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CODIFICATION AND PRESERVATION
OF THE ROMAN LAW.

A Thesis Presented to the School of Law,
Cornell University for the

DEGREE OF BACHELOR OF LAWS.

by

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1896.

PREFACE.

The object of this thesis is to give a brief resumé of the development of Roman Law, showing the wisdom and learning which were expended in its production, and explaining how the sequence of events made possible the foundation of this great system of jurisprudence. I have endeavored to outline in brief the manner in which the rude customs of a rough stage of society were infused with world-wide principles, evolving higher and higher until they resulted in that magnificent body of equitable doctrines which has been fitted into the laws of almost every nation.

It is my object to point^{out} the reasons why this mass of legal learning was preserved, and the way in which it was accomplished, detailing the method of its codification and its reception by succeeding ages. How the law of a conquered nation itself turned conqueror, is one of

the most interesting phases of Mediaeval History. I can but hope to offer up due homage to the wisdom of these ancient jurists, cultivated in the midst of barbarism, whose peculiar knowledge of government has been an eternal blessing to the human race.

CODIFICATION AND PRESERVATION
OF THE ROMAN LAW.

The revival of the study of Roman Law has been ascribed to the discovery of the Pandects of Amalfi in 1135 A.D., when that city was captured by the Pisans, but there is no evidence for this assertion. I will endeavor to show how it survived the downfall of the Empire, becoming the law of its barbarian conquerors by reason of its world-wide application, and accomplishing results which no other system then could even attempt. I will try to point out how it was preserved through the Dark Ages, how it moulded subsequent jurisprudence, and finally how it was introduced into modern legal systems as the foundation upon which these great structures are built.

Till Rome had entered far into her career of con-

quest, her law was perhaps no more noteworthy than early German customs, till then it was but a body of semi-religious rules known only to the church. These rules being hidden in the mysteries of their Pagan worship which the Patricians only governed, the Oracles, the Auguries, or the Haruspices applied a different principle to every case, and no precedents were established. But the discontent of the Plebians was the main cause of the downfall of this sacerdotal power. Very early in their history they demanded a codification of the law, and the Twelve Tables was the result of their first efforts.

From this time onward, the development and preservation of Roman Law are well understood. As Rome grew in power, subduing nation after nation, she had to evolve some system of principles by which to govern these conquered states in their relations with her. I need not repeat the rise of the Praetor Peregrinus, how each year as he entered upon his office, he promulgated his Edict which was to be his rule and guide. This Edict, being followed and revised in each succeeding term, gave to the world that great body of equitable and legal prin-

ciples, and into which the Jus Civile was merged, the Jus Gentium.

Then came the Stoic Philosophy with its Law of Nature, giving to Roman jurisprudence wide and liberal proportions. This Greek school believed that the sports of chance had changed the first pure and simple forms of natural life into the present heterogeneous conditions. To live according to nature was to rise above the disorderly habits of the times, and to return to this state of nature was the aim of these moralists. In front of the disciples of this school there figured Rome's great philosophical lawyers, the jurisconsults. This alliance lasted through many centuries, and the long diffusion of this doctrine among the members of this profession, had a wonderful effect upon the art which they practiced.

The law received great theoretical development through the discussions of these jurists; and their collections and editions of the Edicts and Pandects of the Praetors, and also their commentaries on the existing rules, became of much importance. Under the Empire they gained great power by their interpretations, and the Em-

perors in the most critical period of their history, were often guided by the advice of these skilled lawyers.

Now begins the preparation and preservation of Roman Law for modern use. The praetors and the jurists had laid a sound foundation upon which a gigantic mass of rules had been based. Decrees were piled upon decrees, laws upon laws, constitutions upon constitutions, each succeeding monarch adding new material to this mammoth structure.

At the beginning of the fifth century, theoretically the Romans continued to regard as the sources of law, the ancient decrees of the people, the senatus-consulta, the edicts of the magistrates, and the imperial constitutions. But in practice only the writings of the classic jurists and the constitutions of the kings were in use. With the decline of science, the works of the jurists became rarer and rarer, and in consequence the unlearned judges of that time, being unable to investigate the principles upon which their conclusions had been formed, were content to follow the dicta of these great minds. And since the most sagacious law writers differ on many points, it is

easily seen how vague, arbitrary, and uncertain must have been the administration of justice.

Constantine first felt the necessity of determining by special ordinance which writings of the old jurists should be given legal authority. A simple but more comprehensive rule was subsequently promulgated, 426 A.D., by Theodosius II., for the Eastern Empire, but it soon afterwards was accepted as law in the West under Valentinian III. This ordinance which is often erroneously attributed to Valentinian, provided that the works of Papinian, Paulus, Gaius, Ulpian, and Modestinus, and of the jurists which were cited in the works of those above mentioned, should have the force of legal authority; except however, the notes of Paul and Papinian which had been previously forbidden by Constantine, and which still continued invalid.

In case of disagreement a majority was to govern, when equally divided Papinian was to be preferred, but if he was silent, the judge decided for himself. This ordinance proved of little avail, for instead of a fundamental examination of the various principles involved,

the judge's duty was now in a great measure confined to a mere computation of votes.

The Constitutions presented a similar but less serious difficulty. Their number had been gradually increasing till they had resulted in an intangible mass of law. From Augustus to Hadrian, the modest Caesars had been content to promulgate their Edicts in the character of a Roman magistrate, and in the decrees of the Senate, the epistles and orations of the Prince were respectfully inserted. Hadrian seems to have been the first to have assumed without disguise, full legislative power. This same policy was embraced by the following monarchs, but it did some good, for according to Tertullian, "The gloomy and intricate forest of ancient laws was cleared away by the axe of royal mandates and constitutions."

For four centuries, from Hadrian to Justinian, public and private jurisprudence was moulded by the will of the sovereign, and but few institutions were allowed to stand on their former footing. (We must remember however, the influence which the jurists exercised over the monarch). The ancient Caesars had been granted by the

people and the Senate, a personal exemption from the penalty of particular statutes. This humble privilege was at length transformed into the prerogative of a tyrant, and the Emperor was supposed to be raised above all human restraint, his conscience and reason being the sacred measure of his conduct. . . Through the fancy of Ulpian, or more probably of Tribonian, royal law, though false in fact and slavish in consequence, was supported upon the idea of an irrevocable gift of the people, and upon the principle of freedom and justice. But even with the most vicious rulers, in questions of private jurisprudence, personal considerations seldom affected the law. The seat of justice was filled by the wisdom and integrity of Papinian and Ulpian, and the purest materials of the codes are inscribed with the names of Caracalla and his ministers. "The tyrant of Rome was sometimes a benefactor of the provinces."

Such was the character of the law and thus it developed, but finally, the number of decrees, constitutions, rescripts, and epistles of the Sovereign continually increasing, the rules of obedience became each day more and

more obscure and doubtful. Then begins the great task of reducing this incongruous mass to a system of jurisprudence, with its rules of action clearly defined and outlined.

The practice of collecting the constitutions of the Emperors seems to have been commenced by private lawyers, such was at all events, the character of the earliest collections. Such was the character of the Codes of Gregorianus and of Hermogenianus which later became the models for the imperial codes of Theodosius and Justinian. These first were framed by two private jurists to preserve the constitutions of the Pagan Emperors, but which were however composed mostly of rescripts. They were probably written about the end of the third century. They had no legislative authority, but afterwards received statutory recognition from Theodosius and Valentinian. The Code of Gregorianus probably contained the constitutions from Hadrian to Constantine, while that of Hermogenianus, which supplanted the other, contained principally those of Diocletian and Maximian. Both of these however are now extinct.

Then came the Code of Theodosius which is still ex-

tant, and which consecrated the laws of the Christian Princes from Constantine to his own reign. In 429 A.D. he appointed nine commissioners to draft a code based upon those which had preceded. It was to cover the entire field of jurisprudence, public and private, civil and criminal, military and ecclesiastical, fiscal and municipal. It was digested into sixteen books, and was finished about 435 A.D. Three years later it received imperial sanction and became the sole source of law for the East and West. (This last statement is according to Muirhead, but Gibbons holds that the three codes just mentioned were equal in authority.) But at all events, any act not mentioned in these sacred deposits might be disregarded by the judges as obsolete.

From the time of Severus Alexander to Justinian, there were few judicial writers of importance. All the literary industry of this period was employed in collecting the writings of the old jurists and the constitutions of the kings, and compiling a code therefrom. But only a few of these have been preserved, only three unofficial collections by unknown authors having descended to us. Their origin is veiled in obscurity and but little is

known of them.

One was the *Vaticana Fragmenta* which appears to be the remains of a large compilation made between the time of Hermogenianus and Theodosius. It contains fragments of the writings from the period of the imperial constitutions. There was also the *Mosaicarum et Romanarum Legum Collatio*, probably made about the end of the fourth century, and which is mentioned in the Middle Ages under the title of *Lex Roma*. It is really nothing more than a superficial collection of Mosaic and Roman law, intended to show how the latter was derived from the former. In this respect it amounts to but little, its value consisting in having saved to the world many passages from the writings of the old jurists/consults. The third was the *Consultatio Veterum Icti de Pactis*. This is an edition of legal opinions by an unknown jurist, and was probably framed soon after the Code of Theodosius. It contains many literal quotations from the *Sententiae* of Paul and from the three preceding compilations, thereby preserving much of these works.

The *Romano Barbaric Codes* is the title given to three collections in Western Europe after it had thrown

off the sovereignty of Rome. After the fall of the Empire, the Germans and the Romans lived together, the former having their own indigenous rules and customs, while the conquered Latins continued to use their own laws and were judged according to them. This system of personal rather than territorial jurisprudence, prevailing during the earlier part of the Middle Ages, soon made it necessary to commit to writing the national laws of the Germans, The Leges Barbarorum, and of the Romans, the Lex Romana. Thus there arose two different codes existing side by side, and ruling two different peoples within the same territorial limits. But we shall see how the Roman ^{law} supplanted that of its barbarian conquerors.

Of the three codes of which we know, the first was the Edictum Theodoric, compiled, according to Savigny, 500 A.D., to M. Gloeden 506 A.D., by the king of the Ostrogoths from whom it derives its name. He wished to Romanize his people, and it was an edict for both the Goths and Romans. The subject matter was taken entirely from the Roman Law, especially from the Code of Theodosius, the later Novels and from the works of Paul and Gaius.

The second was the Breviarium Alaricianum framed 506

A.D. by a commission appointed by Alaric II, the king of the Visigoths. It included all the preceding publications, and was the supreme law of the land for all officials to follow. We are indebted to this compilation for many passages which otherwise would have been lost.

The third was the Lex Roma Burgundionum, issued by Gundobald ruler of Burgundia. It was intended for the use of his Roman subjects. Some parts of it were taken from the text of the Code of Alaric, and much directly from Roman sources.

Also there are some manuscripts called Oriental Collections which have just lately been discovered. They were written after the Theodocian Code, and before that of Justinian, and they make use of all the preceding works and of the writings of the jurists. About a century however, after the Theodocian legislation, there was great need of a revision, for the previous codes, edicts of the praetors and works of the jurists formed an unintelligible mass. So Justinian, through a commission under the direction of Tribonin to whom most of the credit is due, began this gigantic task. On this commission were four law professors and eleven members of the bar.

The principal professors were Theophilus and Dorotheus, of the great schools of Constantinople and Beiront respectively.

Justinian's works may be divided into five parts. First appeared his Fifty Decisions (529 - 532 A.D.), to clear up all points not yet settled. Second is his Institutiones, November 21, 532 A.D.; the third is his Digest of Excerpts from the writings of the jurists, appearing December 16, 533 A.D. The fourth is his revised edition of the code in which he included his own Legislation down to November 16, 534 A.D. And until the time of his death there followed a series of Novels which have never been officially collected and many of which have been lost. Everything obsolete was discarded from his Laws, and thus many of the works of the classic jurists such as Marcian, Ulpian, and Florentini have been destroyed.

The works of Justinian cover the entire field of law as did those of Theodosius. They are not pleasant reading, for they are disfigured by redundancy of language, involved periods, and nauseous self glorification; but it is undeniable that those parts dealing with pri-

vate law embody reforms of great moment and of most salutary tendency. The result was the eradication of almost trace of the old Jus Quiritum of the Romans, and the substitution for it, under the name of Jus Romanum, of that cosmopolitan body of law which has largely contributed to almost every modern system. Every thing in his books was to be regarded as law, but nothing outside of them, not even the sources from which they were taken; and all cases for which there was no precedent, the decision was to be left to the Emperor.

He did not wish anything to interfere with the royal prerogative, and he forbade the use of all conventional abbreviation, of commentaries, and of general summaries, all of which he punished as falsifying. But these rules were not well enforced and were frequently broken. To have preserved the purity of his text books, he should have followed the example of Alaric who had copies of his Breviary prepared and certified in Chancery and then distributed throughout the country.

His original products were intended for use in the law schools and for educational purposes, but there is little doubt that they soon came into the hands of the

practitioners and were used without scruple in the courts. And in the schools they were studied by commentaries written by the great law professors of that time, Dorotheus, Anatolius, Thalelaeus, and Theophilus, in open disobedience to the law.

This literary labor was continued throughout the six century by various writers, but ~~in~~ the succeeding three were comparatively barren, the only thing worth noting being an abstract by Leo the Isaurian who amended and rearranged the whole of Justinian's law. But this was repealed by Basil the Macedonian on account of its many imperfections and departures from the original. Then this Emperor and his son Leo the Philosopher, at the end of the ninth and the beginning of the tenth centuries, began an authoritative German version of all of Justinian's Collection and Legislation, introducing post Justinian law, and omitting everything obsolete or redundant. The result was the Basilicia.

Later Leo's son Constantinus made an addition in the shape of an official commentary collected from the writings of the sixth century jurists. The Basilicia was statutory authority until the fall of the Byzantium

Empire, 1453 A.D., but it had long before lost its power and was practically of no authority, Not a single copy now exists, Its place was filled by epitomes and compendia, and thus faded Justinian's works in the East. In all parts of Europe, Justinian's Code exerted its influence sooner or later, and although supplanted by others, it was only by those who had used it as their foundation.

Before the rise of Bologna, it was more from the Romano Barbarian than from Justinian's Code that Central and Western Europe derived their acquaintance with Roman Law. The invasion of the Lombards, their disturbances for two hundred years, and the barrier they formed between Italy and the rest of Europe, militated against the spread of Justinian's Laws to the North; but they were taught without interruption at Ravenna, seat of the Exarchs, As the savagery of the Lombards toned down, Roman Law began to be recognized and even taught at Pavia, their capitol. Their overthrow by Charlemagne opened an outlet for it from Italy, and in the ninth century, there ^{was} ~~is~~ evidence of some of Justinian's works circulating in the hands of the clergy in various parts of

Europe.

It was not however, until the very end of the eleventh or ^{the beginning of the} twelfth century, that at Bologna and under Inerius who appears to have been a professional jurist and ^{did} teacher, the study of law began to attract pupils from Southern Europe. The only parts of Justinian's collection which had hitherto made any progress were the Institutes, Code and Novels. The Institutes had recommended themselves from their elementary character; the Code because of its opening title on the Trinity, and then secondly on the Holy Church; and the Novels for their abundant legislation on church matters which was recognized as a charter of privileges and highly prized.

The Digest, a work of Pagan jurists, was ignored, but ^{and} the Code ^{and} Novels, with their little wheat hidden under a bushel of chaff, were not inviting to laymen of intelligence; and when the Digest with its clear diction and decisive reasoning came into the hands of Inerius, it was like a revelation. Inerius and his successors, the Glossarists, only getting this work by installments, divided the whole collection into five volumes, and with these five volumes and the teaching which accompanied

them, Roman jurisprudence began a new career.

Now having seen how the old Roman Law was saved to the Middle Ages, we will next note how it was affected by the lives and characters of the people with which it came in contact. The barbarians who came across the Rhine in the fifth century, found Roman Law and institutions everywhere in possession of the country they had conquered, having been spread by colonization and the widening of citizenship. We may say that in the year 476 A.D. ended the Roman Empire or rather the last of the Roman Emperors in the West. It seemed as if the foundation of human life and society which under the early monarchs had seemed eternal, had given away, and the world seemed in danger of falling into chaos. But this was not so, there were new forms of life to appear, new ideas of government and national existence were to struggle with the old for mastery. In the great break between the East and the West, some features still remained, others disappeared. One of the principal ideas which remained was that of municipal law.

It is clear that when two peoples like the Germans

and Romans are forced to live side by side, their differences ~~on~~ customs and habits stand out strongly, but in no respect is this difference more strongly marked than in the case of law. We may have supposed the Germans to have been a barbaric race, existing without any well defined system of government. But they were not barbarians in that sense, they had a well defined legal system, and they by no means dropped it as they had dropped their ancient religion, but retained it as the basis of their new arrangements with the conquered Romans. These two sets of government reacted one upon the other, the conquerors giving force and character to the law, and in turn having their own rude customs elevated by contact with learning. Roman Law and Teutonic Habit are no small part of the history of the Middle Ages.

Roman jurisprudence greatly impressed the barbarians. They had brought with them their own unwritten rules by which a rude justice of a rough stage of society was administered. But sooner or later after their settlement, these customs, reduced to Latin and expressed in writing, became the peculiar law of each tribe. At first

these were only rude attempts, merely lists of offenses and penalties, judged according to the nationality and social rank of the offender. These written customs largely recognized Roman law, then next as fresh cases arose and new questions had to be decided, they adopted provisions directly from it.

This is shown by the codes of Alaric, Sigismund, and Theodoric. This continued until the different races were fused together, and one large territorial instead of a personal law governed all alike. And over the special customs of each tribe, there stood the more universal law, a vast system of decrees and judicial decisions which had come down from the Republic and the Empire. This system of jurisprudence was in the hands of the Latins, understood and worked by them, accomplishing ends which a rough barbarian ^{could not} rules_^ attain. The Teutons could appreciate, but did not understand, so Latin clerks compiled and interpreted the Roman codes to the barbaric kings. And more and more as the Goths settled down, did they come under the influence of these laws, ready made and waiting for them, and the Latins thus kept in the ascendancy.

One great cause of social improvement in the Middle Ages was this continued influence of traditional laws and customs of Rome. There were traditions which were never wholly lost, and which eventually formed the basis for the jurisprudence of the greater part of Europe. If not in themselves favorable to liberty, yet as the laws of an advanced stage of society and of accomplished jurists, they upheld the principles of equity and justice. And more, their study produced a new race of lawyers whose place in society was independent of the feudal barons or the churchmen. They formed an upper class or new aristocracy apart from the territorial nobles or princes of the church. They were the only class whose intellectual training qualified them to withstand the barons, by appeals to law, and to cope with the subtle and practiced minds of the ecclesiastics. And while the churchmen and their followers were trusting in miracles and ordeals, they were introducing rational rules of evidence and seeking truth in the sworn statements of credible witnesses.

Such habits, wholly alien to the time, assisted in the development of original inquiry, and in releasing

society from the bondage of the church. They acquired great influence, especially in France and Italy, and without contending for public rights, they were a counterpoise to the power of the king,^{the} ~~and~~ nobles, ~~and the~~ church,

After Inerius commenced his lectures at Bologna, the study of law was greatly revived, and in fifty years Lombardy was full of lawyers, and on whom, Frederic Barbarossa and Alexander III, so hostile in all other respects, conspired to show honors and privileges. In the next age, universities arose at Naples, Padua, and other places where Roman law was held in peculiar regard, and their professors became conspicuous and numerous.

In the University of Paris the study of Roman law was long prohibited because of the disposition of the Pope s to establish exclusively their own decretals, but this prohibition was silently disregarded. As early as the reign of Stephen Vacarius, the lawyer of Bologna taught at Oxford with great success, but the students of the Scholastic Philosophy opposed him for some unexplained reason and his lectures were interdicted. About the time of Henry III and Edward I, the civil law acquired some

credit in England, but a system entirely incompatible with it had been established in her courts of justice, and Roman jurisprudence was not only neglected, but soon became obnoxious. Everywhere however, the clergy combined this study with that of their own canons, for it was a maxim that every canonist must be a good civilian. In the ecclesiastical courts, Justinian was cited as authority where Gregory and Clement were wanting.

After Bologna, Pisa and other Italian schools took up the study of law. This interest spread to France and Spain, in France, first to Montpellier and then Paris, afterwards to Bourges, Orleans, and Toulouse, the old capital of the West Goths; in Spain, 1245 A.D., it created the University of Salamanca. From France and Spain, Holland caught the craze, giving to the world in the seventeenth century, the illustrious jurist, Hugo Grotius, who created out of the principles of equity in Roman jurisprudence, the elevated science of International Law.

The study and practice reacted one upon the other, its use and cultivation went hand in hand. Its rules were unconsciously fitted into the growing laws of the

kingdoms which were just merging from feudalism. Louis IX of France ordered the Roman law to be translated into that language, and made the Parliament of Paris the supreme tribunal of the realm. Here trained jurists were appointed as experts, and they became the real masters. Schooled in Roman law, it was used in deciding cases, and they gave to the king from the same source the maxim which declared that the will of the sovereign was the law of the land. And as the king's power grew, the principles of Roman jurisprudence gained wider and wider acceptance and supremacy.

Presently Roman law came out of the nation to meet the royal system. Very early in the central districts of France the Roman law had been adopted. Subsequently it came to be regarded as the supplementary common law, and was regarded in Northern France as Written Reason. The Code of Napoleon, the last great codification of French rules and customs, has been described as being in a great measure but a republication of the works of Justinian, modified to suit the new phases of French history.

In Germany as in France, the Roman system attended

the progress of unification. When Germany emerged from Feudalism, she was still to a great extent a congeries of petty states. But the idea of the Holy Roman Empire fostered the Roman law in the imperial courts and among the lawyers. This influence grew, and without displacing, it moulded anew the old German customs, and became the basis for legal study in Germany. It was early accepted on its own authority, while German rules only on the testimony of truth. The German universities now furnish the world with lawyers greater than those who once came from Bologna, Paris and Leyden.

In England as has been said, Roman law was a more obscure study. It had its beginning, however, during the four hundred years of Roman rule in England, during which Papinian, the greatest of the juristconsults, himself administered law in Britain. This rootage we have reason to believe, was not totally eradicated by the Saxons. Latin municipalities survived the Conquest, and priests took back to England conceptions steeped in Roman jurisprudence. The study of Roman law began soon after the rise of Bologna, and continued without serious

break for about three centuries. The works of the earliest English text writers abound in tokens of familiarity with Roman law. Through the ecclesiastical courts, through the Court of Chancery with its system of equity, and through such lawyers as Lord Mansfield who are deeply versed in the civil law, and through the courts of admiralty, England has drawn greatly from Roman sources in supplanting her own indigenous customs. Only such of her law as relates to real property has escaped being deeply dyed by the same influences which have moulded the law of the rest of Europe.

Thus we have seen how Roman jurisprudence, once supposed not to have survived the destruction of the Empire, nor to have affected subsequent law till after the discovery of the Pandects of Amalfi, in fact exerted a most powerful control over every stage of the world's legal development. We know that it has entered into modern legal systems as the major element of their structure, and as the chief source of their principles and practice. It has achieved perpetual dominancy by reason of its singular perfection and world-wide currency. Rome did not

yield to the dangers which have blighted the systems of nations less trained in the art of government. Unlike Greece, she avoided precocious maturity and untimely disintegration. Her rules were not relaxed as each new case arose, or her law would have amounted to no more than a mere philosophy. Nor did she succumb to the fate of the Hindoo, whose rigid primitive laws, arising chiefly from early association and identification with religion, bound into a code while still undeveloped, chained down the people to those views of life and action which were entertained at the time when their customs were first consolidated into systematic form .

She did not like Rousseau, believe that a perfect social order to be evolved from an unassisted consideration of Nature, a social order irrespective of existing conditions and totally unlike them; but she conceived that by observing present institutions, parts could be singled out which would exhibit vestiges of that reign of Nature whose reality she faintly discerned. The secret of Rome's improvement was in having some definite object at which to aim, and symmetry and simplicity as her guide.

Historians look upon the codification of these laws to which we have been referring for the light which they throw upon the fate of nations and the course of events. Students of Roman law value them for the service they have rendered the modern world in preserving the various texts which, without them, would have been lost. Who can say what might have been our legal systems of to-day ?

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