During the last fifty years and more, particularly since the publication in 1887 of the memorable book of Gradenwitz on "Interpolationen," much of the work of most of the Roman Law scholars has been to determine the changes and development of the Roman law between the period of the so-called classical times and the time of Justinian. And while the Code has been considered in that connection, it has not been considered to the same extent as the Digest.(2) The work for the search of interpolations has not yet been completed. There are still a great many differences among scholars. It may take another half century until the essentials are sifted from the unessentials, and until reasonable agreement may be obtained as to the vital points wherein the law differed in the two periods. This much is certain, that not all the law of the classical period comports with the standards of the present civilization.(3) Notwithstanding the turbulent times between the third and the second half of the sixth century, many changes were made in the law which, according to our standards, were for the better. Many of the

(2) Schultz in 1 Studi Bonfante 335; 50 ZSS 212.

(3) e.g., no provision had been made for an accounting by tutor except by action against him. See C.5,54,4; Partsch, neg. gest. 52.

rules of the modern civil law are based upon, or are merely a modification of, the rules in force in the Roman law at the time of Justinian. And a number of these rules are exhibited better in the Code than in the other books of corpus juris civilis, for, as stated by Prof. Bonfante,(4) the Code, in antithesis to the Digest, represents, in a sense at least, the Roman-Hellenic period of civilization. And while it is interesting to know the difference between classical law and Justinian's law, the latter itself deserves consideration. It is not the intention of the writer to extol the value of the Code beyond its desert, or in the least to undervalue the other books of the Corpus Juris, but merely to give the Code its proper place. [The Romans ? did not have a system of law as distinguished from that of equity in the same sense as we have or have had. In some of the texts equity is stated to be above the law.(5) The meaning is obscured, in view of the fact that at the same time the emperor reserved to himself the sole right of resolving a doubt between law and equity.(6) Taking

(4) Scr. Giur. 4, 127; see also Kuebler in 57 Z.S.S. 414.
(5) C.3,1,8; D.50,17,90.
(6) C.1,14,1; C.1,14,12,5.

all in all,[7] we cannot be far wrong when we say that the rules of equity as actually applied were, in the main, rules of law which at various times, commencing with an early period, modified or supplanted previously existing rules of law, and which, accordingly, and the conception thereof, might be different in one period than in another.[8] While in many places[9] the "rigor," or "severity" of the "law" is stated to be replaced by a rule of "equity," such places merely expressly claim that which every modern law-maker would claim, but leaves unexpressed, namely, that the new rule or law adopted or enacted is more equitable than the rule or law previously existing. Most of these equitable rules were introduced by the praetors. But they ceased to be the source of new law when Hadrian caused the perpetual edict to be compiled and revised.[10] From that time on, new rules of law, or, if you please, new rules of equity, were the product of the emperors, aided in many matters by judicial practice which accomodated itself to existing customs, to commercial practice and to the ideas and

(7) See 42 Z.S.S. 645 ff for the uncertainty in the meaning of "aequitas."
(8) Pringsheim, 42 Z.S.S. 656, and Riccobono, 2 Mil.Cornell 298 agree in this respect, I think, though they differ from each other somewhat in their conception of the meaning of the "jus strictum" of the compilers.
(9) See Pringsheim in 42 Z.S.S. 645 ff.
(10) See Weiss in 50 Z.S.S. 249 ff.

necessities of the times, and which was influenced by the Christian spirit of charity, benevolence and fraternity. Hence, if we want to know what equity and law was in Justinian's time, we should not neglect consideration of the enactments in the later empire, many of which are found in the book here under consideration.

The Code of Justinian which has come down to us, is the second edition of the Code, and was promulgated on November 16th, 534. It was preceded by a first edition promulgated on April 7, 529. Justinian became associate emperor of Justin in 527 and became sole emperor in 528. In 527 two laws were issued. In 528, and the early part of 529, up to the time of the promulgation of the first edition of the Code, Justinian issued at least 46 laws, a number of which were issued a day or a few days before the Code was promulgated on April 7, 529. The exact number is uncertain, for the reason that a number of the laws appearing in the second edition of the Code bear no date, and some of them may, accordingly, have been issued before April 7, 529. Justinian issued, up to the promulgation

of the second edition of the Code, over 300 laws. Fifty of these, so he tells us in the law of that promulgation,[11] were enacted as decisions to settle disputed points among the jurists. Efforts have been made to discover the identity of these decisions, but have not been successful. Paul Krueger[12] has shown that 94 of the laws issued after the first edition of the Code may be considered as coming within the 50 decisions mentioned. It may be pointed out, however, in this connection, that the number of decisions of that character, let alone the number of other new laws issued by that emperor, make the study of the Code indispensable to anyone who wants to understand the Roman law of his time.

Without going into details, the laws and rescripts which appear in the Code were, aside from the laws of Justinian, mostly taken, as almost goes without saying, from previous compilations, namely, from the Gregorian, Hermogenian and Theodosian Codes and from the so-called Post-Theodosian Novels. The Gregorian Code, a private compilation, was issued about 291. The Hermogenian Code,

(11) The so-called law "cordi" found in the preface of the Code.
(12) Festschrift Bekker "Aus Roem.u.B.Recht" (1907) 1.

also a private compilation, seems to have had three separate editions, the first issued about 295.(13) The Theodosian Code, of the Emperor Theodosius II was promulgated in 438, and contained only laws issued by the Christian emperors, namely, from the time of Constantine the Great. The compilation of the Post-Theodosian Novels contains laws from 438 to 468. The compilation of Justinian's Code used at present the world over is that of Paul Krueger, issued in 1877. It is not complete, due to the ravages of the middle ages. Part of it is based on a manuscript of the sixth or seventh century, part of it on later manuscripts, up to the 11th, and the text of the last three books on a manuscript of the 12th century.(14)

In order that the importance of Justinian's Code within his compilation may be appreciated, it may be pointed out that it contains over 4100 laws and rescripts. Many of the laws were long, covering important subjects, and were divided into two or more parts when the Code was assembled, and they thus appear in different parts of the work. From Constantine the Great on, the laws appearing

(13) Kipp, Gesch.d.Quellen 85; Kuebler, Gesch.d.R.R. 381, 382; Rotondi, Scr.Giur.1,110 ff.

(14) Kipp, supra, 166; Kuebler, supra, 415, 416.

in the Code are, with few exceptions, general laws. The laws issued previous to his time are mostly what are generally called rescripts, namely, decisions on specific points of law, relating to private disputes, and issued either to private individuals or to public officials. The earliest rescript appearing in the Code dates from the time of Hadrian.(15) Rescripts were issued by the emperors before that time, as we learn from the correspondence between Trajan and the younger Pliny. And Pliny, in his ~~max~~ epistles,(16) tells us of rescripts of Vespasian, Titus and Domitian. But they did not, seemingly, relate to private disputes. Macrinus tells us that Trajan never answered petitions directed to him, which Mommson thinks merely means that whatever answer was given was not published, and that, accordingly, it was not recognized as a general law.(17) Only one of Hadrian's Rescripts appears in the Code. 10 of the emperor Pius, 10 or 11 of Marcus Aurelius, and 2 of the emperor Pertinax are embodied therein, making a total of 22 or 23 from the time of Hadrian to 193 A.D. From that

(15) C.6,23,1.
(16) Ep. 65.
(17) Macrinus c.13,1; Mommson 12 Z.S.S. 262; See Kipp, supra, 74, note 1.

time on the number increases rapidly. We find 165 of those issued from 193 to 211 under Severus, 248 of those issued from 211-218 under Caracalla, 433 of those issued from 222-235 under Alexander, 271 issued between 236 to 244. Then the number decreases. Only 209 were issued in the turbulent times between 244 and 284 A.D., making a total of 1348 issued between the time of Hardian and Diocletian.(18) The rescripts and laws -- mostly rescripts -- of Diocletian which appear in the Code number over 1200, making a total of over 2500 between the time of Hadrian and Constantine the Great. Those so appearing were not the only ones issued. We have no exact information, of course. Many are mentioned in the Digest.(19) It seems that one Papirus Justus collected 20 books of the constitutions of Marcus Aurelius. Paul assembled 6 books of imperial decisions.(20) The Gregorian Code, consisting, probably, mostly of rescripts, contained at least 19 books, divided into titles. The Hermoginian Code, which was not divided into books, contained at least 69 titles, and one of the titles contained 120 laws or rescripts.(21)

(18) It is not intended to vouch for the absolute accuracy of the numbers, but they are at least approximately

(19) e.g., D.2,15,3 pr; 3,1,8; 4,1,7 pr; 4,2,18; 4,4,11 pr. and 2; 4,4,45

(20) Kipp, supra, 84, 132.

(21) Kipp, supra, 85; Rotondi, supra, 138-139

We may, accordingly, well conjecture that the number of rescripts, giving advice in private affairs, must have been enormous, and would seem to be a clear indication, even when we take into consideration the difficulty of access to laws, that the profession of lawyers must have been in a low state, and that the science of jurisprudence was followed by few, mainly those at the court of the emperors.(22) That the issuance of rescripts was rather well known among the people seems to be shown by Tertullian, who, in the first part of the third century, wrote in his apology for the Christians: "Are you not yourselves every day, in your efforts to illume the darkness of antiquity, cutting and hewing with the new axes of imperial rescripts and edicts, the whole ancient and rugged forests of your laws?"(23)

While the laws, as distinguished from rescripts, contained in the Code are frequently very long, sometimes not easily read or understood, and often in a style of verbosity, the rescripts are generally short, many of them consisting of sentences which announce a

(22) See Levy in 50 Z.S.S. 292.
(23) Apology c.2. (Ante-Nicene Fathers, vol.III, p. 21.)

clear, crisp rule of law. Let me take a few at random: "Your demand that the creditors should not sue you who received the loan, but should sue the heirs of the person to whom you in turn loaned the money, is plainly contrary to the rules of law."(24) Again: "There is no doubt that money paid by mistake may be recovered."(25) Again: "The law is clear that a trust or legacy paid under a mistake of fact, may be recovered."(26) Again: "The law does not permit that free persons should become slaves of their creditors on account of debts."(27) Again: "The law forbids that wives should be sued on account of the default of their husbands."(28) Again: "A father who is not surety cannot be sued for the money which his son, who is sui juris, has borrowed; nor can he be sued for the son whom he has in his power, if the latter made a contract without his order."(29) Again: "As a creditor who claims money, must show that it was loaned, so on the other hand, a person who affirms that it has been repaid, must show that fact."(30)

The rescript as a public law disappeared with

(24) C.4,2,15.
(25) C.4,5,1 (partial).
(26) C.4,5,7.
(27) C.4,10,12.
(28) C.4,12,2 (partial).
(29) C.4,13,1 (partial).
(30) C.4,19,1.

the time of Constantine.[31] That emperor issued but few.[32] The main reason for the disappearance seems to have been that parties cunningly obtained them for their own advantage, and caused statements to be contained therein contrary to the general law. Imperial enactments became necessary to counteract this evil. The emperors Theodosius and Valentinian in 426 enacted that "rescripts elicited, contrary to law, must be ignored by all the judges."[33] Anastasius in 491 provided: "We warn all the judges of our whole state, whether in major or minor positions of administration, not to suffer any rescript, pragmatic sanction or imperial notation which is contrary to the general law or adverse to the public interest, to be brought forward in the trial of any case, but not to hesitate to follow the general imperial constitutions in every respect."[34] However, rescripts continued to be issued during all of this time. They merely ceased to operate as general laws.[35] We find inscriptions of rescripts issued as late as the time of Justinian.[36] The Code itself furnishes ample evidence of

(31) Rotondi, supra, p. 213, 214; Mommson, 12 Z.S.S. 263, 264, 266; Karlowa, R.RG. 935; Brassloff in 6 Pauly-Wissowa 206.
(32) Rotondi, supra, p.213; C.3,1,8; C.6,1,3; C.7,16,41.
(33) C.1,14,2; C.19,3,7.
(34) C.1,22,6.
(35) Bethmann-Hollweg, C.P. 3-211; Karlowa R.Rg.1,935.
(36) Kipp, supra, 94.

this continuance in several titles.[37] In fact, according to the provisions of the Code, an action could be commenced by rescript, instead of by the regular method.[38] Provisions were made, from time to time during the later empire, regulating the practice. The petitioner, in asking for a rescript, was, in 429 A.D., required to fully set forth the facts in the case. It was not necessary to set out any documents on which he relied, but he was required to set forth the effect thereof.[39] The emperor Zeno provided that every rescript should contain a statement that the facts alleged by the petitioner could be shown to be false.[40] The petition, and the rescript, were required to be filed with the regular judge, or the judge to whom the case had been assigned by the emperor, and made a matter of record.[41] Notice was required to be given the adversary, as in other cases,[42] and thus the proceedings took their regular course.[43] This was not the only interference with what we should consider purely local matters. The emperor Anastasius in 502 provided

(37) C.1, titles 19-23. In 541 Justinian issued Novel 113 relating to rescripts.
(38) C.1,20; C.7,39,3,1.
(39) C.1,19,8.
(40) C.1,23,7.
(41) C.1,23,3; C.8,46,6; C.Th.4,14,1; 4,22,2; C.7,39,3,1.
(42) Nov.112 c.3; C.7,39,3,1.
(43) Bethmann-Hollweg C.P. 3-351-352.

that if a father wanted to emancipate a son he might do so by obtaining an imperial rescript and filing that with the local court.(44) Justinian modified this law in 531, providing that such emancipation might also be made directly in the local court of general jurisdiction.(45) If no purchaser could be found to buy property levied on under an execution, it might be assigned to the execution creditor by order of the emperor.(46) That was true also in connection with mortgaged property.(47) If a young man or young woman under the age of 25 wanted the privilege of majority, he or she might apply to the emperor therefor. Four different laws or rescripts deal with this subject in the Code.(48)

The Code contains twelve books, divided into titles, each of which contains at least one and generally many laws, each indicating the emperor or emperors who wrote the rescript or enacted the law. Generally the date also is given. The first 12 titles of the first book, which are rather voluminous, deal with matters of religion and the administration of church

(44) C.8,48,5.
(45) C.8,48,6.
(46) C.8,22,3; C.7,53,3.
(47) C.8,33,3.
(48) C.2,34,1-4.

property. The remaining titles of the first book deal with private and administrative law. The last three books deal with administrative law, including taxation, guilds, military law, positions of dignity, and related matters. They constitute one of the main sources of our knowledge of these subjects. Each and every rescript or law therein is of interest; each is important. To one who wants to know something of the economic and social history of Rome during the later empire, these books are indispensable. And it is not only the historian or the economist who should be interested therein. To understand the Roman private law, it is important that we should know the history of Rome, its republic and its empire, including the subjects indicated in the last three books of the Code. We interpret our own laws in the light of the history of our country, and of its customs and its civilization in general. Like knowledge as to Rome cannot help but aid us in understanding its laws.

Book 9 of the Code deals with criminal law

and criminal procedure. A great deal of what we know on that subject is contained in the Code. I shall not go into it any further in this paper, except where special reference is otherwise required. The remaining books of the Code deal with private law. The arrangements of some of the subjects is not, according to our view, a very happy one. It was left to the glossators of the 11th and 12th centuries to create a scientific system out of Justinian's collection.(49) The subject of procedure, for instance, is dealt with in various books. We find pacts treated in book 2; stipulations in book 8, though these subjects are related. These matters, coming under the head of agreements in general, might well have been combined with the consideration of other contracts, mainly dealt with in book 4. Part of this arrangement is due to the fact that in classical law the substantive law turned upon procedure. Actions were, to a large extent, the center of the law. For the classical jurists the main question was whether there was an action; substantive rights were considered under

(49) Seckel in 45 Z.S.S. 393.

it.[50] Instead, for instance, of saying that an heir was entitled to so and so, they said that so and so is embraced in the petition for an inheritance. They treated form at the expense of substantive law,[51] just as was true in our own early law.[52] And while the tendency to speak of substantive rather than adjective law became stronger as time went on,[53] we find traces of the classical view in the Code. Thus, one text tells us that the action on the stipulation embraced certain rights in relation to dowry.[54] Again, it is stated that a legatee and testamentary trustee should have a personal, real and hypothecary action, meaning that he had a personal claim; also that he was owner, and also that he had a lien, good against the world.[55]

The information on private law contained in the Code is varied. We receive at least a smattering knowledge of nearly every subject. Property law is considered, and possessory rights. Force in taking possession was strictly forbidden.[56] A contract of sale did not of itself convey title.[57] Delivery was

(50) 47 Z.S.S. 548; Schulz, Principien, 29. But see Steinwenter, 49 Z.S.S. 490-495.
(51) 19 Z.S.S. 199.
(52) Pollock & Maitland, Hist. Eng. Law 2, 558 ff.
(53) Rotondi, Scr.Giur. 2, 239; Theophilus Inst. 3,13 pr.
(54) C.5,13,1.
(55) C.6,43,1.
(56) C.8,4; C.9,12,7.
(57) C.2,3.20.

ordinarily also necessary. The subject of prescription is dealt with at great length in 15 different titles of the book. We find the old rules of the prescriptive period -- usucaption -- abolished as to movable and immovable property and new rules substituted.(58) Rights of possessors in good faith as to outlay and fruits are defined. We learn a little about usufructs, servitudes and quite a little on the subject of ownership in common. Family law is considered at considerable length. New methods of manumission of slaves appear. New ways for giving them freedom are found. Many of their rights and duties are told us. Much law is found on the subject of the protection of minors, of restoring them to their former rights when they had entered into a bad bargain or had been placed in a position of disadvantage. Guardianship is a subject embracing many titles. Marriage and divorce, dowry and nuptial gifts, receive considerable attention, showing us many laws which bear the imprint of Christian spirit and exhibiting some of the customs of the Eastern Empire.

(58) C.7,33,12.

Many laws are found on the subject of agency, authorized and unauthorized. Nearly every contract and agreement finds mention. 125 laws or more are found on the subject of sales alone. We find the promise of a gift raised to the dignity of a binding contract. The book is indispensable on the subject of inheritance, testate and intestate, and exhibits to no little extent the changes which took place in Roman law in this connection, the law finally establishing general principles of inheritance similar to those which prevail in our own time. We find testamentary trusts and legacies, different in the past, placed upon an equal footing. In fact, a careful study of the Code, as already indicated, will give at least a cursory view of the whole of the Roman private law. I cannot, of course, in order to hold this paper within any reasonable limits, discuss all of the subjects separately. But in order that the great amount of information contained in the Code may be appreciated, I will [redacted] attach appendix A and appendix B. The first of these will show that an almost complete, though in some respects crude, code of procedure is exhibited to us in the Code of Justinian; the second will give us at least a rough outline of the essentials in connection with pledges, mortgages and liens.

These two illustrations should suffice to show the great amount of information contained in the Code on specific topics. I shall pass on to a few observations more general in character, showing, mainly as appears from the Code, the development of the Roman law in certain directions, or exhibiting the general spirit of the law in the Byzantine period, and mainly in Justinian's time.