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INSTITUTIONUM IURIS CIVILIS
COMMENTARII QUATTUOR

OR

ELEMENTS OF ROMAN LAW
BY GAIUS

WITH A TRANSLATION AND COMMENTARY

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his authority, and henceforth this office was sought for as an imperial favour.' Compare Inst. Just. 1, 2, 8. Those jurists who had the *Jus respondendi* were called *Juris auctores*. Their *auctoritas* resided, in the first instance, in their *responsa*, or the written opinions they gave when consulted on a single case; but in the second instance, doubtless, in their writings, which in fact were mainly a compilation of their *responsa*, a fact which has left its traces in the disjointed and incoherent style which disagreeably characterizes Roman juristic literature. In the course of centuries the accumulation of juristic writings of coordinate authority was a serious embarrassment to the tribunals. To remedy this evil, A.D. 426, Theodosius and Valentinian enacted what is called the law of citations, Cod. Theodosianus, 3, limiting legal authority to the opinions of five jurists, Gaius, Papinian, Ulpian, Paulus, Modestinus, and of any other jurists whom these writers quoted, provided that such quotations should be verified by reference to the original writings of these *juris auctores*. In case of a divergence of opinion, the authorities were to be counted, and the majority was to prevail. In case of an equal division of authorities, the voice of Papinian was to prevail (see §§ 194-196 comm). A.D. 533, Justinian published his Digest or Pandeets, a compilation of extracts from the writings of the jurists, to which he gives legislative authority. Every sentence, accordingly, of these passages is called a *lex*, and the remainder of their writings is pronounced to be absolutely void of authority. To prevent the recurrence of the evil which his codification was intended to remove, and confident in the lucidity and adequacy of his Digest and Code, Justinian prohibits for the future the composition of any juristic treatise or commentary on the laws. If any one should disregard the prohibition, the books are to be destroyed and the author punished as guilty of forgery (*falsitas*), Cod. 1, 17, 2, 21.

Besides the sources of law enumerated by Gaius, the Institutes of Justinian mention Custom or Usage, the source of consuetudinary or customary law (*jus non scriptum, consensu receptum, moribus introductum*). To this branch of law are referred, with other rules, the invalidity of donations between husband and wife, Dig. 24, 1, 1, the power of making a will for an infant successor who dies before the age of puberty (*pupillaris substitutio*), Dig. 28, 6, 2, pr. and universal succession in Coemption and Adrogation, 3 § 82. See also 4 §§ 26, 27. We may suppose that Customary

law, like Roman law in general, would fall into two divisions, Civil law and Gentile law, the former embracing what Roman writers sometimes speak of as *mores majorum*. Before the time of Gaius, however, most, if not all, of Customary law must have been taken up into the edict of the praetor or the writings of the jurists, Cic. *De Invent.* 2, 22; i.e. unwritten law must have changed its character and have been transformed into written law.

[II. DE IVRIS DIVISIONE.]

ON THE BRANCHES OF THE LAW.

§ 8. *Omne autem ius quo utimur, uel ad personas pertinet uel ad res uel ad actiones. et prius uideamus de personis.*

§ 8. The whole of the law by which we are governed relates either to persons, or to things, or to procedure; and let us first examine the law of persons.

§ 8. What are the leading divisions of law—what are the main masses into which legislation naturally breaks itself—what are the joints and articulations which separate the whole code into various subordinate codes, like the different limbs and members of an organic whole—what is the import of the Gaian division into *jus personarum*, *jus rerum*, *jus actionum*, or rather, to adhere to the classical phrases, *jus ad personas pertinens*, *jus ad res pertinens*, *jus ad actiones pertinens*?

By *jus ad actiones pertinens*, to begin with the easier part of the problem, there is no doubt that the inventor of the division intended to designate the law of PROCEDURE as opposed to the law of rights; the adjective code, to use Bentham's phraseology, as opposed to the substantive code. There is as little doubt that in the Institutions of Gaius this design is not executed with precision, and that, instead of the law of procedure, the last portion of his treatise rather contains the law of sanctioning rights, as opposed to the law of primary rights. Or perhaps we should say that the legislative provisions respecting Procedure have a double aspect: a purely formal aspect, so far as they give regularity and method to the enforcement of sanctioning rights; and a material aspect, so far as certain stages of procedure (e.g. *litis contestatio* and *res judicata*) operate like Dispositions or any other Titles to modify the substantive rights of the contending parties. Procedure, then, is treated of in these Institutions partly indeed in its formal character, but still more in its material character, i.e. so far as its incidents can be regarded as belonging to the substantive code.

It is more difficult to determine the principle of the other division, the relation of the law of Persons to the law of Things. They both deal with the rights and duties of persons in the ordinary modern acceptation of the word; why then, we may inquire, are certain rights and duties of persons separated from the rest and dealt with under the distinguishing category of *jura personarum*? It is not enough to say with Austin that the law of Things is the universal or general portion of the law, the law of Persons a particular and exceptional branch; that it is treated separately on account of no essential or characteristic difference, but merely because it is com-
modious to treat separately what is special and exceptional from what is general and universal. This answer furnishes no positive character of the law of Persons, but only the negative character of anomaly, i. e. of unlikeness to the larger portion of the law; but it would be difficult to show that the law of Persons is more exceptional, anomalous, eccentric, than the Civil dispositions as opposed to the Natural or Gentile dispositions of the law of Things.

We must look to the details of the law of Persons, and observe whether its dispositions have any common character as contrasted with the dispositions of the law of Things. The law of Persons, in other words, the law of Status, classifies men as slaves and free, as citizens (privileged) and aliens (unprivileged), as *paterfamilias* (superior) and *filiusfamilias* (dependent). The law of Things looks at men as playing the parts of contractors or of neighbouring proprietors; in other words, the law of Persons considers men as UNEQUALS, the law of Things considers them as EQUALS: the one may be defined as the law of relations of inequality, the other as the law of relations of equality.

It may induce us to believe that the law of unequal relations and the law of equal relations is a fundamental division of the general code, if we consider how essential are the ideas of equality and inequality to the fundamental conception of law. If we ventured on a Platonic myth, we might say that Zeus, wishing to confer the greatest possible gift on the human race, took the most opposite and uncombinable things in the universe, Equality and Inequality, and, welding them together indissolubly, called the product by the name of political society or positive law.

The assumption will hardly be controverted, that in the relations of subject to subject, Positive law, like Ethical law, recognizes, as an ideal at least, the identity of the just (lawful) with the equal.