

DIGEST OF JUSTINIAN.

FIRST BOOK.

M. J.

I.

ON JUSTICE AND LAW.

1 ULPIANUS (*Institutes* 1) When a man means to give his attention to law (*jus*), he ought first to know whence the term *jus* is derived. Now *jus* is so called from *justitia*; in fact, according to the nice definition of Celsus, *jus* is the art of what is good and fair. 1. Of this art we may deservedly be called the priests; we cherish justice and profess the knowledge of what is good and fair, we separate what is fair from what is unfair, we discriminate between what is allowed and what is forbidden, we desire to make men good, not only by putting them in fear of penalties, but also by appealing to them through rewards, proceeding, if I am not mistaken, on a real and not a pretended philosophy. 2. Of this subject there are two departments, public law and private law. Public law is that which regards the constitution of the Roman state, private law looks at the interest of individuals; as a matter of fact, some things are beneficial from the point of view of the state, and some with reference to private persons. Public law is concerned with¹ sacred rites, with priests, with public officers. Private law has a threefold division, it is deduced partly from the rules of natural law, partly from those of the *jus gentium*, partly from those of the civil law. 3. Natural law is that which all animals have been taught by nature; this law is not peculiar to the human species, it is common to all animals which are produced on land or sea, and to fowls of the air as well. From it comes the union of man and woman called by us matrimony, and therewith the procreation and rearing of children; we find in fact that animals in general, the very wild beasts, are marked by acquaintance with this law. 4. *Jus gentium* is the law used by the various tribes of mankind, and there is no difficulty in seeing that it falls short of natural law, as the latter is common to all animated beings, whereas the former is only common to human beings in respect of their mutual relations;

¹ For *constitut* read *consistit*.

- 2 POMPONIUS (*Enchiridion*) take, for example, religion as observed towards God ; or the duty of submission to parents and country ;
- 3 FLORENTINUS (*Institutes* 1) or the right of repelling violence and wrong ; it is in fact by virtue of this law that whatever a man does in defence of his own person he is held to do lawfully ; and Nature having made us in a certain sense akin to one another, it follows that it is a monstrous thing for one man to lie in wait for another.
- 4 ULPIANUS (*Institutes* 1) Manumissions also are comprised in the *jus gentium*. Manumission is the same as dismissal from *manus* (hand), in short the giving of liberty ; as long as a man is in a state of slavery he is subject to *manus* and *potestas* (control), by manumission he is freed from control. All this had its origin in the *jus gentium*, seeing that by natural law all were born free, and manumission was not known, because slavery itself was unknown ; but when slavery came in through the *jus gentium*, there followed the relief given by manumission ; and whereas people were once simply called by the one natural name of 'man,' by the *jus gentium* there came to be three divisions, first freemen, then, as contradistinguished from them, slaves, and then, in the third place, freedmen, that is persons who had ceased to be slaves.
- 5 HERMOGENIANUS (*Epitomes of law* 1) It was by this same *jus gentium* that war was introduced, nations were distinguished, kingdoms were established, rights of ownership were ascertained, boundaries were set to domains, buildings were erected, mutual traffic, purchase and sale, letting and hiring and obligations in general were set on foot, with the exception of a few of these last which were introduced by the civil law.
- 6 ULPIANUS (*Institutes* 1) The civil law is something which on the one hand is not altogether independent of natural law or *jus gentium*, and on the other is not in every respect subordinate to it ; so that when we make addition to or deduction from universal law (*jus commune*), we establish a law of our own, that is, civil law.
1. Now this law of ours is either ascertained by writing or without writing ; as the Greeks say, τῶν νόμων οἱ μὲν ἔγγραφοι οἱ δὲ ἀγραφοί—(of laws some are in writing and some are not in writing).
- 7 PAPINIANUS (*Definitions* 2) The civil law is the law which is derived from statutes, plebiscites, decrees of the senate, enactments of the emperors, or the authority of those learned in the law.
1. Prætorian law is that which was introduced by the prætors in

these are of special application, and are not drawn into a precedent ; wherever the Emperor shows indulgence to anyone on the ground of his merits, or imposes a penalty on anyone, or gives him relief in a way not practised theretofore, this applies only to the particular person.

- 2 ULPIANUS (*Fideicommissa* 4) Where any new ordinance is made, there ought to be a very clear case of beneficial operation to allow of a departure from the law which has been held just for a long time past.
- 3 JAVOLENUS (*Epistles* 13) An indulgence vouchsafed by the Emperor, which proceeds in fact from his divine clemency, ought to receive the most extensive construction possible.
- 4 MODESTINUS (*Excuses* 2) Later enactments have more force in law than those which precede them.

V.

ON STATUS.

- 1 GAIUS (*Institutes* 1) All law in force amongst us deals with either persons, or things, or actions.
- 2 HERMOGENIANUS (*Epitomes of law* 1). Seeing then that all law has been established for the sake of mankind, we will discuss first personal status, and then the remaining subjects, following the arrangement of the *Edictum perpetuum*, and joining to the above the titles next in order and connected therewith, so far as the nature of the subject allows.
- 3 GAIUS (*Institutes* 1) Now the main division of the law of persons is this, that all human beings are either free or slaves.
- 4 FLORENTINUS (*Institutes* 9) Liberty is the natural power of doing what anyone is disposed to do, save so far as a person is prevented by force or by law. 1. Slavery is a creation of the *jus gentium*, by which a man is subjected, contrary to nature, to ownership on the part of another. 2. Slaves are called *servi* because military commanders commonly sell their captives and so *preserve* them instead of killing them ; 3. they are called *mancipia*, because they are taken by the hands of their enemies.
- 5 MARCIANUS (*Institutes* 1) Now all slaves have one and the same legal condition ; of free men some are *ingenui*, some are *libertini*. 1. Slaves become subjects of ownership either by the

civil law or by the *jus gentium*; by the civil law, a man over twenty years of age becomes a slave by allowing himself to be sold in order to have a share in the purchase-money; by the *jus gentium*, people own as slaves those who are captured from their enemies or who are born from their female slaves. 2. Persons are *ingenui* who are born of a free mother; it is enough that the mother should be free at the moment when the child is born, though she should have been a slave at the time of conception. Even in the converse case, where she is free at conception, but a slave at the time of the birth, the law is that the child is born free; and it matters not whether the mother conceived in lawful wedlock or in random intercourse; the mother's ill fortune ought not to prejudice the unborn child. 3. Hence arose this question:—if a slavewoman is manumitted, being with child at the time, and after that is reduced to slavery again, or sent into banishment, and then gives birth to a child, is the child free or a slave? However, the view which has found deserved favour is that the child is born free, and that it is sufficient for the unborn child that the mother was free at some time or other during the period of pregnancy.

- 6 GAIUS (*Institutes* 1) *Libertini* are those who have been manumitted out of lawful slavery.
- 7 PAULUS (*on the portions allowed to children of condemned persons*). An unborn child is taken care of just as much as if it were in existence, in any case in which the child's own advantage comes in question; though no one else can derive any benefit through the child before its birth.
- 8 PAPINIANUS (*Questions* 3) The Emperor Titus Antoninus laid down that the position of children is not prejudiced by the terms of a badly drawn instrument.
- 9 THE SAME (*ibid.* 31) There are many points in our law in respect of which women are in a worse legal position than men.
- 10 ULPIANUS (*on Sabinus* 1) The question has been asked:—according to which sex are hermaphrodites to be treated? but I should say on the whole that they ought to be treated as having the sex which predominates in them.
- 11 PAULUS (*Responsa* 18) Paulus gave the opinion that where a boy was conceived in the lifetime of the father [of his mother], but without such father being aware of the connexion formed by his daughter, then, even though the boy should be born after the death of such grandfather, he is not to be held to be the lawful son of the man who begot him.

- 26 JULIANUS (*Digest* 69) Unborn children are in almost every branch of the civil law regarded as already existing. They are allowed to take statutable inheritances ; and if a woman with child is taken prisoner by the enemy, and a child is born, it comes under the law of *postliminium*, moreover it follows the condition of its father or its mother [as the case may be] ; lastly, if a slavewoman who is with child is stolen, then, although she should be delivered when in the hands of a *bona fide* purchaser, the child will be regarded as stolen goods, and consequently ownership in it will not be acquired by *usus*. Again, on the same principle, after the death of a patron, so long as a son of the deceased can possibly be born, a freedman is in the same legal position as one whose patron is living.
- 27 ULPIANUS (*Opinions* 5). When a man confesses that he is a freedman, his patron cannot give him freeborn status even by adopting him.

VI.

ON PERSONS *sui juris* AND *alieni juris*.

- 1 GAIUS (*Institutes* 1) We next have another division of the law of persons ; some persons are *sui juris*, and some are subject to the legal authority of others. Let us consider the case of persons who are subject to the authority of others ; when we see who such persons are, we shall thereby understand who are *sui juris*. Let us then take the case of those who are under the *potestas* of others. 1. Now slaves are under the *potestas* of their owners, and this *potestas* is part of the *jus gentium*, in fact we may observe among all nations alike that slave-owners have the power of life and death over their slaves, and whatever is acquired through the slave is acquired to the owner. 2. At the present day however no persons living under Roman rule are at liberty to deal cruelly with their slaves to an excessive extent or without some ground recognised in the statutes, as, by an enactment of the Divine Antoninus, a man who kills his own slave without due cause is to be just as much punished as one who kills the slave of another. Indeed even excessive harshness on the part of slave-owners is restrained by an enactment of the same Emperor.

- 2 ULPIANUS (*on the office of Proconsul* 8) If an owner treat his slaves with cruelty or compel them to commit lewdness or submit to indecent outrage, the proper course for the Præses to take may be plainly seen from the rescript of the Divine Pius to Ælius Marcianus, the Proconsul of Bætica. The words of the rescript are as follows: "The power which owners have over their slaves ought not to be interfered with, and no human being ought to be debarred from exercising his legal rights; still it is in the interest of owners themselves that slaves who make just complaint should not be refused aid against violence or starvation or any insufferable wrong. You must therefore listen to the complaint of those slaves of the household of Julius Sabinus who fled for refuge to the statue, and if you find that they have been treated with improper severity or subjected to infamous wrong, order them to be sold on terms which shall secure that they shall not be brought back into the hands of their present owner; and should such owner endeavour to evade my enactment, let him understand that I will visit his behaviour very severely." Moreover the Divine Hadrian relegated one Umbricia, a lady of good social position (*matrona*), for five years, for treating her female slaves with extreme cruelty on very trivial grounds.
- 3 GAIUS (*Institutes* 1) Again, a man has under his *potestas* any children that he has begotten in lawful wedlock: this rule of law is peculiar to Roman citizens.
- 4 ULPIANUS (*Institutes* 1) A Roman citizen may be a *paterfamilias* or a *filiusfamilias* or a *materfamilias* or a *filiafamilias*. A *paterfamilias* is a man who is in his own *potestas*, whether of mature age or not; a similar definition applies to a *materfamilias*; a *filiusfamilias* or *filiafamilias* is under the *potestas* of some one else. A child who is born from the union of me and my wife is under my *potestas*; and one who is born from the union of my son and his wife, in other words, my grandson or granddaughter, is equally under my *potestas*, so is my great-grandson or great-granddaughter, and so on of more remote descendants.
- 5 THE SAME (*on Sabinus* 36) Grandsons through a son on the death of the grandfather regularly come under the *potestas* of the son, that is, of their own father: similarly great-grandchildren and remoter descendants either come under the *potestas*¹ of the son, if he is living and has remained in the family, or else under that of

¹ Read *potestatem* for *potestate*. Hal.

III.

ON CORRUPTING A SLAVE.

- 1 ULPIANUS (*on the Edict* 23) The Prætor says:—"Where a man is alleged to have harboured a slave of either sex belonging to another or induced him or her maliciously to act in any way with intent to deteriorate his or her character, I will allow an action against him for twice what the matter comes to." 1. A man who is a *bona fide* purchaser of the slave will not be liable under this Edict, nor¹ can he himself bring an action for corrupting the slave, as he has no interest in the slave not being corrupted; in fact, it is clear that, if his right to sue were admitted, two persons would have a good right of action for corruption of the slave, which is absurd. It may be added that, according to the received opinion, the action cannot be brought by one who has *bona fide* the services of a free man. 2. With regard to the word "harboured" (*recepisse*), as used by the Prætor, what this is taken to refer to is the case of a man taking in another man's slave at his own place of abode; "harbouring" is, strictly speaking, affording a slave a refuge with a view to concealing him, whether it be on the party's own ground or in a place or building belonging to another. 3. To induce (*persuadere*) is *to compel and constrain a person to obey you*²; but "induce" is a kind of neutral term, as the incitement may be applied by giving good advice as well as bad; accordingly the Prætor adds the words "maliciously" and "with intent to deteriorate the slave's character." So that one who solicits a slave to do or to plan something objectionable must be the kind of person who is held up to observation in this Edict. 4. Is a man, however, liable only where he has driven a well-conducted slave to commit an offence, or is he equally so where he instigates a bad slave, or shows a bad slave the way to commit it? The truer view is that even where he shows a bad slave how to commit an offence he is liable. Indeed, if the slave had made up his mind independently to run away or to commit a theft, and the

¹ del. *quia*. M.

² The Latin text here is "*persuadere autem est plus quam compelli atque cogi sibi parere.*" These words having no meaning, I have ventured to follow a note in the *Basilica* and substitute the clause I have given in italics; in other words to omit *plus quam* and turn the two passive infinitives into the active.

party in question is shown to have applauded his design, he is liable; the slave's bad disposition ought not to be made worse still by approbation. Accordingly, whether a man makes a good slave bad or makes a bad slave worse, he will be held to corrupt him. 5. A person too makes a slave worse who induces him to commit wrongful damage or theft or to run away or to instigate a slave belonging to some other person to commit such offences, or to make his *peculium* undistinguishable, or to go after girls, or to loiter about, or to give himself up to magical arts, or to spend too much time at public shows, or to engage in riots, or again who induces [a slave who is] a bailiff, either by words or bribes, to mutilate [or] falsify his master's accounts or even to confuse an account put in his hands,

- 2 PAULUS (*on the Edict* 19) or who encourages a slave to live expensively, or to be insubordinate, or induces him to submit to *stuprum*.
- 3 ULPIANUS (*on the Edict* 23) By adding the expression "maliciously" the Prætor stigmatizes craft on the part of the person who induces; whereas if a man deteriorates a slave's character without wrongful intention he incurs no stigma; and he is not liable where he does it for a practical joke. 1. Hence arises this question: suppose a man incites the slave of another to climb on a roof or to go down a well, and the slave accordingly climbs up or goes down, and so falls and breaks his leg or breaks any limb or is killed, will the party be liable? The answer is that, if he did it without malice, he is not liable, but, if it was done maliciously, he is;
- 4 PAULUS (*on the Edict* 19) but the more convenient plan is to hold him liable to an *utilis* [*actio* framed on the] *lex Aquilia*.
- 5 ULPIANUS (*on the Edict* 23) The word "maliciously" must be applied equally in the case of one who harbours a slave, so that a man is not liable unless he harbours maliciously; if he harboured the slave with a view to keeping him safely on his owner's behoof or from motives of humanity or out of pity or on some other approved and lawful ground, he is not liable. 1. If anyone maliciously induces a slave whom he took for a free man to do anything, I should say that he ought to be held liable, as one who corrupts a slave whom he believes to be free commits a still greater offence [than if he knew him to be a slave], consequently, if the man really is a slave, the party will be liable. 2. The action is for

him produce his accounts, which the man was not able to make good, and his patron found that he had spent the money in the company of some woman of no character ; the question was asked whether the patron could sue this woman for corrupting a slave, the slave being by this time free. The answer was that he could, and that so he might for theft too in respect of any money which the slave had put in her hands.

- 17 MARCELLUS (*Rules 4*) A husband is allowed an action against his wife on the ground of corrupting a slave, even while the married state still lasts, but only for the simple value, in consideration of matrimony.

IV.

ON FUGITIVE SLAVES.

- 1 ULPIANUS (*on the Edict 1*) A man who has concealed a fugitive slave is a thief. 1. The Senate laid down that fugitive slaves are not to be admitted into parks nor to be sheltered by the overseers or agents of landowners, and it prescribed a fine ; but if any persons should within twenty days have either restored such slaves to their owners or brought them up before the magistrates, it excused their previous behaviour ; indeed, further on in the same enactment, impunity is promised to anyone who hands over fugitive slaves to their owners or to the magistrate within the prescribed time after finding any such on his ground. 2. The decree allowed both soldiers and civilians a right of entry on the estates of Senators or private persons for the purpose of following up a runaway slave, in fact the *lex Fabia* and a decree of the Senate passed in the consulship of Modestus were enacted with a similar object. It was further laid down that persons who wished to search for fugitive slaves should have letters given them addressed to the magistrates, a fine of a hundred solidi being prescribed at the same time to be payable by the latter, if, on receiving such letters they declined to assist the persons engaged in the search ; and a similar penalty was imposed on anyone who refused to allow a search to be made on his ground. Moreover there is a rescript of the Divine Marcus and Commodus of general application by which it is expressly laid down that governors, magistrates and

police are bound to assist any owner in¹ seeking out runaway slaves and that they must give them up if they find them, also that persons on whose ground the slaves are in hiding are to be punished if any unlawful behaviour is brought home to them. 3. Every person whatever who apprehends a runaway slave is bound to bring him forward publicly, 4. and the magistrates are very properly enjoined to keep any such slaves carefully in custody, so as to prevent their escape. 5. Under the term "fugitive" must be included a slave who is given to roving. But, according to Labeo (*on the Edict* 1), the term does not comprise a slave who is simply born of a runaway mother. 6. A slave is deemed to be brought forward publicly if he is handed over to the municipal magistrates or government officers. 7. Careful custody will allow putting the slave in irons. 8. The custody is continued until the time when the slaves are brought before the Prefect of the Watch or the Governor. 8*a*. The magistrates must be informed of the names and marks of the fugitive slaves and as to who it is to whom any one of them professes to belong, so that they may be the more easily identified and secured; and the term "mark" will include scars. This direction applies equally where the case is advertised by means of a written notice in a public place or in a consecrated temple².

- 2 CALLISTRATUS (*Hearings* 6) Slaves who are simply runaways should be restored to their owners; but, where they affect the station of free men, the practice is to inflict severe punishment.
- 3 ULPIANUS (*on the office of Proconsul* 7) The Divine Pius laid down by rescript that, where a man desires to search for a runaway slave in someone else's ground, he may apply to the Governor, who must give him a letter, and, if the case requires it, an officer, so that he can get permission to enter and make a search, and that the Governor can in addition inflict a penalty on anyone who should refuse to allow the search to be made. Moreover the Divine Marcus delivered an oration before the Senate by which he authorized those who desire to search for fugitives and to examine³ the sleeping-places or any traces of those who concealed them to enter on land of the Emperor or of Senators or private persons.
- 4 PAULUS (*Sentences* 1) Harbour-masters and police-officers, if any fugitive slaves are apprehended, do well to keep them in

¹ Ins. *in* before *inquirendis*. Cf. M.

² For *ædes* read *æde sacra*. Cf. M.

³ Read *scrutandi* for *scrutari*. Cf. M.

custody. Municipal magistrates, on arrest of such slaves, send them on securely to the office of the governor of the province or the proconsul.

- 5 TRYPHONINUS (*Disputations* 1) If a fugitive slave gives himself up to fight in the amphitheatre, he cannot, even by exposing himself to the risk thereby incurred, which only amounts to peril of death, escape from the legal control of his owner ; there being a rescript of the Divine Pius enjoining that such slaves should without further consideration be restored to their owners, either before or after a combat with beasts ; as very often they have either misappropriated money or committed some more serious offence, and they would rather give themselves up to fight in the arena, so as to avoid inquiry or lawful punishment ; accordingly they must be surrendered.

V.

ON GAMBLERS.

- 1 ULPIANUS (*on the Edict* 23) The Prætor says :—if anyone beats a man in whose house it appears that a game with dice has been carried on or damages his property, or, on a similar occasion, something has been taken out of his house¹ by anyone, I will not allow an action. Where a man uses violence for the purpose of a game with dice I will punish the offender as the particular case may require. 1. If parties to the game rob one another, an action will not be refused for *vi bona rapta* (goods taken with violence), it is only the entertainer that the Prætor says shall not be protected, not the gamesters as well, though indeed these too may well be thought unworthy of consideration. 2. It should be observed further that if an entertainer has been beaten or has suffered damage, the Prætor refuses relief irrespective of the place or time at which it happened, but [the rule about] theft is [that it is] committed with impunity in the house where and at the time when the gambling was carried on, and that although the person who commits *any one of the offences named*² should himself not have been engaged in the game. There is no doubt that by the word “house” we must understand habitation and place of abode. 3. With regard to the

¹ Read *tempore e domo* for *tempore dolo*. Cf. M.

² *quid eorum*. The writer ought to have said *furtum*, the theft, and left the reader to infer the generalization, or else have recast the sentence altogether.