Fundamental Concepts of the Roman Law

I

About a half a century ago the great von Ihering wrote an admirable book on the Spirit of the Roman Law. It was a task no one would lightly approach and few men before or after him could undertake it with any considerable fraction of his competence. He wrote for lawyers and for laymen familiar with the terms he used and trained in a legal system which was avowedly an adaptation of the Roman law to the needs of modern society, and it was his purpose to organize the stupendous mass of facts which he so fully commanded under a few general concepts that would not only systematize them but illuminate the character of the people who created them.

At the time von Ihering's book was written, it seemed a difficult, but still feasible task. Men spoke confidently of the philosophy of history, the logic of history, the science of history, and any considerable body of facts about men would, it was generally believed, show certain underlying courses or factors or tendencies to competent investigators. Von Ihering was far from being an Hegelian and was not inclined to see in human developments ideas that worked themselves out and determined absolutely what seems most accidental. Still, to him as to others, the spirit of any great system of law seemed possible of characterization and just as Dean Pound finds the special note of the Common law in the phrase, "supremacy of law,"¹ so von Ihering and many others have thought that the Roman law had as its key-note the idea of "equality."²

It is very doubtful whether the recognition of such key-notes will carry us very far. If they have been accurately discovered, one can only say that the scale on which law plays is singularly chromatic and that many notes are struck that seem even to trained ears to be off the key. All human relations are, or might be, the subject

¹ Pound, Spirit of the Common Law, pp. 6, 81, and passim.
² This "equality" was in v. Ihering's opinion (Geist d. röm. Rechts (5th ed.) I, 325) a purely mechanical one due to the "tyranny of an abstract rule." The Roman spirit he regarded as one of a rigid selfishness which, however, sacrificed the lower and individual advantage to that of the organization in which the individual could reach his largest development.
of legal regulation and we are not as sure as we once were that we know all the impulses that create human society. At any rate for Roman law the subsuming of its spirit under a single phrase has not after all been successful, and von Ihering's book is more valuable as an expression of the fine spirit of its author than of the legal system it expounds.

When, therefore, we speak of "fundamental concepts" in the following pages, we shall think of these concepts in a much humbler fashion. They are fundamental only in the sense of being apparently important, and they are important merely because they seem to have been commonly used by Roman lawyers in reaching the conclusions to which they came in specific cases. The same terms did not always have the same meaning at different stages of Roman legal development, and even contemporary ideas were not always consistent. Further, ancient jurists were as prone as modern ones to frame the reasons for their conclusions in broad general terms and to give to these terms a certain ethical elevation. So there are three famous maxims which we find first in Ulpian and later in Justinian's Institutes, *honeste vivere, alterum non laedere*, and *suum cuique tribuere*, which may be translated "To live honorably"; "Not to injure another" and "To grant each man his due." The maxims are famous because many men read the Institutes who read nothing else of Roman law, and because they have seemed ready texts for the reproaches that laymen have always made against the practise of lawyers.

These maxims are of course not legal principles at all but merely pious hopes that the application of the totality of legal rules will result in no one being injured, each one receiving what belongs to him and in all men living honorably. All legal systems express such hopes and no society would admit that its organization is likely to result in anything else. If we attempted to apply these maxims seriously as guides of legal conclusions we should find that they are contradictory or that the terms used have really no meaning at all. Above all they cannot serve the purpose of distinguishing the Roman system from the Common law system or from any other.

It is generally stated that one of the prime distinctions between the Roman law and the Common law is that the former proceeds from an authoritative code, the exact words of which must be examined and reconciled, and that the latter proceeds from judicial decisions which have the force of precedents but are controlling by their substance rather than by their terms. I venture to think that this is a mischievous error. It was true in a measure for the
Medieval Continental law and in a smaller degree for the modern Civil law. But for the Roman law it was not true in any sense.

In a period of legislative activity between 528 and 545 A.D., Justinian attempted to fix the law and gathered it into the books we call the Corpus Iuris Civilis, the "Body of the Civil Law." This consists of a short elementary text-book for students, the Institutes, excerpts from legal writers, the Digest, and a collection of Imperial ordinances called the Code, together with amendments to the Code called the Novels. The earliest constitution in the Code dates from about 125 A.D. and the excerpts contained in the main body of the Corpus, the Digest, run from Quintus Mucius, who was Cicero's teacher, to nearly 300 A.D. This Corpus is what we must mainly rely on to discover what the Roman law was. We have in addition larger and smaller fragments of Roman legal writers besides those taken into the Corpus, a relatively large number of legal documents contained in ancient inscriptions and papyri, and a great many references to legal affairs in non-legal writers, particularly in Cicero, who was a successful and brilliant lawyer. In dealing with this material, men trained in the Common law have a very real advantage. Much the larger part of it consists of decisions in concrete issues, not distinguishable in character from those decisions that begin with the Year Books and end with the current issue of the advance sheets. Medieval jurists and modern Civilians took the Corpus as a statute,—which of course it was—but treated it as though the words it contained were framed by Justinian himself. What seems to a Civilian a general principle, deliberately announced as such, is seen by a common lawyer to be merely the ratio decidendi of a particular suit, couched in somewhat too general terms.

Modern students of the Roman law are faced with an additional difficulty which, one is almost tempted to say, was created by learned Germans in the nineteenth century chiefly to make their science as critical as Homeric and Biblical studies had become. The discovery of interpolations in the text of the Digest and Code is at present the chief exercise of German and Italian Romanists. The result of their efforts is estimated by Mr. Buckland in an excellent article in the Yale Law Review. That interpolations in the Corpus exist is demonstrable. But it is in my opinion almost equally demonstrable that they are few and rare. Certainly it is completely undemonstrated that the compilers of the Corpus freely rewrote large sections whenever

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8 W. W. Buckland, Interpolations in the Digest, 33 Yale Law Journal, 343 seq.
they were so minded. In the following pages it will be assumed that in the Corpus an excerpt from an earlier writer is in all but a few cases quoted in the original words.

II

The Roman law is the body of rules that governed the social relations of many peoples in Europe, Asia, and Africa for some period between the earliest prehistoric times and 1453 A. D. This date should perhaps be extended to 1900 A. D. or even to the present time, and we might include America in the territory concerned. The people whose relations were so governed varied in number from the inhabitants of a miserable Italian village to those of an empire fully as great as any now existing. Yet the essential fact is that no present-day community,—unless we except South Africa—consciously applies as binding upon its citizens the rules of Roman law in their unmodified form. That law is an historical fact. It would have only a tepid historical interest for practical men, if it were not for the circumstance that before it became a purely historical fact, it was worked into the foundation and framework of what is called the Civil law; that is, the law of all the non-English speaking civilized world, and among English-speaking nations, in whole or in part, the law of Quebec, Louisiana, Scotland, South Africa and the Philippines,—to name only the largest units. Further, on the Common law it has exerted, both in its Roman and in its later form, an influence over which scholars may quarrel, but which is unmistakable and far-reaching. American judges have cited the Roman law in determining the questions before them, and most English and American jurists treat it with an awe derived principally from lack of acquaintance.

American law has, however, a connection with the Roman law more intimate and direct than that derived from its English inheritance. At the time when the political severance took place, American lawyers and publicists were not disinclined to look for a broader basis for their institutions than the historical fact of their recent membership in a polity they had rejected. Both Kent and Story knew the Institutes of Justinian very well and some at least of the later Continental interpreters. They had no doubt that in public law the wickedly autocratic system was inferior to that which breathed the “free spirit of the English and American Common law.” (1 Kent’s Commentaries [14th ed.] p. 716.) But, to quote the sentence immediately following—"Upon subjects relating to private
rights and personal contracts" the Roman law seemed of outstanding excellence. Kent or Story is likely to be the shield behind which an American judge ventures to adopt a Roman law rule and he generally does so with a sort of desperately timid reliance on their unchallengeable authority.

For this timidity there is a great deal of excuse. Courses in Roman law did not readily find their way into the curricula of law schools and were not much encouraged. In the East Professor Munro Smith may be said to have given Roman law the status of a subject which the most practical of lawyers might not disdain to take and in the West Dean William Carey Jones established Roman law as the foundation of the scientific study of law. It is not too much to say that when Dean Jones offered his first course in Roman law at the University of California, legal education in the West was generally thought of as a craft to be acquired by practical apprenticeship. Dean Jones used Roman law as a means of recalling members of a learned profession to the consciousness of their ancient lineage and their intellectual responsibilities.

To Gibbon and, indeed to Kent, a seventeenth century commentator like Heineccius was the best means of studying Roman law. As late as 1873, Mr. Justice Holmes (1 Kent's Commentaries [12th ed.] p. 548, n.1) could add only a few modern writers who "were said to be good," or were works "of reputation." We have advanced rapidly since then. The nineteenth century has shown us law as a growing thing and whether we accept or reject assignment to one of the various "schools" of law, no one is likely to question the fact that "eternal and fundamental principles of justice" manage to mean somewhat different things at various stages of their application.

It was inevitable that rules developed in an economic structure of relative simplicity had to be emptied of their precise content when they were made to fit a more complex social organization. Of course this is exactly what happened in England and America. It may be said with some truth that the changes were more deliberately and consciously made at Roman law. Epochs, to be sure, are rarely recognized by those who live in them, and we cannot suppose that the various stages that Dean Pound has marked in the development of law, were as apparent when they occurred as they are to us at the present time. But it does seem to be true that at the points which we now consider epoch-making there was less squeamish uncertainty in Roman law, less halting between two opinions, than at the crucial moments in the Common law. It may well be that this contrast is due to the character of our sources, but even when due
allowance is made for that fact, there is sufficient left to support the suggestion made above.

The history of the Roman law is unintelligible except as a special aspect of the history of the Roman people. Not even the most concise summary of it can be attempted here. We must even forgo any discussion of the Roman political system, except for a brief reference to a constitutional idea that played a controlling part in Roman procedure and therefore in Roman law. That was the concept of *imperium*.

Roman law was developed in the frame of the City-State. The sovereign was the *populus*, the entire body of adult males capable of bearing arms. This body possessed *maiestas*. It was organized in a complicated way and had the two functions of making binding general regulations (*lex*) and of conferring upon individuals the power of issuing particular commands to other individuals. This power, *imperium*, whether it was held by a magistrate holding office for life, *rex*, or by magistrates with very brief terms such as consuls or praetors, was in theory unlimited and indivisible. A command given by a magistrate with *imperium* could not lawfully be disobeyed. The magistrate giving it might later be held accountable, or the order might be countermanded by another magistrate of equal or higher rank.

Besides the *populus* and the magistrates, there was a body of old men, comprising the heads of families who had passed the age of military service, called the senate. This body had *auctoritas*, that is, theoretically no power at all, but merely such weight as the distinction of its members gave it. We know that during a considerable part of Roman history, for reasons we cannot here examine, this body became the governing corporation of the state, although in constitutional theory its functions never went beyond those of giving directions to the magistrates which they were at liberty to disregard, or of preparing the drafts of laws which the legislating *populus* was at liberty to reject.

When the Corpus was compiled, the Roman constitution had completely changed. Rome was a bureaucratic absolute monarchy. The emperor or *princeps* was above the state and outside it, in theory

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4 That this was a real constitutional change, and not merely one de facto, appears clearly enough from the change made in the Digest in one of the passages excerpted from an earlier writer. We happen to have almost entire, the Institutes of Gaius, written sometime about 150 A. D., when the Emperor was in fact, although not yet in theory, the supreme power in the state. Speaking of adoption, Gaius states that it takes place in two ways, either under the *imperium* of a magistrate or by authority of the people.
the master of everything within it, animate or inanimate, human or non-human. In reality, however, this autocratic theory was sharply modified by the fact that it was relatively recent, that it had developed from a political theory in which the princeps was a magistrate with limited and delegated powers, and from a still older political structure in which the delegation was even more limited in extent and in the time of its operation. Moreover, most of the actual texts of the law were made under this oldest political theory. Again, the vastness of the empire precluded the arbitrary exercise of monarchical ownership of it. The real political fact in the consciousness of most Romans was the bureaucracy. Most of all human functions, political, social and economic, were regulated by being assigned to definite groups of men, controlled by a hierarchy of officials, and directed to the protection of the state from military attack.

Besides the political fact, which makes so vast a contrast between our society and that of Rome, there were certain other facts, more definitely social, of the highest importance. Roman society was based on slavery. A large part of the inhabitants of the state,—perhaps a majority,—were slaves. That is, they were wholly devoid of property rights, and their bodies and activities themselves were considered property which could readily be transferred by the free population of the empire. There was of course a difference between slaves and other property. Although chattels in law, slaves were, as a matter of fact, human beings. Limitations were consequently imposed in dealing with them. The owner's right of abusing or destroying his chattel was less than in the case of other property. Secondly, these chattels could readily become persons, possessing rights of many kinds. That happened when they became emancipated or free. Before becoming completely free, they might have to pass through an intermediate stage of being freedmen, libertini.

Adoptio autem duobus modis fit aut populi auctoritate aut imperio magisteratus velut praetoris. (Gaius, Inst. I, 98, 99.) This appears in the Digest (1, 7, 2) as follows: Generalis enim adoptio duobus modis fit, aut principis auctoritate aut imperio magistratus imperio. "Adoption in general is effected in two ways, either by authority of the Emperor or under the imperium of a magistrate." And later in describing the details of the process of adoption the reference to the people, "And the populus is asked whether it wishes this to be done," is completely omitted in the Digest version.

These passages have the additional value of giving a concrete example of the extent to which the compilers of the Corpus actually undertook to modify the statements they took into their text.

As early as the time of Augustus, it was specifically decided that "slaves" are not ordinarily included under the term "goods" or "merchandise," and that "merchant" does not comprise "slave-dealer."
during which they had almost, but not quite, all the rights of free men.

The second important social fact was the Roman family system. Only one member of the family really possessed all the rights of a free Roman citizen. That was the father, or *paterfamilias*. Over his children (*filiusfamilias, filiafamilias*) he exercised a power called *potestas*, almost as complete as his ownership of slaves, a power which was not extinguished until his death. Over his wife he, at one time, exercised a similar power called *manus*. This *manus* had, at the time of our survey, been superseded by a kind of tutelage that gave the husband a limited control of his wife's actions and management of her property, subject to the obligation not to impair the *dos* or dowry which was the wife's contribution to the joint property of the family, and to which she never lost title, if she originally had it.

*Potestas* might be surrendered by the voluntary act, or forfeited by the fault, of the *paterfamilias*. In that case the *filiusfamilias* became emancipated and himself a *paterfamilias* or *sui juris*. *Potestas* was further limited by humanitarian legislation and better safeguarded against abuse than the *dominium* or ownership of slaves.

Marriage was not strictly a contract, although consent—sometimes of a great many persons—was necessary. Its essence lay in the *deductio uxoris*, the bringing of the wife to the marital domicile. No other ceremony was necessary, and it might be done in the husband's absence. Marriage might be ended by repudiation on the part of either spouse or by divorce by mutual consent. Repudiation without adequate cause began to be penalized early in the Empire and under the Christian emperors could be punished, but penalized or not, it just as effectively ended the status of husband and wife. As for divorce by mutual consent that was at nearly all times completely free. Justinian alone of Roman legislators sought to restrict it, and his nephew promptly abolished the restriction, because as his Sacred Majesty asserts, it is difficult to reconcile "those who have once been seized with an irrational feeling of hatred toward each other."

A slave of course had no property and could neither obligate himself nor his master. The master might, however, treat the slave as his representative and accept the results of the slave's obligatory cooperation as though the master had himself taken part in it. Yet if the slave committed a tort, the master could not escape liability unless he surrendered the slave. This surrender, called noxal deditio, applied to a limited extent to a *filiusfamilias*.

As far as the *filiusfamilias* himself was concerned, he early
became capable of assuming most obligations, both in contract and tort. While all property of either slave or filiusfamilias was in theory that of the father or master, in fact both son and slave had the free disposition of certain property called peculium. A large part of the peculium of the filiusfamilias was soon withdrawn completely from the legal control of the father. In the case of slaves, this was true in a much more limited sense, but in practise slaves did business frequently on their own account, and their peculium was treated as a fund against which creditors might have recourse.

All these constitute thoroughgoing differences between Roman society and our own. Fundamental as the contrast was, economic forces created an external similarity in the ordinary transactions of everyday life. We must not forget that the economic condition of the Roman Empire was very like our own. Production was often on a large scale, and was corporately organized. Transportation and distribution played vitally important parts. Great discrepancies in individual fortunes existed, for which the same legislative remedies were attempted. We hear then, as we do now, of sales' tax, death dues, and in the eastern part of the Empire, of something not unlike capital levies. Elaborate provision was made for the care of dependent classes. The real difference between the ancient and the modern social order was the difference in men's mental attitude toward each other.

III

To the Roman, the idea of ius was of something that belonged to him. Ius was perhaps a manner of acting rather than a concrete thing, but he spoke of it very concretely. It was something he could get, something he was inclined to take. In an unfortunate moment he gathered up the sum of his iura, his rightful ways of acting, and called the total ius also, and so bequeathed to the modern Civil law the distressing and confusing terminology that has compelled a discrimination between subjective and objective Recht, droit, diritto, and occasioned a literally interminable controversy on the validity of the discrimination. We may be sure the Roman intended no such portentous result, but simply meant to make clear that for him ius in the broadest sense was a means of helping him to his iura.

The most primitive means of doing so was to help himself. But it is likely that the generalized sense of ius did not arise until an aggrieved party was induced or required to accept the help of some communal authority. We know that one of the most ancient titles of the holder of imperium, was index, the law-finder, the pointer out
of ius. His interposition at first is merely for the purpose of effectuating an undoubted claim.

A asserts that N is depriving him of the use of a thing or is enjoying without A’s consent that which A has an exclusive right to enjoy for himself. If A makes his claim in the right way, if he uses the right words and makes the right gestures, he can obtain redress at once. He can get back his property. He can oust N from the latter’s unwarranted enjoyment. In somewhat later times, there is still a great stress on formal correctness of words and gestures, but a new point is involved. Precisely performed ritual does not establish a right but raises an issue. Allegations made correctly are as correctly denied. And then for the first time, a real court comes into existence, in our sense of the term,—a court which must determine the truth of the issue raised. This is the legisaction procedure of the Roman law, corresponding somewhat to the procedure before the old local English courts, except that it was much less barbarous.

But the legisaction involved a splitting of the law-finder’s function in a way that remained characteristic of Roman law until its latest period. The magistrate was not competent to decide which of two contradictory claims was really iustum, nor had he any wish to do so. That duty he promptly delegated to an arbitrator to whom he gave his ancient name of iudex, and contented himself with what soon became the simple task of determining the formal correctness of the application.

The inadequacy of the legisaction lay first in the restricted character of the litigants who could use it. Since it was a ritual, it was available only to Roman citizens. Secondly, the issues cognizable under it were limited in range. A certain measure of flexibility was later given to it, but not enough to meet the rapid commercial expansion of Roman life. During the last century of the Roman republic, the legisaction became superseded by a procedure of the utmost elasticity, the procedure by formula, in which the magistrate instructed the iudex so precisely and narrowly that the latter was reduced in most cases to pronouncing on certain issues of fact.

This change in the nature of the magistrate’s intervention was momentous for the development of Roman law. We must remember that the magistrate,—he was nearly always the praetor at this time—possessed imperium. The iudex whom he appointed was as a citizen as much subject to his authority as the litigants themselves. The praetor might conceivably be whimsical and arbitrary and order the iudex to decide accordingly. He might refuse altogether to institute a iudicium. But we may be pretty sure he was rarely tempted to
be arbitrary. He was a public official absorbed in political and military functions, and often of very imperfect education. He generally sought the advice of better-trained men, and these were, like himself, difficult to persuade that anything was ius which had not been called so before.

But, although with difficulty, they were sometimes so persuaded, and the ius which a litigant was fairly confident he could induce the praetor to give him, was as good for all practical purposes as the body of iura which from time immemorial had been the privileges of Roman citizens, the Quirites. And the public proclamation by edict of what iura a praetor would give in addition to the Quiritary ones, appreciably assisted a prospective litigant in discovering whether he had a ius or not. This new body of magisterial law grew apace until it quite overshadowed the ancient ius civile and usurped its name.

The historical fact that it grew in this way is less important than the new spirit which gradually came to inform it. Ius is still something which the claimant demands as his own, as his property, and for many centuries neither the praetor nor the men whose advice he followed were prepared to identify the ius which a given Roman citizen might properly claim as his, with the ideally equitable thing based upon a course of conduct for all civilized men. Yet finally the identification was made. In the famous dictum ius est ars boni et aequi, we have something more than a rhetorical commonplace or a pious hope. It was apparently first used by Celsus, about 100 A. D., who was no bland philosopher but a lawyer as famous for his rudeness as for his keenness. Ius is no longer the means of securing iura. It is a technical device (ars) for the obtaining of equity, that which a good man's conscience will approve, (bonum et aequum).

Just what will constitute equity, the bonum et aequum, will vary with the time and place and person, but a new responsibility is placed upon the magistrate. He must in most cases examine the moral basis of the ius claimed. That is bonum et aequum which if generally and frequently applied will produce a maximum of advantage. In determining what would produce this result, the praetor was aided by a rapidly increasing mass of precedents, collected, discussed and annotated in published books. To disregard them would have been a psychical impossibility even for radical reformers, and radical reformers did not normally obtain imperium in the Roman Empire. The morality enforced by the praetor was a ius gentium, adapted to the needs of civilized society as his experience and imagi-
nation taught him to believe that civilized society was in fact constituted.

For a time it is true, imperium, even the supreme imperium of the princeps, was actually possessed by men who ostensibly held extremely radical views concerning the constitution of society. These were the Stoics. But the Stoics were on the whole a rather muddled group, and the clearer thinkers among them managed to push their troublesome and revolutionary conception of a perfect equality into the state of nature, which lay just outside—but after all quite outside—the city of flesh and blood, of mortar and stones, in which men in fact were living.

Within that city the bonum et aequum, the right and proper thing, continued to depend on the character of the magistrate. But we may say that the most characteristic thing about most magistrates was a profound distrust of their capacity to pronounce without aid on what was equitable. The tendency to seek this aid from a body of professional experts existed from the first. It was long believed that from the time of Augustus, the magistrate could be compelled to seek this aid. This has been recently questioned, although, as it seems to me, for insufficient reasons. However, it is certain that such aid was available and was constantly used, that there was a large body of highly trained professional jurists from all quarters of the Roman Empire, that many of them were themselves magistrates.

The reception of large masses of Mediterranean common law into the Roman system was easily possible under such an organization. There was no need of the subterfuge of fictions. Indeed there was no point at which a desirable reform had to encounter any difficulty other than the task of establishing its desirability. It surely did not have to overcome the sheer inertia of a procedural system such as that of the old common law practice in England and America, and it did not have to wait for the inevitably hesitant process of legislation. That this did not result in an ideally perfect system of law will not surprise those who have ceased to suppose that ideally perfect systems are possible. It may be said that the Roman legal system was a little better than the Romans, just as it can be asserted without malice that Englishmen were a little finer and humaner than the legal system under which they made a shift to live.

The larger part of the doctrines which make up the Roman law were established in the frame of the formulary procedure. We can best see what that procedure was like by a concrete instance.

Let us assume we are dealing with a case of sale in which the vendor claims non-payment and the claim is resisted by an allega-
ition of fraud in the contract. The formula in which these assertions and counter-assertions would result in iure might read somewhat as follows:

1. Let Titius be iudex (Nomination); 2. whereas A has sold and delivered to M, a slave, at the agreed price of a thousand hs., (Demonstration); 3. whatever it appears to you that N should by reason thereof in good faith pay to A (Intention); 3a. if nothing has been done in this matter by the willful fault of A (Exception); 4. to that, do you, iudex condemn N, otherwise acquit him (Condemnation).

To this formula, there were other possible additions and modifications. In the place of the Condemnation, there might, in partition suits, be an Adjudication. A Prescription might precede even the Nomination and limit the range of the entire inquiry. The Exception might be followed by a Replication, a Duplication, or even a Triplication, which call to mind the corresponding pleas of the Common Law. Further, the Condemnation might leave to the iudex a certain arbitrary power of taxing damages.

When the formula was complete, the praetor had no further function to perform and the proceeding in iure came to a close. The formal closing was given a technical name, litis contestatio. For a very long time in Roman history litis contestatio effected a complete novation, provided we understand novation in the sense of the Civil Law. It extinguished whatever claim or counterclaim existed between the parties as the result of the facts stated in the Demonstration, and substituted for such claims a wholly new one, to-wit, that which the iudex in his judgment might grant in accordance with the Intention and the qualifying Exceptions.

The parties are now in iudicio, before the iudex. It must be remembered that the iudex was a private citizen, selected from a panel which was generally determined by property qualifications. He was in most cases not a lawyer. He could, however, secure the assistance and counsel of those who were trained lawyers and in most cases we may be sure that he did so, since the determination he was required to make demanded considerable legal knowledge. However, he was not obliged to go outside of his unaided discretion. If he chose to run the risk, which a wilful or negligently wrong decision entailed, there was nothing to prevent him. But the risk was a real one, since he was liable in tort for the consequences of an erroneous decision. Not only did the iudex have an opportunity of securing learned advice, but the parties themselves often furnished him with guidance. They might enlist the services of professional advocates or obtain the written opinions of eminent counsel. The iudex's
decision, moreover, even if he was corrupt or incompetent, was final. There was no appeal.

One can only regret that this admirable system was ever abolished. If proper provision were made for review, it is hard to imagine a more supple or successful instrument for effecting justice. However, in the undisguised monarchy, justice was less important than regularity and order. Bureaucracy replaces the formula with a procedure of great definiteness and rigidity which substituted paper pleadings and systematic registrations for the vitality and humanity of its predecessor. This new procedure was the *cognitio*.

At all times magistrates found it necessary to deal directly with certain issues brought before them. This reserved class of cases, originally exceptional and extraordinary, became more and more extended. In place of the magistrates themselves, subordinate officials were assigned to hear the increasing body of law suits, and well before the period of Diocletian the *cognitio* was universal.

The *cognitio* abolished the distinction between *in iure* and *in iudicio*. A written declaration (*libellus conventionis*) was made with a written plea, both duly filed and docketed. Fees marked every step of the suit, and the decision of the *index*—now become a bureaucratic clerk—was subject to a review by a higher and more incrusted bureaucrat.

The legal development that went on under this new procedure preserved some of the forms of the older system. Changes in law were made by imperial ukase, but in nearly all instances these ordinances were avowedly based upon a specific application for redress. However, the emperor is consciously legislating and his tone and words show it plainly enough. The law of this period is not without its value. It removed a great many historical vestiges in property law and the law of succession. It simplified personal status somewhat. It performed an astounding feat of clarification in producing the Corpus. But it is not one of the great creative periods of the law, and one may be forgiven for contemplating it with little pleasure.

IV

A Roman citizen standing before a magistrate of the Roman people called upon him to assist in securing his *ius*. What was the content of this demand? Generally it was a claim to be free to act as he chose in connection with some thing, or that some other person shall be compelled to act in a specific way in respect to the claimant. Either demand would be a *ius*. Mr. Hohfeld would have called the
one a privilege and the other a right or claim, and it is unfortunate that this valuable terminological distinction has not obtained greater currency. When the Roman said that his dominium over a res consisted of the *ius utendi, fruendi et abutendi*, he was saying in effect that it was the sum of his privileges in respect to a thing. However, in general the *ius* he sought in court was rarely the determination of *dominium* as an abstract question, but generally the assertion of a claim that a specific person should act in a specific way because of the existence of *dominium* in the claimant. From such claims, it may well be, law itself originated. But for our present purposes we shall first turn to the claims which have no particular references to the privileges of *dominium*. These were the obligations.

The term obligation is a potent word, derived it seems from that ancient body of rites called sympathetic magic. It occurs in vows and curses and incantations generally. When a Roman said, "*Numerius obligatus est Aulo,*" we find it difficult to render the exact force of the prefix "*ob,*" and of the dative case of the predicate noun; but it seems to say literally that Numerius is tied up in a particular way toward Aulus. His actions are restricted. It is Aulus and not he who must determine what he is to do.

How did a man get himself tied up in this fashion? If we follow general analogies, a man got obligated by taking an oath, which combined both the utterance of a formula and the performance of a ritual. In that case he was tied up toward the gods, and if he wilfully severed the bond, he became a thing unclean and outcast. When and exactly how men first tied themselves up in respect to other men as well as toward the gods, we do not know, but it is evident that the potent word and the efficacious ritual played an important part. A man, that is, obligated himself, and could incur an obligation in no other way. And, just as in the case of an oath, the divine bond involved could not be severed without sacrilege, so in the case of the human obligation, the bond could not be severed without violating the common opinion which held it to be valid. The ancient *iudex* with imperium would command the obligor to act as his bond compelled him. In doing so, he declared that the action of the obligor was a *ius* of the obligee. He put a legal seal upon the obligation which the defendant had created for himself.

Now, in the ordinary affairs of life, men become involved or tied up with each other in various ways. Some of them, the law will seal as obligations, that is to say, the court selects from the bonds that unite men certain ones as more important. Which bonds will be selected is largely a matter of historical accident. And with
the element of uncertainty implied in the existence of courts it soon becomes understood that the transaction between parties, the negotium, does not become an obligation by itself, but merely because the court is likely to enforce it.

In these transactions, negotia, later Roman society made a most important distinction. Some were stricti iuris, others, bonae fidei. In the former case, the extent of the obligation, the nature of the act to be enforced, could be predicted with a fair degree of precision. In the latter, the existence of an obligation was likely but its content was more or less doubtful, even when it was a very common transaction. A stricti iuris negotium exercised a strong compulsion on the magistrate to attach a specific obligation to it, but as we shall see, it was only a moral compulsion, and when the time came that what were thought moral considerations leaned the other way, he might deny it obligatory effect. A bonae fidei negotium allowed a much freer readjustment of the relation between the parties.

The outstanding stricti iuris transaction was the stipulation. If A desires certain action on the part of N and closes his proposal with the words "spondesne?, Do you so promise?", and if N answered "spondeo, I promise," N at once became obligated to A. It is likely that the form was originally more complicated and involved a ritual of action, but as far as we can trace it clearly, the stipulation had no other requirement than this succession of question and answer and the employment of the particular word spondeo. Later any word was permitted but the insistence on question and answer was theoretically never abandoned.

The stipulation remained the general form in which any transaction of any sort or any part of a transaction that involved future performance might be framed. It must have been extremely common. It was not very burdensome or complicated. It required no technical skill to perform correctly. In later times it was undoubtedly felt that its formalism was something of a safeguard against hasty and incautious acts, but its obligatory character was certainly not due to such considerations of general advantage. Its history is very similar to the history of seals at the Common law. An almost magically potent word created the bond originally, and traces of the effect of the word remained when the stipulation became the means of concluding thousands of bargains daily in crowded market-places.

The stipulation operates unilaterally only. It binds the promissor to the stipulator. It was characteristic of Roman law that it looked at all transactions from one side at a time, and sought as far as possible to differentiate the parties in every negotium. But being a
negotium it required cooperation, and this cooperation was always an audible question and an audible reply.

Did it need another element? Did it need a meeting of the minds, agreement, consent? That really involves what has so often been called the "Will-theory" of legal transactions. Men are bound because they wish to be bound. The will is autonomous.

The merits of the controversy between those who support the will-theory and those who support the declaration-theory, as far as it concerns modern law, cannot concern us here. But it is unfortunately impossible to ignore the issue as far as it affects Roman law, not only because Roman examples have been cited by the proponents of both views, but because we cannot after all understand a Roman obligation unless we examine somewhat the general basis which, however mistakenly, Roman lawyers assigned to it. Common lawyers have sometimes spoken as though "meeting of the minds" was the essence of contractual obligation. This has been hedged in and qualified by conclusive presumptions, and limited by the large admission that the mental condition must necessarily be inferred from external acts.

Now the Roman lawyers often speak of consensus, and often assert in special cases that absence of this consensus vitiates the supposed obligation. But I think we shall see that the term varies somewhat with the particular situation in connection with which the statement is made. It may be noted that neither at Common law nor at Roman law was it ever contended that agreement in itself constituted an obligation. That would have been in flagrant contradiction with ordinary knowledge and experience. It could at best be maintained that agreement was an essential constitutive element, though often not the only element, of an obligation.

So it is stated that consensus was necessary even for the formal negotium of stipulation. That appears in Venuleius, (2nd century) and in Ulpian and Paul, (3rd century). If N has promised by stipulation to give A a slave, and they are not speaking of the same slave, there is no obligation. If we leave out the question of error which must be specially considered in another place, what consensus really means here, can be seen from the sentence immediately following. There the stipulator asked for one of two named slaves, and the promissor mentioned only one of them. There was no question and answer. Similarly in the other cases to which Venuleius and Paul referred, there seems to have been no mention of a particular slave, and therefore that which N promised was not that which A stipulated for. We may say as in the other case, non ad inter-
rogatum esse responsum. If N attempted to plead that when he said Pamphilus he did not mean the Pamphilus whom A had in mind, the same objection is possible that Paul makes to a suggestion of an older jurist, semper negabit reus se consensisse, "The defendant will always deny that he had agreed."

The point seems to be that consensus is a general word that came to be loosely used for a more specific word, conventio, which retained in its obvious etymology something of the idea which underlay all obligatory transactions at Roman law. They are based upon a conscious cooperation of two persons, although this cooperation may not at all have been directed to the creation of the specific obligation that the law attaches to it.

The problems connected with stipulations which occupy so large a space in our texts, are largely the inevitable problems of interpretation. Just what was asked and what was answered? That often needs extrinsic evidence to determine. Again they are problems of judicial organization. The law would not hold a man to an impossible promise, because it could not. It would not hold him to an improper promise because it chose not to do so. The situations presented are very similar to our own and are dealt with in much the same ways.

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(To be Continued)

(This is the first of a series of articles on Roman law to be written by Professor Radin.)