A TEXT-BOOK OF ROMAN LAW

FROM

AUGUSTUS TO JUSTINIAN

A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN

BY

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FOREWORD TO THIRD EDITION

Professor Buckland died in 1946. The Text-book was published in 1921, the second edition in 1932; and from then till his death he went on writing articles (listed in the Bibliography on page xxvii) and annotating an interleaved copy of the Text-book. It was thus possible to discover Buckland's latest opinion on all matters, and the present edition is intended in the main to represent Buckland's own views.

When the book went out of print a few years ago, without being replaced by any work of comparable scope and authority, the Syndics of the Press considered whether to re-print it without change, to let it die, or to have it thoroughly revised so as to be essentially a new book. In the end they decided to re-publish it with the 1932 pagination unchanged and with only such revision as seemed strictly necessary; and Professor Stein accepted their invitation to undertake that task. He has incorporated Buckland's later views partly by changes in the text and footnotes and partly by writing the longer notes which have replaced blank spaces on pages 232, 364, 404, 526 (in text), 673 and 718. Section CCX on pages 616–18, dealing with *iudicis postulatio* and *condictio*, has been completely rewritten, but at exactly the same length. He has also written the two Notes on pages xvii and xxiii to indicate the main developments in the study of Roman Law since the publication of the second edition. I have read what he has written and made some suggestions, but the revision is his.

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PREFACE TO FIRST EDITION

THE following pages contain an attempt to state the main rules of the Private Law of the Roman Empire for the use of students, and the chief purpose of the writer has been to set out the established or accepted doctrines. This consideration may be held to justify the arrangement of the book. Much criticism, often well founded, has been directed at the arrangement adopted by Gaius and followed by Justinian in his *Institutes*, and many modern treatises adopt arrangements differing from it in important respects. But these arrangements differ so widely among themselves that it may fairly be assumed that none of them has such overwhelming advantages as to make it desirable for the present purpose to adopt it, in view of the fact that the texts to which the student is directed adopt a different order. The general plan of the book therefore follows the Institutional arrangement, though with no hesitation in abandoning it where this course seems to tend to lucidity of exposition. In truth no order of treatment can be quite satisfactory. The study of any branch of the law calls for some knowledge of ideas which are to be looked for in other branches. The law of Persons suffers least from this source of difficulty and can therefore conveniently be studied first. But it is not quite free from it: in particular, ideas connected with civil procedure are frequently involved. This is the case throughout the law: in all systems, the remedy is the root of the matter. Rules of Law do not enforce themselves, and a general idea of the system of remedies, of the steps to be taken if a right is infringed, of the broad distinctions between the different remedies for infringement of different kinds of right, and of the nature of the relief which can be obtained, will be found greatly to facilitate the study of the substantive law. A very brief account of these matters has been prefixed[1] to the detailed account of the law of procedure, and the student is advised to familiarise himself with this, before beginning his systematic study of the book.

The subject treated is the law of the Empire—what is called the classical law—with later developments, including the legislation of Justinian. But the system elaborated by Labeo and his successors has its roots in the past and is scarcely intelligible without some knowledge

1 *Post* §§ CCVI, CCVII.

of the earlier institutions on which it is based. These earlier institutions are therefore taken into account, but are dealt with only in outline and only in so far as knowledge of them seems to be essential to the main purpose of the book.

The great constitutional changes which marked the foundation of the Empire would not of themselves justify the adoption of that event as the starting-point for a statement of the Private Law, but there are other reasons for choosing this or perhaps the slightly earlier age of Cicero. His writings give us the earliest contemporary account, from a more or less legal point of view, of the system of Private Law. The conquest of Greece was somewhat older, but the influence of Greek ideas on Roman institutions was only now becoming important. The first idea which this allusion brings to mind is the *Ius Naturale*. It is borrowed from Greek philosophy, but it does not appear that the expression was in use among the lawyers till the time of Augustus. The expression *ius civile* was in use, but in republican times it meant merely the unwritten part of the law, the "common law" as opposed to that which had been expressly enacted. The expression *ius gentium* is as old as Cicero, but we do not know that it is older, and there is no evidence that it was as yet used by lawyers to mark a sharp contrast with another system known as the *ius civile*. The contrast of *ius civile*, *ius gentium*, *ius naturale* belongs to the Empire. There is no trace of the conception of *obligatio naturalis* among the lawyers of the Republic. But this new traffic in ideas is only one indication of the rapid evolution of legal notions which was now beginning. The complex law of manumission described by Gaius is a very different matter from the simple system of the Republic. Most of the family law is indeed more ancient, but while the main framework of the Law of Property, even Equitable Ownership, is republican, many parts of it (some of which seem to us indispensable) were unknown to the Republic. Praedial servitudes were few in number, and the personal servitudes, though some of them were extant, were not thought of as servitudes: it is not quite clear how they were thought of, or indeed whether they were "servitudes" till a much later date. There was no such thing as acquisition of property by agent. In the law of succession the praetorian changes had as yet gone a very little way towards rationalisation of the system except so far as actual descendants of a man were concerned. It was the early Imperial law which gave something like due weight to the claims of a mother and invested the praetorian will with real efficiency. The early history of the "real" and "consensual" contracts is not certainly known, but it is not probable that any of them were recognised very long before Cicero. The use of *stipulatio* as a general form into which any undertaking might be cast

may perhaps be little older than the Empire, and it is at least possible that *mutuum*, unsupported by either *nexum* or *stipulatio*, is unknown as a contract to the earlier law. Most of the elaborate classification of actions which plays so large a part in the later juristic writings was the work of lawyers of the Empire.

These are changes in the broad institutions of the law, but still more important is the new scientific spirit. Constructive activity on the part of the lawyers was no new thing. Gallus Aquilius, who added so much to the law in the time of Cicero, had no doubt predecessors who inspired a great part of the Edict, but there is no mistaking the new creative impulse which appears with him and Quintus Mucius, and Servius Sulpicius, perhaps the most important of the three, all contemporaries of Cicero. Nearly all the subtle distinctions and refinements of the law, corresponding to the "case law" of our system, are the work of the classical jurists, the earliest of whom were trained by these men. That these refinements were introduced was not a misfortune: it was a necessity. That the introduction occurred then was not an accident: it was inevitable. Rome was now the capital of the civilised world, the chief market for all commodities, including brains. Her conquests and the peace she had imposed on the world led to a great increase of commerce of which she was the centre. The infinitely varying relations of trade created innumerable questions which demanded solutions, and the demand created the supply. From every quarter of the State men of ability gravitated to Rome, and the legal profession, then, as always, an avenue to political life, and having the additional advantage that it was the only career which still preserved its independence, naturally attracted a large proportion of them, many of them, perhaps the majority of the most famous, coming from the remoter parts of the Empire. The system elaborated by these men and modified by their successors is the primary subject of the book.

The subject is the Law, not the history of the Law. But between Labeo and Tribonian there elapsed more than 500 years, and throughout this long period the law was changing, sometimes rapidly, sometimes slowly, but always changing. Any attempt to state the law as a complete single system without reference to its changes would give a misleading result, and if this were remedied by historical footnotes there is some danger that the book would be unreadable. The method adopted therefore is that of a narrative treatment, in which, while the system, as a system, is kept in view and forms the main framework of the book, the historical development is also kept in view and the perspective distorted as little as possible. Further, the subject is the Private Law and little is said of such institutions as the Colonate and the privileged and

State-controlled trade corporations of later law[1], of which, important as they were in practice, the chief interest is social and political.

There are certain fundamental notions which find their application in nearly all branches of the law, and which, for this reason, it is frequently found convenient to treat once for all at the beginning of the discussion. The field of these notions is indeed differently conceived by different writers, but among typical matters may be mentioned the effect of mistake, fraud, duress or impossibility on legal transactions, the law of conditions, and of representation, the basis of legal obligation and so forth. But, apart from the fact that many of these notions cannot well be understood without some knowledge of the institutions to which they can be applied, there is in Roman Law the further serious difficulty that they are not handled in a uniform manner in different branches of the law. The treatment of conditions is not the same in the Law of Contract and in that of Wills. Even in the same branch of the Law there are often two systems to be considered. The effect of mistake or fraud is not the same in relation to Formal Transfers of Property and in transfer by delivery, *traditio*. It is not the same in *iure civili* contracts and in those *iure gentium*. The attempt to treat the law of representation once for all is likely to lead to a cumbersome result, partly because there was much change and partly because the change proceeded at different speeds, by different methods, and to different lengths in different branches of the law. The general result is that brevity, which is the main advantage to be derived from this mode of treatment, is not really attained in the discussion of classical law, though it may be in treatises on "Pandektenrecht," from which the formal and *iure civili* elements of the Roman Law have disappeared, and the various evolutions are more or less complete. There is therefore no attempt at this mode of treatment in the following pages.

On many points in the law, especially on its historical development, there is much controversy. It has seemed undesirable, on the one hand, to confuse the student by over much insistence on these doubtful points, or, on the other, to leave him in the belief that matters are clear and settled which are in fact obscure or disputed. There will therefore be found many references to controverted questions, but discussion of them is brief and, for the most part, relegated to the footnotes.

The question of the proper amount of detail has been found difficult. To a writer on a subject of which the principles are well known and settled, such as the English Law of Contract, the matter is easily dealt

1 An excellent account of both these matters can be seen in Cornil, *Droit Romain, Aperçu historique*, pp. 506–519, a work which was not available till the greater part of this book was in print.

with. Such details are selected as seem to the writer to illustrate the principle under discussion, and the reader is sent, for further information, to the Law Reports and the practitioners' textbooks. But the principles of the classical Roman Law are not known in the same way. Much, no doubt, is known, but scarcely a year passes without some new elucidation of principle, some new point which compels reconsideration of a hitherto accepted notion, and the starting-point in such cases is not unfrequently some point of detail which had been regarded as quite insignificant. In stating the common law for the student we start from the principle and illustrate by detail, while there are many parts of the Roman Law in which it is not too much to say that we have not really passed the stage of arriving at the principle by the study of detail. There is always a danger of imposing on the reader for Roman Law what is really a modern conception and for classical law what is Byzantine. It is difficult to say beforehand what detail may prove illuminating, and the state of the study seems to justify a rather freer use of detail than would be necessary or convenient in a treatise on English Law. But here too it has been possible to rely to a considerable extent on footnotes.

Propositions of private law will be found to be, in general, supported by references to the original texts, but in the Chapter on the "Sources of the Law," since many of the rules stated are inferences from a large number of documents, this was hardly practicable and thus reference is frequently made only to authoritative modern writers. But the rest of the book also is, as such a book must be, largely indebted to earlier writers. Due acknowledgement is made in the footnotes, but more than this is necessary in the case of the well-known "Manuel" of M. Girard. It is impossible to estimate what the writer owes to this book, which he has kept within reach for twenty years.

The book is also indebted to many friends of the writer, in particular to Professor F. de Zulueta, of Oxford, who has read most of the proofs, and to the Master of Trinity Hall, who has seen several parts of the book in manuscript, for countless hints and necessary corrections. Of the helpfulness and care of the Secretary and Staff of the Cambridge University Press, it is hardly necessary to speak: this is so much a matter of course.

W. W. B.

18 *July* 1921

PREFACE TO SECOND EDITION

No change has been made in the plan of the book. Errors and false references have been corrected where observed, and in some cases the new text reflects a change of opinion. Many paragraphs have been added and the attention of the student has been here and there directed to the literature on some historical and theoretical questions not dealt with in the first edition[1]. But there is still no "General Part." The plain fact is that the Roman Law had no such thing, not merely in the sense that the jurists never formulated it but in the sense that, as was noted in the preface to the first edition, the treatment of fundamental points differed in different branches of the law and was not the same in praetorian and civil law. If, indeed, we force a "general part" on Roman Law, we must, for the period covered by this book, provide at least three. The theoretical outlook of the Institutes of Gaius, which seems to be that of the first century, is very different from that of Paul or Ulpian, which differs profoundly from that of Tribonian. It is at least doubtful whether the theoretical matters which must be the chief element in a "general part" can be understood until the reader knows something about the law. In Bonfante's monumental *Corso*, the "general part" is to come at the end of the volumes on substantive law, a fact from which it seems that certain relevant inferences can be drawn. Is the writer a solitary heretic in believing that for the pedestrian purpose of understanding the Roman Law, the "Allgemeiner Teil" with its all-pervading "Willenstheorie" is the least serviceable part of Windscheid's great work? A "general part" almost inevitably contains a legal philosophy. So far as it does not, the rules which it states are, for Roman Law, most conveniently handled in the body of the work. So far as it does contain such a philosophy, it is not too much to say that this is not usually Roman. If it is not Roman, it is, for the purpose of explaining the Roman Law, worse than useless. The purpose of a legal theory is, apart from considerations *de lege ferenda*, to enable one to draw inferences from a recorded rule for analogous cases. To apply non-Roman theory is, inevitably, to draw false inferences: it does not fertilise the text—it sterilises it. This is not

1 The *chief* changes and additions will be found on the following pages of this edition: pp. 44, 55, 98, 102 *sqq.*, 169, 173, 180, 197, 201, 204, 207, 209, 229 *sq.*, 266, 268, 282, 295 *sq.*, 307, 319, 339, 341, 350, 406 *sq.*, 409, 412, 421, 424, 436, 451, 481, 492 *sqq.*, 528 *sq.*, 532, 537, 554 *sq.*, 564, 596, 600, 628 *sq.*, 643, 653 *sq.*, 665 *sqq.*, 674 *sq.*, 697 *sq.*, 706 *sq.*, 716 *sq.*

to say that modern analysis is not of the greatest value or to deny that Roman texts provide material to which it can usefully be applied: it means only that it seems out of place in a book which seeks to state the Roman Law as the Romans saw it.

It is perhaps less easy to defend the continued absence of Comparative Law from the book. It seemed however to the writer that any adequate treatment of Hellenistic and remoter material would call for more space than was available and that little purpose would be served by mere references to papyrological literature. But this consideration does not stand alone. When we find an institution in Greek Law, and, a little later, in Roman Law, it is easy to infer borrowing. But, to take an example, hypothec, proclaimed 50 years ago to be borrowed from Greece, is now held to be indigenous, and it is the writer's belief that a similar fate awaits some borrowings more recently proclaimed. And even where the borrowing may be held certain, it is very difficult to say when it occurred. The fashionable view seems to be (though protests are not wanting) that what is Greek either in rule or in grammar is Byzantine, though there was the closest intercourse with Greek and Hellenised communities from long before the Empire, and the lay literature of the age in which the great jurists wrote is full of graecisms. Comparative Law has shed much light on Roman legal history, and, here and there, some darkness. To have discussed these matters would have given the book a controversial character, out of keeping with its main purpose.

The first edition was published at a time when foreign books were, and had long been, hard to come by. Some references have therefore been added to books which were not then available, owing to the conditions, and many references have been added to more recent works. But there is no attempt at a bibliography. The aim has been to put the reader on the track of the literature, not to specify it in detail. Even this modest aim has certainly not been wholly achieved: for such gaps as exist the writer can only apologise.

W. W. B.

March 1931

SOME RECENT TRENDS IN ROMAN LAW STUDIES

In the last 25 years much new light has been thrown on the actual practice of the law, which has been shewn to differ considerably from the theoretical law found in the writings of the jurists. Through the business documents and court records evidenced by the Egyptian papyri a new and better understanding has been obtained of the law in action[1]. Sometimes, however, it is difficult to decide whether a document relates to Roman Law or to local Egyptian or Greek Law. Leopold Wenger has popularised the notion of a general legal history of the Ancient World (*antike Rechtsgeschichte*), according to which the development of Roman Law is better understood in the context of the history of the legal systems of the Mediterranean basin than in isolation. Papyrologists who follow Wenger have accordingly studied not only the Greek and Latin papyri but also the Coptic, Demotic (native Egyptian), and Aramaic documents. It is not suggested that one system influenced another but rather that similar problems tend to be tackled in similar ways even in systems which are independent of each other. Helpful analogies for Roman Law can frequently be derived from the course of development taken by other legal systems where the community in question had reached a similar stage of development to the Roman. The comparative approach is more valuable for early Roman Law than for classical law, and particularly in such matters as family law[2].

The papyri have been of more particular assistance in furthering our understanding of the *Corpus Iuris* itself[3]. Sometimes they furnish a text from a classical writer which is also reproduced in an interpolated form in the Digest. When this happens it is possible to fix the extent of the interpolation with considerable certainty. These discoveries have provided a valuable control against some of the excesses of the hunt for interpolations. Thus the discovery of the Oxyrhynchus and Antinoite fragments of

1 R. Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri*, 2nd ed., 1955. 2 For a recent example of the technique, R. Yaron, Minutiae on Roman Divorce, *Tijdschrift*, 1960, 1. 3 E. Seidl, Papyrologie und Interpolationenkritik an den Digesten, *Annales Universitatis Saraviensis, Phil-let.* 1959, 21, from which the examples in the text are taken.

Gaius, as Buckland[1] pointed out with some satisfaction, went some way to vindicating the authority of the Veronese MS. of Gaius which had recently been strongly attacked.

A recent example is PSI 1449, actually a small fragment of parchment containing an entirely new text of D. 19. 2. 13. 4. This fragment shows that some of the previous assumptions of interpolations in the Digest text were quite unjustified[2].

The mere discovery of a fragment dating from the fourth or fifth century containing a text in the same terms as the corresponding Digest text is, however, no proof that the text gives us the classical jurist's original words. It may have been subjected to pre-Justinianian interpolation. In the last two decades the interest of Romanists has shifted from the discovery of interpolations attributable to Justinian's compilers to the observation of pre-Justinianian interpolations made by unknown scholars of the middle period from the latter part of the third century to the beginning of the sixth. D. 12. 1. 1. 1 was generally considered to have been interpolated by the compilers. A papyrus fragment[3] from the fourth century, P. Ryl. III. 474, reproduced the text in substantially the same words as it appeared in the Digest. It could not therefore have been interpolated by the compilers. Instead of the text being attributed to Ulpian, responsibility for the interpolation was attributed to early post-classical commentators[4]. Buckland[5] pointed out that for these pre-Justinianian glosses to have been incorporated into the text they must have been written in Latin, and therefore probably have had a Western origin. He considered that they were less numerous than is currently supposed. "Many passages which are taken for glosses by reason of their doctrine or their Latinity or their structure may well be badly executed shortenings by the compilers."

Even where there is no direct comparison of texts, the papyri can confirm or contradict the validity of a hypothetical interpolation. Thus a contract may be drafted or a decision may be given in a way that is compatible only with a particular state of the law. For example, one of the recently published Apokrimata[6], decisions of the Emperor Septimius Severus, given in answer to petitions submitted to him by private individuals during his visit to Egypt in the winter of A.D. 199–200, throws

1 Reflections suggested by the new fragments of Gaius, *Juridical Rev.*, 1936, 339. The fragments are P. Oxy. xvii, 2103 (ed. A. S. Hunt) and PSI, xi, 1182 (reed. V. Arangio-Ruiz in *B.I.D.R.* 1935, 571). 2 Arangio-Ruiz, *Arch. Giur.* 1957, 140. 3 Identified by Buckland, de Zulueta, *Studi Besta*, 1. 139. 4 F. Schulz, *Z.S.S.* 1951, 1. *contra* Stroux in *Miscellanea Academica Berolinensia*, II, 1950, 1. 5 *Juridical Rev.*, 1936, 344. 6 P. Col. 123, edd. W. Westermann and A. A. Schiller, 1954, rev. Stein, *Am. Jo. Comp. Law*, 1956, 686–90.

considerable doubt[1] on the suggested interpolation of D. 16. 1. 28. 1, while another of these decisions suggests that the notion of *diligentia quam in suis rebus*, which had been attacked as post-classical, was known to Septimius[2]. The collection of Apokrimata contains the imperial rescripts but not the original petitions to which they refer, and there is much dispute as to the purpose of the collection. The absence of the facts of the cases decided suggests that this particular collection was not a form of law report, but other papyri do provide evidence that it was the practice in Egypt to cite decided cases as authority in the courts, and that judgements were sometimes based on such authority[3]. This practice was made possible by the use of collections of decisions. There was no rigid system of precedent, but case law had its place as an independent source of law. Although the evidence is confined to Egypt, it does not appear that the practice of citing decided cases was confined to that province.

The papyri throw light mainly on the law of the Eastern Empire. In recent years much attention has been given to the post-classical law of the Western Empire, for which E. Levy has popularised the term "Vulgar Law", an expression invented by H. Brunner in 1880. In a series of studies[4] Levy pointed out that between Diocletian and Justinian the Western Empire suffered not only political changes but also economic, social, cultural and religious changes, which would all require considerable modification of the law in practice if it was to fit the new conditions. Vulgar Law is essentially the law of practice[5]. Its rules were not introduced by imperial legislation. They were not the fruit of jurisprudence, for there was no longer any juristic activity worthy of the name. Nor again were they peregrine law received from a non-Roman source. Vulgar Law was "degenerate Roman law". The standard of legal scholarship was so low that the ordinary practitioner could not understand the abstract concepts and subtle distinctions of classical law, and in practice he abandoned them in favour of simpler and less technical rules more adapted to the conditions of the times. Levy himself conceives of Vulgar Law as a complex of rules with a particular character. But many critics who accept his detailed results regard this concept as too rigid and abstract; they prefer to talk of vulgar tendencies. Vulgar elements become law by being incorporated into other sources. The main sources for the study of Vulgar Law have been the *Interpretationes* to the Gregorian, Hermogenian and Theodosian Codes and of Paul's Sentences, which

1 Pringsheim, *EOS* (Symbolae Taubenschlag I), 1956, 243. 2 Seidl, *op. cit.* 26.
3 H. F. Jolowicz, Case Law in Ancient Egypt, *J. Soc. Pub. Teach. Law*, 1937. 4 *West Roman Vulgar Law, The Law of Property*, 1951; rev. A. H. Campbell, *J.R.S.* 1953, 179–81. *Weströmisches Vulgarrecht, Das Obligationenrecht*, 1956; rev. D. Daube, *J.R.S.* 1958, 196–7.
5 M. Kaser, *Das römische Privatrecht*, II, 1959, 13–18 and *passim*.

were incorporated into the Breviary of Alaric and the Roman portions of the other Barbarian Codes. Certain Imperial Constitutions reject rules of Vulgar Law which had found their way into practice, but sometimes the Constitutions themselves use the terminology of Vulgar Law and betray its influence, so that to a limited extent they may be used as sources. The Digest is of little use for the study of Vulgar Law: its compilation was the fruit of a revival in the academic study of law in the East which had no parallel in the West. It represents a deliberate classicising policy on the part of Justinian, who sought to restore the classical law to its pristine beauty. In any case, the Digest was scarcely applied at all in the West except during Justinian's temporary reoccupation of Italy in the middle of the sixth century.

Both in the field of property and of obligations, substantial differences have been observed between classical law and Vulgar Law. For example, the clear classical notion of *dominium*, as a positive mastery over the thing quite distinct from possession and having its own remedy, disappeared in the post-classical period. Various kinds of limited *dominium* unknown in classical law were recognised. Usufruct was treated as a form of *dominium* which was eventually regarded as the best right to possession. There was no longer any distinction between the owner's and the possessor's remedies.

The distinction between contract and conveyance also disappeared[1]; sale became a cash transaction in which payment of the price was essential, and *traditio* of the object sold normally accompanied payment. As sale gradually took on the characteristics of barter, the buyer lost some of his protection against defects. Aedilician remedies seem to have been retained only in so far as they related to slaves, in contrast with their extension in the Eastern Empire.

In classical law obligation and action were very closely associated; the classical lawyer regarded a legal situation from the point of view of the form of action available. When the formulary procedure was abandoned and replaced by the *cognitio* procedure, matters were viewed more from the standpoint of substantive law alone. The secondary distinction between various forms of action also disappeared.

Although it retained little of the subtlety and juristic interest of the classical law, the Vulgar Law was not entirely lacking in originality and progressive ideas. Forms were simpler; there was general enforceability of undertakings; oral contracts were replaced by written contracts; representation was admitted where authorisation had been given or could be presumed, and assignment of obligation was easier.

1 F. Gallo, *Il principio Emptione Dominium Transfertur nel diritto pregiustinianeo*, 1960.

Buckland discussed the sources of Vulgar Law in two articles[1] towards the end of his life in which he anticipated some of Levy's detailed conclusions. He concludes that the interpreter of Paul's Sentences "was a very ignorant man, and since he must have been well thought of, or his work would hardly have been preserved, we must suppose that he was one of the best men available. That means a tremendous decline in the level of knowledge and skill, and such decline postulates a great gap in time—*nemo repente stultissimus*." Thus where the text shows that a *mandator credendae pecuniae* is not released by an action brought against the principal debtor, the interpreter confused this with the rule that if a *procurator litis* is condemned, the *actio iudicati* goes against the principal. He also betrays his ignorance of the nature of *bonae fidei iudicium*. He does not know what *custodia* and *diligentia* mean and therefore omits the reference to them. Buckland asks what those who contend that *diligentia* as a measure of liability is a post-classical notion make of this fact.

1 The *Interpretationes* to *Pauli Sententiae* and the *Codex Theodosianus*, *L.Q.R.* 1944, 361–5. *Pauli Sententiae* and the Compilers of the Digest *L.Q.R.* 1945, 34–48.

BIBLIOGRAPHICAL NOTE

It has not been practicable to bring up to date the bibliographical references in the footnotes of this book. Since 1932, however, a number of important works, both general treatises and monographs on specific topics, have been published and the number of periodicals wholly or partly devoted to Roman Law has increased. Furthermore, some useful guides to this mass of literature have been provided, as well as several aids to the study of the Roman legal texts themselves. Mention of the main items, especially those in English, may indicate the richness of the material and how it may be found.

Adolf Berger's *Encyclopedic Dictionary of Roman Law*, Transactions of the American Philosophical Society, 1953, provides explanations of most technical terms, as well as accurate short articles on the sources and main institutions of the substantive law, each furnished with bibliographical lists. A general work of a totally different kind is Fritz Schulz's *Principles of Roman Law*, Oxford, 1936, a discussion not of the rules themselves but of the views of law and justice held by the Romans. The notions which characterise the activity of the jurists are delineated with great skill.

Among works devoted to the history of the law, H. F. Jolowicz's *Historical Introduction to the Study of Roman Law*, Cambridge, 2nd ed. 1952, is especially valuable as it was specifically designed to supplement Buckland's *Text-book*, with a historical discussion of the sources of law, constitutional developments and legal procedure. For even more detailed information about sources, Leopold Wenger's monumental *Die Quellen des Römischen Rechts*, Österreichische Akademie der Wissenschaften, 1953, should be consulted. The activities of the legal profession and the different kinds of legal literature which it produced are treated by Fritz Schulz in his fundamental *History of Roman Legal Science*, Oxford, 1946, rep. 1954, while the careers and social background of the individual jurists are described by Wolfgang Kunkel in *Herkunft und Soziale Stellung der Römischen Juristen*, Weimar, 1952. Earlier general works on Roman legal history have not, however, been superseded and much useful information can still be found in H. J. Roby's *Introduction to the Study of Justinian's Digest*, Cambridge, 1886, and in Paul Krüger's *Geschichte der Quellen und Litteratur des Römischen Rechts*, 2nd ed. 1912. The Danish

scholar, C. W. Westrup, has published an interesting series of sociological studies of the Patriarchal Joint Family under the title *Introduction to Early Roman Law*, Copenhagen–London, 5 vols., 1934–1954. The earlier volumes of this uncompleted work are devoted to the house community with its common cult and property and the notion of *patria potestas*, while the later volumes deal with sources and methods. In a short study, *Forms of Roman Legislation*, Oxford, 1956, David Daube applies the technique of form criticism, developed mainly by biblical scholars, to certain characteristic forms in which rules are expressed, seeking the original setting in life of each.

Among systematic accounts of the substantive law, the most substantial work in English in the last 30 years has been Fritz Schulz's *Classical Roman Law*, Oxford, 1951. This is a lively statement of the private law during the period from Augustus to Diocletian, written with authority by an author who held strong personal views. Each section is followed by an extremely full bibliography. A good recent treatment in French is R. Monier's *Manuel élémentaire de Droit Romain* in two volumes, (I) History, Persons, Real Rights, Succession, 6th ed. 1947; (II) Obligations, 4th ed. 1948. The most up-to-date general treatise is Max Kaser's *Das Römische Privatrecht*, (I) Early, Preclassical and Classical Law, 1955; (II) Post-classical developments, 1959 (Handbuch der Altertumswissenschaft, x. iii. 3). For the law of procedure, an English translation of L. Wenger's *Institutionen*, to which frequent reference is made in the *Text-book*, has been published as *Institutes of the Roman Law of Civil Procedure*, New York, 1940. It contains the author's latest views and references to the more recent literature.

Such dogmatic statements of the law as a whole must be based on detailed studies of particular parts, many of which appear in periodicals published in different countries. The most important of these are the following:

Belgium. *Revue internationale des droits de l'antiquité*, 3rd ser. 1954–

France. *Revue historique de droit français et étranger*, 4th ser. 1922–

Germany. *Zeitschrift der Savigny Stiftung für Rechtsgeschichte, Romanistische Abteilung* (General Index to vols. 1–50, 1932), 1880–

Italy. *Archivio Giuridico*, 1868–

Bullettino dell'istituto di diritto romano, 1888–

IURA—Rivista internazionale di diritto romano e antico, 1950–

Labeo—Rassegna di diritto romano, 1955–

Studia et Documenta Historiae et Juris, 1935–

Netherlands. *Tijdschrift voor Rechtsgeschiedenis* (*Revue d'Histoire du droit*) (General Index to vols. 1–25, 1957), 1918–

United States. *Seminar* (Annual extraordinary number of *The Jurist*), 1943–1956.

A comprehensive index to the mass of periodical literature is now provided by the *Collectio Bibliographica operum ad jus romanum pertinentium* of L. Caes and R. Henrion, Brussels, which covers work published from 1800 to the present day and is divided into three series: (I) *Opera edita in periodicis Miscellaneis Encyclopaediisque*, 12 vols. (1949–1962); (II) *Theses* (1. *Theses Galliae* (1959); 2. *Theses Germaniae* (1885–1958) (1960)); (III) *Opera praeter theses separatim vel etiam conjunctim edita* (no volumes yet published). Works are arranged alphabetically according to the name of the author, and at the end of each volume is a subject-index giving the names of authors who have dealt with particular topics.

The annual volumes of *IURA* from 1950 onwards contain a large bibliography of all books, articles and reviews on ancient law which have appeared in the previous year. This is divided into sections, each devoted to a particular branch of law, e.g. family relations, real rights, obligations, studies of sources, papyrology, etc. Within each section the various works are cited alphabetically according to the name of the author, and each item, apart from reviews, has a short summary of the main contents together with a list of the texts discussed. Each volume has both an index of authors and an index of texts. The scholar may thus obtain a panoramic view of all the work appearing on a given topic in a certain year, or see whether a particular author has dealt with it, or find where and by whom a certain text has been recently discussed. The review *Labeo*, which appears three times a year, also contains bibliographical references arranged systematically according to subject-matter, but without any indication of contents or texts cited.

All serious study of Roman Law must ultimately be based on the texts themselves and various aids are available. Thus the *Palingenesia Iuris Civilis* of Otto Lenel, 2 vols., Leipzig, 1889, sets out the surviving fragments of the writings of the classical jurists in the order in which they appeared in the original work. It is thus possible to see the context in which a text first appeared, and how the compilers of the Digest changed its meaning by placing it in a different context, as well as to judge the total surviving work of a particular jurist. Detailed exegesis requires precise information about the uses of individual words and to that end the Savigny Stiftung began the *Vocabularium Jurisprudentiae Romanae*, Berlin, 1903– which cites under each word all the juristic texts in which it appears, arranged according to its different uses. The Digest texts are cited according to page and line in Mommsen's two-volume edition of the Digest, Berlin, 1880. The work, which is still proceeding, so far covers the letters A to G and R to Z inclusive (vols. I, II and V), as well as certain

parts between H and N. For words which have not yet been covered by the *Vocabularium*, Heumann–Seckel, *Handlexicon zu den Quellen des römischen Rechts*, 9th ed. Jena, 1907, should be used. The *Thesaurus Linguae Latinae*, itself incomplete, also includes juristic texts. Words appearing in Gaius' Institutes are listed in P. Zanzucchi's *Vocabolario delle Istituzioni di Gaio*, Milan, 1910. The words used in the imperial constitutions contained in Justinian's Code are set out in Robert Mayr's *Vocabularium Codicis Justiniani*, Prague, part I (Latin words), 1923, part II (Greek words), 1925, with references to the constitution in which they appear. The language of Justinian's Institutes is covered by the *Vocabularium Institutionum Iustiniani Augusti*, of Rodolfo Ambrosino, Milan, 1942, who distinguishes between terms derived from Gaius and those introduced by the compilers. Finally, Ernst Levy's *Ergänzungsindex zu Ius und Leges*, Weimar, 1930, provides a guide to the vocabulary and proper names found in the miscellaneous and fragmentary post-classical works which have survived apart from the *Corpus Iuris*, such as the *Collatio legum mosaicarum et romanarum*, the *Interpretationes* to Paul's Sentences and to the Theodosian Code, The Edict of Theoderic etc.

In the last half century much of the textual study of juristic texts has been devoted to the discovery and identification of interpolations in the classical writings. In this respect, the *Index Interpolationum quae in Iustiniani Digestis inesse dicuntur*, edited by E. Levy and E. Rabel (vol. I and Supplement (books 1–20), 1929; vol. II (books 21–35), 1931; vol. III (books 36–50), 1935) is invaluable. This work lists, text by text in the order of the Digest, the various passages which had been declared to be interpolated up to the publication of each volume. The index is uncritical and many of the passages condemned as non-classical in the early enthusiasm for interpolation-hunting have since had their classical character vindicated. One of the main criteria for recognising interpolations is philological and certain words and phrases have been held to be signs of interpolations. A guide to such words is the *Indice delle Parole, Frasi e construtti ritenuti indizio di interpolazione nei testi giuridici romani*, by A. Guarneri Citati, Milan, 1927, Supplementum I in *Studi Riccobono*, I (1934), 701 *sqq.*, Supplementum II in *Festschrift Koschaker*, I (1939), 117 *sqq.* For the pre-Justinian sources, E. Volterra's "Indice delle glosse, delle interpolazioni...nelle fonti pregiustinianee occidentali", in *Rivista di storia del diritto italiano*, 8, 1935, 9, 1936, provides a useful guide.

The extreme interpolationist argument that the Digest expresses a modernised oriental law quite different in its guiding notions from classical law is best stated by E. Albertario in his *Introduzione Storica allo Studio del Diritto Romano Giustinianeo*, Milan, 1935. Buckland replied in detail to this work, with an evaluation of the various criteria by which the

existence of interpolation is proved, in "Interpolations in the Digest: A criticism of criticism", *Harvard Law Rev.*, 54, 1941, 1273–1310.

The best translation of the Digest into English is *The Digest of Justinian* by C. H. Munro, 2 vols., Cambridge, 1909, but this only covers books 1–15 (the last two books were completed by Buckland after Monro's death). There is an English version of the whole Corpus Juris by S. P. Scott, *The Civil Law*, Cincinnati, 1932. This work contains a number of mistakes which make it unreliable but is useful if used with caution. Certain titles of the Digest have been given separate editions with translations. Recent examples include: H. J. Jolowicz, D. 47. 2. *De Furtis*, Cambridge, 1940; F. H. Lawson, *Negligence in the Civil Law* (D. 9. 2. De Lege Aquilia), Oxford, 1950. F. de Zulueta's *Roman Law of Sale*, Oxford, 1945, is a useful selection of texts with translation and commentary. *The Theodosian Code and Novels and the Sirmondian Constitutions* have been translated with Commentary, Glossary and Bibliography, by Clyde Pharr, Princeton, 1952. The *Institutes of Gaius* have been given a most useful students' edition by F. de Zulueta (Oxford, (I) Text and Translation, 1946; (II) Commentary, 1953), who takes full account of the Antinoite fragments, published in 1933, which are the main new source of Roman Law to be discovered since the second edition of this Text-book and which have required the main alterations to the text.

Many *leges*, senatorial decrees, magisterial edicts and imperial enactments, taken partly from the collections of legal sources of Bruns, of Girard (see *List of Books cited*) and of Riccobono (*Fontes Iuris Romani Anteiustiniani*, 3 vols., Florence, 1940–1943) and partly from general collections of inscriptions and papyri and quotations from classical authors, have been translated with Commentary, Glossary and Index by A. C. Johnson, P. R. Coleman-Norton and F. C. Bourne under the title *Ancient Roman Statutes*, Austin, Texas, 1961.

Finally it may be useful to give a list of Buckland's own writings on Roman Law published since 1932:

(1) *Aestimatum*, *L.Q.R.* 1932, 495–505.

(2) *Culpa* and *bona fides* in the *actio ex empto*, *L.Q.R.* 1932, 217–29.

(3) *Exceptio rei residuae* (G. 4. 112), *R.H.* 1932, 301–3.

(4) Marcian, *Studi Riccobono*, I, 1934 (offprint, 1932), 275–83.

(5) Les limites de l'obligation du *fideiussor*, *R.H.* 1933, 116–29.

(6) *Casus* and Frustration in Roman and Common Law, *Harvard Law Rev.* 46, 1933, 1281–1300.

(7) Review of S. P. Scott, The Civil Law, in *Tulane Law Rev.* 1933, 627–32.

(8) L'*Edictum Provinciale*, *R.H.* 1934, 81–96.

(9) The duty to take care, *L.Q.R.* 1935, 637–49.

(10) *Finium Regundorum*, *R.H.* 1936, 741–51.

(11) Reflections suggested by the new fragments of Gaius, *Juridical Rev.* 1936, 339–64.

(12) Classical Roman Law, *Cambridge Ancient History*, XI, 1936, 806–44.

(13) Gaius and the *Liber Singularis* again, *L.Q.R.* 1937, 508–18.

(14) Civil proceedings against Ex-Magistrates in the Republic, *J.R.S.* 1937, 37–47.

(15) Note on the vocabulary of Gaius, *L.Q.R.* 1938, 182–3.

(16) Les sources du droit romain et du common law, *Recueil Lambert*, II, 1938, 18–31.

(17) D. 12. 4. 16, *Tijdschrift*, 1938, 359–71.

(18) *Superficies* et *lex contractus*, *R.H.* 1938, 666–71.

(19) Praetor and Chancellor, *Tulane Law Rev.* 1939, 163–77.

(20) Ritual acts and words in Roman law, *Festschrift Koschaker I*, 1939, 16–26.

(21) *Per liberam personam nihil adquiri posse*, *Bull. Acad. roy. de Belgique, Cl. Lett.* 1939, 188–210.

(22) Cumulation in the *Actio Doli*, *L.Q.R.* 1939, 222–9.

(23) Interpolations in the Digest, *Harvard Law Rev.* 54, 1941, 1273–1310.

(24) Principal and *Fideiussor*. *Consumptio litis*, *Juridical Rev.* 1941, 1–17.

(25) *Contrectatio*, *L.Q.R.* 1941, 467–74.

(26) Alienation and Manumission by one of *Consortes* (Gaius, 3. 154a), *L.Q.R.* 1942, 483–6.

(27) Cause of Action: English and Roman. *Seminar*, 1943, 3–10.

(28) Gaius 1. 166, "*Tutela parentis manumissoris*", *J.R.S.* 1943, 11–14.

(29) The *Interpretationes* to *Pauli Sententiae* and the *Codex Theodosianus*, *L.Q.R.* 1944, 361–5.

(30) The nature of contractual obligation, *Cambridge Law J.* 1944, 247–51.

(31) *Pauli Sententiae* and the Compilers of the Digest, *L.Q.R.* 1945, 34–48.

LIST OF BOOKS AND PERIODICALS CITED BY A MUCH ABBREVIATED TITLE OR REQUIRING AN INDICATION OF THE EDITION USED

Accarias, *Précis*: Précis de Droit Romain, C. Accarias, 4me Éd.
Affolter, *Inst.*: Das Römische Institutionensystem, F. X. Affolter.
Arangio-Ruiz, *Ist.*: Istituzioni di Diritto Romano, 2da Ed.
Arch. f. c. Pr.: Archiv für civilistische Praxis.
Bertolini, *Obblig.*: Le Obbligazioni, Parte Speciale, G. Bertolini.
Beseler, *Beitr.*: Beiträge zur Kritik der Römischen Rechtsquellen, Gerh. Beseler.
Bethmann-Hollweg, *C.P.*: Der Römische Civilprozess, M. A. von Bethmann-Hollweg
Betti, *Ist.*: Corso di Istituzione di Diritto Romano, 1, E. Betti.
Bonfante, *Corso*: Corso di Diritto Romano, P. Bonfante.
—— *Scr. Giur.*: Scritti Giuridici Varii, P. Bonfante.
Brugi, *Ist.*: Istituzioni di Diritto Romano, P. Brugi, 3za Ed.
Bruns: Fontes Iuris Romani, ed. C. Bruns, Ed. 7a, ed. O. Gradenwitz.
Buckland, *Slavery*: Roman Law of Slavery, W. W. Buckland.
Bull.: Bullettino dell' Istituto di Diritto Romano.
Clark, *R.P.L.*: Roman Private Law, E. C. Clark.
Collinet, *Études Hist.*: Études historiques sur le droit de Justinien, P. Collinet.
Collinet-Giffard, *Précis*: Précis de Droit Romain, P. Collinet et A. Giffard, 2me Éd.
Cornil, *A.D.R.*: Ancien Droit Romain, G. Cornil.
—— *Dr.R.*: Droit Romain: Aperçu historique sommaire, G. Cornil.
Costa, *Profilo Storico*: Profilo storico del Processo Civile Romano, E. Costa.
—— *Le Acque*: Le Acque nel Diritto Romano, E. Costa.
—— *Storia*: Storia del Diritto Romano Privato, E. Costa, 2da Ed.
Cuq, *Man.*: Manuel des Institutions juridiques des Romains, E. Cuq, 2me Éd.
Daremberg et Saglio: Dictionnaire des Antiquités grecques et romaines, sous la direction de Ch. Daremberg et E. Saglio.
D.P.R.: Le Droit Public Romain, par Th. Mommsen, traduit par P. F. Girard.
Esmein, *Mél.*: Mélanges d'histoire de droit, A. Esmein.
Ét. Girard: Études d'histoire juridique, offertes à P. F. Girard, par ses Élèves.
Fitting, *Alter und Folge*: Alter und Folge der Schriften Römischer Juristen, von Hadrian bis Alexander, H. Fitting, 2te Bearbeitung.
Gibbon (Bury): Decline and Fall of the Roman Empire, E. Gibbon, ed. J. B. Bury.
Girard, *Man.*: Manuel élémentaire de Droit Romain, P. F. Girard, 8me Éd., ed. F. Senn.
—— *Mélanges*: Mélanges de Droit Romain, P. F. Girard.
—— *Org. Jud.*: L'Organisation judiciaire des Romains, P. F. Girard.
—— *Textes*: Textes de Droit Romain, P. F. Girard, 5me Éd.
Gött. Gel. Anzeigen: Göttingische gelehrte Anzeigen.
Heumann-Seckel: Heumanns Handlexicon zu den Quellen des Römischen Rechts, 9te Aufl., bearbeitet von E. Seckel.
Huschke: Jurisprudentia Anteiustiniana, P. E. Huschke, Ed. 5a.
Huvelin, *Furtum*: Études sur le Furtum, 1, P. Huvelin.
Ihering, *Geist*: Geist des Römischen Rechts, R. von Ihering.
Jobbé-Duval, *Proc. Civ.*: Études sur l'histoire de la Procédure, E. Jobbé-Duval.
Jörs, *Röm. Rechtsw.*: Römische Rechtswissenschaft der Republik, P. Jörs.
—— *R.R.*: Römisches Recht, P. Jörs.
J.R.S.: Journal of Roman Studies.
Karlowa, *C.P.*: Der Römische Civilprozess, O. Karlowa.
—— *R.Rg.*: Römische Rechtsgeschichte, O. Karlowa.
Keller-Wach, *C.P.*: Der Römische Civilprozess, F. L. von Keller, 6te Aufl., ed. A. Wach.

Kipp: Geschichte der Quellen: Th. Kipp, 4te Aufl.
Krueger, *R.Rq.*: Geschichte der Quellen und Litteratur des Römischen Rechts, P. Krueger, 2te Aufl.
Krv.: Kritische Vierteljahresschrift.
Kuebler: Geschichte des Römischen Rechts, P. Kuebler.
Lenel, *E.P.*: Das Edictum Perpetuum, O. Lenel, 3te Aufl.
—— *Paling.*: Palingenesia Iuris Civilis, O. Lenel.
L.Q.R.: Law Quarterly Review.
Marquardt, *Privatl.*: Privatleben der Römer, J. Marquardt, 2te Aufl.
Mélanges Appleton, Cornil, Fournier, Gérardin, Girard, etc.: Collections of Essays published in honour of the writers named.
Mitteis, *R.Pr.*: Römisches Privatrecht bis auf die Zeit Diocletians, L. Mitteis.
—— *Reichsr. und Volksr.*: Reichsrecht und Volksrecht in den Östlichen Provinzen, L. Mitteis.
Mommsen, *Ges. Schr.*: Gesammelte Schriften, Th. Mommsen.
—— *Staatsr.*: Römisches Staatsrecht, Th. Mommsen, 3te Aufl.
—— *Strafr.*: Römisches Strafrecht, Th. Mommsen.
Moyle, *Instt. Iust.*: Imperatoris Iustiniani Institutionum Libri Quattuor, with commentary, J. B. Moyle, 5th Ed.
—— *Sale*: Contract of Sale in the Civil Law, J. B. Moyle.
N.R.H.: Nouvelle Revue Historique de Droit Français et Étranger.
Partsch, *Neg. Gest.*: Studien zur Negotiorum Gestio, 1, J. Partsch.
—— *Schriftformel*: Die Schriftformel im Römischen Provinzialprozesse, J. Partsch.
Perozzi, *Ist.*: Istituzioni di Diritto Romano, S. Perozzi, 2da Ed.
Puchta, *Inst.*: Cursus der Institutionen, G. F. Puchta, 5te Aufl.
P.W.: Paulys Real-Encyclopädie der Classischen Altertumswissenschaft, Neue Bearbeitung, ed. G. Wissowa.
Revue Gén.: Revue générale du droit, de la législation et de la jurisprudence.
R.H.: Continuation of *N.R.H.*, from 1922.
Riccobono, *Dal Dir. Rom.*: Dal Diritto Romano Classico al Diritto Moderno (Annali del Seminario Giuridico della R. Università di Palermo, iv), S. Riccobono.
Riv. It. p. l. Sc. Giu.: Rivista Italiana per le Scienze Giuridiche.
Roby, *Introd.*: Introduction to the study of Justinian's Digest, H. J. Roby.
—— *R.P.L.*: Roman Private Law in the Times of Cicero and of the Antonines, H. J. Roby.
Savigny, *System*: System des heutigen Römischen Rechts, F. K. von Savigny.
Schulz, *Einführung*: Einführung in das Studium der Digesten, F. Schulz.
Siber, *R.R.*: Römisches Recht, H. Siber.
S.M.W.: Institutionen des Römischen Rechts, R. Sohm, 17te Aufl., bearbeitet von L. Mitteis, herausgegeben von L. Wenger.
Studi, Bonfante, Brugi, Fadda, Perozzi: Collections of Essays published in honour of the writers named.
Vangerow, *Pand.*: Lehrbuch der Pandekten, K. A. von Vangerow, 7te Aufl.
de Visscher, *Ét.*: Études de Droit Romain, F. de Visscher.
Wenger, *Zpr.*: Institutionen des Römischen Zivilprozessrechts, I. Wenger.
van Wetter, *Pand.*: Pandectes, P. van Wetter.
Willems, *D.P.*: Droit Public Romain, P. Willems, 7me Éd.
Windscheid, *Lehrb.*: Lehrbuch des Pandektenrechts, B. Windscheid, 9te Aufl.
Z.S.S.: Zeitschrift der Savigny-Stiftung, Romanistisches Abteilung.

(References for Roman Juristic Sources are to the Berlin Stereotype edition of the Corpus Iuris Civilis, to Mommsen's edition of the Codex Theodosianus and to Girard's Textes. Any exceptions are noted at the reference.)