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**Edward Gibbon: The Decline and Fall of the Roman Empire Volume IV.
Chapter XLIV : Idea Of The Roman Jurisprudence.**

Idea Of The Roman Jurisprudence. -- The Laws Of The Kings -- The Twelve Of The Decemvirs. -- The Laws Of The People. -- The Decrees Of The Senate. -- The Edicts Of The Magistrates And Emperors -- Authority Of The Civilians. -- Code, Pandects, Novels, And Institutes Of Justinian: -- I. Rights Of Persons. -- II. Rights Of Things. -- III. Private Injuries And Actions. -- IV. Crimes And Punishments.

The vain titles of the victories of Justinian are crumbled into dust; but the name of the legislator is inscribed on a fair and everlasting monument. Under his reign, and by his care, the civil jurisprudence was digested in the immortal works of the CODE, the PANDECTS, and the INSTITUTES: the public reason of the Romans has been silently or studiously transfused into the domestic institutions of Europe, and the laws of Justinian still command the respect or obedience of independent nations. Wise or fortunate is the prince who connects his own reputation with the honor or interest of a perpetual order of men. The defence of their founder is the first cause, which in every age has exercised the zeal and industry of the civilians. They piously commemorate his virtues; dissemble or deny his failings; and fiercely chastise the guilt or folly of the rebels, who presume to sully the majesty of the purple. The idolatry of love has provoked, as it usually happens, the rancor of opposition; the character of Justinian has been exposed to the blind vehemence of flattery and invective; and the injustice of a sect (the *Anti-Tribonians*) has refused all praise and merit to the prince, his ministers, and his laws. Attached to no party, interested only for the truth and candor of history, and directed by the most temperate and skilful guides, I enter with just diffidence on the subject of civil law, which has exhausted so many learned lives, and clothed the walls of such spacious libraries. In a single, if possible in a short, chapter, I shall trace the Roman jurisprudence from Romulus to Justinian, appreciate the labors of that emperor, and pause to contemplate the principles of a science so important to the peace and happiness of society. The laws of a nation form the most instructive portion of its history; and although I have devoted myself to write the annals of a declining monarchy, I shall embrace the occasion to breathe the pure and invigorating air of the republic.

The primitive government of Rome was composed, with some political skill, of an elective king, a council of nobles, and a general assembly of the people. War and religion were administered by the supreme magistrate; and he alone proposed the laws, which were debated in the senate, and finally ratified or rejected by a majority of votes in the thirty *curi* or parishes of the city. Romulus, Numa, and Servius Tullius, are celebrated as the most ancient legislators; and each of them claims his peculiar part in the threefold division of jurisprudence. The laws of marriage, the education of children, and the authority of parents, which may seem to draw their origin from *nature* itself, are ascribed to the untutored wisdom of Romulus. The law of *nations* and of religious worship, which Numa introduced, was derived from his nocturnal converse with the nymph Egeria. The *civil* law is attributed to the experience of Servius: he balanced the rights and fortunes of the seven classes of citizens; and guarded, by fifty new regulations, the observance of contracts and the punishment of crimes. The state, which he had inclined towards a democracy, was changed by the last Tarquin into a lawless despotism; and when the kingly office was abolished, the patricians engrossed the benefits of freedom. The royal laws became odious or obsolete; the mysterious deposit was silently preserved by the priests and nobles; and at the end of sixty years, the citizens of Rome still complained that they were ruled by the arbitrary sentence of the magistrates. Yet the positive institutions of the kings had blended themselves with the public and private manners of the city, some fragments of that venerable jurisprudence were compiled by the diligence of antiquarians, and above twenty texts still speak the rudeness of the Pelasgic idiom of the Latins.

I shall not repeat the well-known story of the Decemvirs, who sullied by their actions the honor of inscribing on brass, or wood, or ivory, the TWELVE TABLES of the Roman laws. They were dictated by the rigid and jealous spirit of an aristocracy, which had yielded with reluctance to the just demands of the people. But the substance of the Twelve Tables was adapted to the state of the city; and the Romans had emerged from barbarism, since they were capable of studying and embracing the institutions of their more enlightened neighbors. A wise Ephesian was driven by envy from his native country: before he could reach the shores of Latium, he had observed the various forms of human nature and civil society: he imparted his knowledge to the legislators of Rome, and a statue was erected in the forum to the perpetual memory of Hermodorus. The names and divisions of the copper money, the sole coin of the infant state, were of Dorian origin: the harvests of Campania and Sicily

relieved the wants of a people whose agriculture was often interrupted by war and faction; and since the trade was established, the deputies who sailed from the Tyber might return from the same harbors with a more precious cargo of political wisdom. The colonies of Great Greece had transported and improved the arts of their mother country; and Rhegium, Crotona and Tarentum, Agrigentum and Syracuse, were in the rank of the most flourishing cities. The disciples of Pythagoras applied philosophy to the use of government; the unwritten laws of Charondas accepted the aid of poetry and music, and Zaleucus framed the republic of the Locrians, which stood without alteration above two hundred years. From a similar motive of national pride, both Livy and Dionysius are willing to believe, that the deputies of Rome visited Athens under the wise and splendid administration of Pericles; and the laws of Solon were transfused into the twelve tables. If such an embassy had indeed been received from the Barbarians of Hesperia, the Roman name would have been familiar to the Greeks before the reign of Alexander; and the faintest evidence would have been explored and celebrated by the curiosity of succeeding times. But the Athenian monuments are silent; nor will it seem credible that the patricians should undertake a long and perilous navigation to copy the purest model of democracy. In the comparison of the tables of Solon with those of the Decemvirs, some casual resemblance may be found; some rules which nature and reason have revealed to every society; some proofs of a common descent from Egypt or Phnicia. But in all the great lines of public and private jurisprudence, the legislators of Rome and Athens appear to be strangers or adverse at each other.

Whatever might be the origin or the merit of the twelve tables, they obtained among the Romans that blind and partial reverence which the lawyers of every country delight to bestow on their municipal institutions. The study is recommended by Cicero as equally pleasant and instructive. "They amuse the mind by the remembrance of old words and the portrait of ancient manners; they inculcate the soundest principles of government and morals; and I am not afraid to affirm, that the brief composition of the Decemvirs surpasses in genuine value the libraries of Grecian philosophy. How admirable," says Tully, with honest or affected prejudice, "is the wisdom of our ancestors! We alone are the masters of civil prudence, and our superiority is the more conspicuous, if we deign to cast our eyes on the rude and almost ridiculous jurisprudence of Draco, of Solon, and of Lycurgus." The twelve tables were committed to the memory of the young and the meditation of the old; they were transcribed and illustrated with learned diligence; they had escaped the flames of the Gauls, they subsisted in the age of Justinian, and their

subsequent loss has been imperfectly restored by the labors of modern critics. But although these venerable monuments were considered as the rule of right and the fountain of justice, they were overwhelmed by the weight and variety of new laws, which, at the end of five centuries, became a grievance more intolerable than the vices of the city. Three thousand brass plates, the acts of the senate of the people, were deposited in the Capitol: and some of the acts, as the Julian law against extortion, surpassed the number of a hundred chapters. The Decemvirs had neglected to import the sanction of Zaleucus, which so long maintained the integrity of his republic. A Locrian, who proposed any new law, stood forth in the assembly of the people with a cord round his neck, and if the law was rejected, the innovator was instantly strangled.

The Decemvirs had been named, and their tables were approved, by an assembly of the *centuries*, in which riches preponderated against numbers. To the first class of Romans, the proprietors of one hundred thousand pounds of copper, ninety-eight votes were assigned, and only ninety-five were left for the six inferior classes, distributed according to their substance by the artful policy of Servius. But the tribunes soon established a more specious and popular maxim, that every citizen has an equal right to enact the laws which he is bound to obey. Instead of the *centuries*, they convened the *tribes*; and the patricians, after an impotent struggle, submitted to the decrees of an assembly, in which their votes were confounded with those of the meanest plebeians. Yet as long as the tribes successively passed over narrow *bridges*, and gave their voices aloud, the conduct of each citizen was exposed to the eyes and ears of his friends and countrymen. The insolvent debtor consulted the wishes of his creditor; the client would have blushed to oppose the views of his patron; the general was followed by his veterans, and the aspect of a grave magistrate was a living lesson to the multitude. A new method of secret ballot abolished the influence of fear and shame, of honor and interest, and the abuse of freedom accelerated the progress of anarchy and despotism. The Romans had aspired to be equal; they were levelled by the equality of servitude; and the dictates of Augustus were patiently ratified by the formal consent of the tribes or centuries. Once, and once only, he experienced a sincere and strenuous opposition. His subjects had resigned all political liberty; they defended the freedom of domestic life. A law which enforced the obligation, and strengthened the bonds of marriage, was clamorously rejected; Propertius, in the arms of Delia, applauded the victory of licentious love; and the project of reform was suspended till a new and more tractable generation had arisen in the world. Such an example was not necessary to instruct a prudent usurper of

the mischief of popular assemblies; and their abolition, which Augustus had silently prepared, was accomplished without resistance, and almost without notice, on the accession of his successor. Sixty thousand plebeian legislators, whom numbers made formidable, and poverty secure, were supplanted by six hundred senators, who held their honors, their fortunes, and their lives, by the clemency of the emperor. The loss of executive power was alleviated by the gift of legislative authority; and Ulpian might assert, after the practice of two hundred years, that the decrees of the senate obtained the force and validity of laws. In the times of freedom, the resolves of the people had often been dictated by the passion or error of the moment: the Cornelian, Pompeian, and Julian laws were adapted by a single hand to the prevailing disorders; but the senate, under the reign of the Caesars, was composed of magistrates and lawyers, and in questions of private jurisprudence, the integrity of their judgment was seldom perverted by fear or interest.

The silence or ambiguity of the laws was supplied by the occasional EDICTS of those magistrates who were invested with the *honours* of the state. This ancient prerogative of the Roman kings was transferred, in their respective offices, to the consuls and dictators, the censors and praetors; and a similar right was assumed by the tribunes of the people, the ediles, and the proconsuls. At Rome, and in the provinces, the duties of the subject, and the intentions of the governor, were proclaimed; and the civil jurisprudence was reformed by the annual edicts of the supreme judge, the praetor of the city. As soon as he ascended his tribunal, he announced by the voice of the crier, and afterwards inscribed on a white wall, the rules which he proposed to follow in the decision of doubtful cases, and the relief which his equity would afford from the precise rigor of ancient statutes. A principle of discretion more congenial to monarchy was introduced into the republic: the art of respecting the name, and eluding the efficacy, of the laws, was improved by successive praetors; subtleties and fictions were invented to defeat the plainest meaning of the Decemvirs, and where the end was salutary, the means were frequently absurd. The secret or probable wish of the dead was suffered to prevail over the order of succession and the forms of testaments; and the claimant, who was excluded from the character of heir, accepted with equal pleasure from an indulgent praetor the possession of the goods of his late kinsman or benefactor. In the redress of private wrongs, compensations and fines were substituted to the obsolete rigor of the Twelve Tables; time and space were annihilated by fanciful suppositions; and the plea of youth, or fraud, or violence, annulled the obligation, or excused the performance, of an inconvenient contract. A jurisdiction thus vague and arbitrary was exposed to

the most dangerous abuse: the substance, as well as the form, of justice were often sacrificed to the prejudices of virtue, the bias of laudable affection, and the grosser seductions of interest or resentment. But the errors or vices of each praetor expired with his annual office; such maxims alone as had been approved by reason and practice were copied by succeeding judges; the rule of proceeding was defined by the solution of new cases; and the temptations of injustice were removed by the Cornelian law, which compelled the praetor of the year to adhere to the spirit and letter of his first proclamation. It was reserved for the curiosity and learning of Adrian, to accomplish the design which had been conceived by the genius of Caesar; and the praetorship of Salvius Julian, an eminent lawyer, was immortalized by the composition of the PERPETUAL EDICT. This well-digested code was ratified by the emperor and the senate; the long divorce of law and equity was at length reconciled; and, instead of the Twelve Tables, the perpetual edict was fixed as the invariable standard of civil jurisprudence.

From Augustus to Trajan, the modest Caesars were content to promulgate their edicts in the various characters of a Roman magistrate; and, in the decrees of the senate, the *epistles* and *orations* of the prince were respectfully inserted. Hadrian appears to have been the first who assumed, without disguise, the plenitude of legislative power. And this innovation, so agreeable to his active mind, was countenanced by the patience of the times, and his long absence from the seat of government. The same policy was embraced by succeeding monarchs, and, according to the harsh metaphor of Tertullian, "the gloomy and intricate forest of ancient laws was cleared away by the axe of royal mandates and *constitutions*." During four centuries, from Hadrian to Justinian the public and private jurisprudence was moulded by the will of the sovereign; and few institutions, either human or divine, were permitted to stand on their former basis. The origin of Imperial legislation was concealed by the darkness of ages and the terrors of armed despotism; and a double fiction was propagated by the servility, or perhaps the ignorance, of the civilians, who basked in the sunshine of the Roman and Byzantine courts. 1. To the prayer of the ancient Caesars, the people or the senate had sometimes granted a personal exemption from the obligation and penalty of particular statutes; and each indulgence was an act of jurisdiction exercised by the republic over the first of her citizens. His humble privilege was at length transformed into the prerogative of a tyrant; and the Latin expression of "released from the laws" was supposed to exalt the emperor above *all* human restraints, and to leave his conscience and reason as the sacred measure of his conduct. 2. A similar dependence was implied in the decrees of the senate,

which, in every reign, defined the titles and powers of an elective magistrate. But it was not before the ideas, and even the language, of the Romans had been corrupted, that a *royal* law, and an irrevocable gift of the people, were created by the fancy of Ulpian, or more probably of Tribonian himself; and the origin of Imperial power, though false in fact, and slavish in its consequence, was supported on a principle of freedom and justice. "The pleasure of the emperor has the vigor and effect of law, since the Roman people, by the royal law, have transferred to their prince the full extent of their own power and sovereignty." The will of a single man, of a child perhaps, was allowed to prevail over the wisdom of ages and the inclinations of millions; and the degenerate Greeks were proud to declare, that in his hands alone the arbitrary exercise of legislation could be safely deposited. "What interest or passion," exclaims Theophilus in the court of Justinian, "can reach the calm and sublime elevation of the monarch? He is already master of the lives and fortunes of his subjects; and those who have incurred his displeasure are already numbered with the dead." Disdaining the language of flattery, the historian may confess, that in questions of private jurisprudence, the absolute sovereign of a great empire can seldom be influenced by any personal considerations. Virtue, or even reason, will suggest to his impartial mind, that he is the guardian of peace and equity, and that the interest of society is inseparably connected with his own. Under the weakest and most vicious reign, the seat of justice was filled by the wisdom and integrity of Papinian and Ulpian; and the purest materials of the *Code* and *Pandects* are inscribed with the names of Caracalla and his ministers. The tyrant of Rome was sometimes the benefactor of the provinces. A dagger terminated the crimes of Domitian; but the prudence of Nerva confirmed his acts, which, in the joy of their deliverance, had been rescinded by an indignant senate. Yet in the *rescripts*, replies to the consultations of the magistrates, the wisest of princes might be deceived by a partial exposition of the case. And this abuse, which placed their hasty decisions on the same level with mature and deliberate acts of legislation, was ineffectually condemned by the sense and example of Trajan. The *rescripts* of the emperor, his *grants* and *decrees*, his *edicts* and *pragmatic sanctions*, were subscribed in purple ink, and transmitted to the provinces as general or special laws, which the magistrates were bound to execute, and the people to obey. But as their number continually multiplied, the rule of obedience became each day more doubtful and obscure, till the will of the sovereign was fixed and ascertained in the Gregorian, the Hermogenian, and the Theodosian codes. The two first, of which some fragments have escaped, were framed by two private lawyers, to preserve the constitutions of the Pagan emperors from Hadrian to Constantine. The third, which is still extant, was digested in sixteen

books by the order of the younger Theodosius to consecrate the laws of the Christian princes from Constantine to his own reign. But the three codes obtained an equal authority in the tribunals; and any act which was not included in the sacred deposit might be disregarded by the judge as spurious or obsolete.

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; 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 clenched 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. 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. 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.

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. 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. 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.

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 Scaevolae had been taught by use and experience; but Servius Sulpicius was the first civilian who established his art on a certain and general theory. 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. 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 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, 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.

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, 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 Scaevolae themselves, which was often overthrown by the eloquence or sophistry of an ingenious pleader. 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 Hadrian 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.

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*. Two sages of the law, Ateius Capito and Antistius Labeo, 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; and he consulted nature for the age of puberty, without confining his definition to the precise period of twelve or fourteen years. 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 Hadrian; 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, a timid slave of

Domitian, while the favorite of the Caesars was represented by Cassius, 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 Hadrian 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. 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.

When Justinian ascended the throne, the reformation of the Roman jurisprudence was an arduous but indispensable task. In the space of ten centuries, the infinite variety of laws and legal opinions had filled many thousand volumes, which no fortune could purchase and no capacity could digest. Books could not easily be found; and the judges, poor in the midst of riches, were reduced to the exercise of their illiterate discretion. The subjects of the Greek provinces were ignorant of the language that disposed of their lives and properties; and the *barbarous* dialect of the Latins was imperfectly studied in the academies of Berytus and Constantinople. As an Illyrian soldier, that idiom was familiar to the infancy of Justinian; his youth had been instructed by the lessons of jurisprudence, and his Imperial choice selected the most learned civilians of the East, to labor with their sovereign in the work of reformation. The theory of professors was assisted by the practice of advocates, and the experience of magistrates; and the whole undertaking was animated by the spirit of Tribonian. This extraordinary man, the object of so much praise and censure, was a native of Side in Pamphylia; and his genius, like that of Bacon, embraced, as his own, all the business and knowledge of the age. Tribonian composed, both in prose and verse, on a strange diversity of curious and abstruse subjects: a double panegyric of Justinian and the life of the philosopher Theodotus; the nature of happiness and the duties of

government; Homer's catalogue and the four-and-twenty sorts of metre; the astronomical canon of Ptolemy; the changes of the months; the houses of the planets; and the harmonic system of the world. To the literature of Greece he added the use of the Latin tongue; the Roman civilians were deposited in his library and in his mind; and he most assiduously cultivated those arts which opened the road of wealth and preferment. From the bar of the Praetorian praefects, he raised himself to the honors of quaestor, of consul, and of master of the offices: the council of Justinian listened to his eloquence and wisdom; and envy was mitigated by the gentleness and affability of his manners. The reproaches of impiety and avarice have stained the virtue or the reputation of Tribonian. In a bigoted and persecuting court, the principal minister was accused of a secret aversion to the Christian faith, and was supposed to entertain the sentiments of an Atheist and a Pagan, which have been imputed, inconsistently enough, to the last philosophers of Greece. His avarice was more clearly proved and more sensibly felt. If he were swayed by gifts in the administration of justice, the example of Bacon will again occur; nor can the merit of Tribonian atone for his baseness, if he degraded the sanctity of his profession; and if laws were every day enacted, modified, or repealed, for the base consideration of his private emolument. In the sedition of Constantinople, his removal was granted to the clamors, perhaps to the just indignation, of the people: but the quaestor was speedily restored, and, till the hour of his death, he possessed, above twenty years, the favor and confidence of the emperor. His passive and dutiful submission had been honored with the praise of Justinian himself, whose vanity was incapable of discerning how often that submission degenerated into the grossest adulation. Tribonian adored the virtues of his gracious master; the earth was unworthy of such a prince; and he affected a pious fear, that Justinian, like Elijah or Romulus, would be snatched into the air, and translated alive to the mansions of celestial glory.

If Caesar had achieved the reformation of the Roman law, his creative genius, enlightened by reflection and study, would have given to the world a pure and original system of jurisprudence. Whatever flattery might suggest, the emperor of the East was afraid to establish his private judgment as the standard of equity: in the possession of legislative power, he borrowed the aid of time and opinion; and his laborious compilations are guarded by the sages and legislature of past times. Instead of a statue cast in a simple mould by the hand of an artist, the works of Justinian represent a tessellated pavement of antique and costly, but too often of incoherent, fragments. In the first year of his reign, he directed the faithful Tribonian, and nine learned associates, to

revise the ordinances of his predecessors, as they were contained, since the time of Hadrian, in the Gregorian Hermogenian, and Theodosian codes; to purge the errors and contradictions, to retrench whatever was obsolete or superfluous, and to select the wise and salutary laws best adapted to the practice of the tribunals and the use of his subjects. The work was accomplished in fourteen months; and the twelve books or tables, which the new decemvirs produced, might be designed to imitate the labors of their Roman predecessors. The new CODE of Justinian was honored with his name, and confirmed by his royal signature: authentic transcripts were multiplied by the pens of notaries and scribes; they were transmitted to the magistrates of the European, the Asiatic, and afterwards the African provinces; and the law of the empire was proclaimed on solemn festivals at the doors of churches. A more arduous operation was still behind -- to extract the spirit of jurisprudence from the decisions and conjectures, the questions and disputes, of the Roman civilians. Seventeen lawyers, with Tribonian at their head, were appointed by the emperor to exercise an absolute jurisdiction over the works of their predecessors. If they had obeyed his commands in ten years, Justinian would have been satisfied with their diligence; and the rapid composition of the DIGEST or PANDECTS, in three years, will deserve praise or censure, according to the merit of the execution. From the library of Tribonian, they chose forty, the most eminent civilians of former times: two thousand treatises were comprised in an abridgment of fifty books; and it has been carefully recorded, that three millions of lines or sentences, were reduced, in this abstract, to the moderate number of one hundred and fifty thousand. The edition of this great work was delayed a month after that of the INSTITUTES; and it seemed reasonable that the elements should precede the digest of the Roman law. As soon as the emperor had approved their labors, he ratified, by his legislative power, the speculations of these private citizens: their commentaries, on the twelve tables, the perpetual edict, the laws of the people, and the decrees of the senate, succeeded to the authority of the text; and the text was abandoned, as a useless, though venerable, relic of antiquity. The *Code*, the *Pandects*, and the *Institutes*, were declared to be the legitimate system of civil jurisprudence; they alone were admitted into the tribunals, and they alone were taught in the academies of Rome, Constantinople, and Berytus. Justinian addressed to the senate and provinces his *eternal oracles*; and his pride, under the mask of piety, ascribed the consummation of this great design to the support and inspiration of the Deity.

Since the emperor declined the fame and envy of original composition, we can only require, at his hands, method choice, and fidelity, the humble, though

indispensable, virtues of a compiler. Among the various combinations of ideas, it is difficult to assign any reasonable preference; but as the order of Justinian is different in his three works, it is possible that all may be wrong; and it is certain that two cannot be right. In the selection of ancient laws, he seems to have viewed his predecessors without jealousy, and with equal regard: the series could not ascend above the reign of Adrian, and the narrow distinction of Paganism and Christianity, introduced by the superstition of Theodosius, had been abolished by the consent of mankind. But the jurisprudence of the Pandects is circumscribed within a period of a hundred years, from the perpetual edict to the death of Severus Alexander: the civilians who lived under the first Caesars are seldom permitted to speak, and only three names can be attributed to the age of the republic. The favorite of Justinian (it has been fiercely urged) was fearful of encountering the light of freedom and the gravity of Roman sages. Tribonian condemned to oblivion the genuine and native wisdom of Cato, the Scaevolae, and Sulpicius; while he invoked spirits more congenial to his own, the Syrians, Greeks, and Africans, who flocked to the Imperial court to study Latin as a foreign tongue, and jurisprudence as a lucrative profession. But the ministers of Justinian, were instructed to labor, not for the curiosity of antiquarians, but for the immediate benefit of his subjects. It was their duty to select the useful and practical parts of the Roman law; and the writings of the old republicans, however curious on excellent, were no longer suited to the new system of manners, religion, and government. Perhaps, if the preceptors and friends of Cicero were still alive, our candor would acknowledge, that, except in purity of language, their intrinsic merit was excelled by the school of Papinian and Ulpian. The science of the laws is the slow growth of time and experience, and the advantage both of method and materials, is naturally assumed by the most recent authors. The civilians of the reign of the Antonines had studied the works of their predecessors: their philosophic spirit had mitigated the rigor of antiquity, simplified the forms of proceeding, and emerged from the jealousy and prejudice of the rival sects. The choice of the authorities that compose the Pandects depended on the judgment of Tribonian: but the power of his sovereign could not absolve him from the sacred obligations of truth and fidelity. As the legislator of the empire, Justinian might repeal the acts of the Antonines, or condemn, as seditious, the free principles, which were maintained by the last of the *Roman* lawyers. But the existence of past facts is placed beyond the reach of despotism; and the emperor was guilty of fraud and forgery, when he corrupted the integrity of their text, inscribed with their venerable names the words and ideas of his servile reign, and suppressed, by the hand of power, the pure and authentic copies of their sentiments. The

changes and interpolations of Tribonian and his colleagues are excused by the pretence of uniformity: but their cares have been insufficient, and the *antinomies*, or contradictions of the Code and Pandects, still exercise the patience and subtilty of modern civilians.

A rumor devoid of evidence has been propagated by the enemies of Justinian; that the jurisprudence of ancient Rome was reduced to ashes by the author of the Pandects, from the vain persuasion, that it was now either false or superfluous. Without usurping an office so invidious, the emperor might safely commit to ignorance and time the accomplishments of this destructive wish. Before the invention of printing and paper, the labor and the materials of writing could be purchased only by the rich; and it may reasonably be computed, that the price of books was a hundred fold their present value. Copies were slowly multiplied and cautiously renewed: the hopes of profit tempted the sacrilegious scribes to erase the characters of antiquity, and Sophocles or Tacitus were obliged to resign the parchment to missals, homilies, and the golden legend. If such was the fate of the most beautiful compositions of genius, what stability could be expected for the dull and barren works of an obsolete science? The books of jurisprudence were interesting to few, and entertaining to none: their value was connected with present use, and they sunk forever as soon as that use was superseded by the innovations of fashion, superior merit, or public authority. In the age of peace and learning, between Cicero and the last of the Antonines, many losses had been already sustained, and some luminaries of the school, or forum, were known only to the curious by tradition and report. Three hundred and sixty years of disorder and decay accelerated the progress of oblivion; and it may fairly be presumed, that of the writings, which Justinian is accused of neglecting, many were no longer to be found in the libraries of the East. The copies of Papinian, or Ulpian, which the reformer had proscribed, were deemed unworthy of future notice: the Twelve Tables and praetorian edicts insensibly vanished, and the monuments of ancient Rome were neglected or destroyed by the envy and ignorance of the Greeks. Even the Pandects themselves have escaped with difficulty and danger from the common shipwreck, and criticism has pronounced that *all* the editions and manuscripts of the West are derived from *one* original. It was transcribed at Constantinople in the beginning of the seventh century, was successively transported by the accidents of war and commerce to Amalphi, Pisa, and Florence, and is now deposited as a sacred relic in the ancient palace of the republic.

It is the first care of a reformer to prevent any future reformation. To maintain the text of the Pandects, the Institutes, and the Code, the use of ciphers and abbreviations was rigorously proscribed; and as Justinian recollected, that the perpetual edict had been buried under the weight of commentators, he denounced the punishment of forgery against the rash civilians who should presume to interpret or pervert the will of their sovereign. The scholars of Accursius, of Bartolus, of Cujacius, should blush for their accumulated guilt, unless they dare to dispute his right of binding the authority of his successors, and the native freedom of the mind. But the emperor was unable to fix his own inconstancy; and, while he boasted of renewing the exchange of Diomede, of transmuting brass into gold, discovered the necessity of purifying his gold from the mixture of baser alloy. Six years had not elapsed from the publication of the Code, before he condemned the imperfect attempt, by a new and more accurate edition of the same work; which he enriched with two hundred of his own laws, and fifty decisions of the darkest and most intricate points of jurisprudence. Every year, or, according to Procopius, each day, of his long reign, was marked by some legal innovation. Many of his acts were rescinded by himself; many were rejected by his successors; many have been obliterated by time; but the number of sixteen EDICTS, and one hundred and sixty-eight NOVELS, has been admitted into the authentic body of the civil jurisprudence. In the opinion of a philosopher superior to the prejudices of his profession, these incessant, and, for the most part, trifling alterations, can be only explained by the venal spirit of a prince, who sold without shame his judgments and his laws. The charge of the secret historian is indeed explicit and vehement; but the sole instance, which he produces, may be ascribed to the devotion as well as to the avarice of Justinian. A wealthy bigot had bequeathed his inheritance to the church of Emesa; and its value was enhanced by the dexterity of an artist, who subscribed confessions of debt and promises of payment with the names of the richest Syrians. They pleaded the established prescription of thirty or forty years; but their defence was overruled by a retrospective edict, which extended the claims of the church to the term of a century; an edict so pregnant with injustice and disorder, that, after serving this occasional purpose, it was prudently abolished in the same reign. If candor will acquit the emperor himself, and transfer the corruption to his wife and favorites, the suspicion of so foul a vice must still degrade the majesty of his laws; and the advocates of Justinian may acknowledge, that such levity, whatsoever be the motive, is unworthy of a legislator and a man.

Monarchs seldom condescend to become the preceptors of their subjects; and some praise is due to Justinian, by whose command an ample system was reduced to a short and elementary treatise. Among the various institutes of the Roman law, those of Caius were the most popular in the East and West; and their use may be considered as an evidence of their merit. They were selected by the Imperial delegates, Tribonian, Theophilus, and Dorotheus; and the freedom and purity of the Antonines was incrustated with the coarser materials of a degenerate age. The same volume which introduced the youth of Rome, Constantinople, and Berytus, to the gradual study of the Code and Pandects, is still precious to the historian, the philosopher, and the magistrate. The INSTITUTES of Justinian are divided into four books: they proceed, with no contemptible method, from, I. *Persons*, to, II. *Things*, and from things, to, III. *Actions*; and the article IV., of *Private Wrongs*, is terminated by the principles of *Criminal Law*.

I. 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. Two hundred families 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. 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.

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, and seems to be coeval with the foundation of the city. 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*; 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; 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, 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; 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: 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.

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. 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. 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. 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. 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 newborn 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. 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 and Christianity had been insufficient to eradicate this inhuman practice, till their gentle influence was fortified by the terrors of capital punishment.

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. 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*, 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 (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, 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: but as polygamy was unknown, he could never admit to his bed a fairer or a more favored partner.

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. They declined the solemnities of the old nuptials; 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; 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.

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; 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. 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: 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.

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*, 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; 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. 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, 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, the theologians were divided, and the ambiguous word, which contains the precept of Christ, is flexible to any interpretation that the wisdom of a legislator can demand.

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 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, 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, to live the *concubines* of Mark Antony and Titus. 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. 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.

The relation of guardian and ward, or in Roman words of *tutor* and *pupil*, which covers so many titles of the Institutes and Pandects, is of a very simple and uniform nature. The person and property of an orphan must always be trusted to the custody of some discreet friend. If the deceased father had not signified his choice, the *agnats*, or paternal kindred of the nearest degree, were compelled to act as the natural guardians: the Athenians were apprehensive of exposing the infant to the power of those most interested in his death; but an axiom of Roman jurisprudence has pronounced, that the charge of tutelage should constantly attend the emolument of succession. If the choice of the father, and the line of consanguinity, afforded no efficient guardian, the failure was supplied by the nomination of the praetor of the city, or the president of the province. But the person whom they named to this *public* office might be legally excused by insanity or blindness, by ignorance or inability, by previous enmity or adverse interest, by the number of children or guardianships with which he was already burdened, and by the immunities which were granted to the useful labors of magistrates, lawyers, physicians, and professors. Till the infant could speak, and think, he was represented by the tutor, whose authority was finally determined by the age of puberty. Without his consent, no act of the pupil could bind himself to his own prejudice, though it might oblige others for his personal benefit. It is needless to observe, that the tutor often gave security, and always rendered an account, and that the want of diligence or integrity exposed him to a civil and almost criminal action for the violation

of his sacred trust. The age of puberty had been rashly fixed by the civilians at fourteen; but as the faculties of the mind ripen more slowly than those of the body, a *curator* was interposed to guard the fortunes of a Roman youth from his own inexperience and headstrong passions. Such a trustee had been first instituted by the praetor, to save a family from the blind havoc of a prodigal or madman; and the minor was compelled, by the laws, to solicit the same protection, to give validity to his acts till he accomplished the full period of twenty-five years. Women were condemned to the perpetual tutelage of parents, husbands, or guardians; a sex created to please and obey was never supposed to have attained the age of reason and experience. Such, at least, was the stern and haughty spirit of the ancient law, which had been insensibly mollified before the time of Justinian.

II. The original right of property can only be justified by the accident or merit of prior occupancy; and on this foundation it is wisely established by the philosophy of the civilians. The savage who hollows a tree, inserts a sharp stone into a wooden handle, or applies a string to an elastic branch, becomes in a state of nature the just proprietor of the canoe, the bow, or the hatchet. The materials were common to all, the new form, the produce of his time and simple industry, belongs solely to himself. His hungry brethren cannot, without a sense of their own injustice, extort from the hunter the game of the forest overtaken or slain by his personal strength and dexterity. If his provident care preserves and multiplies the tame animals, whose nature is tractable to the arts of education, he acquires a perpetual title to the use and service of their numerous progeny, which derives its existence from him alone. If he encloses and cultivates a field for their sustenance and his own, a barren waste is converted into a fertile soil; the seed, the manure, the labor, create a new value, and the rewards of harvest are painfully earned by the fatigues of the revolving year. In the successive states of society, the hunter, the shepherd, the husbandman, may defend their possessions by two reasons which forcibly appeal to the feelings of the human mind: that whatever they enjoy is the fruit of their own industry; and that every man who envies their felicity, may purchase similar acquisitions by the exercise of similar diligence. Such, in truth, may be the freedom and plenty of a small colony cast on a fruitful island. But the colony multiplies, while the space still continues the same; the common rights, the equal inheritance of mankind. are engrossed by the bold and crafty; each field and forest is circumscribed by the landmarks of a jealous master; and it is the peculiar praise of the Roman jurisprudence, that it asserts the claim of the first occupant to the wild animals of the earth, the air, and the waters. In the progress from primitive equity to final injustice, the

steps are silent, the shades are almost imperceptible, and the absolute monopoly is guarded by positive laws and artificial reason. The active, insatiate principle of self-love can alone supply the arts of life and the wages of industry; and as soon as civil government and exclusive property have been introduced, they become necessary to the existence of the human race. Except in the singular institutions of Sparta, the wisest legislators have disapproved an agrarian law as a false and dangerous innovation. Among the Romans, the enormous disproportion of wealth surmounted the ideal restraints of a doubtful tradition, and an obsolete statute; a tradition that the poorest follower of Romulus had been endowed with the perpetual inheritance of two *jugera*; a statute which confined the richest citizen to the measure of five hundred jugera, or three hundred and twelve acres of land. The original territory of Rome consisted only of some miles of wood and meadow along the banks of the Tyber; and domestic exchange could add nothing to the national stock. But the goods of an alien or enemy were lawfully exposed to the first hostile occupier; the city was enriched by the profitable trade of war; and the blood of her sons was the only price that was paid for the Volscian sheep, the slaves of Briton, or the gems and gold of Asiatic kingdoms. In the language of ancient jurisprudence, which was corrupted and forgotten before the age of Justinian, these spoils were distinguished by the name of *manceps* or *mancipium*, taken with the hand; and whenever they were sold or *emancipated*, the purchaser required some assurance that they had been the property of an enemy, and not of a fellow-citizen. A citizen could only forfeit his rights by apparent dereliction, and such dereliction of a valuable interest could not easily be presumed. Yet, according to the Twelve Tables, a prescription of one year for movables, and of two years for immovables, abolished the claim of the ancient master, if the actual possessor had acquired them by a fair transaction from the person whom he believed to be the lawful proprietor. Such conscientious injustice, without any mixture of fraud or force could seldom injure the members of a small republic; but the various periods of three, of ten, or of twenty years, determined by Justinian, are more suitable to the latitude of a great empire. It is only in the term of prescription that the distinction of real and personal fortune has been remarked by the civilians; and their general idea of property is that of simple, uniform, and absolute dominion. The subordinate exceptions of *use*, of *usufruct*, of *servitude*, imposed for the benefit of a neighbor on lands and houses, are abundantly explained by the professors of jurisprudence. The claims of property, as far as they are altered by the mixture, the division, or the transformation of substances, are investigated with metaphysical subtilty by the same civilians.

The personal title of the first proprietor must be determined by his death: but the possession, without any appearance of change, is peaceably continued in his children, the associates of his toil, and the partners of his wealth. This natural inheritance has been protected by the legislators of every climate and age, and the father is encouraged to persevere in slow and distant improvements, by the tender hope, that a long posterity will enjoy the fruits of his labor. The *principle* of hereditary succession is universal; but the *order* has been variously established by convenience or caprice, by the spirit of national institutions, or by some partial example which was originally decided by fraud or violence. The jurisprudence of the Romans appear to have deviated from the inequality of nature much less than the Jewish, the Athenian, or the English institutions. On the death of a citizen, all his descendants, unless they were already freed from his paternal power, were called to the inheritance of his possessions. The insolent prerogative of primogeniture was unknown; the two sexes were placed on a just level; all the sons and daughters were entitled to an equal portion of the patrimonial estate; and if any of the sons had been intercepted by a premature death, his person was represented, and his share was divided, by his surviving children. On the failure of the direct line, the right of succession must diverge to the collateral branches. The degrees of kindred are numbered by the civilians, ascending from the last possessor to a common parent, and descending from the common parent to the next heir: my father stands in the first degree, my brother in the second, his children in the third, and the remainder of the series may be conceived by a fancy, or pictured in a genealogical table. In this computation, a distinction was made, essential to the laws and even the constitution of Rome; the *agnats*, or persons connected by a line of males, were called, as they stood in the nearest degree, to an equal partition; but a female was incapable of transmitting any legal claims; and the *cognats* of every rank, without excepting the dear relation of a mother and a son, were disinherited by the Twelve Tables, as strangers and aliens. Among the Romans *agens* or lineage was united by a common *name* and domestic rites; the various *cognomens* or *surnames* of Scipio, or Marcellus, distinguished from each other the subordinate branches or families of the Cornelian or Claudian race: the default of the *agnats*, of the same surname, was supplied by the larger denomination of *gentiles*; and the vigilance of the laws maintained, in the same name, the perpetual descent of religion and property. A similar principle dictated the Voconian law, which abolished the right of female inheritance. As long as virgins were given or sold in marriage, the adoption of the wife extinguished the hopes of the daughter. But the equal succession of independent matrons supported their pride and luxury, and might transport into a foreign house the riches of their

fathers. While the maxims of Cato were revered, they tended to perpetuate in each family a just and virtuous mediocrity: till female blandishments insensibly triumphed; and every salutary restraint was lost in the dissolute greatness of the republic. The rigor of the decemvirs was tempered by the equity of the praetors. Their edicts restored and emancipated posthumous children to the rights of nature; and upon the failure of the *agnats* they preferred the blood of the *cognats* to the name of the gentiles whose title and character were insensibly covered with oblivion. The reciprocal inheritance of mothers and sons was established in the Tertullian and Orphitian decrees by the humanity of the senate. A new and more impartial order was introduced by the Novels of Justinian, who affected to revive the jurisprudence of the Twelve Tables. The lines of masculine and female kindred were confounded: the descending, ascending, and collateral series was accurately defined; and each degree, according to the proximity of blood and affection, succeeded to the vacant possessions of a Roman citizen.

The order of succession is regulated by nature, or at least by the general and permanent reason of the lawgiver: but this order is frequently violated by the arbitrary and partial *wills*, which prolong the dominion of the testator beyond the grave. In the simple state of society, this last use or abuse of the right of property is seldom indulged: it was introduced at Athens by the laws of Solon; and the private testaments of the father of a family are authorized by the Twelve Tables. Before the time of the decemvirs, a Roman citizen exposed his wishes and motives to the assembly of the thirty curiae or parishes, and the general law of inheritance was suspended by an occasional act of the legislature. After the permission of the decemvirs, each private lawgiver promulgated his verbal or written testament in the presence of five citizens, who represented the five classes of the Roman people; a sixth witness attested their concurrence; a seventh weighed the copper money, which was paid by an imaginary purchaser; and the estate was emancipated by a fictitious sale and immediate release. This singular ceremony, which excited the wonder of the Greeks, was still practised in the age of Severus; but the praetors had already approved a more simple testament, for which they required the seals and signatures of seven witnesses, free from all legal exception, and purposely summoned for the execution of that important act. A domestic monarch, who reigned over the lives and fortunes of his children, might distribute their respective shares according to the degrees of their merit or his affection; his arbitrary displeasure chastised an unworthy son by the loss of his inheritance, and the mortifying preference of a stranger. But the experience of unnatural parents recommended some limitations of their testamentary powers. A son,

or, by the laws of Justinian, even a daughter, could no longer be disinherited by their silence: they were compelled to name the criminal, and to specify the offence; and the justice of the emperor enumerated the sole causes that could justify such a violation of the first principles of nature and society. Unless a legitimate portion, a fourth part, had been reserved for the children, they were entitled to institute an action or complaint of *inofficious* testament; to suppose that their father's understanding was impaired by sickness or age; and respectfully to appeal from his rigorous sentence to the deliberate wisdom of the magistrate. In the Roman jurisprudence, an essential distinction was admitted between the inheritance and the legacies. The heirs who succeeded to the entire unity, or to any of the twelve fractions of the substance of the testator, represented his civil and religious character, asserted his rights, fulfilled his obligations, and discharged the gifts of friendship or liberality, which his last will had bequeathed under the name of legacies. But as the imprudence or prodigality of a dying man might exhaust the inheritance, and leave only risk and labor to his successor, he was empowered to retain the *Falcidian* portion; to deduct, before the payment of the legacies, a clear fourth for his own emolument. A reasonable time was allowed to examine the proportion between the debts and the estate, to decide whether he should accept or refuse the testament; and if he used the benefit of an inventory, the demands of the creditors could not exceed the valuation of the effects. The last will of a citizen might be altered during his life, or rescinded after his death: the persons whom he named might die before him, or reject the inheritance, or be exposed to some legal disqualification. In the contemplation of these events, he was permitted to substitute second and third heirs, to replace each other according to the order of the testament; and the incapacity of a madman or an infant to bequeath his property might be supplied by a similar substitution. But the power of the testator expired with the acceptance of the testament: each Roman of mature age and discretion acquired the absolute dominion of his inheritance, and the simplicity of the civil law was never clouded by the long and intricate entails which confine the happiness and freedom of unborn generations.

Conquest and the formalities of law established the use of *codicils*. If a Roman was surprised by death in a remote province of the empire, he addressed a short epistle to his legitimate or testamentary heir; who fulfilled with honor, or neglected with impunity, this last request, which the judges before the age of Augustus were not authorized to enforce. A codicil might be expressed in any mode, or in any language; but the subscription of five witnesses must declare that it was the genuine composition of the author. His intention, however

laudable, was sometimes illegal; and the invention of *fidei-commissa*, or trusts, arose from the struggle between natural justice and positive jurisprudence. A stranger of Greece or Africa might be the friend or benefactor of a childless Roman, but none, except a fellow-citizen, could act as his heir. The Voconian law, which abolished female succession, restrained the legacy or inheritance of a woman to the sum of one hundred thousand sesterces; and an only daughter was condemned almost as an alien in her father's house. The zeal of friendship, and parental affection, suggested a liberal artifice: a qualified citizen was named in the testament, with a prayer or injunction that he would restore the inheritance to the person for whom it was truly intended. Various was the conduct of the trustees in this painful situation: they had sworn to observe the laws of their country, but honor prompted them to violate their oath; and if they preferred their interest under the mask of patriotism, they forfeited the esteem of every virtuous mind. The declaration of Augustus relieved their doubts, gave a legal sanction to confidential testaments and codicils, and gently unravelled the forms and restraints of the republican jurisprudence. But as the new practice of trusts degenerated into some abuse, the trustee was enabled, by the Trebellian and Pegasian decrees, to reserve one fourth of the estate, or to transfer on the head of the real heir all the debts and actions of the succession. The interpretation of testaments was strict and literal; but the language of *trusts* and codicils was delivered from the minute and technical accuracy of the civilians.

III. The general duties of mankind are imposed by their public and private relations: but their specific *obligations* to each other can only be the effect of, 1. a promise, 2. a benefit, or 3. an injury: and when these obligations are ratified by law, the interested party may compel the performance by a judicial action. On this principle, the civilians of every country have erected a similar jurisprudence, the fair conclusion of universal reason and justice.

1. The goddess of *faith* (of human and social faith) was worshipped, not only in her temples, but in the lives of the Romans; and if that nation was deficient in the more amiable qualities of benevolence and generosity, they astonished the Greeks by their sincere and simple performance of the most burdensome engagements. Yet among the same people, according to the rigid maxims of the patricians and decemvirs, a *naked pact*, a promise, or even an oath, did not create any civil obligation, unless it was confirmed by the legal form of a *stipulation*. Whatever might be the etymology of the Latin word, it conveyed the idea of a firm and irrevocable contract, which was always expressed in the mode of a question and answer. Do you promise to pay me one hundred pieces

of gold? was the solemn interrogation of Seius. I do promise, was the reply of Sempronius. The friends of Sempronius, who answered for his ability and inclination, might be separately sued at the option of Seius; and the benefit of partition, or order of reciprocal actions, insensibly deviated from the strict theory of stipulation. The most cautious and deliberate consent was justly required to sustain the validity of a gratuitous promise; and the citizen who might have obtained a legal security, incurred the suspicion of fraud, and paid the forfeit of his neglect. But the ingenuity of the civilians successfully labored to convert simple engagements into the form of solemn stipulations. The praetors, as the guardians of social faith, admitted every rational evidence of a voluntary and deliberate act, which in their tribunal produced an equitable obligation, and for which they gave an action and a remedy.

2. The obligations of the second class, as they were contracted by the delivery of a thing, are marked by the civilians with the epithet of real. A grateful return is due to the author of a benefit; and whoever is intrusted with the property of another, has bound himself to the sacred duty of restitution. In the case of a friendly loan, the merit of generosity is on the side of the lender only; in a deposit, on the side of the receiver; but in a *pledge*, and the rest of the selfish commerce of ordinary life, the benefit is compensated by an equivalent, and the obligation to restore is variously modified by the nature of the transaction. The Latin language very happily expresses the fundamental difference between the *commodatum* and the *mutuum*, which our poverty is reduced to confound under the vague and common appellation of a loan. In the former, the borrower was obliged to restore the same individual thing with which he had been *accommodated* for the temporary supply of his wants; in the latter, it was destined for his use and consumption, and he discharged this *mutual* engagement, by substituting the same specific value according to a just estimation of number, of weight, and of measure. In the contract of *sale*, the absolute dominion is transferred to the purchaser, and he repays the benefit with an adequate sum of gold or silver, the price and universal standard of all earthly possessions. The obligation of another contract, that of *location*, is of a more complicated kind. Lands or houses, labor or talents, may be hired for a definite term; at the expiration of the time, the thing itself must be restored to the owner, with an additional reward for the beneficial occupation and employment. In these lucrative contracts, to which may be added those of partnership and commissions, the civilians sometimes imagine the delivery of the object, and sometimes presume the consent of the parties. The substantial pledge has been refined into the invisible rights of a mortgage or *hypotheca*; and the agreement of sale, for a certain price, imputes, from that moment, the

chances of gain or loss to the account of the purchaser. It may be fairly supposed, that every man will obey the dictates of his interest; and if he accepts the benefit, he is obliged to sustain the expense, of the transaction. In this boundless subject, the historian will observe the *location* of land and money, the rent of the one and the interest of the other, as they materially affect the prosperity of agriculture and commerce. The landlord was often obliged to advance the stock and instruments of husbandry, and to content himself with a partition of the fruits. If the feeble tenant was oppressed by accident, contagion, or hostile violence, he claimed a proportionable relief from the equity of the laws: five years were the customary term, and no solid or costly improvements could be expected from a farmer, who, at each moment might be ejected by the sale of the estate. Usury, the inveterate grievance of the city, had been discouraged by the Twelve Tables, and abolished by the clamors of the people. It was revived by their wants and idleness, tolerated by the discretion of the praetors, and finally determined by the Code of Justinian. Persons of illustrious rank were confined to the moderate profit of *four per cent*; six was pronounced to be the ordinary and legal standard of interest; eight was allowed for the convenience of manufactures and merchants; twelve was granted to nautical insurance, which the wiser ancients had not attempted to define; but, except in this perilous adventure, the practice of exorbitant usury was severely restrained. The most simple interest was condemned by the clergy of the East and West; but the sense of mutual benefit, which had triumphed over the law of the republic, has resisted with equal firmness the decrees of the church, and even the prejudices of mankind.

3. Nature and society impose the strict obligation of repairing an injury; and the sufferer by private injustice acquires a personal right and a legitimate action. If the property of another be intrusted to our care, the requisite degree of care may rise and fall according to the benefit which we derive from such temporary possession; we are seldom made responsible for inevitable accident, but the consequences of a voluntary fault must always be imputed to the author. A Roman pursued and recovered his stolen goods by a civil action of theft; they might pass through a succession of pure and innocent hands, but nothing less than a prescription of thirty years could extinguish his original claim. They were restored by the sentence of the praetor, and the injury was compensated by double, or threefold, or even quadruple damages, as the deed had been perpetrated by secret fraud or open rapine, as the robber had been surprised in the fact, or detected by a subsequent research. The Aquilian law defended the living property of a citizen, his slaves and cattle, from the stroke

of malice or negligence: the highest price was allowed that could be ascribed to the domestic animal at any moment of the year preceding his death; a similar latitude of thirty days was granted on the destruction of any other valuable effects. A personal injury is blunted or sharpened by the manners of the times and the sensibility of the individual: the pain or the disgrace of a word or blow cannot easily be appreciated by a pecuniary equivalent. The rude jurisprudence of the decemvirs had confounded all hasty insults, which did not amount to the fracture of a limb, by condemning the aggressor to the common penalty of twenty-five *asses*. But the same denomination of money was reduced, in three centuries, from a pound to the weight of half an ounce: and the insolence of a wealthy Roman indulged himself in the cheap amusement of breaking and satisfying the law of the twelve tables. Veratius ran through the streets striking on the face the inoffensive passengers, and his attendant purse-bearer immediately silenced their clamors by the legal tender of twenty-five pieces of copper, about the value of one shilling. The equity of the praetors examined and estimated the distinct merits of each particular complaint. In the adjudication of civil damages, the magistrate assumed a right to consider the various circumstances of time and place, of age and dignity, which may aggravate the shame and sufferings of the injured person; but if he admitted the idea of a fine, a punishment, an example, he invaded the province, though, perhaps, he supplied the defects, of the criminal law.

The execution of the Alban dictator, who was dismembered by eight horses, is represented by Livy as the first and the first instance of Roman cruelty in the punishment of the most atrocious crimes. But this act of justice, or revenge, was inflicted on a foreign enemy in the heat of victory, and at the command of a single man. The Twelve Tables afford a more decisive proof of the national spirit, since they were framed by the wisest of the senate, and accepted by the free voices of the people; yet these laws, like the statutes of Draco, are written in characters of blood. They approve the inhuman and unequal principle of retaliation; and the forfeit of an eye for an eye, a tooth for a tooth, a limb for a limb, is rigorously exacted, unless the offender can redeem his pardon by a fine of three hundred pounds of copper. The decemvirs distributed with much liberality the slighter chastisements of flagellation and servitude; and nine crimes of a very different complexion are adjudged worthy of death. 1. Any act of *treason* against the state, or of correspondence with the public enemy. The mode of execution was painful and ignominious: the head of the degenerate Roman was shrouded in a veil, his hands were tied behind his back, and after he had been scourged by the lictor, he was suspended in the midst of the forum on a cross, or inauspicious tree. 2. Nocturnal meetings in

the city; whatever might be the pretence, of pleasure, or religion, or the public good. 3. The murder of a citizen; for which the common feelings of mankind demand the blood of the murderer. Poison is still more odious than the sword or dagger; and we are surprised to discover, in two flagitious events, how early such subtle wickedness had infected the simplicity of the republic, and the chaste virtues of the Roman matrons. The parricide, who violated the duties of nature and gratitude, was cast into the river or the sea, enclosed in a sack; and a cock, a viper, a dog, and a monkey, were successively added, as the most suitable companions. Italy produces no monkeys; but the want could never be felt, till the middle of the sixth century first revealed the guilt of a parricide. 4. The malice of an *incendiary*. After the previous ceremony of whipping, he himself was delivered to the flames; and in this example alone our reason is tempted to applaud the justice of retaliation. 5. *Judicial perjury*. The corrupt or malicious witness was thrown headlong from the Tarpeian rock, to expiate his falsehood, which was rendered still more fatal by the severity of the penal laws, and the deficiency of written evidence. 6. The corruption of a judge, who accepted bribes to pronounce an iniquitous sentence. 7. Libels and satires, whose rude strains sometimes disturbed the peace of an illiterate city. The author was beaten with clubs, a worthy chastisement, but it is not certain that he was left to expire under the blows of the executioner. 8. The nocturnal mischief of damaging or destroying a neighbor's corn. The criminal was suspended as a grateful victim to Ceres. But the sylvan deities were less implacable, and the extirpation of a more valuable tree was compensated by the moderate fine of twenty-five pounds of copper. 9. Magical incantations; which had power, in the opinion of the Latin shepherds, to exhaust the strength of an enemy, to extinguish his life, and to remove from their seats his deep-rooted plantations. The cruelty of the twelve tables against insolvent debtors still remains to be told; and I shall dare to prefer the literal sense of antiquity to the specious refinements of modern criticism. After the judicial proof or confession of the debt, thirty days of grace were allowed before a Roman was delivered into the power of his fellow-citizen. In this private prison, twelve ounces of rice were his daily food; he might be bound with a chain of fifteen pounds weight; and his misery was thrice exposed in the market place, to solicit the compassion of his friends and countrymen. At the expiration of sixty days, the debt was discharged by the loss of liberty or life; the insolvent debtor was either put to death, or sold in foreign slavery beyond the Tyber: but, if several creditors were alike obstinate and unrelenting, they might legally dismember his body, and satiate their revenge by this horrid partition. The advocates for this savage law have insisted, that it must strongly operate in deterring idleness and fraud from

contracting debts which they were unable to discharge; but experience would dissipate this salutary terror, by proving that no creditor could be found to exact this unprofitable penalty of life or limb. As the manners of Rome were insensibly polished, the criminal code of the decemvirs was abolished by the humanity of accusers, witnesses, and judges; and impunity became the consequence of immoderate rigor. The Porcian and Valerian laws prohibited the magistrates from inflicting on a free citizen any capital, or even corporal, punishment; and the obsolete statutes of blood were artfully, and perhaps truly, ascribed to the spirit, not of patrician, but of regal, tyranny.

In the absence of penal laws, and the insufficiency of civil actions, the peace and justice of the city were imperfectly maintained by the private jurisdiction of the citizens. The malefactors who replenish our jails are the outcasts of society, and the crimes for which they suffer may be commonly ascribed to ignorance, poverty, and brutal appetite. For the perpetration of similar enormities, a vile plebeian might claim and abuse the sacred character of a member of the republic: but, on the proof or suspicion of guilt, the slave, or the stranger, was nailed to a cross; and this strict and summary justice might be exercised without restraint over the greatest part of the populace of Rome. Each family contained a domestic tribunal, which was not confined, like that of the praetor, to the cognizance of external actions: virtuous principles and habits were inculcated by the discipline of education; and the Roman father was accountable to the state for the manners of his children, since he disposed, without appeal, of their life, their liberty, and their inheritance. In some pressing emergencies, the citizen was authorized to avenge his private or public wrongs. The consent of the Jewish, the Athenian, and the Roman laws approved the slaughter of the nocturnal thief; though in open daylight a robber could not be slain without some previous evidence of danger and complaint. Whoever surprised an adulterer in his nuptial bed might freely exercise his revenge; the most bloody and wanton outrage was excused by the provocation; nor was it before the reign of Augustus that the husband was reduced to weigh the rank of the offender, or that the parent was condemned to sacrifice his daughter with her guilty seducer. After the expulsion of the kings, the ambitious Roman, who should dare to assume their title or imitate their tyranny, was devoted to the infernal gods: each of his fellow-citizens was armed with the sword of justice; and the act of Brutus, however repugnant to gratitude or prudence, had been already sanctified by the judgment of his country. The barbarous practice of wearing arms in the midst of peace, and the bloody maxims of honor, were unknown to the Romans; and, during the two purest ages, from the establishment of equal freedom to the end of the Punic

wars, the city was never disturbed by sedition, and rarely polluted with atrocious crimes. The failure of penal laws was more sensibly felt, when every vice was inflamed by faction at home and dominion abroad. In the time of Cicero, each private citizen enjoyed the privilege of anarchy; each minister of the republic was exalted to the temptations of regal power, and their virtues are entitled to the warmest praise, as the spontaneous fruits of nature or philosophy. After a triennial indulgence of lust, rapine, and cruelty, Verres, the tyrant of Sicily, could only be sued for the pecuniary restitution of three hundred thousand pounds sterling; and such was the temper of the laws, the judges, and perhaps the accuser himself, that, on refunding a thirteenth part of his plunder, Verres could retire to an easy and luxurious exile.

The first imperfect attempt to restore the proportion of crimes and punishments was made by the dictator Sylla, who, in the midst of his sanguinary triumph, aspired to restrain the license, rather than to oppress the liberty, of the Romans. He gloried in the arbitrary proscription of four thousand seven hundred citizens. But, in the character of a legislator, he respected the prejudices of the times; and, instead of pronouncing a sentence of death against the robber or assassin, the general who betrayed an army, or the magistrate who ruined a province, Sylla was content to aggravate the pecuniary damages by the penalty of exile, or, in more constitutional language, by the interdiction of fire and water. The Cornelian, and afterwards the Pompeian and Julian, laws introduced a new system of criminal jurisprudence; and the emperors, from Augustus to Justinian, disguised their increasing rigor under the names of the original authors. But the invention and frequent use of *extraordinary pains* proceeded from the desire to extend and conceal the progress of despotism. In the condemnation of illustrious Romans, the senate was always prepared to confound, at the will of their masters, the judicial and legislative powers. It was the duty of the governors to maintain the peace of their province, by the arbitrary and rigid administration of justice; the freedom of the city evaporated in the extent of empire, and the Spanish malefactor, who claimed the privilege of a Roman, was elevated by the command of Galba on a fairer and more lofty cross. Occasional rescripts issued from the throne to decide the questions which, by their novelty or importance, appeared to surpass the authority and discernment of a proconsul. Transportation and beheading were reserved for honorable persons; meaner criminals were either hanged, or burnt, or buried in the mines, or exposed to the wild beasts of the amphitheatre. Armed robbers were pursued and extirpated as the enemies of society; the driving away horses or cattle was made a capital offence; but simple theft was uniformly considered as a mere

civil and private injury. The degrees of guilt, and the modes of punishment, were too often determined by the discretion of the rulers, and the subject was left in ignorance of the legal danger which he might incur by every action of his life.

A sin, a vice, a crime, are the objects of theology, ethics, and jurisprudence. Whenever their judgments agree, they corroborate each other; but, as often as they differ, a prudent legislator appreciates the guilt and punishment according to the measure of social injury. On this principle, the most daring attack on the life and property of a private citizen is judged less atrocious than the crime of treason or rebellion, which invades the *majesty* of the republic: the obsequious civilians unanimously pronounced, that the republic is contained in the person of its chief; and the edge of the Julian law was sharpened by the incessant diligence of the emperors. The licentious commerce of the sexes may be tolerated as an impulse of nature, or forbidden as a source of disorder and corruption; but the fame, the fortunes, the family of the husband, are seriously injured by the adultery of the wife. The wisdom of Augustus, after curbing the freedom of revenge, applied to this domestic offence the animadversion of the laws: and the guilty parties, after the payment of heavy forfeitures and fines, were condemned to long or perpetual exile in two separate islands. Religion pronounces an equal censure against the infidelity of the husband; but, as it is not accompanied by the same civil effects, the wife was never permitted to vindicate her wrongs; and the distinction of simple or double adultery, so familiar and so important in the canon law, is unknown to the jurisprudence of the Code and the Pandects. I touch with reluctance, and despatch with impatience, a more odious vice, of which modesty rejects the name, and nature abominates the idea. The primitive Romans were infected by the example of the Etruscans and Greeks: and in the mad abuse of prosperity and power, every pleasure that is innocent was deemed insipid; and the Scatinian law, which had been extorted by an act of violence, was insensibly abolished by the lapse of time and the multitude of criminals. By this law, the rape, perhaps the seduction, of an ingenuous youth, was compensated, as a personal injury, by the poor damages of ten thousand sesterces, or fourscore pounds; the ravisher might be slain by the resistance or revenge of chastity; and I wish to believe, that at Rome, as in Athens, the voluntary and effeminate deserter of his sex was degraded from the honors and the rights of a citizen. But the practice of vice was not discouraged by the severity of opinion: the indelible stain of manhood was confounded with the more venial transgressions of fornication and adultery, nor was the licentious lover exposed to the same dishonor which he impressed on the male or female partner of his guilt. From

Catullus to Juvenal, the poets accuse and celebrate the degeneracy of the times; and the reformation of manners was feebly attempted by the reason and authority of the civilians till the most virtuous of the Caesars proscribed the sin against nature as a crime against society.

A new spirit of legislation, respectable even in its error, arose in the empire with the religion of Constantine. The laws of Moses were received as the divine original of justice, and the Christian princes adapted their penal statutes to the degrees of moral and religious turpitude. Adultery was first declared to be a capital offence: the frailty of the sexes was assimilated to poison or assassination, to sorcery or parricide; the same penalties were inflicted on the passive and active guilt of paederasty; and all criminals of free or servile condition were either drowned or beheaded, or cast alive into the avenging flames. The adulterers were spared by the common sympathy of mankind; but the lovers of their own sex were pursued by general and pious indignation: the impure manners of Greece still prevailed in the cities of Asia, and every vice was fomented by the celibacy of the monks and clergy. Justinian relaxed the punishment at least of female infidelity: the guilty spouse was only condemned to solitude and penance, and at the end of two years she might be recalled to the arms of a forgiving husband. But the same emperor declared himself the implacable enemy of unmanly lust, and the cruelty of his persecution can scarcely be excused by the purity of his motives. In defiance of every principle of justice, he stretched to past as well as future offences the operations of his edicts, with the previous allowance of a short respite for confession and pardon. A painful death was inflicted by the amputation of the sinful instrument, or the insertion of sharp reeds into the pores and tubes of most exquisite sensibility; and Justinian defended the propriety of the execution, since the criminals would have lost their hands, had they been convicted of sacrilege. In this state of disgrace and agony, two bishops, Isaiah of Rhodes and Alexander of Diospolis, were dragged through the streets of Constantinople, while their brethren were admonished, by the voice of a crier, to observe this awful lesson, and not to pollute the sanctity of their character. Perhaps these prelates were innocent. A sentence of death and infamy was often founded on the slight and suspicious evidence of a child or a servant: the guilt of the green faction, of the rich, and of the enemies of Theodora, was presumed by the judges, and paederasty became the crime of those to whom no crime could be imputed. A French philosopher has dared to remark that whatever is secret must be doubtful, and that our natural horror of vice may be abused as an engine of tyranny. But the favorable persuasion of the same writer, that a legislator may confide in the taste and reason of mankind, is

impeached by the unwelcome discovery of the antiquity and extent of the disease.

The free citizens of Athens and Rome enjoyed, in all criminal cases, the invaluable privilege of being tried by their country. 1. The administration of justice is the most ancient office of a prince: it was exercised by the Roman kings, and abused by Tarquin; who alone, without law or council, pronounced his arbitrary judgments. The first consuls succeeded to this regal prerogative; but the sacred right of appeal soon abolished the jurisdiction of the magistrates, and all public causes were decided by the supreme tribunal of the people. But a wild democracy, superior to the forms, too often disdains the essential principles, of justice: the pride of despotism was envenomed by plebeian envy, and the heroes of Athens might sometimes applaud the happiness of the Persian, whose fate depended on the caprice of a *single* tyrant. Some salutary restraints, imposed by the people or their own passions, were at once the cause and effect of the gravity and temperance of the Romans. The right of accusation was confined to the magistrates. A vote of the thirty five tribes could inflict a fine; but the cognizance of all capital crimes was reserved by a fundamental law to the assembly of the centuries, in which the weight of influence and property was sure to preponderate. Repeated proclamations and adjournments were interposed, to allow time for prejudice and resentment to subside: the whole proceeding might be annulled by a seasonable omen, or the opposition of a tribune; and such popular trials were commonly less formidable to innocence than they were favorable to guilt. But this union of the judicial and legislative powers left it doubtful whether the accused party was pardoned or acquitted; and, in the defence of an illustrious client, the orators of Rome and Athens address their arguments to the policy and benevolence, as well as to the justice, of their sovereign. 2. The task of convening the citizens for the trial of each offender became more difficult, as the citizens and the offenders continually multiplied; and the ready expedient was adopted of delegating the jurisdiction of the people to the ordinary magistrates, or to extraordinary *inquisitors*. In the first ages these questions were rare and occasional. In the beginning of the seventh century of Rome they were made perpetual: four praetors were annually empowered to sit in judgment on the state offences of treason, extortion, peculation, and bribery; and Sylla added new praetors and new questions for those crimes which more directly injure the safety of individuals. By these *inquisitors* the trial was prepared and directed; but they could only pronounce the sentence of

the majority of *judges*, who with some truth, and more prejudice, have been compared to the English juries. To discharge this important, though burdensome office, an annual list of ancient and respectable citizens was formed by the praetor. After many constitutional struggles, they were chosen in equal numbers from the senate, the equestrian order, and the people; four hundred and fifty were appointed for single questions; and the various rolls or *decuries* of judges must have contained the names of some thousand Romans, who represented the judicial authority of the state. In each particular cause, a sufficient number was drawn from the urn; their integrity was guarded by an oath; the mode of ballot secured their independence; the suspicion of partiality was removed by the mutual challenges of the accuser and defendant; and the judges of Milo, by the retrenchment of fifteen on each side, were reduced to fifty-one voices or tablets, of acquittal, of condemnation, or of favorable doubt. 3. In his civil jurisdiction, the praetor of the city was truly a judge, and almost a legislator; but, as soon as he had prescribed the action of law, he often referred to a delegate the determination of the fact. With the increase of legal proceedings, the tribunal of the centumvirs, in which he presided, acquired more weight and reputation. But whether he acted alone, or with the advice of his council, the most absolute powers might be trusted to a magistrate who was annually chosen by the votes of the people. The rules and precautions of freedom have required some explanation; the order of despotism is simple and inanimate. Before the age of Justinian, or perhaps of Diocletian, the *decuries* of Roman judges had sunk to an empty title: the humble advice of the assessors might be accepted or despised; and in each tribunal the civil and criminal jurisdiction was administered by a single magistrate, who was raised and disgraced by the will of the emperor.

A Roman accused of any capital crime might prevent the sentence of the law by voluntary exile, or death. Till his guilt had been legally proved, his innocence was presumed, and his person was free: till the votes of the last *century* had been counted and declared, he might peaceably secede to any of the allied cities of Italy, or Greece, or Asia. His fame and fortunes were preserved, at least to his children, by this civil death; and he might still be happy in every rational and sensual enjoyment, if a mind accustomed to the ambitious tumult of Rome could support the uniformity and silence of Rhodes or Athens. A bolder effort was required to escape from the tyranny of the Caesars; but this effort was rendered familiar by the maxims of the stoics, the example of the bravest Romans, and the legal encouragements of suicide. The bodies of condemned criminals were exposed to public ignominy, and their children, a more serious evil, were reduced to poverty by the confiscation of

their fortunes. But, if the victims of Tiberius and Nero anticipated the decree of the prince or senate, their courage and despatch were recompensed by the applause of the public, the decent honors of burial, and the validity of their testaments. The exquisite avarice and cruelty of Domitian appear to have deprived the unfortunate of this last consolation, and it was still denied even by the clemency of the Antonines. A voluntary death, which, in the case of a capital offence, intervened between the accusation and the sentence, was admitted as a confession of guilt, and the spoils of the deceased were seized by the inhuman claims of the treasury. Yet the civilians have always respected the natural right of a citizen to dispose of his life; and the posthumous disgrace invented by Tarquin, to check the despair of his subjects, was never revived or imitated by succeeding tyrants. The powers of this world have indeed lost their dominion over him who is resolved on death; and his arm can only be restrained by the religious apprehension of a future state. Suicides are enumerated by Virgil among the unfortunate, rather than the guilty; and the poetical fables of the infernal shades could not seriously influence the faith or practice of mankind. But the precepts of the gospel, or the church, have at length imposed a pious servitude on the minds of Christians, and condemn them to expect, without a murmur, the last stroke of disease or the executioner.

The penal statutes form a very small proportion of the sixty-two books of the Code and Pandects; and in all judicial proceedings, the life or death of a citizen is determined with less caution or delay than the most ordinary question of covenant or inheritance. This singular distinction, though something may be allowed for the urgent necessity of defending the peace of society, is derived from the nature of criminal and civil jurisprudence. Our duties to the state are simple and uniform: the law by which he is condemned is inscribed not only on brass or marble, but on the conscience of the offender, and his guilt is commonly proved by the testimony of a single fact. But our relations to each other are various and infinite; our obligations are created, annulled, and modified, by injuries, benefits, and promises; and the interpretation of voluntary contracts and testaments, which are often dictated by fraud or ignorance, affords a long and laborious exercise to the sagacity of the judge. The business of life is multiplied by the extent of commerce and dominion, and the residence of the parties in the distant provinces of an empire is productive of doubt, delay, and inevitable appeals from the local to the supreme magistrate. Justinian, the Greek emperor of Constantinople and the East, was the legal successor of the Latin shepherd who had planted a colony on the banks of the Tyber. In a period of thirteen hundred years, the

laws had reluctantly followed the changes of government and manners; and the laudable desire of conciliating ancient names with recent institutions destroyed the harmony, and swelled the magnitude, of the obscure and irregular system. The laws which excuse, on any occasions, the ignorance of their subjects, confess their own imperfections: the civil jurisprudence, as it was abridged by Justinian, still continued a mysterious science, and a profitable trade, and the innate perplexity of the study was involved in tenfold darkness by the private industry of the practitioners. The expense of the pursuit sometimes exceeded the value of the prize, and the fairest rights were abandoned by the poverty or prudence of the claimants. Such costly justice might tend to abate the spirit of litigation, but the unequal pressure serves only to increase the influence of the rich, and to aggravate the misery of the poor. By these dilatory and expensive proceedings, the wealthy pleader obtains a more certain advantage than he could hope from the accidental corruption of his judge. The experience of an abuse, from which our own age and country are not perfectly exempt, may sometimes provoke a generous indignation, and extort the hasty wish of exchanging our elaborate jurisprudence for the simple and summary decrees of a Turkish cadhi. Our calmer reflection will suggest, that such forms and delays are necessary to guard the person and property of the citizen; that the discretion of the judge is the first engine of tyranny; and that the laws of a free people should foresee and determine every question that may probably arise in the exercise of power and the transactions of industry. But the government of Justinian united the evils of liberty and servitude; and the Romans were oppressed at the same time by the multiplicity of their laws and the arbitrary will of their master.
