WEST ROMAN VULGAR LAW
THE LAW OF PROPERTY

by Ernst Levy
Professor of Law, History, and Political Science

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WEST ROMAN VULGAR LAW
THE LAW OF PROPERTY

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PREFACE

The intention of this book is to round out my studies on the law of property in West Roman Vulgar Law. The phenomenon of this vulgar law has attracted my curiosity time and again during the past twenty-five years. A kind of program was proposed in my Oslo paper on *Westen und Osten in der nachklassischen Entwicklung des römischen Rechts* (SZ 1929), and a lexicographical tool was offered in the *Ergänzungsindex zu Ius und Leges* (1930). The articles on *Paulus und der Sentenzenverfasser* (SZ 1930) and *Vulgarization of Roman Law in the Early Middle Ages* (*Medievalia et Humanistica* 1943) as well as the book *Pauli Sententiae* (1945) made an attempt to clarify a source especially relevant to an insight into the vulgar law. In a general way, the vulgar law occupied the center of discussion in my Rome paper *Zum Wesen des weströmischen Vulgarrechtes* (Atti 1933) and the Chicago paper *Reflections on the First Reception of Roman Law in Germanic States* (*Amer. Hist. Review* 1942). Special problems were treated in the articles *Vom römischen Precarium zur germanischen Landleihe* (SZ 1948) and *Zur nachklassischen in integrum restitutio* (forthcoming in SZ 1951). In the same category there are two further contributions which are so closely connected with the subject of this book that, with some modifications, they have been incorporated here: *Die nachklassische Ersitzung* (Bull. 1948) in chapter III B and *Possessory Remedies in Roman Vulgar Law* (Scritti Ferrini, Milano 1948) in chapter IV B.

The vulgarized law of the western part of the Roman Empire has hitherto met with slight, if any, attention. It has been obscured by the splendor of the classical jurisprudence. But human history is not limited to climaxes. Developments on a lower level have often had an influence hardly less profound. The vulgar law is an outstanding case in point. One cannot hope to understand fully the earliest codifications of the Germanic world or properly judge Justinian's basic attitude, unless one becomes acquainted with the main currents which molded the private law in the preceding period. And these currents were largely determined by a vulgarization of the classical system. Not everywhere, it is true, are the sources plentiful enough to make an approach to the details of a rule possible. But the principal lines of thought reveal themselves with sufficient and, in places, impressive clarity.

The present work would not have been accomplished but for the aid which came to me from many quarters. Numerous friends have

continued to send me their writings and have thus alleviated my lot in working far away from the main centres where Roman law is a matter of lively concern and cultivation. The General Library of the University of Washington and, above all, the Law Library have, by generous acquisitions, procured for me access to important books and periodicals. But in spite of all this invaluable help I have been unable to see a considerable number of publications which in an earlier stage of my life would easily have found their way to my desk. This necessitated omissions or inequalities in references and the occasional failure to use most recent editions. I hope, however, that I have not disregarded anything directly essential to my task.

Owing to my many and varied teaching obligations the progress of writing has been somewhat slow. The composition was begun in 1945 and concluded in the autumn of 1949. Later publications could not, as a rule, be taken into account. Otherwise my references are based on a selection which, I trust, will not be looked upon as arbitrary. The dates of imperial decrees of the "intervening period" have usually been given according to the *Regesten* by Seeck.

My thanks go out to all those who have helped me prepare this book. I am deeply indebted to the University of Washington for the liberal support it has given me in many ways, and to the Library of the University of Basel in Switzerland where I worked during my sabbatical year. Dr. Karl Schwarber, the director of that library, whose recent death has grieved his many friends, did everything in his power to make me feel at home in the halls of his richly equipped institution. Brigitte M. Bodenheimer, J. D., my daughter, has translated those sections of the manuscript which were written in German. My friend, Professor Solomon Katz, has read all of the typescript and made a large number of suggestions in regard to language and style. I thank them both for their unfailing assistance.

Finally, I would like to express my warmest gratitude to the American Philosophical Society which facilitated the completion of this book through repeated grants and undertook its publication.

E. L.

SEATTLE, WASHINGTON
OCTOBER 1950.

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INTRODUCTION

1. THE OBJECTIVE

Within the last hundred years Roman law has presented ever new tasks to its historians. At first it was taken for granted that the law of the classical period (from about 40 B.C. to about A.D. 240), this unique phenomenon in world legal history, could be directly read out of the excerpts of the writings which Justinian had compiled in his Digest in the years A.D. 530 to 533. In other words, it was, as a rule, believed that these excerpts were intact and unimpaired, although the immense span of three to six centuries lay between the classical writers quoted therein and their compilers. About seventy-five years ago, one began to see more clearly that not all the texts found under the name of a classical jurist were actually of classical origin. It was then supposed that Justinian had changed many passages in order to adapt them to the requirements of his time. This resulted in the assumption that the Digest contained either classical or Justinian law, an alternative hardly entitled to credence, since the period from about A.D. 240 to 530—we shall call it the intervening period—was thereby left unaccounted for. Moreover, it was frequently possible to prove directly that a given rule could not have originated with Justinian any more than with the classics. Therefore, for the last forty or fifty years, the existence of pre-Justinian interpolations has been taken into consideration. Such interpolations were proved or asserted, first with hesitation, then in an ever-increasing degree. This process went so far that according to the opinion rightly prevailing today most non-classical norms were not created but already found by Justinian. But even this modern method of approach was primarily interested in ascertaining how the classical system had developed into that of Justinian. By and large, only the starting and terminal points were considered important; that which lay between them was perfunctorily disposed of with the negative labels "postclassical" and "pre-Justinian."

With this kind of attitude, however, one could not do justice to the peculiarities of the intervening period.[1] In particular, the interval between Diocletian, the last defender of classical standards, and Justinian, who became their reviver, called for an independent appraisal,

[1] In the same way the work of the "commentators" of the thirteenth and fourteenth centuries was underestimated as long as they were merely considered "post-glossators."

the more so since this epoch experienced not only fundamental political changes but also revolutionary transformations in the economic, social, cultural, and religious conditions of life. Accordingly, some few attempts were made to trace the postclassical development, either by way of programmatic survey or in investigations devoted to specific problems. A comprehensive analysis, however, is still wanting. Likewise wanting is a systematic effort to construct the bridges which connect the intervening period, not only with the preceding, i.e. the classical period, but also with the subsequent developments in the East and the West. This book is designed to serve both of these purposes. In order to replace the negative characterization with a positive one, it calls its subject the "vulgar law."[2] But not all vulgar law is postclassical; even less is every postclassical innovation of vulgar law character. The term, therefore, calls for a more precise definition.

The expression "Roman vulgar law" has—one might almost say, significantly—not been coined by a Romanist. It was first used by Heinrich Brunner in 1880 when he undertook to investigate the "legal history of the Roman and Germanic document."[3] It was then taken over into Roman legal science by Ludwig Mitteis who distinguished it from peregrine law, to which his own research was devoted.[4] According to Brunner, vulgar law is the law applied in the practice of the Roman provincials of that period, presenting itself as an evolution, or, if one prefers, a degeneration of pure Roman law, and contrary to the theory of the written law. This statement contains essential elements. In order to determine the nature of the vulgar law more exactly, it will be considered from three different points of view: its relation to statute law, to peregrine law, and to classicizing law.

2. VULGAR LAW AND STATUTE LAW

Vulgar law grows inordinately, out of the practice, at times assisted by a doctrine which consciously or unconsciously misinterprets the old sources. So it comes to be contrasted with the official law such as is laid down during this period by the emperors in their *constitutiones*. The relation between these two sets of rules is a multiple one. As a source of law the imperial decrees were frequently limited in their applicability, until their compass became general through incorporation in a codification.[5] *Rescripta* and

[2] Mommsen's occasional term "Franco-Roman" law (*Schr.* II 371) would seem neither distinctive nor broad enough.

[3] *Urk.* 113, 139. See also his retrospective remark in *Forsch.* 607 n. 1 and the excellent exposition in *Rechtsgesch.* I 377 f.

[4] *Reichsr.* 3 ff.

[5] Such as the Codex Theodosianus or the Leges Barbarorum.

decreta were to apply only to the case in which they were rendered.[6] Other statutes were designed to be in force solely in one province or in a smaller district or within a definite group of persons.[7] These facts already account for a large range left untouched by the legislation. To be sure, these limitations did not prevent those *constitutiones* from becoming *exempla* which were followed in similar cases.[8] But in such a situation the judges were supposed to examine whether and how far the analogy seemed appropriate. This is one of the reasons why, throughout the intervening period, time and again the emperors saw fit to warn the judges to apply only "rescripta consentanea legibus publicis" (CT 1.2.3 [317]) and not "rescripta contra ius elicita" (CJ 1.19.7 [426]) or "generali iuri vel utilitati publicae adversa" (CJ 1.22.6 [491?]). For "contra ius rescripta non valeant, quocumque modo fuerint inpetrata. Quod enim publica iura perscribunt, magis sequi iudices debent" (CT 1.2.2 [315]). The same careful examination was no doubt in order where a party petitioned a court to recognize a decree not released for his province or not covering the group to which the party belonged.[9] The *ius,* however, called upon to serve as the test, was in many instances not statutory law, but law based on tradition, judicial precedents or notarial practice.[10] Ultimately, in spite of such impracticable rulings as CT 1.2.3. i.f. (317), NMc 4 pr. (454), or CJ 1.14.11 (474), any statute was apt to require interpretation on the part of the judge. Nothing in this respect is more revealing than the thought that the authority of an imperial decree was deemed to be increasing the longer it stood its ground and proved

[6] So expressly the "Statute of Citations" in CJ 1.14.2 and 3.1 (426).

[7] Edoardo Volterra, *Diritto romano e diritti orientali* (Bologna, Zanichelli, 1937) 278 ff. and in *Studi Besta* (Milano, Giuffrè, 1938) I 449 f.; Giuseppe Ignazio Luzzatto, *Scritti Ferrini* (Pavia) 263 ff. The addressee of a *constitutio* alone is, of course, no reliable basis for an assumption of the kind. See Mommsen, *Schr.* II 388 ff., Seeck 12 ff.

[8] See, e.g., CT 1.2.11 (398): "Rescripta . . . *in futurum* iis tantum negotiis opitulentur, quibus effusa docebuntur."

[9] For Egypt see, e.g., BGU 19 = Mitteis *Chr.* 85 (135); on it, among others, Mommsen, *Schr.* I 462 f., H. F. Jolowicz, *Jour. Soc. Public Teachers of Law* (1937) 8. Such cases were certainly not confined to the early imperial period.

[10] Evidence is abundant for Egypt (Taubenschlag, *Law* 28 ff., 33 ff.), but by no means limited to that province (Jolowicz 13 ff.). Illuminating for the kind of pleadings pro and con the applicability of an old imperial enactment is the example offered by P Lond. inv. no. 2565 (*ca.* A.D. 250). On this document, edited by Skeat and Wegener in *Jour. Egyptian Archaeol.* 21 (1935) 224 ff., see Jolowicz 9 f., Leopold Wenger, *Actes du Ve Congrès international de papyrologie* (at *Oxford*) (1938) 537 ff., Fritz Frhr. von Schwind, *Zur Frage der Publikation im römischen Recht* (Münchener Beiträge zur Papyrusforschung 31 [München, Beck, 1940] 152 f.

its worth in practice: ἡ τῶν νόμων ἰσχὺς προειόντος τοῦ χρόνου μᾶλλον αὔξεται (P. Lond. inv. no. 2565 lin. 104f.)[11]

But it is not only for these reasons that the compass for non-statutory law remained impressively wide. Even in their *leges generales* the emperors preferred to direct their attention to the solution of a single concrete problem. When, in the preamble to such *leges,* they criticize the previous handling of certain fact situations, they often bear direct testimony to the existence of a law which had grown and spread *extra legem.*[12] Beyond that, in order to make themselves understood, they could not help making use of notions which, regardless of their origin, had grown up among the people or in the legal profession. This mode of approach had nothing to do with the subject matter or purpose of the respective *lex.* It was the natural medium of expression of its authors, like the lay language they constantly used. Without realizing it, they spoke in terms which a classical jurist would have avoided and yet which no legislator had inaugurated, i.e. in terms of the vulgar law. This unintentional phraseology makes the loquacious statutes of the Dominate one of the most important sources of information of the non-statutory law. But in their utilization some caution is in order. The norm created by a *lex generalis* may be an indication of some preexisting vulgar law which now received the stamp of official recognition;[13] such a norm might also become the basis for the development of new vulgar law; but its own vulgar law character was terminated through the official sanction. Direct clues to the vulgar law are, however, furnished by incidental remarks (*obiter dicta*) and concepts used as self-explanatory. They, in fact, make up the largest and, from the point of view of legal history, often most valuable part of the *constitutiones,* which, generally speaking, yield a great deal more, if one tries to read between the lines.

Intentional reforms of the late Roman emperors and their top civil servants remained within relatively narrow limits, as far as private law was concerned. That must be kept in mind for a proper appraisal of the interaction between statutory and vulgar law. This interaction was the more lasting and pronounced as there was a complete lack, during these centuries, of an authoritative theory[14]

[11] Arangio-Ruiz, *Parerga* (Napoli, Jovene, 1945) 86 f. He also refers to P. Columbia Inv. no. 181 and 182 (*Negotia* no. 101) pag. III lin. 15 (of 340).

[12] Mitteis, *Reichsr.* 12.

[13] In this way a rather large number of decrees referred to in this book are to be understood.

[14] Its growth was certainly discouraged by the number and nature of the statutes themselves which, with contradictory provisions, often followed each other in rapid succession: "iuris . . . scientiam . . . repugnantium sibi legum abolevere discidia" (Ammian. Marc. 30.4.11). Moreover these statutes were

which could have reconciled both forms of law upon a higher plane. Taking only one of them into consideration, one gets a most imperfect picture. The recent proposal to characterize the intervening period as the bureaucratic stage of Roman jurisprudence [15] overlooks the vulgar law and has for this reason alone [16] little to recommend it.

3. VULGAR LAW AND PEREGRINE LAW

"Vulgar law and peregrine law [17] do not coincide. The first is degenerate Roman law, the second is not Roman law at all." This was Mitteis' definition (p. 5). For it was his main purpose to set forth the alien, particularly Greek, ideas which were contrary to the "empire law." Consequently, he paid less attention to those non-classical norms which could not be ethnologically determined. That this approach was and continues to be fruitful, is obvious. But it is not the approach of the present book. Problems of "reception" or parallelism will in the following be examined as far as it is feasible without too much digression from the main topic. The chief purpose of this discussion is, however, to ascertain what the private law applied in the intervening period looked like, without constant regard to its source. This task has hitherto been neglected.[18] And yet it may yield safe results more frequently than questions of origin, which often cannot be solved as definitely as many assume. Mitteis [19] already warned against hasty conclusions, pointing out that "the peregrine law, while probably rarely preserved in its purity, is often found in a form modified by the empire law." In the latter case, "out of the mingling of Roman and provincial ele-

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sometimes spurned by the very men whose duty it would have been to administer them: "ecce quid valeant statuta legum . . ., quae illi spernunt maxime qui ministrant" (Salvian, De gubernatione Dei 7.21.93).

[15] Schulz in his generally outstanding *History* 262.

[16] See, in addition, Arangio-Ruiz, *Doxa* (Roma, Tuminelli, 1948) 1, 108, Adolf Berger, *Classical Jour.* 43 (1948) 439 f.

[17] This term is used to indicate what Mitteis called *Volksrecht*. Signifying the national law of any non-Roman community it is to be distinguished from the nation-wide official law (*Reichsrecht,* empire law) as well as from positive rules issued by the authorities for a more or less limited area within the empire ("provincial law" in the phrase suggested by Ernst Schönbauer, *SZ* 57 [1937] 346 ff.).

[18] The objective of Biscardi, *Studi sulla legislazione del Basso Impero* is related, but more limited. The book, which, owing to war conditions, did not reach me until early in 1948, arrives in a number of places at conclusions similar to those presented below in Chapter I. Discussing, however, only legislation and only such as was issued by Roman emperors, it does not intend to approach the broad problem of the vulgar law.

[19] *Reichsr.* 9 f., 6; see also 202 f. In this respect his book ends on a somewhat resigned note (552). *Cf.* also *Privatrecht* I 17 f. for the Principate.

ments a third law is formed, which, because of its Roman elements, may be characterized as a type of the vulgar law." [20]

Greater clarity may, however, be obtained if the factor of provenience is left aside in defining the vulgar law and if that factor is considered only in order to determine the point on which this law ceases to be Roman altogether.[21] Viewed in this way, vulgar law represents the generic term of which the peregrine law is a subdivision. It comprises all those rules or concepts appearing on Roman soil, especially in the intervening period, which differ from the classical system and yet cannot be traced to some positive enactment. It does not matter whether these provisions and ideas originated in peregrine usage, whether they emanated from statutes limited to provinces, districts, or groups, or whether they arose uninfluenced by non-Roman thought. The existence of the last-named category cannot be seriously disputed. But this category has been obscured through an overemphasis on Hellenistic influences, and it is completely overlooked where the postclassical era is characterized as the Roman-Greek or Roman-Oriental period. It is therefore one of the secondary purposes of this discussion to direct attention to the great number of transformations which can easily be explained from the inner disintegration of the traditional modes of thinking.

The forces which were here operative sprang from the perpetual quest for simplification and popularization of the law. They were nourished by the instinctive aversion of the common man and of the inadequately trained legal practitioner out in the country, to the ever more ingenious and hence ever more intricate system of the Roman city jurists, which could not but seem alien and exclusive even to those who were not new citizens. Forces of this kind had always been at work.[22] But they had been held down and prevented from spreading freely so long as a creative jurisprudence stood guard over the orderly growth of the accepted legal institutions. When in the third century the emperors felt to an increasing degree compelled to insist on the observation of the rules of the Roman private law, the reason for this must be sought not only in the grant of citizenship to the provincials, but also in the relaxation of legal discipline which resulted from the political agony of the State and

[20] Pietro de Francisci (*Arch. giur.* 93 [1925] 200) proposed to limit the use of the phrase "vulgar law" to this one group.

[21] See *infra* p. 12.

[22] Examples of customs practiced in Western provinces prior to and during classical times are found in Mitteis 102 ff., 284 ff. and *passim*. See also Taubenschlag, *Mélanges Cornil* II (Sirey, Paris, 1926) 499 ff. For Spain, in particular, see the very commendable discussion of Torres I 228 ff.

the dying out of authoritative jurists.[23] This imperial policy, however, came to an abrupt end with the abdication of Diocletian. The long pent-up energies now broke forth immediately through the disintegrating dams. Thus a different Roman law began to unfold which, unconcerned with the traditional niceties, was governed by social and economic rather than legal considerations, a law averse to strict concepts and neither able nor inclined to live up to the standards of classical jurisprudence with respect to artistic elaboration or logical construction. It had grown up from the practice in day-to-day affairs or from court usage, as they may first have appeared at some point within the vast empire, whether in a province or in Italy, or in the very city of Rome.[24] There are even instances showing that the same basic idea independently developed in far distant regions.[25] In any event, the considerable uniformity with which certain notions occur from the fourth century, is strong evidence of the progress that vulgar tendencies must have made long before this time.[26] From the practice, the vulgar law crept unnoticed into legislation, and it won over those jurists who wrote for the use of the practitioners or for purposes of elementary training. These authors, whom we know especially from the later versions of Pauli Sententiae, from the Epitome Gai and the Interpretatio preserved in the Breviarium, naturally came to serve the interests of the new movement. Their aim was simplification and popularization of the law, but misconception and distortion of the models were unavoidable, and for us informative, corollaries.

[23] See also Arangio-Ruiz, *Storia* 340 f.

[24] That most of the preserved documentary material originates in the East, and predominantly in Egypt, ought not to confuse us. For the scarcity of evidence of local legal growths in Spain, see, e.g., Rafael Altamira in *The Continental Legal History Series* I (1912) 592 ff.; *cf.* Rostovtzeff 173 f.

[25] Mitteis 264 points out that rudiments of a *donatio propter nuptias* seem to have been familiar to all parts of the empire. But, naturally, the detail differed considerably, especially between the West and the East (289 f., 295 f., 298 ff., 306 f.).

[26] As to deviations from the official law which we meet in extant legal transactions of Romans of the third century see, e.g., Arangio-Ruiz, nos. 11, 14, 51, 61, 94, 95, 98, 138, 155; of these nos. 94 and 95 come from Rome. For defective testamentary nominations of a *tutor* or *curator* (Pap. D. 26.2.26 pr., CJ 2.18.6 [207]) see Mitteis 200. The *leges metallis dictae* offer examples for Spain: *infra* p. 112 f. Information about Egypt can be gained from the rich material presented by Taubenschlag in *Studi Bonfante* I 382 ff., 402 ff., for the time before as well as after the *constitutio Antoniniana*. Illustrations for a non-classical terminology employed by laymen or petty practitioners are easily found in inscriptions or documents of the classical period; *cf.* recently H. J. Wolff, *Seminar* 3 (1945), 24, 36 f.; Bruck, *ibid.* 6 (1948), 14.

4. VULGAR LAW AND CLASSICIZING LAW

Altogether different was the work of those men who set themselves the task of interpreting the great works of jurisprudence and the *constitutiones* by means of scholarly methods. Their minds and predilections remained attached to the past although they could not, of course, fail to refer to legislative innovations and to make additions of their own which they deemed necessary in the interest of comprehensive classification and greater clarification. These commentators, as a rule, taught in the law schools among which in the third and fourth centuries the Western schools held the leadership and later the Eastern schools came to prevail.[27] The tendencies of the interpretative activities of these scholars necessarily underwent certain changes in the course of time. Some generations or groups active during the long intervening period were no doubt more responsible for those pre-Justinian interpolations than others. To fix the share in these achievements in a more precise way numerous and valuable attempts have been made. A treatise on the vulgar law, however, is not the place to take sides. What must be emphasized here is the fact that the efforts of the learned professors of Berytus and Constantinople culminated in Justinian's renaissance of the classical law. To concern themselves with the heterogeneous vulgar law they considered beneath their dignity.[28] They may have treated the representatives of the vulgar law with the same contempt with which, hundreds of years later, the Glossators talked about the Lombardists[29] and, still later, the Humanists chided the Commentators.[30] The contrast between the classicizing and the vulgar law appears to have been of greater consequence than any other antagonism in the developments of the intervening period.[31]

What has been stated here does not seem to be in accord with the usual assumption that the private law of the Principate continued to be applied, except where it contravened subsequent legislation. But the classical wine was in reality, where available at all,[32] adulterated with an ample dash of vulgar water. This state-

[27] *SZ* 49 (1929) 233 f. *Cf.* Volterra, *Cambridge Law Jour.* 10 (1949) 196 ff.

[28] See, e.g., *infra* p. 178 f., 273, also 149 f., 155.

[29] See, e.g., Frederic William Maitland, *English Law and the Renaissance* (Cambridge, University Press, 1901) 25.

[30] Among recent studies see Paul Koschaker, *Europa und das römische Recht* (München, Biederstein, 1947) 109 f., Jolowicz, *Law Quarterly Review* 65 (1949) 324.

[31] *Infra* p. 12 ff.

[32] It is worth noting that out of the hundreds of extant enactments of the intervening period only three (CT 9.43.1 [321]; 4.4.3 [396]; CJ 6.61.5 [473]) seem to refer to the doctrine of an explicitly named classical jurist (Massimo

ment should not be doubted because of the fact that, during the flowering of the vulgar law, in order to help the courts find their way through the confused mass of the old texts invoked by the parties, the "Statute of Citations" (CT 1.4.3 [426]) endowed a great number of classical writings with imperial authority. We shall disregard the point that that statute, in the version of 438 preserved to us, contains obscurities and inconsistencies which must have made its application well-nigh impossible.[33] We shall also disregard the problem of how far the statute was truly heeded in the time to come.[34] Even if we limit the number of jurists, whom it elevated to the rank of legislators, to the first five named in it (Papinian, Paulus, Gaius, Ulpian, and Modestin), we must not make the mistake of assuming that their expositions were interpreted in the way they had originally been written. One took out of them what one could use, and gave it a meaning that could still be understood. How much or how little it was, can be judged by a comparison of the latest version of Pauli Sententiae, cited at the end of the Statute, with Paulus himself, of the Interpretatio with the original Sententiae, of the Epitome with Gaius. What the final outcome of all this was, is revealed to us eighty years later by the authors of the Breviarium[35] who, out of the whole jurisprudence, recognized only those meager remnants which they themselves considered worthy of inclusion in their compilation: "Sed ex his omnibus iuris consultoribus, ex Gregoriano, Hermogeniano, Gaio, Papiniano et Paulo, quae necessaria causis praesentium temporum videbantur, elegimus" (IT 1.4.3 i.f.).

5. PERIODS OF DEVELOPMENT

It has already been mentioned that, even in legal relations between Romans, the vulgar law had its inception well before the intervening period. But only from the time of Constantine did it begin to assume its real importance. This ruler truly deserves the characterization, confirmed by any new research, as a "novatoris turbatorisque priscarum legum et moris antiquitus recepti," a phrase applied to him, of course in a deprecatory sense, by his later an-

Massei, *Scritti Ferrini* [Pavia] 409 ff., 416 ff.). Consider this fact in the light of the 34 decrees (Massei 469 ff.) in which Justinian discusses opinions of those authors.

[33] Otto Gradenwitz, *SZ* 34, 274 ff., Fernand de Visscher, *Conferenze per il XIV centenario delle Pandette* (Milano, Vita e Pensiero, 1931) 70 ff., Schulz, *History* 282.

[34] See Massei 450 ff.

[35] *Cf.* Hermann H. Fitting, *Z. für Rechtsgeschichte* 11 (1873) 227 n. 13, 236 n. 34.

tagonist Julian.[36] With Constantine, the orthodox reference of the rescripts to the traditional law disappears at once. He shows himself receptive of the new tendencies, not only in his own reforms, but also in his terminology and approach which he shapes unconsciously in conformity with the popular views heretofore decried as heresies. Thus he becomes the first official exponent not only of the Greek peregrine law,[37] but of the entire vulgar law. With his reign commences that section of Roman legal history which characterizes the intervening period. This period reaches, for the Roman world in its entirety, into the sixth century. In the West, in particular, the vulgar law maintains itself much beyond the age of Justinian.[38] As late as the eighth century, the Frankish collections of *formulae* and the *Lex Romana Curiensis* [39] furnish striking proof of its continuing efficacy and strength. But Germanic legal ideas appear more and more frequently, particularly in the Burgundian, Lombard, and Frankish kingdoms. Correspondingly, the pure vulgar law loses ground, though a definite time limit cannot be set. The following discussion will draw primarily from sources of the fourth to the sixth century, without, however, excluding later evidence.

6. WEST ROMAN AND EAST ROMAN VULGAR LAW

The same flexibility is needed in the delimitation of the geographical area to be covered here. A strict confinement to the West Roman law would not be practicable. This is already true for the statutory law. It is, to be sure, important to consider external factors, such as the seat of government of the emperor, the place where the decree was dated, and the office and person of the addressee.[40] But these facts alone would only in rare instances suffice to distinguish a decree as western or eastern.[41] In the last analysis, the decisive question will always be whether a norm can be geographically identified from its contents. Even then the result is

[36] Ammian. 21.10.8.

[37] Mitteis, *Reichsr.* 204, 548 ff.

[38] See also *infra* p. 14.

[39] On the time of the latter see Brunner I 520 ff.

[40] On all these data see Mommsen, *Theodosianus* CLX ff., CLXII ff., CCIX ff., Seeck, *Regesten*.

[41] *Cf.* Mitteis 11 f., Wilhelm Felgentraeger, *Antikes Lösungsrecht* (Berlin und Leipzig, De Gruyter, 1933) 9 ff., Kaser, *SZ* 54, 435 f.; see also Levy, *SZ* 49, 258 and *supra* n. 7. Mommsen, *Schr.* II 385, 388 defines as occidental (or oriental respectively) the decrees released (*a*) to officials of the West (East), when the empire was not yet divided, and (*b*) by the ruler of the Western (Eastern) part after the split.

important only for ascertaining the origin of an institution [42] and, if no *lex generalis* was intended *ab initio,* for determining the original territorial scope of a statute. Whether or not the norm, in the course of time, by virtue of an explicit decree or analogous application, became binding for the whole empire, is a different matter. If thus the chances of a localization are limited even for the official law, they are still smaller for the unofficial. The vulgar law ideas unintentionally appearing in the statutes [43] are universal to a surprisingly large extent. This is the explanation for the fact that in searching for vulgar law one finds only minor differences between the decrees of Constantine and Julian, of Honorius and Arcadius. The uniformity continued even after legislation became dual in A.D. 429.[44] The Novels of Theodosianus II and of Valentinianus III sprout from the same stem, in both substance and language.

If nonetheless the specific subject of this book is the West Roman vulgar law, this signifies that the eastern law will not be taken into account where it differs. More specifically: where Hellenistic custom did not extend its influence beyond the *partes orientis,*[45] it will either be disregarded or covered by references. Such a situation occurs occasionally in the *constitutiones* of the eastern empire, but much more frequently in legal documents, particularly the papyri from Egypt. Conversely, much attention will be paid to vulgar law found solely in the West. Accordingly, beside the legislation which is usually neutral in this regard, western sources will furnish most of the material. There is no need to name them all. Only a few of them may be mentioned as they have heretofore seemed somewhat remote to the Romanist. The first place should be given to the *Interpretatio* on the three *Codices* and *Pauli Sententiae.* It has usually found so little consideration that the *Interpretatio* to the Sentences as such [46] has not only not been reedited, but has not even been printed within the last hundred years.[47] However, the very reasons which have depreciated the value of the *Interpretatio* in the eyes of the historians of the classical era, increase its significance for an appraisal of the intervening period.

[42] For the *constitutiones* of Constantine, e.g., see Mitteis, *Reichsr.* 204 f., 548 ff., but also 299.

[43] *Supra* p. 4.

[44] *SZ* 49, 236 n. 1, 250 ff.

[45] See, e.g., *SZ* 49, 244 f.

[46] Part of it also appears in the photolithographed edition of the then newly discovered *Codex Legionensis* of the *Lex Romana Visigothorum* (Madrid, Academia Hispana, 1896). See Mommsen, *Theodosianus,* praef. LXXI f.

[47] I.e. after Gustav Haenel's edition of the *Lex Romana Visigothorum* (Berlin, Besser, 1849).

As a matter of fact, it offers one of the most comprehensive and virtually [48] purest documentations of the vulgar law. Likewise little affected as yet by Germanic ideas are the Ostrogothic edicts. Dealing with the other principal sources of the later period, the first question has always to be whether a given rule was both Germanic in character and confined to the Germanic population. To the extent that this is true, the rule no longer belongs to the Roman vulgar law. Otherwise, however, the yield may be considerable.[49] This applies particularly to the Visigothic and Burgundian codifications, the Register of Gregory the Great, the Visigothic and Frankish *Formulae*, the western documents, the *Lex Romana Curiensis*, and the late excerpts from the Breviarium.

7. SIGNIFICANCE FOR AN APPRAISAL OF JUSTINIAN LAW

A treatise on Roman vulgar law, like any other comprehensive work in legal history, carries its purpose within itself. But that does not exhaust its significance. As a phenomenon governing the formation of the Roman system for far more than two centuries, the vulgar law could not fail to have a profound effect upon simultaneous and subsequent codifications. That happened in the East as well as the West, although in a very different manner. Justinian's compilation is divided in many ways. It is a fabric consisting of multifarious threads. In one respect it was, to be sure, the culmination of a gradual development of rudiments already intimated in the classical system.[50] In other regards it showed alien, particularly Hellenistic, influences which, to some writers, have made it appear as a revolutionary break with the Roman past.[51] Thirdly, it took over hundreds of *constitutiones* of the intervening period which, though serving purposes of specific reforms, operated with general concepts of the vulgar law.[52] While, however, these three currents

[48] But see also Levy, *Vulg.* n. 102.

[49] See *infra* p. 14 ff.

[50] This is the core of the thesis advocated by Riccobono. The thesis certainly accounts for a number of generalizations and classifications originating in postclassical schools. Otherwise it explains only a limited group of innovations in the field of substantive law. A long reference list of the pertinent important writings of Riccobono and those of his followers and opponents is found in Albertario, *Introd.* I 83 ff.

[51] An opinion widely held and not yet entirely abandoned by authoritative writers considers these influences as far reaching enough to term postclassical private law "Roman-Hellenic." See, among others, Bonfante, *Storia* II 35 ff., Arangio-Ruiz, *Storia* 327 ff., Albertario *loc. cit.* Such a broad interpretation can hardly be maintained in the light of more recent research. *Cf.*, e.g., the careful appraisal by Kunkel 54 f.

[52] For this reason alone it goes too far to assume, as Arangio-Ruiz does (*Storia* 342 f.), that the vulgar law was entirely irrelevant in the formation

which had been at work for centuries carried the legislator away from the classical structure, a fourth tendency made him vindicate it. Stemming from his own initiative and prompted by personal ambition as well as political and educational motives, the revival of classical rules and thoughts became the distinctive program and all-dominating idea of his whole codification. This restoration which, after the ground had been prepared by the professors of the schools in the East, was undertaken in the Digest on such a broad scale, implied the disavowal or repudiation of countless infiltrations of postclassical origin. If the work was evolution from and reaction against the classical law, it was at the same time, and even prominently, a counter-revolution against intrusions of the vulgar law and particularly its Western branch. The utter discrepancy of the vulgar law in spirit and practical consequences illustrates more strikingly than anything else what would have become of Roman thought in Western civilization if Justinian had not paved the way for the later renaissance of the great jurisprudence.

How much he had at heart the reinstatement of the old and the suppression of contravening devices of the vulgar law, the following discussion will show in detail.[53] That he was guided by this motive, he states expressly in several passages which, though frequently quoted, also have to have their place here:

. . . leges antiquas iam senio praegravatas per nostram vigilantiam (providentia) praebuit in novam pulchritudinem et moderatum pervenire compendium (c. Tanta pr.);
. . . nobis reparantibus omnem vetustatem iam deperditam, iam deminutam placuit (Nov 17 init. [535]).

Ταῦτα ἐννοοῦντες ἡμεῖς, καὶ τὴν παλαιότητα πάλιν μετὰ μείζονος ἄνθους εἰς τὴν πολιτείαν ἐπαναγαγόντες καὶ τὸ Ῥωμαίων σεμνύναντες ὄνομα . . . (Nov 24.1 init. [535]).

That is why the emperor praises the publication of the Digest as the raising of a sunken treasure: "Mirabile autem aliquid ex his libris emersit . . ." (c. Tanta 17). That is why he condemns the then prevalent practice of the courts which "vel propter inopiam librorum . . . vel propter ipsam inscientiam" had often adjudged cases arbitrarily (*ibid.*). That is why he turns indignantly against the doctrines presented at many law schools:

audivimus etiam in Alexandrina splendidissima civitate et in Caesariensium et in aliis quosdam imperitos homines devagare et doctrinam discipulis adulterinam[54] tradere (c. Omnem rei publicae 7).

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of Justinian's private law, which, in addition to the classical law, had solely drawn upon usages of the Hellenistic or, generally speaking, eastern provinces. For some detail see, e.g., *infra* p. 73, 77, 150 f., 191; *cf.* also p. 119.

[53] There is no want of classicizing interpolations: see, e.g., *infra* p. 227 n. 133 and Levy, *PS* 21, 48 n. 230.

[54] Theodosius II (NT 1 pr. [438]) and Valentinianus III (NV 32.6 [451])

Here the language of the emperor, to be sure, is vague enough. It does not gain in precision by the fact that, understandably, he names, among others, two eastern schools. But for this very reason we are neither required nor entitled to assume that his prohibition was directed merely against doctrines of the Greek law [55] or local usages.[56] The heretical views common to the East and the West must have seemed far more dangerous to him. But that may be left open. What matters is the knowledge that Justinian, with his revival of the classical system, gave, in the long run, an entirely new direction to continental legal history. The existence of the vulgar law, which signified a flagrant disregard of classical achievements, and Justinian's struggle against it through his going back to the great tradition, are incompatible with the widespread belief that, in spite of all changes from within and without, a straight and essentially unbroken line ran from the classical through the postclassical to Justinian's law.

Moreover, and this is a well-known fact,[57] his reform, while it finally won out, was for centuries by no means victorious. His own novels knew little of the spirit that pervaded the Digest, the very core of his classicizing tendency. Nor did the Digest have an effective appeal to the practice. In the East it faced great difficulties to hold its ground and, consequently, left only slight traces in Byzantine compilations, until the Basilica made an attempt to infuse new life into Justinian's work. In the West, after some application in Italy during the second half of the sixth century, the Digest fell almost into oblivion for more than four hundred years.[58] The very name "Pandectae" rather pointed to the Bible. It took the grandiose effort of the School of Bologna to make the rediscovered Digest the fountainhead of European jurisprudence. Prior to the eleventh century, manifold forms of Roman vulgar law, combined with Germanic ideas, continued to control the field.

8. SIGNIFICANCE FOR AN APPRAISAL OF GERMANIC LAW

The legal history of the West, therefore, is particularly benefited by a study of the vulgar law. There was no Justinian here to interrupt the intrinsic course of events to any noticeable extent. It is the continuity of development which strikingly comes to

significantly do not speak of a *doctrina adulterina*. They only deplore the lack of competent jurists in general.

[55] Mitteis, *Reichsr.* 203.

[56] Rotondi II 409 n. 1.

[57] *Cf.* Mariano San Nicolò, *Atti*, Roma I 270 ff., 279 f.

[58] Conrat, *Gesch.* I 31 ff., 65 ff. Not conflicting are the statements by C. G. Mor, in *Per il XIV centenario della codificazione Giustinianea* (1934) 562, 675 f.

light.[59] Brunner already spoke of the "connection, often overlooked, which exists in so many respects between the legal conditions prevailing in the Frankish and in the late Roman periods." [60] He, and others after him, have done some valuable work in elucidating these ties. However, the degree of their closeness has yet to be realized. The authors of textbooks and monographs on the history of the German or other continental private law systems almost generally continue to understand by the Roman law which they contradistinguish from Germanic ideas the law of the classical jurists or Justinian. This presentation rests upon a fallacy. The law books of Justinian were not yet in existence when the earliest Germanic codes were framed. The remnants of the classical law played only a modest part in the sources used for these legislations. The Roman law adopted in the Germanic kingdoms was at first everywhere the vulgar law. And such "receptions" appear, though in different degrees, in the laws of the Goths and the Burgundians, the Franks as well as the Lombards. They were most conspicuous among the Visigoths [61] and Ostrogoths, and in Burgundy. One may safely assert that where Germanic ideas found entrance into these codifications, as they particularly did in the law of persons, domestic relations, and succession, there was a deliberate creation of something new, while in other cases, where such will to reform was absent, the authors adopted Roman vulgar law concepts and provisions as a matter of course. That is indeed easy to understand. The jurists who drafted these codes were trained in the Roman law of their time [62] and were often of Roman extraction.[63] They

[59] The champion of the "theory of continuity" is A. Dopsch, especially in *Grundlagen;* see also the condensed English translation: *Foundations.* But neither Dopsch nor the authors who spoke out *pro* or *contra* him are essentially concerned with problems of the private law. For further references see Torres II 22 f.

[60] *Abh.* II 79 (ex 1894).

[61] A list of Visigothic rules and Roman parallels on the basis of Zeumer's investigations, has recently been presented by Arcadio Larraona and Arturo Tabera, *Atti,* Bologna II 100–103.

[62] Sidonius Apollinaris, the Roman poet in Southern Gaul, in a letter written about 470, commends Arbogastes, count of Trier, for his singlehanded endeavors to maintain the Latin language at the Moselle river across the northern border of the Visigothic kingdom. But Roman law, in those districts, seemed irretrievably lost: "etsi apud limitem ipsum Latina iura ceciderunt, verba non titubant" (epist. 4.17.2 in *MGH, Auctores Antiquissimi* VIII). The contrast of legal conditions between the Ribuarian and Visigothic kingdoms is manifest here. For Sidonius see Mommsen, *Reden und Aufsätze* (Berlin, Weidmann, 1905) 134 ff., for the political and cultural background Brunner I 44, Halban II 211, 220.

[63] Mommsen *loc. cit.* 139 ff., Franz Beyerle, *SZ GA* 49, 391 ff. and *Gesetze der Burgunden* (1936) XIII ff.; see also Georg Baesecke, Die deutschen Worte

had Roman *constitutiones* and writings before them. The very incentive for their undertakings came from Roman models, such as the Codex Theodosianus and later the Breviarium Alaricianum.[64] Moreover, even those rules which clearly bear the Germanic stamp, are usually formulated in the legal technique and phraseology of the vulgar law, not only because all of these laws were written in Latin, but also because the Germanic tongues of that time had not yet developed an adequate legal terminology. Where Germanic words are inserted,[65] they generally denote physical objects and simple facts perceivable with the senses or comprehensible to the layman, or they speak in pictures.[66] Whole sentences are not yet in evidence.[67] Even the most superficial reader of these enactments must, as far as language and style are concerned, instinctively find himself engulfed in the atmosphere of late Roman law. The uninterrupted sequence springs to the mind.

There is no intention, of course, to deny that those codifications which were not made solely for the Romans contained many specifically Germanic elements in their subject matter.[68] But the criterion shifts. Wherever it is asked whether a rule has Germanic or Roman roots, the Roman component to be considered is not the classical or the Justinian law, which the Germanic peoples at that time did not know at all, but the vulgar law which they did know.[69] This opens the way for a novel method. The new approach will frequently furnish a tool for the clarification of the question of origin.[70] It will also at times be instrumental in uncovering the Roman model or analogue in those instances where the assertion of a divergence of the two systems and of an exclusively Germanic root could be made only in view of the fact that the classical

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der germanischen Gesetze in *Beiträge zur Geschichte der deutschen Sprache und Literatur* 59 (1935) 32 f.

[64] See also Brunner I 413 f., Baesecke 52, 55.

[65] None are found in CE, as far as we know it: Baesecke 56 f.; in any event, they make their appearance only gradually: Beyerle *SZ GA* 49, 397 ff., Baesecke 29, 55.

[66] On this *cf.* particularly the lists in the article by Baesecke, *supra* n. 63, 1-101.

[67] E.g., Baesecke 21. On the Gothic *belagines* see Karl Zeumer, *NA* 23 (1898) 425 f.

[68] See also *American Historical Review* 48 (1942) 22, 28 f.

[69] Accordingly, the term *Lex Romana* which appears from the early sixth century (RB 2.5; Concil. Aurelianense [511] can. 1; Turonense [567] can. 21 = *MGH, Legum Sectio* III, Tom. I pp. 2, 129) does not always point to a specific statute or codification. It also embraces the vulgar law. *Cf.* in general, Savigny, *Gesch.* I 130 ff., Brunner I 377 n. 1. For the rule "ecclesia vivit secundum legem Romanam," in particular, see Edgar Loening, *Geschichte des deutschen Kirchenrechts* II (Strassburg, 1878) 284 ff., Brunner I 394.

[70] See, e.g., *infra* p. 87 ff., 90 ff., 94 f., 156 ff., 164, 167 f., 187 f., 240, 266.

or classicizing Roman law did not offer any clue.[71] The true contrast in such cases is that between Justinian's and vulgar law concepts. But then another independent question arises which must be considered separately in each instance. It is whether the similarity between vulgar and Germanic rules of law is due to a "reception" or to a parallelism of original thoughts.

The amalgamation of vulgar and Germanic ideas was an event of lasting importance. As an element of the Germanic laws, the vulgar law shared their history. On the West-European continent it maintained its effect until the age of the "receptions" of the Justinian law. Thereafter its traces become weaker. But they can be pursued to the present day. To explore this matter more intensively would be a profitable undertaking, but one that lies outside the scope of this book.

9. ORGANIZATION AND METHOD OF THE BOOK

From what has been said, the guiding principles for the organization of the material are easily derived. The main emphasis will be placed on an analysis of the West Roman vulgar law at the height of its evolution, but it will also be shown how the vulgar law was carried on, transformed or eliminated either through its treatment by Justinian or its contact with Germanic ideas. Completeness, however, is not sought here in the sense that, e.g., on the basis of the system of the Pandects all the various legal institutions would be discussed successively with respect to general rules and exceptions, prerequisites and effects. For such an undertaking not only are the sources lacking, but also, at present, the need. The existing material does not permit as intensive a method of research as is feasible and necessary in the exploration of the law of the Corpus Juris or of the classical period. What we are in want of at this point is an introduction into the fundamental characteristics of the vulgar law and an exposition of the changes which took place in general legal thinking. Secondary details will therefore be omitted, but selected central problems will be examined with as much thoroughness as is possible within the framework of a general synthesis.

The book deals in principle only with the private law. The present volume is primarily devoted to the law of property. The next volume, which is being planned, will cover the law of obligations. This division has been retained, although one cannot, in the vulgar law, make that sharp distinction between acts of obligation and acts of disposal which we are accustomed to from the classical

[71] See, e.g., *infra* p. 67 f., 96 ff., 136.

law. A sale, in principle, transferred ownership,[72] and the action for the return of loaned or rented property became practically merged in the proprietary action.[73] It remains nevertheless true that ownership could be enforced against anyone while an obligation bound the debtor alone.[74] Likewise, within the law of sales or gifts, the question as to the acquisition of title in the property was answered on points of view that had little to do with the way in which the substance of the obligations between seller and buyer or donor and donee was shaped. Hence, such internal relations between the parties are only occasionally touched upon in the present volume.

[72] *Infra* ch. III, A 1 and *passim*.
[73] *Infra* ch. IV, A 4.
[74] *Infra* ch. IV, A 5.

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