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PART I.

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CHAPTER I.

INTRODUCTORY.

WHEN Uprauda the Slave or Goth, reigning under the name of Justinian, essayed the reformation of the laws of Rome and accomplished it in seven years, he undertook and performed a task which, in point of difficulty and usefulness, is not undeserving even of the highflown praise which he has himself bestowed upon it. It is remarkable that the nephew of a barbarian peasant should, in the first year of his obtaining the Empire of the East, have conceived or adopted so bold a design: it is much more remarkable that within so few years he should have executed in masterly fashion the codification of the jurisprudence and legislation of more than seven hundred years, from Cato the Censor to his own time. But it is a still more striking fact that the law books, issued at Constantinople by Justinian for the lands surrounding the Eastern half of the Mediterranean in the beginning of the sixth century of our era, should be directly or indirectly a large, or even the principal, source of private law in all the civilized countries of the world in the nineteenth century. As a basis for the scientific study of law Justinian's law books have still no rival. We in England do not stand in the same close and direct connexion with them that our continental neighbours do. No part of the Digest or Code is law with us, or is now of more than illustrative or casual bearing on the decisions of our courts. But partly through the early law-writers, much more through the Chancellor's jurisdiction, and partly, perhaps in an increasing degree, through intercourse with other nations and through literary and professional training, the Roman law has materially helped, and is still helping, to form our rules for the business of life. It may be that a cultivated nation having to form laws for itself would naturally devise a body of rules in many respects very similar to those actually in force here or on

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the continent: but cultivated nations do not exist without laws already; and laws are not sudden creations but the slow growth of time, in other words their shape is due to a nation's past history as well as to the practical exigencies of life. The intellect of the nineteenth century can no more deny or shake off its hereditary allegiance to the law of Rome, than it can to the philosophy and art of Greece. And for the law of Rome we have to thank Justinian and his great minister Tribonian.

Whether the Emperor or his minister have the largest claim to our respect is rather a curious than a fruitful question. One may well guess, that the scheme originated with the skilled lawyer, who afterwards assisted in and presided over its practical execution. But the Emperor had at least the ability to comprehend its importance, the courage to adopt it, and the energy and persistence to carry it through. An absolute monarch has not indeed the special difficulties to contend with, that a constitutional sovereign or a parliamentary minister has, in dealing with legal reform, but the isolation and uncertainty of an absolute monarch's position, the danger of waywardness, the influence of private temptations are so great, that there is as much to claim our respect and gratitude in the resolve of the Emperor as in the excellence of his instruments. The good judgment that found Belisarius and Narses for the work of war was shewn previously in the selection of Tribonian for the work of peace: and while fully admitting that Justinian has often the praise and blame which more strictly may belong to Tribonian, and that Tribonian in the same way stands responsible for the merits and demerits of Theophilus and Dorotheus and their colleagues, I am content to use the names almost indiscriminately as symbols of a great achievement, and leave to others the hopeless problem whether he who wisely selects the instruments or he who faithfully and skilfully executes can best claim the credit of the work.

But there is another point of view from which one part, and that the most important, of Justinian's legislation deserves to be regarded. The Digest is not only, or for us chiefly, a law book with Justinian's sanction, but it is a collection of fragments, mutilated and interpolated to some extent, but still fragments, of some of the great masters of Roman jurisprudence. Latin literature from Nerva to Alexander Severus comprises Tacitus, Pliny the younger, Juvenal, Suetonius, the short but elegant apology of Minucius Felix, the antiquarian Gellius, the affected Fronto, and the lively

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though very different African writers, Apuleius and Tertullian. And those are all that deserve mention. But the first two names drop off with Trajan, and from Hadrian onwards the real strength of Roman literature was in law. Celsus and Julian, Pomponius and Gaius, Marcellus and Cervidius Scaevola, Papinian, Paul, and Ulpian are the writers who represent Roman thought for a period of more than 100 years, and have been the teachers to the subsequent world of one of the chief divisions of systematic knowledge and practical literature. In this light, it is true, Justinian and Tribonian have an ambiguous reputation. It is common enough to visit them with scorn and blame for what they have destroyed, rather than praise for what they have preserved; to reproach them with their alterations and interpolations; and in fact to treat them more as slaves who have plundered their masters' treasures and not known how to use them, than as guardians who have saved what was possible from a general conflagration. But after all they have a sufficient and a twofold answer. First, it is very improbable that much of the original works of the Roman jurists would have come down to us at all, if it had not been for their collection and abridgment under imperial sanction; and secondly, the primary and paramount use of law is to be a practical guide in the business of men. No consideration of antiquarian wishes ought for a moment to prevent the thorough adaptation of the law to the real needs and conveniences of the time. Happily for us Justinian felt the authority the law derived both from its antiquity and from the great names of the ancient jurists, and found a means, rough and unscientific but practical, of working in the spirit of the great lawyers themselves and preserving much of the past without doing injustice to the wants of the present.

There is no more difficult task of practical literature than the codification of the law of a nation, and it is connected with the equally difficult task of arranging for the practical application of the code by the judges and for its continual amendment. Written law is like a forest: if underwood be allowed to grow freely, the forest becomes impenetrable. Justinian forbad commentaries and all comparison of his new Digest with the writings from which it was compiled. Napoleon's exclamation on seeing a commentary on the *Code Civil* was "*Mon Code est perdu.*" Doubtless it is impossible to prevent explanations of the law from being written, and it would be undesirable if it were possible. The writings of jurists have a

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twofold purpose and effect: they tend to improve the law itself as a system of principles and rules, and they bring the conceptions of the judges and practitioners and of the general public itself into accord or intelligent relation with the system. Reports of decided cases come under the same category. The decision itself has only a special and limited bearing, but the arguments of counsel and the reasons of the judge are essentially the discussions of jurists, and, when reported, become part of the class of juristic literature. They are the only discussions which the people in general read at all, and in fact are the main source of legal education to laymen. Reports are however destined for a further purpose, and one for which jurists' writings are at least not so openly used. They are quoted in the courts not merely to instruct the mind of the judge but to influence his decision; not merely to let him see all the bearings of the case at issue, but to impose on him a somewhat vague necessity of making his decision in the case before him consistent with that given by a judge in a previous case of a similar character. When this principle is once fully admitted, reports are multiplied without limit, the law, whether codified or not, becomes dispersed through hundreds and thousands of volumes, and there is ultimately, owing to the mass of literature, the inevitable progress of thought, and the ineradicable divergency of human minds, no more security for consistency of decision than there would be, if no reported cases were quoted at all. In the vain desire to prevent or remedy one evil another still greater is forgotten and encouraged.

For there is a real and constant opposition between the interests of the suitor and the tendency of scientific law. I put aside the vulgar opposition between the interests of practitioners in the law's being complicated and dear, and the interests of suitors in its being simple and cheap. That opposition may under certain circumstances exist, but it is one which the public can in time overcome. The opposition that I refer to is inherent in the nature of the subject. Legal conceptions, however you may define and explain, will not have the same content in all minds, and the facts to which they are applied will wear a different aspect according to the presumptions which the judge brings to bear on them. The more thoroughly a matter is investigated, the more fully it is compared with other cases, the more the application of different legal principles or categories to it is discussed, the greater chance there would appear to be of the right decision being arrived at in the particular case, and of the

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general law being set in clearer light. But the process is long and costly, and, cases being thus selected only by accident[1], the general improvement of the law is very slight and very slow. The suitor's real interest is forgotten. It may seem paradoxical, but I believe it is on the whole true, that, apart from questions of life, freedom and honour, a suitor's real interest lies not so much in a just decision as in a speedy and final decision. *Summum jus summa iniuria* is true in more senses than one. A perfectly just decision would often be badly purchased by the loss of time, temper and money, and by the paralysis of uncertainty. And that the decision, when obtained, is perfectly just, is a proposition of the truth of which the successful party is often the only person to be confident. There is usually in a disputed question some right or reasonable claim on each side: the decision must of course turn on the balance of probabilities and equities; but if the balance is eventually not quite rightly adjusted, a bystander will console himself for the failure of justice by the reflexion, that the law no longer prevents the parties from adjusting themselves to their now ascertained circumstances, and seeking in a wise and energetic future the remedy for the mistake of the past. A statesman will try to improve the law by other means than the prolongation of a private suit between those, to whom the immediate interests are of more importance than the solution of legal difficulties or the improvement of legal procedure.

Ultimately it will I believe be found best to leave each private suit as much as possible to the *viri boni arbitratus* acting authoritatively and publicly, whether he be called judge or arbitrator. Let the preparatory stages be under his control: let him order the proceedings as in the particular case may be best calculated to bring the issues out clearly: let all witnesses be examined who can throw light on the matter, whether the parties call them or not: let him stop the inquiry whenever it is being carried, even by the parties' consent, to an unreasonable length. It is *pessimi exempli* to have litigation run on, till the cost in time and money to the public and the parties is out of proportion to the attainable object of the suit.

In points of law no decision in a parallel case should be quoted except that of an appeal court[2], and the decision itself should be

[1] See Maine's *Ancient Law*, chap. ii. pp. 38, 39.
[2] I recently examined the decisions in one Part of the Law Reports, containing a large number of appeal cases. In one half the judgment of the Court of first instance was reversed. If this be a fair sample, it is an even chance

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subject to review only once, and that, at least in most cases, only with the consent of the judge.

But the law itself must be better ascertained. There must be a code, or something like one, and there must be means for its continued improvement. As a scientific consolidation of the law no jurist would approve Justinian's plan. It had however two great merits; it was actually done within a very short time, and it gave the people and the practitioners the law to which they were accustomed, with only such alterations as probably had long been desired. A new code, with new definitions, method and arrangement, may or may not, according to the skill of the draughtsman, be greatly superior, but there is more difficulty in its execution, more criticism to be encountered, and more risk of its not being understood. Few of the judges who have to apply it will be scientific jurists, and it is easy to be too logical for the mass. The problem of consolidating the common law must in every country be an arduous one, but the difficulty is not insuperable, and one gets weary of finding an imagined future perfection made a bar to present improvement. The better should not for ever be an enemy to the good.

Almost more important than the code is the means for keeping it abreast of the development of men's minds and of new circumstances. A standing Commission having a small nucleus of scientific and practising lawyers, with large power of temporary and special addition, should be continually considering the code and preparing such alterations as may be shewn, either by reports of cases or by scientific criticism, to be desirable. The decisions of appeal courts should be specially considered with a view to incorporation. A revised code should be issued at regular intervals, say every five or ten years, and the previous decisions even of the appeal courts should then be no longer citable in cases commenced subsequently.

With these brief remarks suggested naturally by the subject of the Digest, I pass to the subject itself.

The reign of Justinian occupies five brilliant chapters of Gibbon's history, and I shall therefore content myself with a brief notice. It is only the first few years of it which concern the present subject. His father's name was Iztok, his mother's Bigleniza, which were translated or latinized into Sabatius and Vigilantia. He was born

whether the first decision be right or wrong, according to the judgment of the Appeal Court, and cannot therefore be trusted as a guide in other cases.

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in 482 or 483 A.D. at the village Tauresium, near the site of the modern Sophia. His uncle, a peasant, whom we know as Justin I. became a soldier, rose from the ranks to the command of the Guards, and on the death of Anastasius was made emperor by the soldiers A.D. 518. He adopted his nephew Upráuda, who succeeded him in the year 527, and reigned for more than 38 years. Justinian at once commenced the reform of the law, and did not allow it to be delayed by a sedition in Jan. 532, which was excited by the rivalry of the blue and green factions of the circus. They set fire to the city and demanded and obtained the removal from office of the ministers Tribonian and John of Cappadocia; and the tumult was only quelled by a massacre of the greens, effected by three thousand veteran soldiers and the orthodox blues. The conquest of the Vandals in Africa, and of the Goths in Italy, and the defeat of the Persians, all by Belisarius, and a renewed conquest of Italy by Narses, were the principal military glories of Justinian's reign. His buildings were no less remarkable. In Constantinople and its suburbs alone he raised 25 churches, and amongst them the church of St Sophia is as memorable in architecture as his other achievements in their respective lines. 'There was nothing erected during the ten centuries from Constantine to the building of the great mediæval cathedrals which can be compared with it. Indeed it remains now an open question, whether a christian church exists anywhere of any age, whose interior is so beautiful as that of this marvellous creation of old Byzantine art[1].' A chain of more than 80 forts from Belgrade to the Black Sea was formed to protect the empire from the northern barbarians, but this was only part of the system of fortification which was carried out on many other borders. Justinian was courteous and patient, temperate and frugal, constantly engaged in the work of administration: 'he professed himself a musician and architect, a poet and philosopher, a lawyer and theologian. But he was not a successful ruler: the people were oppressed and discontented; his wife and many of his ministers abused their power: his name was eclipsed by those of his victorious generals. He died A.D. 565[2].'

'Tribonian was a native of Side in Pamphylia, and his genius 'embraced all the business and knowledge of the age. He composed

[1] Fergusson, *Hist. of Arch.* vol. II. pp. 444.
[2] An interesting notice of Justinian by Prof. Bryce is entombed in the new edition of the *Encyclopaedia Britannica*.

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'both in prose and verse on a strange diversity of curious and abstruse 'subjects: a double panegyric of Justinian and the life of the 'philosopher Theodotus; the nature of happiness and the duties of 'government; Homer's catalogue and the four and twenty sorts of 'metre; the astronomical canon of Ptolemy; the changes of the 'months; the homes of the planets and the harmonic system of the 'world. From the bar of the praetorian prefects he raised himself to 'the honours of quaestor, of consul, and of master of the offices'. His gentleness and affability were admitted, but he was charged with impiety and avarice. In the sedition of 532 he was removed from office, but was speedily restored, and continued to enjoy the confidence of the emperor till his death in 546[1].

CHAPTER II.

JUSTINIAN'S LEGISLATION.

Our knowledge respecting the method adopted by Justinian in his rearrangement and codification of the law is derived from the decrees which were issued by him for the direction of the work, and which are prefixed to the several parts of it.

The first step was to compose one Code which should contain the imperial constitutions which were comprised in the Codes of Gregorian, Hermogenian and Theodosian, and those subsequently issued. But collection was not the whole task: the laws were to be edited as well. 1. Superfluous matter, not touching the real purport of the constitution, but inserted merely as preface, was to be omitted. 2. The constitutions were to be compared, and repetitions and contradictions to be removed, excepting so far as the division of the law into different parts required their preservation (*praeterquam si juris aliqua divisione adiuuentur*. Cf. Const. *Summa*). 3. What was obsolete was to be removed. 4. Additions, omissions and changes were to be made in the constitutions themselves, where convenience required it. 5. The constitutions were to be classified according to their subject matter into different titles. 6. They were

[1] Condensed from Gibbon, chapp. xliii. xliv. The description of Tribonian does not rest on sure evidence.

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to be arranged in each title in chronological order, with their dates appended, the absence of a date not however to detract from the authority of the constitution. 7. Rescripts addressed to individuals and pragmatic sanctions (i.e. charters addressed to communities. Cf. Cod. I. 23. l 7), if included in the Code, were to have the force of general law. This Code was to be compiled by a commission of ten persons, of whom Johannes was named first and Tribonian sixth. Seven were high officials, a professor of law at Constantinople, Theophilus, was the eighth; and two practising lawyers made up the number. The Constitution was dated 13 Febr. 528 A.D. (Const. *Haec quae necessario.*)

In little over a year the task was completed. On the 7th April, A.D. 529, Justinian issued a constitution announcing the completion of the *Codex Justinianus*, and directing it to have exclusive validity from the 16th of that month. No constitutions were to be cited in the courts, except such as were contained in the Code; and whatever alterations had been made were not to be impugned. Cases in the courts were to be decided on the basis of the old legal commentators and this Code. No constitutions not contained therein were to be valid, except such 'pragmatic sanctions' as only granted special privileges to communities or corporations, and such as dealt only with special points (*pro certis capitulis factae*), and were consistent with the code. (Const. *Summa.*)

The next step was a more difficult one. Justinian determined to do, what as he says no one had attempted before, to collect, amend and digest the authorized Roman law from the writings of the old lawyers (see below, ch. VI.). Having found Tribonian, from his labours on the Code, to be well qualified for the task, he entrusted it to him and to such colleagues, both professors and practising lawyers, as he should select. The writings of those lawyers only who had received official recognition were to be taken; all selected passages were to have the force of law equally; neither the number of authorities nor the importance of some (e.g. Papinian) were to affect the question. Contradictions and repetitions were to be cut out; even what was already to be found in the Code was not to be repeated in the Digest, except so far as circumstances might require or justify some repetitions; and such additions and corrections were to be made both in the writings of the lawyers and in any constitutions quoted in those writings, as might be necessary for the perfection of the Digest. Any obsolete laws were to be omitted, the test

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