Chapter XLIV: Idea Of The Roman Jurisprudence.--Part II.

Whatever might be the origin or the merit of the twelve tables, [20] they obtained among the Romans that blind and partial reverence which the lawyers of every country delight to bestow on their municipal institutions. The study is recommended by Cicero [21] as equally pleasant and instructive. "They amuse the mind by the remembrance of old words and the portrait of ancient manners; they inculcate the soundest principles of government and morals; and I am not afraid to affirm, that the brief composition of the Decemvirs surpasses in genuine value the libraries of Grecian philosophy. How admirable," says Tully, with honest or affected prejudice, "is the wisdom of our ancestors! We alone are the masters of civil prudence, and our superiority is the more conspicuous, if we deign to cast our eyes on the rude and almost ridiculous jurisprudence of Draco, of Solon, and of Lycurgus." The twelve tables were committed to the memory of the young and the meditation of the old; they were transcribed and illustrated with learned diligence; they had escaped the flames of the Gauls, they subsisted in the age of Justinian, and their subsequent loss has been imperfectly restored by the labors of modern critics. [22] But although these venerable monuments were considered as the rule of right and the fountain of justice, [23] they were overwhelmed by the weight and variety of new laws, which, at the end of five centuries, became a grievance more intolerable than the vices of the city. [24] Three thousand brass plates, the acts of the senate of the people, were deposited in the Capitol: [25] and some of the acts, as the Julian law against extortion, surpassed the number of

a hundred chapters. [26] The Decemvirs had neglected to import the sanction of Zaleucus, which so long maintained the integrity of his republic. A Locrian, who proposed any new law, stood forth in the assembly of the people with a cord round his neck, and if the law was rejected, the innovator was instantly strangled.

[Footnote 20: It is the praise of Diodorus, (tom. i. l. xii. p. 494,) which may be fairly translated by the eleganti atque absoluta brevitate verborum of Aulus Gellius, (Noct. Attic. xxi. 1.)]

[Footnote 21: Listen to Cicero (de Legibus, ii. 23) and his representative Crassus, (de Oratore, i. 43, 44.)]

[Footnote 22: See Heineccius, (Hist. J. R. No. 29--33.) I have followed the restoration of the xii. tables by Gravina (Origines J. C. p. 280--307) and Terrasson, (Hist. de la Jurisprudence Romaine, p. 94--205.) Note: The wish expressed by Warnkonig, that the text and the conjectural emendations on the fragments of the xii. tables should be submitted to rigid criticism, has been fulfilled by Dirksen, Uebersicht der bisherigen Versuche Leipzig Kritik und Herstellung des Textes der Zwolf-Tafel-Fragmente, Leipzug, 1824.--M.]

[Footnote 23: Finis aequi juris, (Tacit. Annal. iii. 27.) Fons omnis publici et privati juris, (T. Liv. iii. 34.) * Note: From the context of the phrase in Tacitus, "Nam secutae leges etsi alquando in maleficos ex delicto; saepius tamen dissensione ordinum * * * latae sunt," it is

clear that Gibbon has rendered this sentence incorrectly. Hugo, Hist. p. 62.--M.]

[Footnote 24: De principiis juris, et quibus modis ad hanc multitudinem infinitam ac varietatem legum perventum sit altius disseram, (Tacit. Annal. iii. 25.) This deep disquisition fills only two pages, but they are the pages of Tacitus. With equal sense, but with less energy, Livy (iii. 34) had complained, in hoc immenso aliarum super alias acervatarum legum cumulo, &c.]

[Footnote 25: Suetonius in Vespasiano, c. 8.]

[Footnote 26: Cicero ad Familiares, viii. 8.]

The Decemvirs had been named, and their tables were approved, by an assembly of the centuries, in which riches preponderated against numbers. To the first class of Romans, the proprietors of one hundred thousand pounds of copper, [27] ninety-eight votes were assigned, and only ninety-five were left for the six inferior classes, distributed according to their substance by the artful policy of Servius. But the tribunes soon established a more specious and popular maxim, that every citizen has an equal right to enact the laws which he is bound to obey. Instead of the centuries, they convened the tribes; and the patricians, after an impotent struggle, submitted to the decrees of an assembly, in which their votes were confounded with those of the meanest plebeians. Yet as long as the tribes successively passed over narrow bridges [28]

and gave their voices aloud, the conduct of each citizen was exposed to the eyes and ears of his friends and countrymen. The insolvent debtor consulted the wishes of his creditor; the client would have blushed to oppose the views of his patron; the general was followed by his veterans, and the aspect of a grave magistrate was a living lesson to the multitude. A new method of secret ballot abolished the influence of fear and shame, of honor and interest, and the abuse of freedom accelerated the progress of anarchy and despotism. [29] The Romans had aspired to be equal; they were levelled by the equality of servitude; and the dictates of Augustus were patiently ratified by the formal consent of the tribes or centuries. Once, and once only, he experienced a sincere and strenuous opposition. His subjects had resigned all political liberty; they defended the freedom of domestic life. A law which enforced the obligation, and strengthened the bonds of marriage, was clamorously rejected; Propertius, in the arms of Delia, applauded the victory of licentious love; and the project of reform was suspended till a new and more tractable generation had arisen in the world. [30] Such an example was not necessary to instruct a prudent usurper of the mischief of popular assemblies; and their abolition, which Augustus had silently prepared, was accomplished without resistance, and almost without notice, on the accession of his successor. [31] Sixty thousand plebeian legislators, whom numbers made formidable, and poverty secure, were supplanted by six hundred senators, who held their honors, their fortunes, and their lives, by the clemency of the emperor. The loss of executive power was alleviated by the gift of legislative authority; and Ulpian might assert, after the practice of two hundred years, that the

decrees of the senate obtained the force and validity of laws. In the times of freedom, the resolves of the people had often been dictated by the passion or error of the moment: the Cornelian, Pompeian, and Julian laws were adapted by a single hand to the prevailing disorders; but the senate, under the reign of the Caesars, was composed of magistrates and lawyers, and in questions of private jurisprudence, the integrity of their judgment was seldom perverted by fear or interest. [32]

[Footnote 27: Dionysius, with Arbuthnot, and most of the moderns, (except Eisenschmidt de Ponderibus, &c., p. 137--140,) represent the 100,000 asses by 10,000 Attic drachmae, or somewhat more than 300 pounds sterling. But their calculation can apply only to the latter times, when the as was diminished to 1-24th of its ancient weight: nor can I believe that in the first ages, however destitute of the precious metals, a single ounce of silver could have been exchanged for seventy pounds of copper or brass. A more simple and rational method is to value the copper itself according to the present rate, and, after comparing the mint and the market price, the Roman and avoirdupois weight, the primitive as or Roman pound of copper may be appreciated at one English shilling, and the 100,000 asses of the first class amounted to 5000 pounds sterling. It will appear from the same reckoning, that an ox was sold at Rome for five pounds, a sheep for ten shillings, and a quarter of wheat for one pound ten shillings, (Festus, p. 330, edit. Dacier. Plin. Hist. Natur. xviii. 4:) nor do I see any reason to reject these consequences, which moderate our ideas of the poverty of the first Romans. * Note: Compare Niebuhr, English translation, vol. i. p. 448,

&c.--M.]

[Footnote 28: Consult the common writers on the Roman Comitia, especially Sigonius and Beaufort. Spanheim (de Praestantia et Usu Numismatum, tom. ii. dissert. x. p. 192, 193) shows, on a curious medal, the Cista, Pontes, Septa, Diribitor, &c.]

[Footnote 29: Cicero (de Legibus, iii. 16, 17, 18) debates this constitutional question, and assigns to his brother Quintus the most unpopular side.]

[Footnote 30: Prae tumultu recusantium perferre non potuit, (Sueton. in August. c. 34.) See Propertius, l. ii. eleg. 6. Heineccius, in a separate history, has exhausted the whole subject of the Julian and Papian Poppaean laws, (Opp. tom. vii. P. i. p. 1--479.)]

[Footnote 31: Tacit. Annal. i. 15. Lipsius, Excursus E. in Tacitum. Note: This error of Gibbon has been long detected. The senate, under Tiberius did indeed elect the magistrates, who before that emperor were elected in the comitia. But we find laws enacted by the people during his reign, and that of Claudius. For example; the Julia-Norbana, Vellea, and Claudia de tutela foeminarum. Compare the Hist. du Droit Romain, by M. Hugo, vol. ii. p. 55, 57. The comitia ceased imperceptibly as the republic gradually expired.--W.]

[Footnote 32: Non ambigitur senatum jus facere posse, is the decision

of Ulpian, (l. xvi. ad Edict. in Pandect. l. i. tit. iii. leg. 9.)
Pomponius taxes the comitia of the people as a turba hominum, (Pandect.
l. i. tit. ii. leg 9.) * Note: The author adopts the opinion, that under
the emperors alone the senate had a share in the legislative power.
They had nevertheless participated in it under the Republic, since
senatus-consulta relating to civil rights have been preserved, which are
much earlier than the reigns of Augustus or Tiberius. It is true that,
under the emperors, the senate exercised this right more frequently, and
that the assemblies of the people had become much more rare, though in
law they were still permitted, in the time of Ulpian. (See the fragments
of Ulpian.) Bach has clearly demonstrated that the senate had the
same power in the time of the Republic. It is natural that the
senatus-consulta should have been more frequent under the emperors,
because they employed those means of flattering the pride of the
senators, by granting them the right of deliberating on all affairs
which did not intrench on the Imperial power. Compare the discussions of
M. Hugo, vol. i. p. 284, et seq.--W.]

The silence or ambiguity of the laws was supplied by the occasional
edicts [3211] of those magistrates who were invested with the honors
of the state. [33] This ancient prerogative of the Roman kings was
transferred, in their respective offices, to the consuls and dictators,
the censors and praetors; and a similar right was assumed by the
tribunes of the people, the ediles, and the proconsuls. At Rome, and
in the provinces, the duties of the subject, and the intentions of the
governor, were proclaimed; and the civil jurisprudence was reformed by

the annual edicts of the supreme judge, the praetor of the city. [3311] As soon as he ascended his tribunal, he announced by the voice of the crier, and afterwards inscribed on a white wall, the rules which he proposed to follow in the decision of doubtful cases, and the relief which his equity would afford from the precise rigor of ancient statutes. A principle of discretion more congenial to monarchy was introduced into the republic: the art of respecting the name, and eluding the efficacy, of the laws, was improved by successive praetors; subtleties and fictions were invented to defeat the plainest meaning of the Decemvirs, and where the end was salutary, the means were frequently absurd. The secret or probable wish of the dead was suffered to prevail over the order of succession and the forms of testaments; and the claimant, who was excluded from the character of heir, accepted with equal pleasure from an indulgent praetor the possession of the goods of his late kinsman or benefactor. In the redress of private wrongs, compensations and fines were substituted to the obsolete rigor of the Twelve Tables; time and space were annihilated by fanciful suppositions; and the plea of youth, or fraud, or violence, annulled the obligation, or excused the performance, of an inconvenient contract. A jurisdiction thus vague and arbitrary was exposed to the most dangerous abuse: the substance, as well as the form, of justice were often sacrificed to the prejudices of virtue, the bias of laudable affection, and the grosser seductions of interest or resentment. But the errors or vices of each praetor expired with his annual office; such maxims alone as had been approved by reason and practice were copied by succeeding judges; the rule of proceeding was defined by the solution of new cases; and the

temptations of injustice were removed by the Cornelian law, which
compelled the praetor of the year to adhere to the spirit and letter
of his first proclamation. [34] It was reserved for the curiosity and
learning of Adrian, to accomplish the design which had been conceived by
the genius of Caesar; and the praetorship of Salvius Julian, an eminent
lawyer, was immortalized by the composition of the Perpetual Edict. This
well-digested code was ratified by the emperor and the senate; the long
divorce of law and equity was at length reconciled; and, instead of the
Twelve Tables, the perpetual edict was fixed as the invariable standard
of civil jurisprudence. [35]

[Footnote 3211: There is a curious passage from Aurelius, a writer on
Law, on the Praetorian Praefect, quoted in Lydus de Magistratibus, p.
32, edit. Hase. The Praetorian praefect was to the emperor what the
master of the horse was to the dictator under the Republic. He was the
delegate, therefore, of the full Imperial authority; and no appeal could
be made or exception taken against his edicts. I had not observed
this passage, when the third volume, where it would have been more
appropriately placed, passed through the press.--M]

[Footnote 33: The jus honorarium of the praetors and other magistrates
is strictly defined in the Latin text to the Institutes, (l. i. tit.
ii. No. 7,) and more loosely explained in the Greek paraphrase of
Theophilus, (p. 33--38, edit. Reitz,) who drops the important word
honorarium. * Note: The author here follows the opinion of Heineccius,
who, according to the idea of his master Thomasius, was unwilling

to suppose that magistrates exercising a judicial could share in the legislative power. For this reason he represents the edicts of the praetors as absurd. (See his work, Historia Juris Romani, 69, 74.) But Heineccius had altogether a false notion of this important institution of the Romans, to which we owe in a great degree the perfection of their jurisprudence. Heineccius, therefore, in his own days had many opponents of his system, among others the celebrated Ritter, professor at Wittemberg, who contested it in notes appended to the work of Heineccius, and retained in all subsequent editions of that book.
After Ritter, the learned Bach undertook to vindicate the edicts of the praetors in his Historia Jurisprud. Rom. edit. 6, p. 218, 224. But it remained for a civilian of our own days to throw light on the spirit and true character of this institution. M. Hugo has completely demonstrated that the praetorian edicts furnished the salutary means of perpetually harmonizing the legislation with the spirit of the times. The praetors were the true organs of public opinion. It was not according to their caprice that they framed their regulations, but according to the manners and to the opinions of the great civil lawyers of their day. We know from Cicero himself, that it was esteemed a great honor among the Romans to publish an edict, well conceived and well drawn. The most distinguished lawyers of Rome were invited by the praetor to assist in framing this annual law, which, according to its principle, was only a declaration which the praetor made to the public, to announce the manner in which he would judge, and to guard against every charge of partiality. Those who had reason to fear his opinions might delay their cause till the following year. The praetor was responsible for all

the faults which he committed. The tribunes could lodge an accusation against the praetor who issued a partial edict. He was bound strictly to follow and to observe the regulations published by him at the commencement of his year of office, according to the Cornelian law, by which these edicts were called perpetual, and he could make no change in a regulation once published. The praetor was obliged to submit to his own edict, and to judge his own affairs according to its provisions. These magistrates had no power of departing from the fundamental laws, or the laws of the Twelve Tables. The people held them in such consideration, that they rarely enacted laws contrary to their provisions; but as some provisions were found inefficient, others opposed to the manners of the people, and to the spirit of subsequent ages, the praetors, still maintaining respect for the laws, endeavored to bring them into accordance with the necessities of the existing time, by such fictions as best suited the nature of the case. In what legislation do we not find these fictions, which even yet exist, absurd and ridiculous as they are, among the ancient laws of modern nations? These always variable edicts at length comprehended the whole of the Roman legislature, and became the subject of the commentaries of the most celebrated lawyers. They must therefore be considered as the basis of all the Roman jurisprudence comprehended in the Digest of Justinian. ----It is in this sense that M. Schrader has written on this important institution, proposing it for imitation as far as may be consistent with our manners, and agreeable to our political institutions, in order to avoid immature legislation becoming a permanent evil. See the History of the Roman Law by M. Hugo, vol. i. p. 296, &c., vol. ii. p. 30, et seq.,

78. et seq., and the note in my elementary book on the Industries, p. 313. With regard to the works best suited to give information on the framing and the form of these edicts, see Haubold, Institutiones Literariae, tom. i. p. 321, 368. All that Heineccius says about the usurpation of the right of making these edicts by the praetors is false, and contrary to all historical testimony. A multitude of authorities proves that the magistrates were under an obligation to publish these edicts.--W. ----With the utmost deference for these excellent civilians, I cannot but consider this confusion of the judicial and legislative authority as a very perilous constitutional precedent. It might answer among a people so singularly trained as the Romans were by habit and national character in reverence for legal institutions, so as to be an aristocracy, if not a people, of legislators; but in most nations the investiture of a magistrate in such authority, leaving to his sole judgment the lawyers he might consult, and the view of public opinion which he might take, would be a very insufficient guaranty for right legislation.--M.]

[Footnote 3311: Compare throughout the brief but admirable sketch of the progress and growth of the Roman jurisprudence, the necessary operation of the jusgentium, when Rome became the sovereign of nations, upon the jus civile of the citizens of Rome, in the first chapter of Savigny. Geschichte des Romischen Rechts im Mittelalter.--M.]

[Footnote 34: Dion Cassius (tom. i. l. xxxvi. p. 100) fixes the perpetual edicts in the year of Rome, 686. Their institution, however,

is ascribed to the year 585 in the Acta Diurna, which have been published from the papers of Ludovicus Vives. Their authenticity is supported or allowed by Pighius, (Annal. Rom. tom. ii. p. 377, 378,) Graevius, (ad Sueton. p. 778,) Dodwell, (Praelection. Cambden, p. 665,) and Heineccius: but a single word, Scutum Cimbricum, detects the forgery, (Moyle's Works, vol. i. p. 303.)]

[Footnote 35: The history of edicts is composed, and the text of the perpetual edict is restored, by the master-hand of Heineccius, (Opp. tom. vii. P. ii. p. 1--564;) in whose researches I might safely acquiesce. In the Academy of Inscriptions, M. Bouchaud has given a series of memoirs to this interesting subject of law and literature. * Note: This restoration was only the commencement of a work found among the papers of Heineccius, and published after his death.--G. ----Note: Gibbon has here fallen into an error, with Heineccius, and almost the whole literary world, concerning the real meaning of what is called the perpetual edict of Hadrian. Since the Cornelian law, the edicts were perpetual, but only in this sense, that the praetor could not change them during the year of his magistracy. And although it appears that under Hadrian, the civilian Julianus made, or assisted in making, a complete collection of the edicts, (which certainly had been done likewise before Hadrian, for example, by Ofilius, qui diligenter edictum composuit,) we have no sufficient proof to admit the common opinion, that the Praetorian edict was declared perpetually unalterable by Hadrian. The writers on law subsequent to Hadrian (and among the rest Pomponius, in his Summary of the Roman Jurisprudence) speak of the

edict as it existed in the time of Cicero. They would not certainly have passed over in silence so remarkable a change in the most important source of the civil law. M. Hugo has conclusively shown that the various passages in authors, like Eutropius, are not sufficient to establish the opinion introduced by Heineccius. Compare Hugo, vol. ii. p. 78. A new proof of this is found in the Institutes of Gaius, who, in the first books of his work, expresses himself in the same manner, without mentioning any change made by Hadrian. Nevertheless, if it had taken place, he must have noticed it, as he does l. i. 8, the responsa prudentum, on the occasion of a rescript of Hadrian. There is no lacuna in the text. Why then should Gaius maintain silence concerning an innovation so much more important than that of which he speaks? After all, this question becomes of slight interest, since, in fact, we find no change in the perpetual edict inserted in the Digest, from the time of Hadrian to the end of that epoch, except that made by Julian, (compare Hugo, l. c.) The latter lawyers appear to follow, in their commentaries, the same texts as their predecessors. It is natural to suppose, that, after the labors of so many men distinguished in jurisprudence, the framing of the edict must have attained such perfection that it would have been difficult to have made any innovation. We nowhere find that the jurists of the Pandects disputed concerning the words, or the drawing up of the edict. What difference would, in fact, result from this with regard to our codes, and our modern legislation? Compare the learned Dissertation of M. Biener, De Salvii Juliani meritis in Edictum Praetorium recte aestimandis. Lipsae, 1809, 4to.--W.]

From Augustus to Trajan, the modest Caesars were content to promulgate their edicts in the various characters of a Roman magistrate; [3511] and, in the decrees of the senate, the epistles and orations of the prince were respectfully inserted. Adrian [36] appears to have been the first who assumed, without disguise, the plenitude of legislative power. And this innovation, so agreeable to his active mind, was countenanced by the patience of the times, and his long absence from the seat of government. The same policy was embraced by succeeding monarchs, and, according to the harsh metaphor of Tertullian, "the gloomy and intricate forest of ancient laws was cleared away by the axe of royal mandates and constitutions." [37] During four centuries, from Adrian to Justinian the public and private jurisprudence was moulded by the will of the sovereign; and few institutions, either human or divine, were permitted to stand on their former basis. The origin of Imperial legislation was concealed by the darkness of ages and the terrors of armed despotism; and a double tiction was propagated by the servility, or perhaps the ignorance, of the civilians, who basked in the sunshine of the Roman and Byzantine courts. 1. To the prayer of the ancient Caesars, the people or the senate had sometimes granted a personal exemption from the obligation and penalty of particular statutes; and each indulgence was an act of jurisdiction exercised by the republic over the first of her citizens. His humble privilege was at length transformed into the prerogative of a tyrant; and the Latin expression of "released from the laws" [38] was supposed to exalt the emperor above all human restraints, and to leave his conscience and reason as the sacred measure of his

conduct. 2. A similar dependence was implied in the decrees of the senate, which, in every reign, defined the titles and powers of an elective magistrate. But it was not before the ideas, and even the language, of the Romans had been corrupted, that a royal law, [39] and an irrevocable gift of the people, were created by the fancy of Ulpian, or more probably of Tribonian himself; [40] and the origin of Imperial power, though false in fact, and slavish in its consequence, was supported on a principle of freedom and justice. "The pleasure of the emperor has the vigor and effect of law, since the Roman people, by the royal law, have transferred to their prince the full extent of their own power and sovereignty." [41] The will of a single man, of a child perhaps, was allowed to prevail over the wisdom of ages and the inclinations of millions; and the degenerate Greeks were proud to declare, that in his hands alone the arbitrary exercise of legislation could be safely deposited. "What interest or passion," exclaims Theophilus in the court of Justinian, "can reach the calm and sublime elevation of the monarch? He is already master of the lives and fortunes of his subjects; and those who have incurred his displeasure are already numbered with the dead." [42] Disdaining the language of flattery, the historian may confess, that in questions of private jurisprudence, the absolute sovereign of a great empire can seldom be influenced by any personal considerations. Virtue, or even reason, will suggest to his impartial mind, that he is the guardian of peace and equity, and that the interest of society is inseparably connected with his own. Under the weakest and most vicious reign, the seat of justice was filled by the wisdom and integrity of Papinian and Ulpian; [43] and the purest

materials of the Code and Pandects are inscribed with the names of Caracalla and his ministers. [44] The tyrant of Rome was sometimes the benefactor of the provinces. A dagger terminated the crimes of Domitian; but the prudence of Nerva confirmed his acts, which, in the joy of their deliverance, had been rescinded by an indignant senate. [45] Yet in the rescripts, [46] replies to the consultations of the magistrates, the wisest of princes might be deceived by a partial exposition of the case. And this abuse, which placed their hasty decisions on the same level with mature and deliberate acts of legislation, was ineffectually condemned by the sense and example of Trajan. The rescripts of the emperor, his grants and decrees, his edicts and pragmatic sanctions, were subscribed in purple ink, [47] and transmitted to the provinces as general or special laws, which the magistrates were bound to execute, and the people to obey. But as their number continually multiplied, the rule of obedience became each day more doubtful and obscure, till the will of the sovereign was fixed and ascertained in the Gregorian, the Hermogenian, and the Theodosian codes. [4711] The two first, of which some fragments have escaped, were framed by two private lawyers, to preserve the constitutions of the Pagan emperors from Adrian to Constantine. The third, which is still extant, was digested in sixteen books by the order of the younger Theodosius to consecrate the laws of the Christian princes from Constantine to his own reign. But the three codes obtained an equal authority in the tribunals; and any act which was not included in the sacred deposit might be disregarded by the judge as epurious or obsolete. [48]

[Footnote 3511: It is an important question in what manner the emperors were invested with this legislative power. The newly discovered Gaius distinctly states that it was in virtue of a law--Nec unquam dubitatum est, quin id legis vicem obtineat, cum ipse imperator per legem imperium accipiat. But it is still uncertain whether this was a general law, passed on the transition of the government from a republican to a monarchical form, or a law passed on the accession of each emperor. Compare Hugo, Hist. du Droit Romain, (French translation,) vol. ii. p. 8.--M.]

[Footnote 36: His laws are the first in the code. See Dodwell, (Praelect. Cambden, p. 319--340,) who wanders from the subject in confused reading and feeble paradox. * Note: This is again an error which Gibbon shares with Heineccius, and the generality of authors. It arises from having mistaken the insignificant edict of Hadrian, inserted in the Code of Justinian, (lib. vi, tit. xxiii. c. 11,) for the first constitutio principis, without attending to the fact, that the Pandects contain so many constitutions of the emperors, from Julius Caesar, (see l. i. Digest 29, l) M. Hugo justly observes, that the acta of Sylla, approved by the senate, were the same thing with the constitutions of those who after him usurped the sovereign power. Moreover, we find that Pliny, and other ancient authors, report a multitude of rescripts of the emperors from the time of Augustus. See Hugo, Hist. du Droit Romain, vol. ii. p. 24-27.--W.]

[Footnote 37: Totam illam veterem et squalentem sylvam legum novis

principalium rescriptorum et edictorum securibus truncatis et caeditis; (Apologet. c. 4, p. 50, edit. Havercamp.) He proceeds to praise the recent firmness of Severus, who repealed the useless or pernicious laws, without any regard to their age or authority.]

[Footnote 38: The constitutional style of Legibus Solutus is misinterpreted by the art or ignorance of Dion Cassius, (tom. i. l. liii. p. 713.) On this occasion, his editor, Reimer, joins the universal censure which freedom and criticism have pronounced against that slavish historian.]

[Footnote 39: The word (Lex Regia) was still more recent than the thing. The slaves of Commodus or Caracalla would have started at the name of royalty. Note: Yet a century before, Domitian was called not only by Martial but even in public documents, Dominus et Deus Noster. Sueton. Domit. cap. 13. Hugo.--W.]

[Footnote 40: See Gravina (Opp. p. 501--512) and Beaufort, (Republique Romaine, tom. i. p. 255--274.) He has made a proper use of two dissertations by John Frederic Gronovius and Noodt, both translated, with valuable notes, by Barbeyrac, 2 vols. in 12mo. 1731.]

[Footnote 41: Institut. l. i. tit. ii. No. 6. Pandect. l. i. tit. iv. leg. 1. Cod. Justinian, l. i. tit. xvii. leg. 1, No. 7. In his Antiquities and Elements, Heineccius has amply treated de constitutionibus principum, which are illustrated by Godefroy (Comment.

ad Cod. Theodos. l. i. tit. i. ii. iii.) and Gravina, (p. 87--90.)
----Note: Gaius asserts that the Imperial edict or rescript has and
always had, the force of law, because the Imperial authority rests upon
law. Constitutio principis est, quod imperator decreto vel edicto,
vel epistola constituit, nee unquam dubitatum, quin id legis, vicem
obtineat, cum ipse imperator per legem imperium accipiat. Gaius, 6
Instit. i. 2.--M.]

[Footnote 42: Theophilus, in Paraphras. Graec. Institut. p. 33, 34,
edit. Reitz For his person, time, writings, see the Theophilus of J. H.
Mylius, Excurs. iii. p. 1034--1073.]

[Footnote 43: There is more envy than reason in the complaint of
Macrinus (Jul. Capitolin. c. 13:) Nefas esse leges videri Commodi et
Caracalla at hominum imperitorum voluntates. Commodus was made a Divus
by Severus, (Dodwell, Praelect. viii. p. 324, 325.) Yet he occurs only
twice in the Pandects.]

[Footnote 44: Of Antoninus Caracalla alone 200 constitutions are extant
in the Code, and with his father 160. These two princes are quoted fifty
times in the Pandects, and eight in the Institutes, (Terasson, p. 265.)]

[Footnote 45: Plin. Secund. Epistol. x. 66. Sueton. in Domitian. c. 23.]

[Footnote 46: It was a maxim of Constantine, contra jus rescripta non
valeant, (Cod. Theodos. l. i. tit. ii. leg. 1.) The emperors reluctantly

allow some scrutiny into the law and the fact, some delay, petition, &c.; but these insufficient remedies are too much in the discretion and at the peril of the judge.]

[Footnote 47: A compound of vermilion and cinnabar, which marks the Imperial diplomas from Leo I. (A.D. 470) to the fall of the Greek empire, (Bibliotheque Raisonnee de la Diplomatique, tom. i. p. 504--515 Lami, de Eruditione Apostolorum, tom. ii. p. 720-726.)]

[Footnote 4711: Savigny states the following as the authorities for the Roman law at the commencement of the fifth century:-- 1. The writings of the jurists, according to the regulations of the Constitution of Valentinian III., first promulgated in the West, but by its admission into the Theodosian Code established likewise in the East. (This Constitution established the authority of the five great jurists, Papinian, Paulus, Caius, Ulpian, and Modestinus as interpreters of the ancient law. * * * In case of difference of opinion among these five, a majority decided the case; where they were equal, the opinion of Papinian, where he was silent, the judge; but see p. 40, and Hugo, vol. ii. p. 89.) 2. The Gregorian and Hermogenian Collection of the Imperial Rescripts. 3. The Code of Theodosius II. 4. The particular Novellae, as additions and Supplements to this Code Savigny. vol. i. p 10.--M.]

[Footnote 48: Schulting, Jurisprudentia Ante-Justinianea, p. 681-718. Cujacius assigned to Gregory the reigns from Hadrian to Gallienus. and the continuation to his fellow-laborer Hermogenes. This general division

may be just, but they often trespassed on each other's ground]