

Roman Law

"It was the most original product of the Roman mind. In almost all their other intellectual endeavors the Romans were the eager pupils of the Greeks, but in law they were, and knew themselves to be, the masters."

B. Nicholas, *Introduction to Roman Law*

"It is no exaggeration to say that, next to the Bible, no book has left a deeper mark upon the history of mankind than [Justinian's] *Corpus Juris Civilis*."

C.F. Kolbert, Introduction to *The Digest*

"[Roman law] has given to continental lawyers their underlying basic notions and Roman legal expressions still are the *lingua franca* of Continental lawyers."

H. Coing, *Law Quarterly Review*

Excerpt from *The Institutes of Justinian*

Book I. Of Persons

I. Justice and Law.

JUSTICE is the constant and perpetual wish to render every one his due.

1. Jurisprudence is the knowledge of things divine and human; the science of the just and the unjust.

2. Having explained these general terms, we think we shall commence our exposition of the law of the Roman people most advantageously, if we pursue at first a plain and easy path, and then proceed to explain particular details with the utmost care and exactness. For, if at the outset we overload the mind of the student, while yet new to the subject and unable to bear much, with a multitude and variety of topics, one of two things will happen---we shall either cause him wholly to abandon his studies, or, after great toil, and often after great distrust to himself (the most frequent stumbling block in the way of youth), we shall at last conduct him to the point, to which, if he had been led by an easier road, he might, without

great labor, and without any distrust of his own powers, have been sooner conducted.

3. The maxims of law are these: to live honestly, to hurt no one, to give every one his due.

4. The study of law is divided into two branches; that of public and that of private law. Public law regards the government of the Roman empire; private law, the interest of the individuals. We are now to treat of the latter, which is composed of three elements, and consists of precepts belonging to the natural law, to the law of nations, and to the civil law.

II. Natural, Common, and Civil Law.

The law of nature is that law which nature teaches to all animals. For this law does not belong exclusively to the human race, but belongs to all animals, whether of the earth, the air, or the water. Hence comes the union of the male and female, which we term matrimony; hence the procreation and bringing up of children. We see, indeed, that all the other animals besides men are considered as having knowledge of this law.

1. Civil law is thus distinguished from the law of nations. Every community governed by laws and customs uses partly its own law, partly laws common to all mankind. The law which a people makes for its own government belongs exclusively to that state and is called the civil law, as being the law of the particular state. But the law which natural reason appoints for all mankind obtains equally among all nations, because all nations make use of it. The people of Rome, then, are governed partly by their own laws, and partly by the laws which are common to all mankind. We will take notice of this distinction as occasion may arise.

2. Civil law takes its name from the state which it governs, as, for instance, from Athens; for it would be very proper to speak of the laws of Solon or Draco as the civil law of Athens. And thus the law which the Roman people make use of is called the civil law of the Romans, or that of the Quirites; for the Romans are called Quirites from Quirinum. But whenever we speak of civil law, without adding the name of any state, we mean our own law; just as the Greeks, when "the poet" is spoken of without any name being expressed, mean the great Homer, and we Romans mean Virgil.

The law of the nations is common to all mankind, for nations have established certain laws, as occasion and the necessities of human life required. Wars arose, and in their train followed captivity and then slavery, which is contrary to the law of nature; for by that law all men are originally born free. Further, by the law of nations almost all contracts were at first introduced, as, for instance, buying and selling, letting and hiring, partnership, deposits, loans returnable in kind, and very many others.

3. Our law is written and unwritten, just as among the Greeks some of their laws were written and others were not written. The written part consists of *leges (lex)*, *plebiscita*, *senatusconsulta*, *constitutiones* of emperors, *edicta* of magistrates, and *responsa* of jurists [*i.e.*, jurists].

4. A *lex* is that which was enacted by the Roman people on its being proposed by a senatorian magistrate, as a consul. A *plebiscitum* is that which was enacted by the plebs on its being proposed by a plebeian magistrate, as a tribune. The plebs differ from the people as a species from its genus, for all the citizens, including patricians and senators, are

5. A *senatusconsultum* is that which the senate commands or appoints: for, when the Roman people was so increased that it was difficult to assemble it together to pass laws, it seemed right that the senate should be consulted in place of the people.

6. That which seems good to the emperor has also the force of law; for the people, by the *Lex Regia*, which is passed to confer on him his power, make over to him their whole power and authority. Therefore whatever the emperor ordains by *rescript*, or decides in adjudging a cause, or lays down by edict, is unquestionably law; and it is these enactments of the emperor that are called *constitutiones*. Of these, some are personal, and are not to be drawn into precedent, such not being the intention of the emperor. Supposing the emperor has granted a favor to any man on account of his merit, or inflicted some punishment, or granted some extraordinary relief, the application of these acts does not extend beyond the particular individual. But the other *constitutiones*, being general, are undoubtedly binding on all.

7. The edicts of the praetors are also of great authority. These edicts are called the *ius honorarium*, because those who bear honors [*i.e.*, offices] in the state, that is, the magistrates, have given them their sanction. The curule aediles also used to publish an edict relative to certain subjects, which edict also became a part of the *ius honorarium*.

8. The answers of the *jurisprudenti* are the decisions and opinions of persons who were authorized to determine the law. For anciently it was provided that there should be persons to interpret publicly the law, who were permitted by the emperor to give answers on questions of law. They were called *jurisconsulti*; and the authority of their decision and opinions, when they were all unanimous, was such, that the judge could not, according to the *constitutiones*, refuse to be guided by their answers.

9. The unwritten law is that which usage has established; for ancient customs, being sanctioned by the consent of those who adopt them, are like laws.

10. The civil law is not improperly divided into two kinds, for the division seems to have had its origin in the customs of the two states, Athens and Lacedaemon. For in these states it used to be the case, that the Lacedaemonians rather committed to memory what they observed as law, while the Athenians rather observed as law what they had consigned to writing, and included in the body of their laws.

11. The laws of nature, which all nations observe alike, being established by a divine providence, remain ever fixed and immutable. But the laws which every state has enacted, undergo frequent changes, either by the tacit consent of the people, or by a new law being subsequently passed.

Roman Law

Digest 9.3.3

Those Who Pour or Throw Things out of Buildings

THOSE WHO POUR OR THROW THINGS OUT OF BUILDINGS

- 1 ULPIAN, *Edict, book 23*: The praetor says the following about those who pour out or throw out anything: "If anything should be thrown out or poured out from a building onto a place where people commonly pass and repass or stand about, I will grant an action to be brought against whoever lives there for double the damage caused or done as a result. If it is alleged that a free man was killed by whatever fell, I will grant an action for fifty aurei. If he is alleged to be injured, but survives, I will grant an action for whatever it seems right to the judge that the defendant should be condemned to pay. If a slave is alleged to have done it without his master's knowledge, I will add to the judgment or noxally surrender him." 1. There is no one who will deny that the above edict of the praetor is most useful; for it is in the public interest that everyone should move about and gather together without fear or danger. 2. It should be a matter of little interest whether the place [where the harm occurs] is public or private ground, so long as the public pass there, because the edict is concerned with protecting passersby rather than regulating public streets, and those places where people habitually pass by should at all times enjoy equal safety. On the other hand, if the public gave up passing along a particular way and then something was poured out or thrown down while it was still closed, but thereafter it began to be used again, there would be no liability under this edict. 3. Something which falls while it is being hung up should rather be deemed thrown down; but even when it falls down after being hung up, the better opinion is that it too is regarded as having been thrown down. From this proposition it follows that if something is poured from a suspended vessel, even though no one did the actual pouring, we must still hold that the edict applies. 4. This *actio in factum* is given against him who occupies the house when anything is thrown down or poured out and not the owner; for the fault rests with the former. Nor is there added any mention of fault or of the defendant denying the facts, so that he becomes liable for double the damages although these are both factors of liability in an action for unlawful damage. 5. When a freeman is killed, there is no doubling of the amount of loss because in the case of a freeman no valuation of his body is possible, but the condemnation will be for fifty aurei. 6. These words "if he is alleged to be injured but survives" do not refer to damage which is done to the property of a freeman, if, for example, his clothes or anything else of his is torn or spoilt, but apply only to matters affecting his body. 7. If a son-in-power has hired an upper room and something is thrown down or poured out from there, an action on his *peculium* is not granted against the head of the family because the claim does not arise from the contract of hire. This action, therefore, lies against the son himself. 8. When a slave is the occupier, will a noxal action be allowed, since there is none for unauthorized administration? Or will there be an action on the *peculium*, because there is no action on a slave's delict? Nor can we properly speak of harm on the part of the slave because the slave himself harmed nothing. For my part, I do not think that the slave should go unpunished, but that he should be corrected on special application under the court's extraordinary jurisdiction. 9. We hold that a man occupies a house if it is his own or if it is let to him or if he is there as a favor. A guest is clearly not liable, because he does not occupy the house but is only entertained there; but the one liable is the person who gives the entertainment. There is as much difference between an occupier and a guest as between someone who lives there and a stranger. 10. If a number of people occupy a lodging house and something is thrown down from it, action may be brought against any one of them,

- 2 GAIUS, *Provincial Edict*, book 6: because it is quite impossible to know which one threw or poured out anything,
- 3 ULPIAN, *Edict*, book 23: and each is liable for the whole damage; but if action is brought against one, the rest go free,
- 4 PAUL, *Edict*, book 19: on actual payment, not merely on joinder of issue, the others being made to contribute their shares to the one who paid by an action on partnership or an *actio utilis*.
- 5 ULPIAN, *Edict*, book 23: However, if several people occupy separate parts of a lodging house, the action lies only against him who occupies that part from which something was poured. 1. If someone gives free accommodation to his own or his wife's freedmen and clients, Trebatius says he is liable in his own name, and this is true. The same must also be said in the case of someone who gives hospitality to his friends on a modest scale; for if, although he lets out lodgings, he occupies most of the house himself, he alone will be liable; but if a lodging house keeper retains only a small part for himself and lets out the rest to a large number of people, all those who live in that house will be liable as occupiers for whatever is thrown down or poured out. 2. Occasionally, however, provided it can be done without injustice to the plaintiff, the praetor acting in fairness ought rather to grant the action against the person from whose bedroom or sleeping quarters the thing was thrown, even though a number of people share the same lodging. But if something is thrown from the middle of a lodging house, the better view is that all are liable. 3. If a warehouseman or a hirer of a storeroom or a place to do some work or to teach his pupils should throw something down or pour something out an *actio in factum* will lie, even if it was one of his workmen or one of his pupils who did the throwing or pouring. 4. If someone has judgment given against him under the *lex Aquilia* for something of this sort on the ground that his guest or anyone else threw something down from his lodgings, it is right in Labeo's opinion that he should have an *actio in factum* granted to him against the actual thrower, and this is correct. Clearly, if he let the room to the thrower, he also has an action on the contract. 5. This action which is available in the case of things poured out or thrown down cannot be barred by lapse of time and is available for the heir of the plaintiff, but not against the heir of the defendant. But the action which lies in the matter of an allegation that a freeman has been killed is available only for one year and is not granted against an heir, nor can it be brought by an heir or successors generally, for it is a penal action and one which anyone may bring, though we are aware that where a number of people wish to bring this action, preference should be given to one who has a special interest in the matter or who was related to the deceased by blood or marriage. But if a freeman was injured, his own action will not be barred by lapse of time, though if anyone else wishes to pursue the matter, it will expire in a year; nor is it available to the heirs by virtue of hereditary right because the rule is that when any injury is done to the body of a freeman, no claim can pass to his successors by hereditary right, as it is not a matter of pecuniary loss and the action is based upon justice and fairness. 6. The praetor says: "No one shall place anything on an eave or projecting roof over a spot where the public pass or congregate which would injure anyone if it fell. If anyone is in breach of this regulation, I will grant an *actio in factum* against him for ten *solidi*. If it is alleged that a slave did this without his master's knowledge, I will order [either the same sum to be paid] or that he be noxally surrendered." 7. This ruling is a part of the edict already referred to; for it followed that the praetor should attend to this case also, so that no harm should befall if anything should be placed on these dangerous parts of a house. 8. The praetor's words refer to "no one" and "on an eave or projecting roof." The words "no one" refer to all persons whether lodgers or owners and whether they live there or not, so long as they have put something in these places. 9. "Anything placed over a spot where the public pass or congregate." We must take the word "placed" to apply to a house or lodging or a warehouse or any other building. 10. A man is rightly deemed to keep a thing "placed" even though he did not put it there himself but simply allows to remain what someone else had put there. Accordingly, if a slave puts it there and his owner allows it to remain, the owner will be liable in his own name and not to a judgment for noxal surrender. 11. The praetor says: "which would injure anyone if it fell." From these words it is clear that the praetor's sole concern in order to prevent harm is with

things which could do harm if placed as described and not every sort of thing which is placed there. Nor do we simply watch until the harm occurs, but if anything is likely to cause any harm, the edict applies. And he who kept the thing in place is punished whether the thing so placed actually causes harm or not. 12. If the thing which had been placed falls down and does harm, action lies against him who did the placing, not against him who lives there, as if this action is not enough, because he who placed it does not seem thereby to have kept it placed unless he was either the owner or the occupier of the house. Thus, when a painter had exhibited a shield or a picture in a booth and it fell and injured a passerby, Servius took the view that an action framed on the analogy of this one should be granted. He said that the present action was clearly not available because the picture had not been placed on eaves or on a projecting roof. He was also of the opinion that the same rule should apply if a jar suspended in a net had fallen down and caused damage, because there was no statutory or praetorian action available. 13. This action also is open to anyone and is available for an heir and successors generally, but it cannot be brought against the heir of the defendant because it is penal.

6 PAUL, *Edict, book 19*: This edict applies not only to cities and villages but also to any roads where people commonly pass. 1. Labeo says it applies if something is thrown down during daytime, but not at night; but there are places where people pass by even at night. 2. The occupier is bound to make good his own negligence and that of his family. 3. If something is thrown out from a ship an *actio utilis* will be granted against the person in charge of the ship.

7. GAIUS, *Provincial Edict, book 6*: When a freeman sustains bodily injury by something which is thrown down or poured out, the judge takes account of the cost of medical attendance and other expenses incurred in his recovery as well as the value of any employment which he lost or will have to lose because of his disability. However, no account is taken of scars or disfigurement, because the body of a free man is not susceptible of valuation.

Excerpt from The Permanent Edict of the Urban Praetor

244. PERMANENT EDICT OF THE URBAN PRAETOR, ca. 129 A.D.

(B 211; G 137; R 335)

The right to issue proclamations (*ius edicendi*) affecting the entire community or classes of citizens or individuals was among the powers of magistrates, provincial governors, and imperial officials, and was enjoyed by the emperor. Such a proclamation, usually called an edict (*edictum*), concerned ordinarily only matters within the competence of the issuer and was valid only during his incumbency. Although it was originally only a temporary regulation because of the latter limitation, yet an edict acquired the practical force of a law if successive officials adopted and announced in their own proclamations an edict of their predecessors. This practice led to the creation of magisterial law (*ius honorarium*), which stood beside the statutory law (*ius civile*).

The edict most important in Roman law—and here its importance cannot be overestimated—was the praetorian, for after the institution of the praetorship in 367 B.C., to relieve the consuls of their judicial duties, the praetor became the chief magistrate charged with administration of the law. The development of the praetorship proceeded proportionately with the expansion of Rome's legal relations as the power of the State increased. When new legal situations had to be faced and solved,

these were referred to the praetor,¹ whose principal function, when he manipulated the tribal law of primitive Rome to meet new conditions, obviously was to aid, to supplement, to correct statute law in the public interest.² This was effected chiefly by the edict, which was posted annually on a white board (*album*), usually in the Forum, when the praetor entered office, and which exhibited the legal principles on which he proposed to act or to adjudicate throughout his tenure. Hence it was called *edictum perpetuum* (permanent, continuous, or perpetual edict).

Originally the praetor was not compelled to abide by the intentions expressed in his edict; in fact he could issue additional or emergency edicts (*edicta repentina*), which, as occasion arose, altered his original provisions, but it is presumed that pressure of public opinion ordinarily sufficed to bind the average praetor to his promises. However, in the late Republic, when unscrupulous magistrates were not averse from misusing their authority in their own or their friends' interests, a Cornelian Law (67 B.C.) forbade praetors to deviate from their permanent edicts (*edicta perpetua*).³

Though each praetor theoretically had a free hand in the composition of his edict, yet it became the custom for a succeeding praetor to reissue as his own, so far as was operationally practicable, most of his predecessor's edict, deleting and adding as either he or his advisory council (*consilium*)⁴ thought fit. Thus there was developed a document of considerable compass, called the transmitted edict (*edictum tralaticium*).⁵ Despite its conservative character, however, the praetorian edict was truly the living voice of the civil law (*viva vox iuris civilis*), because the praetors not seldom discarded their predecessors' principles and introduced their own or their advisers' ideas to meet certain circumstances. It was this freedom to alter that made it possible for the law to be influenced by the praetor to such an enormous extent. In this way Roman law combined the stability of statutory legislation with the flexibility and adaptability of magisterial judgments.

In addition to the announcement of how the praetor would act in certain circumstances, his edict acquired new importance when the Aebutian Law (ca. 135 B.C.), accepting the inelasticity of the statutory process (*legis actio*), authorized the introduction of the formulary procedure (*formula*). Since the *ius civile* (civil law) had not provided *formulae* (formulas), it fell to the praetor's province not only to devise formulas but also to draft their patterns.⁶

Doubtless into every judicial system operated by man uncertainties and abuses have infiltrated. How far that condition was true of the magisterial edicts in Rome we know not. But it was not so much that confusion had crept into the edicts as it was that the great growth of the imperial power with its jealous intolerance of the prerogatives of a subordinate magistracy induced Hadrian (ca. 129 A.D.) to commission Lucius Octavius Cornelius Publius Salvius Julianus, commonly called Julian, his praetorian prefect, to consolidate the extant edicts into an imperial permanent edict (*edictum perpetuum*), which, alterable only at the prince's pleasure, marked the end of the magisterial edict, that masterpiece of republican jurisprudence, as a living source of law after almost five centuries.⁷ This stabilization, which affected also the aedilician edicts, apparently effected only small alterations in substance, but by importing some change into the order of topics and by occasional rewording of the contents created a stereotyped form.⁸ Thereafter⁹ the interpretation of the law passed in large measure into the possession of men learned in the law, the jurists or the juriconsults, who, whether anonymously assisting the emperor in composing his

imperial constitutions (*placita principum*) or unofficially in their writings, sowed the seed in this field, gathered from it the fruit, and stored it for future generations.

The standard study on the edict is still O. Lenel's *Das Edictum Perpetuum*³ (Leipzig 1927), whence Riccobono takes his text, which is translated here. The quinquepartite division of the praetorian edict, based on processual considerations, is, as an analysis of it shows, "anything but a masterpiece of systematization."¹⁰ Part I regulates procedure to the joinder of the issue; Part IV orders execution of judgment; Part V assembles formulas, interdicts, exceptions, stipulations; Parts II and III treat such ordinary and summary remedies, respectively, as are not provided in Parts I and IV. Of the 45 titles, containing 292 sub-heads with numerous subdivisions, some are authentic and others are either uncertain or disputed; their exact formulation is still a subject of study.

Since the several editors have provided numerous references to illustrative material, drawn chiefly from Justinian's *Digest*, notes to this translation are reduced to a minimum.

First Part

I. Those Persons Who Have Jurisdiction in a Municipality, a Colony, a Market

1. If anyone does not obey the person who has jurisdiction I shall grant an action for as much as is the value of this matter in dispute.

2. If anyone summoned into court does not go before the person who has jurisdiction in a municipality, a colony, a market, or if anyone summons into court the person whom he ought not to have summoned into court in accordance with the edict . . . I shall grant an action.

IV. Agreed Pacts²⁰

10. I shall support agreed pacts that are made neither with malicious deception nor against statutes, plebiscites, decrees of the Senate, edicts, or decrees of emperors, nor where evasion is made in the case of any of these.

V. Summons into Court

11a. Persons summoned into court to go or to provide a surety.²¹

11b. Without my permission no person shall summon into court his parent, his patron, his patroness, the children or the parents of his patron or of his patroness.

11c. If anyone summons into court his parent, his patron, his patroness, the children or the parents of his patron or of his patroness, or his own children, or the person whom he has in his power, or his wife, or his daughter-in-law a surety of any quality soever shall be accepted.

11d. I shall order procedure against the property of the person who has given (gives?)²² a surety if he neither allows access to himself nor is defended.

12. No person to rescue by force the person who is summoned into court nor by fraudulent intent to act so that he may be rescued.

13. ?²³

XXXV. Outrages^{141b}

190. General edict. Whoever sues for outrages shall say specifically what outrage has been done and shall set an appraisal of not less than the amount of security offered.

191. Insult. Whoever is said to have shouted^{141c} an insult, contrary to good morals, against any person, or by whose means it is said to have been effected that such insult, contrary to good morals, is shouted,^{142c} against him I shall grant an action.

192. Attempt on chastity. If anyone is said to have carried away forcibly the attendant from a mother of a family or from a boy or a girl wearing a toga praetexta¹⁴² or if anyone is said to have accosted or to have followed closely such person contrary to good morals.

193. Nothing to be done for the purpose of bringing into ill repute. If anyone acts against these rules I shall consider each case on the basis of its particulars.

194. Outrages that are done to slaves. Whoever is said to have beaten another person's slave, contrary to good morals, or to have tortured him¹⁴² without his owner's order, against him I shall grant an action. Also, if any other thing is said to have been done for an approved cause^{19a} I shall grant an action.

195. Noxal action for outrages.^{142a}

196. If an outrage is said to have been committed against the person who is in another person's power, and neither he is present in whose power he is nor any procurator appears who can sue in his name, for an approved cause^{19a} I shall grant an action to the person who is said to have received the outrage.

197. Counteraction for outrages.¹⁴⁴

Three Imperial Rescripts

216. RESCRIPT OF TRAJAN ON FOUNDLINGS, ca. 112 A.D.

(Pliny, *Ep.* 10, 66)

Pliny has asked Trajan for a ruling on the status and the maintenance of foundlings,¹ a matter which had excited recently his province, for among copies of imperial constitutions available to him he had not found any regulations on this subject relating to Bithynia.

Trajan to Pliny, greetings.

Your question, which pertains to those persons who, born free, have been exposed and then have been rescued by certain persons and have been reared in slavery, often has been discussed, nor is there found in the records of those emperors who have preceded me anything that may be established for all the provinces. There are, indeed, Domitian's letters to Avidius Nigrinus² and to Armenius Brocchus,² which perhaps ought to be observed; but Bithynia is not among those provinces about which he wrote replies; and, therefore,³ I think that such persons neither must be denied a claim of freedom by suit when they assert their freedom in a case of this kind⁴ nor must redeem their freedom by payment for support.⁵

¹ Whether they should be considered free or servile and if the former, whether those who had reared them could claim reimbursement for their expenses in regard to them.

² Probably proconsuls of Achaëa (Greece), as seems likely from Pliny's letter (*Ep.* 10, 65).

³ Since neither local custom nor imperial regulation could be cited as pertinent to Pliny's province, Trajan felt free to impose his own instructions.

⁴ This decision concerns status. Ordinarily such a claim of freedom was made by the child's father, but it could be brought by a kinsman or even by any interested person.

⁵ This ruling treats maintenance. Presumably the claimer of liberty had been expected to reimburse the rescuer and/or the rearer of the child for previous support. Perhaps he still is expected to do so, but it is not mandatory. Why Trajan rules against this practice is unknown. Two opposing suggestions may be advanced: (1) discouragement of rescuing exposed children for either of two reasons: (a) loss of revenue from estates of childless persons, who without necessary heirs were manumitting and then adopting as heirs such ex-slaves, when otherwise their estates would fall to the imperial fisc or (b) pressure of provincial population; (2) Trajan's presumed intention, for which, it must be said, no evidence exists, was to substitute for it (a) a scheme whereby the community concerned was charged with payment of the child's past expenses to his former master or (b) an extension of the Italian alimentation (ordered by Nerva) to the provinces.