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

Among savage nations, the want of letters is imperfectly supplied by the use of visible signs, which awaken attention, and perpetuate the remembrance of any public or private transaction. The jurisprudence of the first Romans exhibited the scenes of a pantomime; the words were adapted to the gestures, and the slightest error or neglect in the forms of proceeding was sufficient to annul the substance of the fairest claim. The communion of the marriage-life was denoted by the necessary elements of fire and water; [49] and the divorced wife resigned the bunch of keys, by the delivery of which she had been invested with the government of the family. The manumission of a son, or a slave, was performed by turning him round with a gentle blow on the cheek; a work was prohibited by the casting of a stone; prescription was interrupted by the breaking of a branch; the clinched fist was the symbol of a pledge or deposit; the right hand was the gift of faith and confidence. The indenture of covenants was a broken straw; weights and scales were introduced into every payment, and the heir who accepted a testament was sometimes obliged to snap his fingers, to cast away his garments, and to leap or dance with real or affected transport. [50] If a citizen pursued any stolen goods into a neighbor's house, he concealed his nakedness with a linen towel, and hid his face with a mask or basin, lest he should encounter the eyes of a virgin or a matron. [51] In a civil action the plaintiff touched the ear of his witness, seized his reluctant adversary by the neck, and implored, in solemn lamentation, the aid of his fellow-citizens. The two competitors grasped each other's

hand as if they stood prepared for combat before the tribunal of the praetor; he commanded them to produce the object of the dispute; they went, they returned with measured steps, and a clod of earth was cast at his feet to represent the field for which they contended. This occult science of the words and actions of law was the inheritance of the pontiffs and patricians. Like the Chaldean astrologers, they announced to their clients the days of business and repose; these important trifles were interwoven with the religion of Numa; and after the publication of the Twelve Tables, the Roman people was still enslaved by the ignorance of judicial proceedings. The treachery of some plebeian officers at length revealed the profitable mystery: in a more enlightened age, the legal actions were derided and observed; and the same antiquity which sanctified the practice, obliterated the use and meaning of this primitive language. [52]

[Footnote 49: Scaevola, most probably Q. Cervidius Scaevola; the master of Papinian considers this acceptance of fire and water as the essence of marriage, (Pandect. l. xxiv. tit. 1, leg. 66. See Heineccius, Hist. J. R. No. 317.)]

[Footnote 50: Cicero (de Officiis, iii. 19) may state an ideal case, but St. Am brose (de Officiis, iii. 2,) appeals to the practice of his own times, which he understood as a lawyer and a magistrate, (Schulting ad Ulpian, Fragment. tit. xxii. No. 28, p. 643, 644.) * Note: In this passage the author has endeavored to collect all the examples of judicial formularies which he could find. That which he adduces as the

form of cretio haereditatis is absolutely false. It is sufficient to glance at the passage in Cicero which he cites, to see that it has no relation to it. The author appeals to the opinion of Schulting, who, in the passage quoted, himself protests against the ridiculous and absurd interpretation of the passage in Cicero, and observes that Graevius had already well explained the real sense. See in Gaius the form of cretio haereditatis Inst. l. ii. p. 166.--W.]

[Footnote 51: The furtum lance licioque conceptum was no longer understood in the time of the Antonines, (Aulus Gellius, xvi. 10.) The Attic derivation of Heineccius, (Antiquitat. Rom. l. iv. tit. i. No. 13--21) is supported by the evidence of Aristophanes, his scholiast, and Pollux. * Note: Nothing more is known of this ceremony; nevertheless we find that already in his own days Gaius turned it into ridicule. He says, (lib. iii. et p. 192, Sections 293,) prohibiti actio quadrupli ex edicto praetoris introducta est; lex autem eo nomine nullam poenam constituit. Hoc solum praecepit, ut qui quaerere velit, nudus quaerat, linteo cinctus, lancem habens; qui si quid invenerit. jubet id lex furtum manifestum esse. Quid sit autem linteum? quaesitum est. Sed verius est consuti genus esse, quo necessariae partes tegerentur. Quare lex tota ridicula est. Nam qui vestitum quaerere prohibet, is et nudum quaerere prohibiturus est; eo magis, quod invenerit ibi imponat, neutrum eorum procedit, si id quod quaeratur, ejus magnitudinis aut naturae sit ut neque subjici, neque ibi imponi possit. Certe non dubitatur, cujuscunque materiae sit ea lanx, satis legi fieri. We see moreover, from this passage, that the basin, as most authors, resting on

the authority of Festus, have supposed, was not used to cover the figure.--W. Gibbon says the face, though equally inaccurately. This passage of Gaius, I must observe, as well as others in M. Warnkonig's work, is very inaccurately printed.--M.]

[Footnote 52: In his Oration for Murena, (c. 9--13,) Cicero turns into ridicule the forms and mysteries of the civilians, which are represented with more candor by Aulus Gellius, (Noct. Attic. xx. 10,) Gravina, (Opp p. 265, 266, 267,) and Heineccius, (Antiquitat. l. iv. tit. vi.) * Note: Gibbon had conceived opinions too decided against the forms of procedure in use among the Romans. Yet it is on these solemn forms that the certainty of laws has been founded among all nations. Those of the Romans were very intimately allied with the ancient religion, and must of necessity have disappeared as Rome attained a higher degree of civilization. Have not modern nations, even the most civilized, overloaded their laws with a thousand forms, often absurd, almost always trivial? How many examples are afforded by the English law! See, on the nature of these forms, the work of M. de Savigny on the Vocation of our Age for Legislation and Jurisprudence, Heidelberg, 1814, p. 9, 10.--W. This work of M. Savigny has been translated into English by Mr. Hayward.--M.]

A more liberal art was cultivated, however, by the sage of Rome, who, in a stricter sense, may be considered as the authors of the civil law. The alteration of the idiom and manners of the Romans rendered the style of the Twelve Tables less familiar to each rising generation, and the

doubtful passages were imperfectly explained by the study of legal antiquarians. To define the ambiguities, to circumscribe the latitude, to apply the principles, to extend the consequences, to reconcile the real or apparent contradictions, was a much nobler and more important task; and the province of legislation was silently invaded by the expounders of ancient statutes. Their subtle interpretations concurred with the equity of the praetor, to reform the tyranny of the darker ages: however strange or intricate the means, it was the aim of artificial jurisprudence to restore the simple dictates of nature and reason, and the skill of private citizens was usefully employed to undermine the public institutions of their country. [521] The revolution of almost one thousand years, from the Twelve Tables to the reign of Justinian, may be divided into three periods, almost equal in duration, and distinguished from each other by the mode of instruction and the character of the civilians. [53] Pride and ignorance contributed, during the first period, to confine within narrow limits the science of the Roman law. On the public days of market or assembly, the masters of the art were seen walking in the forum ready to impart the needful advice to the meanest of their fellow-citizens, from whose votes, on a future occasion, they might solicit a grateful return. As their years and honors increased, they seated themselves at home on a chair or throne, to expect with patient gravity the visits of their clients, who at the dawn of day, from the town and country, began to thunder at their door. The duties of social life, and the incidents of judicial proceeding, were the ordinary subject of these consultations, and the verbal or written opinion of the juris-consults was framed according to the rules

of prudence and law. The youths of their own order and family were permitted to listen; their children enjoyed the benefit of more private lessons, and the Mucian race was long renowned for the hereditary knowledge of the civil law. The second period, the learned and splendid age of jurisprudence, may be extended from the birth of Cicero to the reign of Severus Alexander. A system was formed, schools were instituted, books were composed, and both the living and the dead became subservient to the instruction of the student. The tripartite of Aelius Paetus, surnamed Catus, or the Cunning, was preserved as the oldest work of Jurisprudence. Cato the censor derived some additional fame from his legal studies, and those of his son: the kindred appellation of Mucius Scaevola was illustrated by three sages of the law; but the perfection of the science was ascribed to Servius Sulpicius, their disciple, and the friend of Tully; and the long succession, which shone with equal lustre under the republic and under the Caesars, is finally closed by the respectable characters of Papinian, of Paul, and of Ulpian. Their names, and the various titles of their productions, have been minutely preserved, and the example of Labeo may suggest some idea of their diligence and fecundity. That eminent lawyer of the Augustan age divided the year between the city and country, between business and composition; and four hundred books are enumerated as the fruit of his retirement. Of the collection of his rival Capito, the two hundred and fifty-ninth book is expressly quoted; and few teachers could deliver their opinions in less than a century of volumes. In the third period, between the reigns of Alexander and Justinian, the oracles of jurisprudence were almost mute. The measure of curiosity had been filled: the throne was occupied

by tyrants and Barbarians, the active spirits were diverted by religious disputes, and the professors of Rome, Constantinople, and Berytus, were humbly content to repeat the lessons of their more enlightened predecessors. From the slow advances and rapid decay of these legal studies, it may be inferred, that they require a state of peace and refinement. From the multitude of voluminous civilians who fill the intermediate space, it is evident that such studies may be pursued, and such works may be performed, with a common share of judgment, experience, and industry. The genius of Cicero and Virgil was more sensibly felt, as each revolving age had been found incapable of producing a similar or a second: but the most eminent teachers of the law were assured of leaving disciples equal or superior to themselves in merit and reputation.

[Footnote 521: Compare, on the Responsa Prudentum, Warnkonig, Histoire Externe du Droit Romain Bruxelles, 1836, p. 122.--M.]

[Footnote 53: The series of the civil lawyers is deduced by Pomponius, (de Origine Juris Pandect. l. i. tit. ii.) The moderns have discussed, with learning and criticism, this branch of literary history; and among these I have chiefly been guided by Gravina (p. 41--79) and Hei neccius, (Hist. J. R. No. 113-351.) Cicero, more especially in his books de Oratore, de Claris Oratoribus, de Legibus, and the Clavie Ciceroniana of Ernesti (under the names of Mucius, &c.) afford much genuine and pleasing information. Horace often alludes to the morning labors of the civilians, (Serm. I. i. 10, Epist. II. i. 103, &c)

Agricolam laudat juris legumque peritus Sub galli cantum,
consultor ubi ostia pulsat.

Romae dulce diu fuit et solemne, reclusa Mane domo vigilare,
clienti promere jura.

* Note: It is particularly in this division of the history of the Roman jurisprudence into epochs, that Gibbon displays his profound knowledge of the laws of this people. M. Hugo, adopting this division, prefaced these three periods with the history of the times anterior to the Law of the Twelve Tables, which are, as it were, the infancy of the Roman law.--W]

The jurisprudence which had been grossly adapted to the wants of the first Romans, was polished and improved in the seventh century of the city, by the alliance of Grecian philosophy. The Scaevolas had been taught by use and experience; but Servius Sulpicius [5311] was the first civilian who established his art on a certain and general theory. [54] For the discernment of truth and falsehood he applied, as an infallible rule, the logic of Aristotle and the stoics, reduced particular cases to general principles, and diffused over the shapeless mass the light of order and eloquence. Cicero, his contemporary and friend, declined the reputation of a professed lawyer; but the jurisprudence of his country was adorned by his incomparable genius, which converts into gold every object that it touches. After the example of Plato, he composed a

republic; and, for the use of his republic, a treatise of laws; in which he labors to deduce from a celestial origin the wisdom and justice of the Roman constitution. The whole universe, according to his sublime hypothesis, forms one immense commonwealth: gods and men, who participate of the same essence, are members of the same community; reason prescribes the law of nature and nations; and all positive institutions, however modified by accident or custom, are drawn from the rule of right, which the Deity has inscribed on every virtuous mind. From these philosophical mysteries, he mildly excludes the sceptics who refuse to believe, and the epicureans who are unwilling to act. The latter disdain the care of the republic: he advises them to slumber in their shady gardens. But he humbly entreats that the new academy would be silent, since her bold objections would too soon destroy the fair and well ordered structure of his lofty system. [55] Plato, Aristotle, and Zeno, he represents as the only teachers who arm and instruct a citizen for the duties of social life. Of these, the armor of the stoics [56] was found to be of the firmest temper; and it was chiefly worn, both for use and ornament, in the schools of jurisprudence. From the portico, the Roman civilians learned to live, to reason, and to die: but they imbibed in some degree the prejudices of the sect; the love of paradox, the pertinacious habits of dispute, and a minute attachment to words and verbal distinctions. The superiority of form to matter was introduced to ascertain the right of property: and the equality of crimes is countenanced by an opinion of Trebatius, [57] that he who touches the ear, touches the whole body; and that he who steals from a heap of corn, or a hogshead of wine, is guilty of the entire theft. [58]

[Footnote 5311: M. Hugo thinks that the ingenious system of the Institutes adopted by a great number of the ancient lawyers, and by Justinian himself, dates from Severus Sulpicius. Hist du Droit Romain, vol.iii.p. 119.--W.]

[Footnote 54: Crassus, or rather Cicero himself, proposes (de Oratore, i. 41, 42) an idea of the art or science of jurisprudence, which the eloquent, but illiterate, Antonius (i. 58) affects to deride. It was partly executed by Servius Sulpicius, (in Bruto, c. 41,) whose praises are elegantly varied in the classic Latinity of the Roman Gravina, (p. 60.)]

[Footnote 55: Perturbatricem autem omnium harum rerum academiam, hanc ab Arcesila et Carneade recentem, exoremus ut sileat, nam si invaserit in haec, quae satis scite instructa et composita videantur, nimis edet ruinas, quam quidem ego placare cupio, submovere non audeo. (de Legibus, i. 13.) From this passage alone, Bentley (Remarks on Free-thinking, p. 250) might have learned how firmly Cicero believed in the specious doctrines which he has adorned.]

[Footnote 56: The stoic philosophy was first taught at Rome by Panaetius, the friend of the younger Scipio, (see his life in the Mem. de l'Academis des Inscriptions, tom. x. p. 75--89.)]

[Footnote 57: As he is quoted by Ulpian, (leg.40, 40, ad Sabinum in

Pandect. l. xlvii. tit. ii. leg. 21.) Yet Trebatius, after he was a leading civilian, que qui familiam duxit, became an epicurean, (Cicero ad Fam. vii. 5.) Perhaps he was not constant or sincere in his new sect. * Note: Gibbon had entirely misunderstood this phrase of Cicero. It was only since his time that the real meaning of the author was apprehended. Cicero, in enumerating the qualifications of Trebatius, says, Accedit etiam, quod familiam ducit in jure civili, singularis memoria, summa scientia, which means that Trebatius possessed a still further most important qualification for a student of civil law, a remarkable memory, &c. This explanation, already conjectured by G. Menage, Amaenit. Juris Civilis, c. 14, is found in the dictionary of Scheller, v. Familia, and in the History of the Roman Law by M. Hugo. Many authors have asserted, without any proof sufficient to warrant the conjecture, that Trebatius was of the school of Epicurus--W.]

[Footnote 58: See Gravina (p. 45--51) and the ineffectual cavils of Mascou. Heineccius (Hist. J. R. No. 125) quotes and approves a dissertation of Everard Otto, de Stoica Jurisconsultorum Philosophia.]

Arms, eloquence, and the study of the civil law, promoted a citizen to the honors of the Roman state; and the three professions were sometimes more conspicuous by their union in the same character. In the composition of the edict, a learned praetor gave a sanction and preference to his private sentiments; the opinion of a censor, or a counsel, was entertained with respect; and a doubtful interpretation of the laws might be supported by the virtues or triumphs of the civilian.

The patrician arts were long protected by the veil of mystery; and in more enlightened times, the freedom of inquiry established the general principles of jurisprudence. Subtile and intricate cases were elucidated by the disputes of the forum: rules, axioms, and definitions, [59] were admitted as the genuine dictates of reason; and the consent of the legal professors was interwoven into the practice of the tribunals. But these interpreters could neither enact nor execute the laws of the republic; and the judges might disregard the authority of the Scaevolas themselves, which was often overthrown by the eloquence or sophistry of an ingenious pleader. [60] Augustus and Tiberius were the first to adopt, as a useful engine, the science of the civilians; and their servile labors accommodated the old system to the spirit and views of despotism. Under the fair pretence of securing the dignity of the art, the privilege of subscribing legal and valid opinions was confined to the sages of senatorian or equestrian rank, who had been previously approved by the judgment of the prince; and this monopoly prevailed, till Adrian restored the freedom of the profession to every citizen conscious of his abilities and knowledge. The discretion of the praetor was now governed by the lessons of his teachers; the judges were enjoined to obey the comment as well as the text of the law; and the use of codicils was a memorable innovation, which Augustus ratified by the advice of the civilians. [61] [6111]

[Footnote 59: We have heard of the Catonian rule, the Aquilian stipulation, and the Manilian forms, of 211 maxims, and of 247 definitions, (Pandect. l. i. tit. xvi. xvii.)]

[Footnote 60: Read Cicero, l. i. de Oratore, Topica, pro Murena.]

[Footnote 61: See Pomponius, (de Origine Juris Pandect. l. i. tit. ii. leg. 2, No 47,) Heineccius, (ad Institut. l. i. tit. ii. No. 8, l. ii. tit. xxv. in Element et Antiquitat.,) and Gravina, (p. 41--45.) Yet the monopoly of Augustus, a harsh measure, would appear with some softening in contemporary evidence; and it was probably veiled by a decree of the senate]

[Footnote 6111: The author here follows the then generally received opinion of Heineccius. The proofs which appear to confirm it are l. 2 47, D. I. 2, and 8. Instit. I. 2. The first of these passages speaks expressly of a privilege granted to certain lawyers, until the time of Adrian, publice respondendi jus ante Augusti tempora non dabatur. Primus Divus ut major juris auctoritas haberetur, constituit, ut ex auctoritate ejus responderent. The passage of the Institutes speaks of the different opinions of those, quibus est permissum jura condere. It is true that the first of these passages does not say that the opinion of these privileged lawyers had the force of a law for the judges. For this reason M. Hugo altogether rejects the opinion adopted by Heineccius, by Bach, and in general by all the writers who preceded him. He conceives that the 8 of the Institutes referred to the constitution of Valentinian III., which regulated the respective authority to be ascribed to the different writings of the great civilians. But we have now the following passage in the Institutes of Gaius: Responsa prudentum sunt sententiae

et opiniones eorum, quibus permissum est jura condere; quorum omnium si in unum sententiae concorrupt, id quod ita sentiunt, legis vicem obtinet, si vero dissentiunt, judici licet, quam velit sententiam sequi, idque rescripto Divi Hadrian signiticatur. I do not know, how in opposition to this passage, the opinion of M. Hugo can be maintained. We must add to this the passage quoted from Pomponius and from such strong proofs, it seems incontestable that the emperors had granted some kind of privilege to certain civilians, quibus permissum erat jura condere. Their opinion had sometimes the force of law, legis vicem. M. Hugo, endeavoring to reconcile this phrase with his system, gives it a forced interpretation, which quite alters the sense; he supposes that the passage contains no more than what is evident of itself, that the authority of the civilians was to be respected, thus making a privilege of that which was free to all the world. It appears to me almost indisputable, that the emperors had sanctioned certain provisions relative to the authority of these civilians, consulted by the judges. But how far was their advice to be respected? This is a question which it is impossible to answer precisely, from the want of historic evidence. Is it not possible that the emperors established an authority to be consulted by the judges? and in this case this authority must have emanated from certain civilians named for this purpose by the emperors. See Hugo, l. c. Moreover, may not the passage of Suetonius, in the Life of Caligula, where he says that the emperor would no longer permit the civilians to give their advice, mean that Caligula entertained the design of suppressing this institution? See on this passage the Themis, vol. xi. p. 17, 36. Our author not being acquainted with the opinions

opposed to Heineccius has not gone to the bottom of the subject.--W.]

The most absolute mandate could only require that the judges should agree with the civilians, if the civilians agreed among themselves. But positive institutions are often the result of custom and prejudice; laws and language are ambiguous and arbitrary; where reason is incapable of pronouncing, the love of argument is inflamed by the envy of rivals, the vanity of masters, the blind attachment of their disciples; and the Roman jurisprudence was divided by the once famous sects of the Proculians and Sabinians. [62] Two sages of the law, Ateius Capito and Antistius Labeo, [63] adorned the peace of the Augustan age; the former distinguished by the favor of his sovereign; the latter more illustrious by his contempt of that favor, and his stern though harmless opposition to the tyrant of Rome. Their legal studies were influenced by the various colors of their temper and principles. Labeo was attached to the form of the old republic; his rival embraced the more profitable substance of the rising monarchy. But the disposition of a courtier is tame and submissive; and Capito seldom presumed to deviate from the sentiments, or at least from the words, of his predecessors; while the bold republican pursued his independent ideas without fear of paradox or innovations. The freedom of Labeo was enslaved, however, by the rigor of his own conclusions, and he decided, according to the letter of the law, the same questions which his indulgent competitor resolved with a latitude of equity more suitable to the common sense and feelings of mankind. If a fair exchange had been substituted to the payment of money, Capito still considered the transaction as a legal sale; [64]

and he consulted nature for the age of puberty, without confining his definition to the precise period of twelve or fourteen years. [65] This opposition of sentiments was propagated in the writings and lessons of the two founders; the schools of Capito and Labeo maintained their inveterate conflict from the age of Augustus to that of Adrian; [66] and the two sects derived their appellations from Sabinus and Proculus, their most celebrated teachers. The names of Cassians and Pegasians were likewise applied to the same parties; but, by a strange reverse, the popular cause was in the hands of Pegasus, [67] a timid slave of Domitian, while the favorite of the Caesars was represented by Cassius, [68] who gloried in his descent from the patriot assassin. By the perpetual edict, the controversies of the sects were in a great measure determined. For that important work, the emperor Adrian preferred the chief of the Sabinians: the friends of monarchy prevailed; but the moderation of Salvius Julian insensibly reconciled the victors and the vanquished. Like the contemporary philosophers, the lawyers of the age

of the Antonines disclaimed the authority of a master, and adopted from every system the most probable doctrines. [69] But their writings would have been less voluminous, had their choice been more unanimous. The conscience of the judge was perplexed by the number and weight of discordant testimonies, and every sentence that his passion or interest might pronounce was justified by the sanction of some venerable name. An indulgent edict of the younger Theodosius excused him from the labor of comparing and weighing their arguments. Five civilians, Caius, Papinian, Paul, Ulpian, and Modestinus, were established as the oracles of

jurisprudence: a majority was decisive: but if their opinions were equally divided, a casting vote was ascribed to the superior wisdom of Papinian. [70]

[Footnote 62: I have perused the Diatribe of Gotfridus Mascovius, the learned Mascou, de Sectis Jurisconsultorum, (Lipsiae, 1728, in 12mo., p. 276,) a learned treatise on a narrow and barren ground.]

[Footnote 63: See the character of Antistius Labeo in Tacitus, (Annal. iii. 75,) and in an epistle of Ateius Capito, (Aul. Gellius, xiii. 12,) who accuses his rival of libertas nimia et vecors. Yet Horace would not have lashed a virtuous and respectable senator; and I must adopt the emendation of Bentley, who reads Labieno insanior, (Serm. I. iii. 82.) See Mascou, de Sectis, (c. i. p. 1--24.)]

[Footnote 64: Justinian (Institut. l. iii. tit. 23, and Theophil. Vers. Graec. p. 677, 680) has commemorated this weighty dispute, and the verses of Homer that were alleged on either side as legal authorities. It was decided by Paul, (leg. 33, ad Edict. in Pandect. l. xviii. tit. i. leg. 1,) since, in a simple exchange, the buyer could not be discriminated from the seller.]

[Footnote 65: This controversy was likewise given for the Proculians, to supersede the indecency of a search, and to comply with the aphorism of Hippocrates, who was attached to the septenary number of two weeks of years, or 700 of days, (Institut. l. i. tit. xxii.) Plutarch and the

Stoics (de Placit. Philosoph. l. v. c. 24) assign a more natural reason. Fourteen years is the age. See the vestigia of the sects in Mascou, c. ix. p. 145--276.]

[Footnote 66: The series and conclusion of the sects are described by Mascou, (c. ii.--vii. p. 24--120;) and it would be almost ridiculous to praise his equal justice to these obsolete sects. * Note: The work of Gaius, subsequent to the time of Adrian, furnishes us with some information on this subject. The disputes which rose between these two sects appear to have been very numerous. Gaius avows himself a disciple of Sabinus and of Caius. Compare Hugo, vol. ii. p. 106.--W.]

[Footnote 67: At the first summons he flies to the turbot-council; yet Juvenal (Satir. iv. 75--81) styles the praefect or bailiff of Rome sanctissimus legum interpres. From his science, says the old scholiast, he was called, not a man, but a book. He derived the singular name of Pegasus from the galley which his father commanded.]

[Footnote 68: Tacit. Annal. xvii. 7. Sueton. in Nerone, c. xxxvii.]

[Footnote 69: Mascou, de Sectis, c. viii. p. 120--144 de Herciscundis, a legal term which was applied to these eclectic lawyers: herciscere is synonymous to dividere. * Note: This word has never existed. Cujacius is the author of it, who read me words terris condi in Servius ad Virg. herciscundi, to which he gave an erroneous interpretation.--W.]

[Footnote 70: See the Theodosian Code, l. i. tit. iv. with Godefroy's Commentary, tom. i. p. 30--35. [! This decree might give occasion to Jesuitical disputes like those in the Lettres Provinciales, whether a Judge was obliged to follow the opinion of Papinian, or of a majority, against his judgment, against his conscience, &c. Yet a legislator might give that opinion, however false, the validity, not of truth, but of law. Note: We possess (since 1824) some interesting information as to the framing of the Theodosian Code, and its ratification at Rome, in the year 438. M. Closius, now professor at Dorpat in Russia, and M. Peyron, member of the Academy of Turin, have discovered, the one at Milan, the other at Turin, a great part of the five first books of the Code which were wanting, and besides this, the reports (gesta) of the sitting of the senate at Rome, in which the Code was published, in the year after the marriage of Valentinian III. Among these pieces are the constitutions which nominate commissioners for the formation of the Code; and though there are many points of considerable obscurity in these documents, they communicate many facts relative to this legislation. 1. That Theodosius designed a great reform in the legislation; to add to the Gregorian and Hermogenian codes all the new constitutions from Constantine to his own day; and to frame a second code for common use with extracts from the three codes, and from the works of the civil lawyers. All laws either abrogated or fallen into disuse were to be noted under their proper heads. 2. An Ordinance was issued in 429 to form a commission for this purpose of nine persons, of which Antiochus, as quaestor and praefectus, was president. A second commission of sixteen members was issued in 435 under the

same president. 3. A code, which we possess under the name of Codex Theodosianus, was finished in 438, published in the East, in an ordinance addressed to the Praetorian praefect, Florentinus, and intended to be published in the West. 4. Before it was published in the West, Valentinian submitted it to the senate. There is a report of the proceedings of the senate, which closed with loud acclamations and gratulations.--From Warnkonig, Histoire du Droit Romain, p. 169-Wenck has published this work, Codicis Theodosiani libri priores. Leipzig, 1825.--M.] * Note *: Closius of Tubingen communicated to M.Warnkonig the two following constitutions of the emperor Constantine, which he discovered in the Ambrosian library at Milan:-- 1. Imper. Constantinus Aug. ad Maximium Praef. Praetorio. Perpetuas prudentum contentiones eruere cupientes, Ulpiani ac Pauli, in Papinianum notas, qui dum ingenii laudem sectantur, non tam corrigere eum quam depravere maluerunt, aboleri praecepimus. Dat. III. Kalend. Octob. Const. Cons. et Crispi, (321.) Idem. Aug. ad Maximium Praef Praet. Universa, quae scriptura Pauli continentur, recepta auctoritate firmanda runt, et omni veneratione celebranda. Ideoque sententiarum libros plepissima luce et perfectissima elocutione et justissima juris ratione succinctos in judiciis prolatos valere minimie dubitatur. Dat. V. Kalend. Oct. Trovia Coust. et Max. Coss. (327.)--W]