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

The distinction of ranks and persons is the firmest basis of a mixed and limited government. In France, the remains of liberty are kept alive by the spirit, the honors, and even the prejudices, of fifty thousand nobles. [99] Two hundred families [9911] supply, in lineal descent, the second branch of English legislature, which maintains, between the king and commons, the balance of the constitution. A gradation of patricians and plebeians, of strangers and subjects, has supported the aristocracy of Genoa, Venice, and ancient Rome. The perfect equality of men is the point in which the extremes of democracy and despotism are confounded; since the majesty of the prince or people would be offended, if any heads were exalted above the level of their fellow-slaves or fellow-citizens. In the decline of the Roman empire, the proud distinctions of the republic were gradually abolished, and the reason or instinct of Justinian completed the simple form of an absolute monarchy. The emperor could not eradicate the popular reverence which always waits on the possession of hereditary wealth, or the memory of famous ancestors. He delighted to honor, with titles and emoluments, his generals, magistrates, and senators; and his precarious indulgence communicated some rays of their glory to the persons of their wives and children. But in the eye of the law, all Roman citizens were equal, and all subjects of the empire were citizens of Rome. That inestimable character was degraded to an obsolete and empty name. The voice of a Roman could no longer enact his laws, or create the annual ministers of his power: his constitutional rights might have checked the arbitrary

will of a master: and the bold adventurer from Germany or Arabia was admitted, with equal favor, to the civil and military command, which the citizen alone had been once entitled to assume over the conquests of his fathers. The first Caesars had scrupulously guarded the distinction of ingenuous and servile birth, which was decided by the condition of the mother; and the candor of the laws was satisfied, if her freedom could be ascertained, during a single moment, between the conception and the delivery. The slaves, who were liberated by a generous master, immediately entered into the middle class of libertines or freedmen; but they could never be enfranchised from the duties of obedience and gratitude; whatever were the fruits of their industry, their patron and his family inherited the third part; or even the whole of their fortune, if they died without children and without a testament. Justinian respected the rights of patrons; but his indulgence removed the badge of disgrace from the two inferior orders of freedmen; whoever ceased to be a slave, obtained, without reserve or delay, the station of a citizen; and at length the dignity of an ingenuous birth, which nature had refused, was created, or supposed, by the omnipotence of the emperor. Whatever restraints of age, or forms, or numbers, had been formerly introduced to check the abuse of manumissions, and the too rapid increase of vile and indigent Romans, he finally abolished; and the spirit of his laws promoted the extinction of domestic servitude.

Yet the eastern provinces were filled, in the time of Justinian, with multitudes of slaves, either born or purchased for the use of their masters; and the price, from ten to seventy pieces of gold, was determined by their age, their strength, and their education. [100] But

the hardships of this dependent state were continually diminished by the influence of government and religion: and the pride of a subject was no longer elated by his absolute dominion over the life and happiness of his bondsman. [101]

[Footnote 99: See the Annales Politiques de l'Abbe de St. Pierre, tom. i. p. 25 who dates in the year 1735. The most ancient families claim the immemorial possession of arms and fiefs. Since the Crusades, some, the most truly respectable, have been created by the king, for merit and services. The recent and vulgar crowd is derived from the multitude of venal offices without trust or dignity, which continually ennoble the wealthy plebeians.]

[Footnote 9911: Since the time of Gibbon, the House of Peers has been more than doubled: it is above 400, exclusive of the spiritual peers--a wise policy to increase the patrician order in proportion to the general increase of the nation.--M.]

[Footnote 100: If the option of a slave was bequeathed to several legatees, they drew lots, and the losers were entitled to their share of his value; ten pieces of gold for a common servant or maid under ten years: if above that age, twenty; if they knew a trade, thirty; notaries or writers, fifty; midwives or physicians, sixty; eunuchs under ten years, thirty pieces; above, fifty; if tradesmen, seventy, (Cod. l. vi. tit. xliii. leg. 3.) These legal prices are generally below those of the market.]

[Footnote 101: For the state of slaves and freedmen, see Institutes, l. i. tit. iii.--viii. l. ii. tit. ix. l. iii. tit. viii. ix. Pandects or Digest, l. i. tit. v. vi. l. xxxviii. tit. i.--iv., and the whole of the xlth book. Code, l. vi. tit. iv. v. l. vii. tit. i.--xxiii. Be it henceforward understood that, with the original text of the Institutes and Pandects, the correspondent articles in the Antiquities and Elements of Heineccius are implicitly quoted; and with the xxvii. first books of the Pandects, the learned and rational Commentaries of Gerard Noodt, (Opera, tom. ii. p. 1--590, the end. Lugd. Bat. 1724.)]

The law of nature instructs most animals to cherish and educate their infant progeny. The law of reason inculcates to the human species the returns of filial piety. But the exclusive, absolute, and perpetual dominion of the father over his children, is peculiar to the Roman jurisprudence, [102] and seems to be coeval with the foundation of the city. [103] The paternal power was instituted or confirmed by Romulus himself; and, after the practice of three centuries, it was inscribed on the fourth table of the Decemvirs. In the forum, the senate, or the camp, the adult son of a Roman citizen enjoyed the public and private rights of a person: in his father's house he was a mere thing; [1031] confounded by the laws with the movables, the cattle, and the slaves, whom the capricious master might alienate or destroy, without being responsible to any earthly tribunal. The hand which bestowed the daily sustenance might resume the voluntary gift, and whatever was acquired by the labor or fortune of the son was immediately lost in the property

of the father. His stolen goods (his oxen or his children) might be recovered by the same action of theft; [104] and if either had been guilty of a trespass, it was in his own option to compensate the damage, or resign to the injured party the obnoxious animal. At the call of indigence or avarice, the master of a family could dispose of his children or his slaves. But the condition of the slave was far more advantageous, since he regained, by the first manumission, his alienated freedom: the son was again restored to his unnatural father; he might be condemned to servitude a second and a third time, and it was not till after the third sale and deliverance, [105] that he was enfranchised from the domestic power which had been so repeatedly abused. According to his discretion, a father might chastise the real or imaginary faults of his children, by stripes, by imprisonment, by exile, by sending them to the country to work in chains among the meanest of his servants. The majesty of a parent was armed with the power of life and death; [106] and the examples of such bloody executions, which were sometimes praised and never punished, may be traced in the annals of Rome beyond the times of Pompey and Augustus. Neither age, nor rank, nor the consular office, nor the honors of a triumph, could exempt the most illustrious citizen from the bonds of filial subjection: [107] his own descendants were included in the family of their common ancestor; and the claims of adoption were not less sacred or less rigorous than those of nature. Without fear, though not without danger of abuse, the Roman legislators had reposed an unbounded confidence in the sentiments of paternal love; and the oppression was tempered by the assurance that each generation must succeed in its turn to the awful dignity of parent and master.

[Footnote 102: See the patria potestas in the Institutes, (l. i. tit. ix.,) the Pandects, (l. i. tit. vi. vii.,) and the Code, (l. viii. tit. xlvii. xlviii. xlix.) Jus potestatis quod in liberos habemus proprium est civium Romanorum. Nulli enim alii sunt homines, qui talem in liberos habeant potestatem qualem nos habemus. * Note: The newly-discovered Institutes of Gaius name one nation in which the same power was vested in the parent. Nec me praeterit Galatarum gentem credere, in potestate parentum liberos esse. Gaii Instit. edit. 1824, p. 257.--M.]

[Footnote 103: Dionysius Hal. l. ii. p. 94, 95. Gravina (Opp. p. 286) produces the words of the xii. tables. Papinian (in Collatione Legum Roman et Mosaicarum, tit. iv. p. 204) styles this patria potestas, lex regia: Ulpian (ad Sabin. l. xxvi. in Pandect. l. i. tit. vi. leg. 8) says, jus potestatis moribus receptum; and furiosus filium in potestate habebit How sacred--or rather, how absurd! * Note: All this is in strict accordance with the Roman character.--W.]

[Footnote 1031: This parental power was strictly confined to the Roman citizen. The foreigner, or he who had only jus Latii, did not possess it. If a Roman citizen unknowingly married a Latin or a foreign wife, he did not possess this power over his son, because the son, following the legal condition of the mother, was not a Roman citizen. A man, however, alleging sufficient cause for his ignorance, might raise both mother and child to the rights of citizenship. Gaius. p. 30.--M.]

[Footnote 104: Pandect. l. xlvii. tit. ii. leg. 14, No. 13, leg. 38, No.

1. Such was the decision of Ulpian and Paul.]

[Footnote 105: The trina mancipatio is most clearly defined by Ulpian, (Fragment. x. p. 591, 592, edit. Schulting;) and best illustrated in the Antiquities of Heineccius. * Note: The son of a family sold by his father did not become in every respect a slave, he was statu liber; that is to say, on paying the price for which he was sold, he became entirely free. See Hugo, Hist. Section 61--W.]

[Footnote 106: By Justinian, the old law, the jus necis of the Roman father (Institut. l. iv. tit. ix. No. 7) is reported and reprobated. Some legal vestiges are left in the Pandects (l. xliii. tit. xxix. leg. 3, No. 4) and the Collatio Legum Romanarum et Mosaicarum, (tit. ii. No. 3, p. 189.)]

[Footnote 107: Except on public occasions, and in the actual exercise of his office. In publicis locis atque muneribus, atque actionibus patrum, jura cum filiorum qui in magistratu sunt potestatibus collata interquiescere paullulum et connivere, &c., (Aul. Gellius, Noctes Atticae, ii. 2.) The Lessons of the philosopher Taurus were justified by the old and memorable example of Fabius; and we may contemplate the same story in the style of Livy (xxiv. 44) and the homely idiom of Claudius Quadri garius the annalist.]

The first limitation of paternal power is ascribed to the justice and humanity of Numa; and the maid who, with his father's consent, had

espoused a freeman, was protected from the disgrace of becoming the wife of a slave. In the first ages, when the city was pressed, and often famished, by her Latin and Tuscan neighbors, the sale of children might be a frequent practice; but as a Roman could not legally purchase the liberty of his fellow-citizen, the market must gradually fail, and the trade would be destroyed by the conquests of the republic. An imperfect right of property was at length communicated to sons; and the threefold distinction of profectitious, adventitious, and professional was ascertained by the jurisprudence of the Code and Pandects. [108] Of all that proceeded from the father, he imparted only the use, and reserved the absolute dominion; yet if his goods were sold, the filial portion was excepted, by a favorable interpretation, from the demands of the creditors. In whatever accrued by marriage, gift, or collateral succession, the property was secured to the son; but the father, unless he had been specially excluded, enjoyed the usufruct during his life. As a just and prudent reward of military virtue, the spoils of the enemy were acquired, possessed, and bequeathed by the soldier alone; and the fair analogy was extended to the emoluments of any liberal profession, the salary of public service, and the sacred liberality of the emperor or empress. The life of a citizen was less exposed than his fortune to the abuse of paternal power. Yet his life might be adverse to the interest or passions of an unworthy father: the same crimes that flowed from the corruption, were more sensibly felt by the humanity, of the Augustan age; and the cruel Erixo, who whipped his son till he expired, was saved by the emperor from the just fury of the multitude. [109] The Roman father, from the license of servile dominion, was reduced to the

gravity and moderation of a judge. The presence and opinion of Augustus confirmed the sentence of exile pronounced against an intentional parricide by the domestic tribunal of Arius. Adrian transported to an island the jealous parent, who, like a robber, had seized the opportunity of hunting, to assassinate a youth, the incestuous lover of his step-mother. [110] A private jurisdiction is repugnant to the spirit of monarchy; the parent was again reduced from a judge to an accuser; and the magistrates were enjoined by Severus Alexander to hear his complaints and execute his sentence. He could no longer take the life of a son without incurring the guilt and punishment of murder; and the pains of parricide, from which he had been excepted by the Pompeian law, were finally inflicted by the justice of Constantine. [111] The same protection was due to every period of existence; and reason must applaud the humanity of Paulus, for imputing the crime of murder to the father who strangles, or starves, or abandons his new-born infant; or exposes him in a public place to find the mercy which he himself had denied. But the exposition of children was the prevailing and stubborn vice of antiquity: it was sometimes prescribed, often permitted, almost always practised with impunity, by the nations who never entertained the Roman ideas of paternal power; and the dramatic poets, who appeal to the human heart, represent with indifference a popular custom which was palliated by the motives of economy and compassion. [112] If the father could subdue his own feelings, he might escape, though not the censure, at least the chastisement, of the laws; and the Roman empire was stained with the blood of infants, till such murders were included, by Valentinian and his colleagues, in the letter and spirit of the

Cornelian law. The lessons of jurisprudence [113] and Christianity had been insufficient to eradicate this inhuman practice, till their gentle influence was fortified by the terrors of capital punishment. [114]

[Footnote 108: See the gradual enlargement and security of the filial peculium in the Institutes, (l. ii. tit. ix.,) the Pandects, (l. xv. tit. i. l. xli. tit. i.,) and the Code, (l. iv. tit. xxvi. xxvii.)]

[Footnote 109: The examples of Erixo and Arius are related by Seneca, (de Clementia, i. 14, 15,) the former with horror, the latter with applause.]

[Footnote 110: Quod latronis magis quam patris jure eum interfecit, nam patria potestas in pietate debet non in atrocitate consistere, (Marcian. Institut. l. xix. in Pandect. l. xlviii. tit. ix. leg.5.)]

[Footnote 111: The Pompeian and Cornelian laws de sicariis and parricidis are repeated, or rather abridged, with the last supplements of Alexander Severus, Constantine, and Valentinian, in the Pandects (l. xlviii. tit. viii ix,) and Code, (l. ix. tit. xvi. xvii.) See likewise the Theodosian Code, (l. ix. tit. xiv. xv.,) with Godefroy's Commentary, (tom. iii. p. 84--113) who pours a flood of ancient and modern learning over these penal laws.]

[Footnote 112: When the Chremes of Terence reproaches his wife for not obeying his orders and exposing their infant, he speaks like a father

and a master, and silences the scruples of a foolish woman. See Apuleius, (Metamorph. l. x. p. 337, edit. Delphin.)]

[Footnote 113: The opinion of the lawyers, and the discretion of the magistrates, had introduced, in the time of Tacitus, some legal restraints, which might support his contrast of the boni mores of the Germans to the bonae leges alibi--that is to say, at Rome, (de Moribus Germanorum, c. 19.) Tertullian (ad Nationes, l. i. c. 15) refutes his own charges, and those of his brethren, against the heathen jurisprudence.]

[Footnote 114: The wise and humane sentence of the civilian Paul (l. ii. Sententiarum in Pandect, 1. xxv. tit. iii. leg. 4) is represented as a mere moral precept by Gerard Noodt, (Opp. tom. i. in Julius Paulus, p. 567--558, and Amica Responsio, p. 591-606,) who maintains the opinion of Justus Lipsius, (Opp. tom. ii. p. 409, ad Belgas. cent. i. epist. 85,) and as a positive binding law by Bynkershoek, (de Jure occidendi Liberos, Opp. tom. i. p. 318--340. Curae Secundae, p. 391--427.) In a learned out angry controversy, the two friends deviated into the opposite extremes.]

Experience has proved, that savages are the tyrants of the female sex, and that the condition of women is usually softened by the refinements of social life. In the hope of a robust progeny, Lycurgus had delayed the season of marriage: it was fixed by Numa at the tender age of twelve years, that the Roman husband might educate to his will a pure and

obedient virgin. [115] According to the custom of antiquity, he bought his bride of her parents, and she fulfilled the coemption by purchasing, with three pieces of copper, a just introduction to his house and household deities. A sacrifice of fruits was offered by the pontiffs in the presence of ten witnesses; the contracting parties were seated on the same sheep-skin; they tasted a salt cake of far or rice; and this confarreation, [116] which denoted the ancient food of Italy, served as an emblem of their mystic union of mind and body. But this union on the side of the woman was rigorous and unequal; and she renounced the name and worship of her father's house, to embrace a new servitude, decorated only by the title of adoption, a fiction of the law, neither rational nor elegant, bestowed on the mother of a family [117] (her proper appellation) the strange characters of sister to her own children, and of daughter to her husband or master, who was invested with the plenitude of paternal power. By his judgment or caprice her behavior was approved, or censured, or chastised; he exercised the jurisdiction of life and death; and it was allowed, that in the cases of adultery or drunkenness, [118] the sentence might be properly inflicted. She acquired and inherited for the sole profit of her lord; and so clearly was woman defined, not as a person, but as a thing, that, if the original title were deficient, she might be claimed, like other movables, by the use and possession of an entire year. The inclination of the Roman husband discharged or withheld the conjugal debt, so scrupulously exacted by the Athenian and Jewish laws: [119] but as polygamy was unknown, he could never admit to his bed a fairer or a more favored partner.

[Footnote 115: Dionys. Hal. l. ii. p. 92, 93. Plutarch, in Numa, p. 140-141.]

[Footnote 116: Among the winter frunenta, the triticum, or bearded wheat; the siligo, or the unbearded; the far, adorea, oryza, whose description perfectly tallies with the rice of Spain and Italy. I adopt this identity on the credit of M. Paucton in his useful and laborious Metrologie, (p. 517--529.)]

[Footnote 117: Aulus Gellius (Noctes Atticae, xviii. 6) gives a ridiculous definition of Aelius Melissus, Matrona, quae semel materfamilias quae saepius peperit, as porcetra and scropha in the sow kind. He then adds the genuine meaning, quae in matrimonium vel in manum convenerat.]

[Footnote 118: It was enough to have tasted wine, or to have stolen the key of the cellar, (Plin. Hist. Nat. xiv. 14.)]

[Footnote 119: Solon requires three payments per month. By the Misna, a daily debt was imposed on an idle, vigorous, young husband; twice a week on a citizen; once on a peasant; once in thirty days on a camel-driver; once in six months on a seaman. But the student or doctor was free from tribute; and no wife, if she received a weekly sustenance, could sue for a divorce; for one week a vow of abstinence was allowed. Polygamy divided, without multiplying, the duties of the husband, (Selden, Uxor

Ebraica, l. iii. c 6, in his works, vol ii. p. 717--720.)]

After the Punic triumphs, the matrons of Rome aspired to the common benefits of a free and opulent republic: their wishes were gratified by the indulgence of fathers and lovers, and their ambition was unsuccessfully resisted by the gravity of Cato the Censor. [120] They declined the solemnities of the old nuptiais; defeated the annual prescription by an absence of three days; and, without losing their name or independence, subscribed the liberal and definite terms of a marriage contract. Of their private fortunes, they communicated the use, and secured the property: the estates of a wife could neither be alienated nor mortgaged by a prodigal husband; their mutual gifts were prohibited by the jealousy of the laws; and the misconduct of either party might afford, under another name, a future subject for an action of theft. To this loose and voluntary compact, religious and civil rights were no longer essential; and, between persons of a similar rank, the apparent community of life was allowed as sufficient evidence of their nuptials. The dignity of marriage was restored by the Christians, who derived all spiritual grace from the prayers of the faithful and the benediction of the priest or bishop. The origin, validity, and duties of the holy institution were regulated by the tradition of the synagogue, the precepts of the gospel, and the canons of general or provincial synods; [121] and the conscience of the Christians was awed by the decrees and censures of their ecclesiastical rulers. Yet the magistrates of Justinian were not subject to the authority of the church: the emperor consulted the unbelieving civilians of antiquity, and the choice of

matrimonial laws in the Code and Pandects, is directed by the earthly motives of justice, policy, and the natural freedom of both sexes. [122]

[Footnote 120: On the Oppian law we may hear the mitigating speech of Vaerius Flaccus, and the severe censorial oration of the elder Cato, (Liv. xxxiv. l--8.) But we shall rather hear the polished historian of the eighth, than the rough orators of the sixth, century of Rome. The principles, and even the style, of Cato are more accurately preserved by Aulus Gellius, (x. 23.)]

[Footnote 121: For the system of Jewish and Catholic matrimony, see Selden, (Uxor Ebraica, Opp. vol. ii. p. 529--860,) Bingham, (Christian Antiquities, l. xxii.,) and Chardon, (Hist. des Sacremens, tom. vi.)]

[Footnote 122: The civil laws of marriage are exposed in the Institutes, (l. i. tit. x.,) the Pandects, (l. xxiii. xxiv. xxv.,) and the Code, (l. v.;) but as the title de ritu nuptiarum is yet imperfect, we are obliged to explore the fragments of Ulpian (tit. ix. p. 590, 591,) and the Collatio Legum Mosaicarum, (tit. xvi. p. 790, 791,) with the notes of Pithaeus and Schulting. They find in the Commentary of Servius (on the 1st Georgia and the 4th Aeneid) two curious passages.]

Besides the agreement of the parties, the essence of every rational contract, the Roman marriage required the previous approbation of the parents. A father might be forced by some recent laws to supply the wants of a mature daughter; but even his insanity was not gradually

allowed to supersede the necessity of his consent. The causes of the dissolution of matrimony have varied among the Romans; [123] but the most solemn sacrament, the confarreation itself, might always be done away by rites of a contrary tendency. In the first ages, the father of a family might sell his children, and his wife was reckoned in the number of his children: the domestic judge might pronounce the death of the offender, or his mercy might expel her from his bed and house; but the slavery of the wretched female was hopeless and perpetual, unless he asserted for his own convenience the manly prerogative of divorce. [1231] The warmest applause has been lavished on the virtue of the Romans, who abstained from the exercise of this tempting privilege above five hundred years: [124] but the same fact evinces the unequal terms of a connection in which the slave was unable to renounce her tyrant, and the tyrant was unwilling to relinquish his slave. When the Roman matrons became the equal and voluntary companions of their lords, a new jurisprudence was introduced, that marriage, like other partnerships, might be dissolved by the abdication of one of the associates. In three centuries of prosperity and corruption, this principle was enlarged to frequent practice and pernicious abuse.

Passion, interest, or caprice, suggested daily motives for the dissolution of marriage; a word, a sign, a message, a letter, the mandate of a freedman, declared the separation; the most tender of human connections was degraded to a transient society of profit or pleasure. According to the various conditions of life, both sexes alternately felt the disgrace and injury: an inconstant spouse transferred her wealth to

a new family, abandoning a numerous, perhaps a spurious, progeny to the paternal authority and care of her late husband; a beautiful virgin might be dismissed to the world, old, indigent, and friendless; but the reluctance of the Romans, when they were pressed to marriage by Augustus, sufficiently marks, that the prevailing institutions were least favorable to the males. A specious theory is confuted by this free and perfect experiment, which demonstrates, that the liberty of divorce does not contribute to happiness and virtue. The facility of separation would destroy all mutual confidence, and inflame every trifling dispute: the minute difference between a husband and a stranger, which might so easily be removed, might still more easily be forgotten; and the matron, who in five years can submit to the embraces of eight husbands, must cease to reverence the chastity of her own person. [125]

[Footnote 123: According to Plutarch, (p. 57,) Romulus allowed only three grounds of a divorce--drunkenness, adultery, and false keys. Otherwise, the husband who abused his supremacy forfeited half his goods to the wife, and half to the goddess Ceres, and offered a sacrifice (with the remainder?) to the terrestrial deities. This strange law was either imaginary or transient.]

[Footnote 1231: Montesquieu relates and explains this fact in a different marnes Esprit des Loix, l. xvi. c. 16.--G.]

[Footnote 124: In the year of Rome 523, Spurius Carvilius Ruga repudiated a fair, a good, but a barren, wife, (Dionysius Hal. l. ii.

p. 93. Plutarch, in Numa, p. 141; Valerius Maximus, l. ii. c. 1; Aulus Gellius, iv. 3.) He was questioned by the censors, and hated by the people; but his divorce stood unimpeached in law.]

[Footnote 125:--Sic fiunt octo mariti Quinque per autumnos. Juvenal, Satir. vi. 20.--A rapid succession, which may yet be credible, as well as the non consulum numero, sed maritorum annos suos computant, of Seneca, (de Beneficiis, iii. 16.) Jerom saw at Rome a triumphant husband bury his twenty-first wife, who had interred twenty-two of his less sturdy predecessors, (Opp. tom. i. p. 90, ad Gerontiam.) But the ten husbands in a month of the poet Martial, is an extravagant hyperbole, (l. 71. epigram 7.)]

Insufficient remedies followed with distant and tardy steps the rapid progress of the evil. The ancient worship of the Romans afforded a peculiar goddess to hear and reconcile the complaints of a married life; but her epithet of Viriplaca, [126] the appeaser of husbands, too clearly indicates on which side submission and repentance were always expected. Every act of a citizen was subject to the judgment of the censors; the first who used the privilege of divorce assigned, at their command, the motives of his conduct; [127] and a senator was expelled for dismissing his virgin spouse without the knowledge or advice of his friends. Whenever an action was instituted for the recovery of a marriage portion, the proetor, as the guardian of equity, examined the cause and the characters, and gently inclined the scale in favor of the guiltless and injured party. Augustus, who united the powers of both

magistrates, adopted their different modes of repressing or chastising the license of divorce. [128] The presence of seven Roman witnesses was required for the validity of this solemn and deliberate act: if any adequate provocation had been given by the husband, instead of the delay of two years, he was compelled to refund immediately, or in the space of six months; but if he could arraign the manners of his wife, her guilt or levity was expiated by the loss of the sixth or eighth part of her marriage portion. The Christian princes were the first who specified the just causes of a private divorce; their institutions, from Constantine to Justinian, appear to fluctuate between the custom of the empire and the wishes of the church, [129] and the author of the Novels too frequently reforms the jurisprudence of the Code and Pandects. In the most rigorous laws, a wife was condemned to support a gamester, a drunkard, or a libertine, unless he were guilty of homicide, poison, or sacrilege, in which cases the marriage, as it should seem, might have been dissolved by the hand of the executioner. But the sacred right of the husband was invariably maintained, to deliver his name and family from the disgrace of adultery: the list of mortal sins, either male or female, was curtailed and enlarged by successive regulations, and the obstacles of incurable impotence, long absence, and monastic profession, were allowed to rescind the matrimonial obligation. Whoever transgressed the permission of the law, was subject to various and heavy penalties. The woman was stripped of her wealth and ornaments, without excepting the bodkin of her hair: if the man introduced a new bride into his bed, her fortune might be lawfully seized by the vengeance of his exiled wife. Forfeiture was sometimes commuted to a fine; the fine was

sometimes aggravated by transportation to an island, or imprisonment in a monastery; the injured party was released from the bonds of marriage; but the offender, during life, or a term of years, was disabled from the repetition of nuptials. The successor of Justinian yielded to the prayers of his unhappy subjects, and restored the liberty of divorce by mutual consent: the civilians were unanimous, [130] the theologians were divided, [131] and the ambiguous word, which contains the precept of Christ, is flexible to any interpretation that the wisdom of a legislator can demand.

[Footnote 126: Sacellum Viriplacae, (Valerius Maximus, l. ii. c. 1,) in the Palatine region, appears in the time of Theodosius, in the description of Rome by Publius Victor.]

[Footnote 127: Valerius Maximus, l. ii. c. 9. With some propriety he judges divorce more criminal than celibacy: illo namque conjugalia sacre spreta tantum, hoc etiam injuriose tractata.]

[Footnote 128: See the laws of Augustus and his successors, in Heineccius, ad Legem Papiam-Poppaeam, c. 19, in Opp. tom. vi. P. i. p. 323--333.]

[Footnote 129: Aliae sunt leges Caesarum, aliae Christi; aliud Papinianus, aliud Paulus nocter praecipit, (Jerom. tom. i. p. 198. Selden, Uxor Ebraica l. iii. c. 31 p. 847--853.)]

[Footnote 130: The Institutes are silent; but we may consult the Codes of Theodosius (l. iii. tit. xvi., with Godefroy's Commentary, tom. i. p. 310--315) and Justinian, (l. v. tit. xvii.,) the Pandects (l. xxiv. tit. ii.) and the Novels, (xxii. cxvii. cxxvii. cxxxiv. cxl.) Justinian fluctuated to the last between civil and ecclesiastical law.]

[Footnote 131: In pure Greek, it is not a common word; nor can the proper meaning, fornication, be strictly applied to matrimonial sin. In a figurative sense, how far, and to what offences, may it be extended? Did Christ speak the Rabbinical or Syriac tongue? Of what original word is the translation? How variously is that Greek word translated in the versions ancient and modern! There are two (Mark, x. 11, Luke, xvi. 18) to one (Matthew, xix. 9) that such ground of divorce was not excepted by Jesus. Some critics have presumed to think, by an evasive answer, he avoided the giving offence either to the school of Sammai or to that of Hillel, (Selden, Uxor Ebraica, l. iii. c. 18--22, 28, 31.) * Note: But these had nothing to do with the question of a divorce made by judicial authority.--Hugo.]

The freedom of love and marriage was restrained among the Romans by natural and civil impediments. An instinct, almost innate and universal, appears to prohibit the incestuous commerce [132] of parents and children in the infinite series of ascending and descending generations. Concerning the oblique and collateral branches, nature is indifferent, reason mute, and custom various and arbitrary. In Egypt, the marriage of brothers and sisters was admitted without scruple or exception: a

Spartan might espouse the daughter of his father, an Athenian, that of his mother; and the nuptials of an uncle with his niece were applauded at Athens as a happy union of the dearest relations. The profane lawgivers of Rome were never tempted by interest or superstition to multiply the forbidden degrees: but they inflexibly condemned the marriage of sisters and brothers, hesitated whether first cousins should be touched by the same interdict; revered the parental character of aunts and uncles, [1321] and treated affinity and adoption as a just imitation of the ties of blood. According to the proud maxims of the republic, a legal marriage could only be contracted by free citizens; an honorable, at least an ingenuous birth, was required for the spouse of a senator: but the blood of kings could never mingle in legitimate nuptials with the blood of a Roman; and the name of Stranger degraded Cleopatra and Berenice, [133] to live the concubines of Mark Antony and Titus. [134] This appellation, indeed, so injurious to the majesty, cannot without indulgence be applied to the manners, of these Oriental queens. A concubine, in the strict sense of the civilians, was a woman of servile or plebeian extraction, the sole and faithful companion of a Roman citizen, who continued in a state of celibacy. Her modest station, below the honors of a wife, above the infamy of a prostitute, was acknowledged and approved by the laws: from the age of Augustus to the tenth century, the use of this secondary marriage prevailed both in the West and East; and the humble virtues of a concubine were often preferred to the pomp and insolence of a noble matron. In this connection, the two Antonines, the best of princes and of men, enjoyed the comforts of domestic love: the example was imitated by many citizens

impatient of celibacy, but regardful of their families. If at any time they desired to legitimate their natural children, the conversion was instantly performed by the celebration of their nuptials with a partner whose faithfulness and fidelity they had already tried. [1341] By this epithet of natural, the offspring of the concubine were distinguished from the spurious brood of adultery, prostitution, and incest, to whom Justinian reluctantly grants the necessary aliments of life; and these natural children alone were capable of succeeding to a sixth part of the inheritance of their reputed father. According to the rigor of law, bastards were entitled only to the name and condition of their mother, from whom they might derive the character of a slave, a stranger, or a citizen. The outcasts of every family were adopted without reproach as the children of the state. [135] [1351]

[Footnote 132: The principles of the Roman jurisprudence are exposed by Justinian, (Institut. t. i. tit. x.;) and the laws and manners of the different nations of antiquity concerning forbidden degrees, &c., are copiously explained by Dr. Taylor in his Elements of Civil Law, (p. 108, 314--339,) a work of amusing, though various reading; but which cannot be praised for philosophical precision.]

[Footnote 1321: According to the earlier law, (Gaii Instit. p. 27,) a man might marry his niece on the brother's, not on the sister's, side. The emperor Claudius set the example of the former. In the Institutes, this distinction was abolished and both declared illegal.--M.]

[Footnote 133: When her father Agrippa died, (A.D. 44,) Berenice was sixteen years of age, (Joseph. tom. i. Antiquit. Judaic. l. xix. c. 9, p. 952, edit. Havercamp.) She was therefore above fifty years old when Titus (A.D. 79) invitus invitam invisit. This date would not have adorned the tragedy or pastoral of the tender Racine.]

[Footnote 134: The Aegyptia conjux of Virgil (Aeneid, viii. 688) seems to be numbered among the monsters who warred with Mark Antony against Augustus, the senate, and the gods of Italy.]

[Footnote 1341: The Edict of Constantine first conferred this right; for Augustus had prohibited the taking as a concubine a woman who might be taken as a wife; and if marriage took place afterwards, this marriage made no change in the rights of the children born before it; recourse was then had to adoption, properly called arrogation.--G.]

[Footnote 135: The humble but legal rights of concubines and natural children are stated in the Institutes, (l. i. tit. x.,) the Pandects, (l. i. tit. vii.,) the Code, (l. v. tit. xxv.,) and the Novels, (lxxiv. lxxxix.) The researches of Heineccius and Giannone, (ad Legem Juliam et Papiam-Poppaeam, c. iv. p. 164-175. Opere Posthume, p. 108--158) illustrate this interesting and domestic subject.]

[Footnote 1351: See, however, the two fragments of laws in the newly discovered extracts from the Theodosian Code, published by M. A. Peyron, at Turin. By the first law of Constantine, the legitimate offspring

could alone inherit; where there were no near legitimate relatives, the inheritance went to the fiscus. The son of a certain Licinianus, who had inherited his father's property under the supposition that he was legitimate, and had been promoted to a place of dignity, was to be degraded, his property confiscated, himself punished with stripes and imprisonment. By the second, all persons, even of the highest rank, senators, perfectissimi, decemvirs, were to be declared infamous, and out of the protection of the Roman law, if born ex ancilla, vel ancillae filia, vel liberta, vel libertae filia, sive Romana facta, seu Latina, vel scaenicae filia, vel ex tabernaria, vel ex tabernariae filia, vel humili vel abjecta, vel lenonis, aut arenarii filia, vel quae mercimoniis publicis praefuit. Whatever a fond father had conferred on such children was revoked, and either restored to the legitimate children, or confiscated to the state; the mothers, who were guilty of thus poisoning the minds of the fathers, were to be put to the torture (tormentis subici jubemus.) The unfortunate son of Licinianus, it appears from this second law, having fled, had been taken, and was ordered to be kept in chains to work in the Gynaeceum at Carthage. Cod. Theodor ab. A. Person, 87--90.--M.]