, 'tis no hard Matter to regain it ; provided it be carefully read over from time to time, which the ablest Judges and best Lawyers do, being perfectly sensible of the use it is to them, to be conversant in the Principles of the *Roman Law*, which, as we shall shew hereafter, are the Basis and Foundation of ours.

The *Institutes* are divided into *Four Books*, each Book into several *Titles*, and every Title into several *Parts* ; the First is called *Principium*, as it is the Beginning of the Title, and those which follow, *Paragraphs*.

The First Book of the *Institutes* has Twenty six Titles, the Second Twenty five, the Third Thirty, and the Fourth Eighteen. Before I enter upon the Order of the *Titles* of this Work, it is to be observ'd, that the Law has Three Objects, PERSONS, THINGS and ACTIONS, which make up the Subject Matter of the Four Books of the *Institutes*. The first Book treats of the Right of *Persons* ; the Second, Third, and Five first Titles of the Fourth, of *Things* ; and *Actions* are the Subject treated of, from the Sixth Title of the Fourth Book, to the End.

The First Book treats of PERSONS, but it is from the Third Title only ; for the Two first, which are by way of Preliminaries, explain what *Justice, Law, and Right* are ; after which, the meaning of the *Right or State of Persons*,

is explain'd under Two Divisions, which make up the remaining Part of the First Book.

According to the chief Division of Persons, treated of from the Third Title of the first Book to the Eighth; Men are either *Free* or *Slaves*.

The Condition of all *Slaves* is the same, but it is not so with *Freemen*; whereof some are Free by *Birth*, others are made so by *Emancipation*, which is null, when contrary to *Law*.

The Second Division of Persons, begins at the Eighth Title of the First Book, and is explain'd in the following Titles of the same. It is of Persons independent; and of those who are subject to the Power of another, that is, a *Master* or a *Father*.

The first, therefore, first speaks of the Power of *Masters* over their *Slaves*, and of *Fathers* over their *Children*; after which, he shows the manner of acquiring Paternal Power, &c. by *Marriage*, *Legitimation*, and *Adoption*: And then how that Power may be dissolv'd.

From the Thirtieth Title, to the End of the First Book, He speaks of Persons that are Independent, I mean, *Pupils*, or such as have *Tutors*; of *Minors*, or such as have *Curators* appointed them; and lastly, of Persons that are of Age, subject to no body, and Masters of their own Rights: Wherein, the Remainder of this Book turns upon *Tutor* and *Curatorship*.

The *Emancipator* next explains Three things which concern *Tutorship*; the First is the Definition or Division thereof into *Testamentary*, *Legal*, and *Dative*; the Second, is the Effect of the *Tutorship*, which consists in putting the *Pupil* under the Care of his *Tutor*; so that he may do nothing that will bind him, unless the Authority of his *Tutor* intervenes at the very Instant when the Act is perform'd by the *Pupil*: The Third thing concerns the manner how *Tutorships* end or expire.

After this, in the Twenty third Title, He treats of Matters relating to *Curators*; and in the three last of this Book, speaks of three things common to *Tutors* and *Curators*; which are the Security they are oblig'd to give, to indemnify *Pupils* and *Minors*; the Lawful Causes exempting them from being *Tutors* or *Curators*; and lastly, those for which they may be depriv'd of their Offices.

From *Persons*, the Emperor passes to *Things*; of which he treats, from the First Title of the Second Book, to the Sixth Title in the Fourth.

He explains three Points concerning *Things*; their *Divisions*, the ways of *acquiring* them, and *Obligations* that are the Means by which *Things* become due to us.

As to the *Divisions*, he makes them principally Two; by the first, *Things* are either in *Commerce* or out of *Commerce*; by the second, they are *Corporeal* or *Incorporeal*.

In Relation to the Second, we shall observe, that the Property of *Things* is acquir'd either by the *Law of Nations*, or the *Civil Law*.

The ways of acquiring introduc'd by the *Law of Nations*, are explain'd in the First Title of the Second Book.

The Second Title explains the Second *Division* of things; which are either *Corporeal* or *Incorporeal*; upon which, the Emperor takes occasion to treat of *Real* and *Personal Services*, as being *Incorporeal Things*.

From thence he passes to the Ways of *acquiring*, introduc'd by the *Civil Law*. Whereupon we are to observe, that the Property of *Things*, according to the *Civil Law*, is acquir'd either by *Particular* or *Universal Title*.

The Means of acquiring in the *Civil Law* by *Particular Title*, are *Adjudication*, *Usucaption*, or *Prescription*; and the Express Disposition of the *Law*, which transfers the full Right of a Thing, as a *Donation* in prospect of Death, resembling a *Legacy*, the Property whereof passes to the *Donee* without Delivery. Then the Emperor in the Sixth Title speaks of *Usucaption*, or just *Usurpation*, and the Conditions which it requires; and in the Seventh Title, of *Donations*.

After that, He goes upon *Persons* who have the Power of *Alienation*, and such by whose Means another may acquire any thing.

The Ways of acquiring the Property of *Things*, according to the *Civil Law*, by *Universal Title*, are *Inheritance*, the *Prætorian Succession*, called *Bonorum Possessio*, Acquisition by *Adrogation*, *Adjudication* of the Goods of a deceased Person, in Favour of Liberty bestow'd upon *Slaves*; Succession by *Publick* and *Open Sales*, and the Succession called *Miserable*; these Six Ways are explain'd from the Tenth Title of the Second Book, to the Fourteenth of the Third.



As every Succession is either *Testamentary* or *Legal*, and the *Legal* takes place only in defect of the *Testamentary*: The Matter of *Testaments* is explain'd from the tenth Title of the Second Book to the End thereof, and may be reduc'd to Three principal Articles,

The First relates to the Four Conditions requir'd to make a *Testament* valid; whereof the first is, that it be made in the Form prescrib'd by the *Laws*; from which, however, the *Military Testament* is exempt: Secondly, the *Testator* must be intitled to the Power of making a *Will*; Thirdly, He must either Institute or Disinherit those Children that are under his Power; Fourthly, He must institute an *Heir*; for without that, there can be no *Testament*: Now the Institution may be to the first, second, or third Degree: That in the First, is called *proper Institution*; that in the Second or other Degree, is termed *substitution*; and it is divided into *Voluntary, Legitary, and Fideicommissary*.

The Second Article shews, how many Ways a *Testament* duly made, may afterwards become null; which is the Subject-Matter of the Seventeenth and Eighteenth Titles of the Second Book.

The Third shews how a *Testament* made in the Form prescrib'd by Law, and not invalidated may have its Execution; which is done by the *Heir's* entering to the Succession: Now this may be done several ways, according to the different Qualities of the *Heir*; for some are *necessary Heirs*, others are both *necessary* and *sui Heredes*, and others *extraneous Heirs*.

The coming to Inheritance, makes the *Heir* liable not only to the Debts of the *Testator*, but to the Deliverance of *Legacies* and *Fiduciary Bequests*; which are therefore the Subject of the Second Book, from the Twentieth Title to the End.

In the first Place, the Emperor explains the Meaning of a *Legacy*; what Actions a *Legatee* may have on Account of the *Legacy* left him; what things may be dispos'd of by *Legacy*, and to whom: Then he shews how *Legacies* are taken away or transferr'd; and lastly, what Diminution they receive by the *Law Falcidia*.

As to *Fiduciary Bequests*, He treats of them in the Twenty third and Twenty fourth Titles: In the First of these, He explains the Nature of the universal *Fiduciary Bequest*, called *Inheritance by Fiduciary Bequest*; and in the other, He explains what a particular *Fiduciary Bequest* is: After which, in the last Title of the Book, He speaks of *Codicils*.

*Testamentary Successions*, which take place before all others, being explain'd in the Fifteen last Titles of the foregoing Book; the first Titles of the third Book, treat of *Legal Successions*, which are admitted only in default of *Testamentary*.

According to the Ancient Law, there were but two kinds of *Legal Heirs*: For by the Disposition of the Law of the Twelve Tables, the *Legal*, or Succession to *Intestates*, fell only to two sorts of *Heirs*; which were, first *Heredes sui*, or *Domestick Heirs*, and in default of them, to the next of Kin by the *Father*; which makes the Subject Matter of the two first Titles of this Book.

In process of time, there came to be another *Legal Succession*, appointed by the *Senatus Consultum Tertullianum* and *Orphitianum*, of which mention is made in the Third and Fourth Titles.

The Fifth treats of the Succession of *Intestates*, to which the *Cognati* were called by the *Prætorian Law*; every one according to the Degree of Parentage: This leads the Emperor to speak of the Degrees of Kindred in the Sixth Title; after which, He considers those which were excluded from this *Prætorian Succession*, because they were no otherwise ally'd to the deceas'd, than by a servile Relation.

The Succession of *Freemen*, is the Subject of the Seventh Title; and the *Assignment of Freemen*, that of the Eighth.

After the Emperor has explain'd the Matter of *Succession*, which, according to the *Civil Law*, is the first way of acquiring the Property of Things by *Universal Title*, He proceeds to the other Five; which are the *Prætorian Succession*, called *Bonorum Possessio*, Acquisition by *Adrogation*, *Adjudication* of the Goods of a deceas'd Person, in favour of Liberty conferr'd upon *Slaves*, the Succession which accrues by *Publick Sales*, and that called *Miserable*. All which are treated of, from the Ninth to the Fourteenth Title.

Then

Then he comes to the last Point relating to *Things*, viz. OBLIGATIONS; which are the Means whereby Things become due to us: First he shews what an *Obligation* is, and the Causes that produce a *mix'd Obligation*; that is, partly Natural and partly Civil; as a *Contract*, *Quasi-Contract*, *Crime* or *Offence*.

As touching *Contracts*, some are called *Nominate*; that is, distinguish'd by certain proper Names, authoriz'd by the *Law*, which allows them a particular Action; others are called *Innominate Contracts*, having no special Name or particular Designation, and are form'd only by one of the Parties, without the Assent.

*Nominate Contracts* are formal. Four ways, by *delivery* of the Thing, *by deed* *solely* by *solemn* and *formal Words*, by *Writing*, and by the *sole Consent* of the Contractors.

*Nominate Contracts* made by the *Delivery* of any thing, are the *Loan*, *Deposit* and *Pawn*, which are treated of in the following Title.

*Contracts* made by *Writing*, are called *Stipulations*; the general Principles of which, are first unravell'd, in order to come to the five Divisions of that kind of *Contract*.

The First of the *Stipulation* made between the Person who *demands*, and *him that Promises*; and of that made by the *second* that *stipulate* or *promise*.

The Second is of the *Stipulation* made by *Free Persons* or *Slaves*.

The Third of *Stipulations* that are called *Judicial*, *Prætorian*, *Common* or *Conventional*.

The Fourth of *Stipulations* called *Useful*, or good in *Law*; and of *Stipulations* that are *Unuseful*.

The Fifth is of *Principal* and *Accessory Stipulations*, called *Sureties* or *Cautions*.

The Twenty second Title treats of *Written Contracts*.

The Five following Titles, explain *Contracts* made by the *sole Consent* of the contracting Persons; which are the *Contract* of *Purchase*, of *Hire*, of *Partnership*, and of the *Mandate*.

The Twenty eighth Title treats of *Quasi-Contracts*; the next shews how *Obligations* are to be acquir'd; and the last, after what manner they may be extinguisht.

Having spoken of *Obligations*, which arise from *Contracts* or *Quasi Contracts*, the Emperor proceeds in the Five first *Titles* of the Fourth Book, to treat of *Obligations*, that spring from *Faults* and *Quasi-Faults*.

The rest of the Book, from the Sixth *Title* to the Sixteenth, is employ'd in treating of *Actions*.

It begins with the *Definition* of an *Action*, which is follow'd by several *Divisions*, explain'd in the Sixth *Title*, according to the Chief and Principal of which, *Actions* are either *Real*, *Personal*, or *Mix'd*.

The Second is, of *Actions* deriv'd from the *Civil Law*, and such as have their Foundation in the *Prætorian*.

The Third is, of *Actions* by which the *Plaintiff* only pursues the Right of a thing belonging or due to him, and of those by which the Punishment of the *Offender* is only aimed at; and of such *Actions* by which both are intended.

The Fourth Division, is of *Actions* by which the *Plaintiff* sues for the Single, Double, Treble, or Quadruple Value of the Thing he would recover.

The Fifth is of *Actions* of *Good Faith*, *Strict Law*, and *Arbitrary Actions*.

The Sixth is of *Actions* in which the Total of what is due is sued for, and in which the *Defendant* is either not sued for the whole, or in Consequence of which, he is condemn'd to pay only as far as his Circumstances will allow.

After these Divisions of *Actions* are explain'd in the Sixth *Title*, the Seventh treats of certain *Prætorian Actions* which Men are liable to, and which proceed from *Contracts* made by *Slaves* or *Children* under their Power, or else by such Persons to whom they have committed the Management of their Affairs.

The Eighth *Title* speaks of *Actions* that may be brought against a *Master*, for a Fault done by his *Slave*.

The Ninth, of *Actions* to which the Owner is liable, for the Hurt or Damage done by a Beast.

The tenth, directs what Persons are to be employ'd in carrying on *Law-Suits*.

The Eleventh *Title*, treats of the Security requir'd of the Parties to a Suit, or such as appear for them.

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The twelfth sets forth the Nature of temporary or perpetual Actions, and what Actions the Law affords to or against *Heirs*; what those are which lye in their Favour, and not against them; and lastly, those which are neither allow'd for nor against them.

The thirteenth treats of *Exceptions*, and the Fourteenth of *Replies*.

The Fifteenth of *Injunctions*, or *Actions* to put the Party injur'd into *Possession*.

The Sixteenth declares the *Penalty* of such as commence *Vexatious Suits*.

The Seventeenth prescribes *Rules* to be observ'd by *Judges*, in the several *Suits* brought before them.

And the Eighteenth and last, shews what were the *Roman Publick Judgements*, wherein every one had free Liberty of *proceeding*; and in which the *Penalties* were establish'd by the Law, called *Publicum Publicorum Leges*.

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C H A P. XXII.

*Of the Second Edition of JUSTINIAN'S Code.*

FROM what has been said, it follows, that in 528, the Body of the *Civil Law*, compos'd by *Justinian's Order*, consisted only of the *Institutes*, *Digest* and *Code*; but the *Code* came out afterwards, with some Alterations: Besides, the *Publication of New Constitutions* publish'd by this Emperor, produc'd in process of time, a Fourth Part of that Body of *Law* now in use; of which I shall give an Account in this and the following *Chapter*.

In the Year of *Græc* 529, the Emperor *Justinian* publish'd another *Code*, and suppress'd that which was put out by his command in the Year 528. He was sensible that in the first, there were many *useless Laws*, which decided the same Matter, others contrary to the present *Usage*, and that since the Publication of it, he had been oblig'd to make several *Ordinances*, which it was proper to insert in this Volume: And therefore, thinking it not below his Majesty to

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to correct his own Work, He reform'd the first, and publish'd an Ordinance, *De emendatione Codicis Domini Justiniani. Et secunda ejus editio*; which he directed to the Senate of Constantinople, to receive his New Code; declaring therein his Pleasure, that his last Code should have the Force of Law, and intirely rejecting the former: This last was intitled, *Codex repetita prælectionis*; that is, *Revis'd, Corrected, and Augmented.*

The Additions and Alterations in the *Second Code*, naturally lead me to speak in this Place, of those Two Sects of Lawyers, who began to be taken notice of in the Reign of Augustus; and continu'd till that of the Two Brothers, *Marcus Aurelius*, and *Lucius Verus*.

Altho' this Matter was touch'd upon in the Seventeenth Chapter, I thought it the best way to refer to this Place the particular Explanation thereof, which I shall now give; and the rather, because it discovers the Reasons of the greatest part of the Alterations made by Justinian in his Code.

These Sects were not distinguish'd by any particular Name, till long after they had carry'd their Disputes to a great length: Thus one was call'd the Sect of the *Sabinians*, from *Sabinus*, who was a Favorite of the Emperor *Tiberius*; the other had the Name of the Sect of *Proculians*, from *Proculus*, who liv'd under *Vespasian*. 'Tis held, that *Atteius Capito*, who was extremely attach'd to *Precedents and Old Customs*, was the Head of the *Sabinians*; and that *Labee*, who did not confine himself to Rules, but follow'd the Dictates of Reason and his own Understanding, was the Head of the *Proculian* Sect.

Thus the *Sabinians* chose rather to stick to the Decision of the Law, than any Equitable Interpretation that might be drawn from it; and gave their *Answers* and *Decisions* according to the Rules and Principles they had learnt.

The *Proculians*, on the other Hand, without sticking close to the Rules and Principles of the Law, carefully examin'd all Questions propos'd to them; and being rather inclin'd to follow natural Equity, than the rigorous Decision of the Law, ground'd their *Answers* upon their own Reason and natural Equity; thereby endeavouring to establish abundance of *New Principles*, contrary to the Rules of the *Ancient Law*.

However, this was not so general, but that it frequently happen'd otherwise; and *Justinian*, affirming the Opinion of the one, and sometimes of the other Sect, sufficiently demonstrates, both were often agreeable to the Rules of Equity: *Atteius Capito*, *Masur*, *Sabinus*, *Cassius Longinus*, *Caelius Sabinus*, *Favolenus Priscus*, *Aburnus Valens*, *Tuscanus*, *Salvius Julianus*, were all of the *Sabinian* Sect.

*Antistius Labeo*, *Nerva* the Father, *Nerva* the Son, *Pegasus*, *Celfus* the Son, and *Neratius* the Elder, were of the Sect of *Proculians*.

These two Sects continu'd till the Reign of the two Brothers, *Marcus Aurelius* and *Lucius Verus*, so that all the Students of the Law, generally follow'd the Principles and Opinions either of the *Sabinians* or *Proculians*. But the Lawyers who flourish'd under these two Emperors, affected neither of these Parties, and some who had gone before them had done the same, following their own Judgments, without any regard to either of the two Sects.

These Lawyers, who read the Writings of the *Sabinians* and *Proculians*, without prejudice to either, agreed with the Opinions of either Side, as they seem'd to carry in them more Reason and Justice; nay, sometimes they endeavour'd by an equal Temperance to avoid the two Extremities, into which the two Sects thro' too great Obstinacy, had fallen; and we call them the Name of *Priscians*, which comes from *Prisus*, to Divide. Because they made use of the Opinions of both Sides, in order to bring to forth their own.

As neither of these Sects wanted strong Reasons to support their Opinions, it often happen'd, that the Judge being hard upon it to determine between them, apply'd himself to the Emperor for his Decision; and several important have decided Questions, upon which these two Sects had given contrary Opinions: But notwithstanding, there was compil'd so great a number of Cases collected by the two Sects, that while the *Digest* was compiling, the Emperor made several Ordinances, to decide part of them, these being few in number, were call'd *Justinian's Digest Decisions*. And as he thought it proper to insert them in his Code, so he resolv'd at the same time to correct, and retract some *Constitutions* which seem'd unjust, and

ding thereto these Fifty Decisions, and some other *Constitutions*, which were not in his First Code.

This new Edition of the Code, was publish'd in the Year of Christ 524, under the Title of *Codex Justinianus repetita praelectionis*, as is before observ'd; and is the same that is now in use.

As to *Justinian's* Fifty Decisions, they being mix'd with the rest of the *Laws*, 'tis not an easie Matter to distinguish all of them, nor are our Authors agreed upon that Point: [See the *Treatise* written by Merillus upon that Subject.]

But we must not forget that the *Institutes* came out in 529, and consequently before the Code just now mention'd; which is the Reason, that altho' the *Fiduciary Tutorship* of Brothers was abolish'd by the last Law, §. 1. *Cod. de Legit. hered.* there is no notice taken of it in the *Institutes*, under the Title *De Fiduciaria Tutela*; that Law being posterior to them, and not publish'd till 534.

## C H A P. XXIII.

### Of Justinian's latter Constitutions, called Novels.

**D**URING *Justinian's* Life, the Body of the *Civil Law* consisted only of Three Parts, the *Institutes*, *Digest*, and *Code*; but after his Death, the Fourth Part was compos'd out of his *Constitutions*, called *Novels*.

So that this Emperor's *Novels* are his last *Constitutions*, made after the Publication of the Second Code; and which compose the Fourth and last part of the *Civil Law*.

This Emperor then made several *Laws* posterior to his Second Code, at several times, and upon divers Subjects, as Occasion requir'd.

Some Interpreters have thought these *Constitutions* were called *Novels*, as introducing a New Law, contrary to that of the *Digest* and *Code*: But they have no ground for this Opinion, since all the *Novels* are not repugnant to the *Laws* of those Two Collections; we must say with *Cujacius*, that they were so called, *Quasi Novae Constitutiones*



*Constitutiones* & post *Codicem Justiniani*, repetita prælectionis promulgata. In the same manner, some of the *Constitutions* of the Emperors *Theodosius*, *Valentinianus*, *Marrianus*, *Leo*, *Majoranus* and *Severus*, were also called *Novels*, because they were made after the *Theodosian Code*; in Imitation of which, *Justinian* gave the same Name to certain *Constitutions* by him made, between the Publishing of the *Two Codes*; *L. 1. §. Sed cum Novellæ C. de emendat. Cod. l. Siquis filium in fine C. de inoff. Testam.* And in short, this Name has been given to the *Constitutions* of several Emperors who came after *Justinian*.

As to those made by the Emperors who preceded him, it is to be observ'd, they had not the Authority of *Law*, after the Collection made by his Order; He having in his *Edict* for the Confirmation of the *Digest*, declar'd, that no *Laws* or *Ordinances* which were not comprehended in the Collection published by his Authority, should be of any Force; forbidding all Lawyers to quote or make use of them, and the Judges to have any regard thereto.

Nevertheless, the *Novels* are not altogether useless; for as *Justinian's Law* was chiefly composed of the *Constitutions* taken out of the *Antiquæ Leges*, and the *Novels* of some of *Justinian's* Predecessors, they may be of great service towards understanding the *State* of which *Tribonian* has reported on the *Law*.

In regard to *Justinian's Novels*, it is to be observ'd, that this Emperor after having made his *Code*, which has in it a vast number of *Antient Ordinances*, was oblig'd to make *New Laws*, upon occasion of some *Cases*, not been decided; or to abrogate the *Old ones*, according to the Circumstances of the *Times*: For all *Laws* have their Original in the Publick Advantage, which alters according to the present Variety of Circumstances.

In short, many of these *Novels* were made only to confirm and enforce the *Ancient Laws*, that were become obsolete, by the Alterations to which all Human Affairs are subject.

Thus amongst this Emperor's *Novels*, some were design'd to establish a *New Law*, others to confirm the *Law* whereof the Use was uncertain; and some to correct the *Ancient Law*, or reform the Whole or in Part.

Altho' *Tribonian* was often employ'd in making of the *Novels*, there is room to believe, *Justinian* made use of several other Hands on those Occasions; which is to be perceiv'd, by the Difference of the *Stile* they are writ in: However that be, 'tis certain he reap'd great Advantages from several of those which were of his Composition; and it is believ'd, He very much enrich'd himself by introducing a *New Law* contrary to the *Old*; or by deciding Disputes, upon which Suits had been before commenc'd; which is the Reason that many of the *Novels* are rejected in our *Provinces*, where the *Civil Law* is receiv'd.

All these *Novels* were either directed to *Magistrates, Bishops,*  
or *Citizens of Constantinople*, and were of equal Force and  
Authority; forasmuch as by those directed to *Private Per-*  
*sons*, they are enjoyn'd to have them proclaim'd, and see  
them executed according to their Form and Tenour.

After *Justinian's* Decease, which happen'd in the Year of Christ 566, in the Eighty second of his Age, and Thirty ninth of his Empire, some part of his *Novels*, which were dispers'd here and there, were collected and reduc'd into one Volume, together with Thirteen of his *Edicts*; all which make up the Fourth and last Part of the Body of the *Civil Law*.

The greatest part of these *Novels* were written in *Greek*; because the Seat of the Empire was then at *Constantinople*, where few or none spoke the *Latin Tongue* in Perfection: Yet, some of them were publish'd in *Latin*, and have been taken notice of by *Augustinus*.

There are 100 editions of the *Novels*.

The First, which appeared just after *Justinian's Death*, is a reprint of the Preface, which he made in 1564, on the occasion of the Collection.

Confutius shews that he was a good, and his Translations of the Scriptures are very good. Confutius in his Commentary shews that he was a very good, shews that he was a very good, shews that his Translations of the Scriptures are very good. He allows that many Faults were in the Editions, but imputes them to the Editors, and not to the Translator.