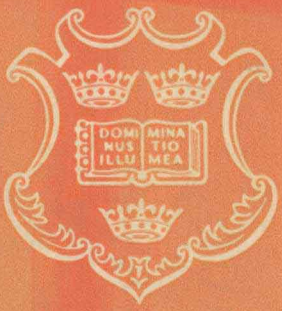
AN INTRODUCTION TO ROMAN LAW

BARRY NICHOLAS



CLARENDON LAW SERIES

AN INTRODUCTION TO ROMAN LAW

BY

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PREFACE

THIS is not intended to be a comprehensive textbook. The customary English elementary textbook of Roman law has been essentially an expansion of and commentary on the Institutes of Gaius and Justinian. My purpose has been somewhat different. The main framework of the Institutes has become a necessary part of any thinking about Roman law, and to some extent about law in general, and an account which abandoned that framework would not be an account of Roman law. But within that framework I have attempted a shift of emphasis. It was not the habit of the Roman lawyers to make explicit the fundamental assumptions and distinctions with which they worked; nor could they criticize and evaluate their own achievement in the way that we, with our knowledge of its subsequent history and of the contrasts provided by the English Common law, are able to. I have tried to do both these things and also to point very briefly to some of the ways in which Roman law still survives in modern Civil law systems.

I have tried, in the first place, to draw out the fundamental assumptions and distinctions of the Roman law and to delineate its most characteristic institutions. In doing so I have of course stated many of its detailed rules, since without them the skeleton would lack life, but I have omitted much that seemed to me to be, in a book of this size, of secondary importance. Those who are already acquainted with the subject will each, I fear, find that I have omitted something which to him is fundamental and included something else which is trivial or abstruse. Such readers will also find that on controversial points—and owing to the peculiar character of the surviving evidence they are many—I have either muted the controversy or, more often, have stated without qualification what is no more than one opinion. I have had to steer a course between two familiar dangers. On the one hand it would be an unjustifiable distortion to depict the Roman law of any period as clear and undisputed, and on the other hand it would defeat the purpose of an introductory book to express every qualification that strict scholarship would demand. Where I have made a choice

between conflicting opinions I have thought it right to err on the side of conservatism even where my own preference might be for a more radical view.

I have tried, in the second place, to show the Roman law as a living system with both merits and defects, a system made by men who worked within limitations imposed by the conditions of the time and by their own methods of thought. And finally I have attempted to provide some signposts to the more significant contrasts to be found in the Common law and to the salient features of the Roman inheritance of modern Civil law. In a book of this size they can be no more than signposts, and I have made no attempt at exposition of the modern law. Moreover within the Civil law I have confined myself to the French and German systems, as being both the most divergent and the most influential. I have made almost no mention of Scots law. For this the explanation is in part my own ignorance and in part a sense that the influence of English law has been strong enough to blur the similarities and that of Roman law to blur the contrasts which I was seeking.

I have said little about early Roman law, both because the proportion of conjecture to evidence is very much higher than in the classical and later law, and the risks of distortion in a simplified account are correspondingly increased, and also because the interest to be found in the primitive law is often different in kind from that offered by the mature system, and it is the mature system which has influenced subsequent law.

I have abandoned the main framework of the Institutes in several respects, of which only one needs mention here. I have given no separate treatment of Actions. This is not because I think Actions unimportant. On the contrary, I am sure that their main features are vital to an understanding of the law. But I think that in an introductory book those main features are best incorporated in the discussion of the sources and of the substantive law.

I am indebted to a number of friends for criticism and advice. From Professor F. H. Lawson I have derived more ideas and insights over the past dozen years than I can now hope to identify; and I am in particular grateful to him for reading the manuscript of the book at a time when it had become overgrown and for suggesting the points at which it could advantageously

be pruned. I am greatly in the debt of Mr. G. D. G. Hall, who subjected the final draft to a penetrating and detailed criticism which was all the more valuable because it came from one whose primary interest lies outside the field of Roman law. I am most grateful also to Mr. D. L. Stockton and Dr. W. A. J. Watson for their advice on particular sections, and especially to Professor P. Stein who read the proofs and saved me from a number of errors and obscurities. For those in which I have persisted he is of course not responsible.

BARRY NICHOLAS

Oxford, November 1961

DATES

Republic

B.C.

451–450 Twelve Tables
367 Institution of (Urban) Praetorship
c. 242 Institution of Peregrine Praetorship
?*c.* 125 *Lex Aebutia*

Principate

27 Augustus regularizes his power

A.D.

14 Death of Augustus
117–138 Reign of Hadrian
c. 130 Consolidation of Edict
138–161 Reign of Antoninus Pius
?*c.* 161 Institutes of Gaius
161–169 Reign of M. Aurelius and L. Verus
169–180 Reign of M. Aurelius alone
193–211 Reign of Septimius Severus
211–217 Reign of Caracalla (Antoninus)
c. 212 *Constitutio Antoniniana*

Dominate

284–305 Reign of Diocletian
306–337 Reign of Constantine the Great
313 Toleration of Christianity
330 Transfer of capital to Constantinople
395 Final division of Empire
426 Law of Citations
438 *Codex Theodosianus*
476 End of Western Empire
527–565 Reign of Justinian

CONTENTS

I. HISTORY AND SOURCES OF THE LAW

II. LAW OF PERSONS

III. LAW OF PROPERTY

I

HISTORY AND SOURCES OF THE LAW

I. INTRODUCTION

1. THE CLAIMS OF ROMAN LAW

ACCORDING to tradition Rome was founded in 753 B.C. In the twenty-seven centuries since then Roman law has lived two lives and makes two claims on our attention. In its first life it was the law of the city of Rome and, in its ultimate maturity, of the whole Roman Empire. But it was more than this. It was the most original product of the Roman mind. In almost all their other intellectual endeavours the Romans were the eager pupils of the Greeks, but in law they were, and knew themselves to be, the masters. In their hands law became for the first time a thoroughly scientific subject, an elaborately articulated system of principles abstracted from the detailed rules which constitute the raw material of law. This process of abstraction is important not merely for the simplicity of formulation which it makes possible, but also because principles, unlike rules, are fertile: a lawyer can by combining two or more principles create new principles and therefore new rules. The difference between a system of principles and a system of rules may thus be likened to the difference between an alphabetic script and a system of ideographs such as the Chinese.[1] It was the strength of the Roman lawyers that they not only had the ability to construct and manipulate these abstractions on a scale and with a complexity previously unknown, but had also a clear sense of the needs of social and commercial life, an eye for the simplest method of achieving a desired practical result, and a readiness to reject the logic of their own constructions when it conflicted with the demands of convenience. If the law is 'practical reason' it is not surprising that the Romans, with their genius for the

[1] This observation, with others on this page, was made by Rudolf von Jhering in perhaps the most perceptive book ever written about the Roman law, *Geist des römischen Rechts* (*Spirit of the Roman Law*, 1st ed. 1852–65), unhappily never translated into English (French translation by O. de Meulenaere).

practical, should have found in it a field of intellectual activity to which they were ideally suited.

This first life of Roman law was summed up, and in the event brought to a close, by the Emperor Justinian in the sixth century A.D. It claims our attention for the intrinsic quality of its intellectual achievement. But five and a half centuries later the law books of Justinian came to be studied in northern Italy, and there began, at first in the universities and later in the courts, the astonishing second life of Roman law which gave to almost the whole of Europe a common stock of legal ideas, a common grammar of legal thought, and, to a varying but considerable extent, a common mass of legal rules. England stood out against this Reception of Roman law and retained its own Common law largely but not entirely uninfluenced by the Roman. Hence it is that in the world today there are two great families of law of European origin—the one deriving from the Common law of England and embracing the greater part of the English-speaking world, and the other rooted, or partly rooted, in the revived Roman law and including almost all the countries of Europe and a number of others besides.[1] In contrast to the Common law these Romanistic systems are commonly called Civil law, the name by which until quite recently the Roman law itself was known.

The Roman law thus makes this second claim on our attention, that it provides the Common lawyer with a key to the common language of almost every other system of law which traces its origin to Europe.

It is not for the whole of Roman law, however, that this claim can be substantiated. The Romans themselves made a distinction between public law and private law. The former was concerned with the functioning of the state, and included in particular constitutional law and criminal law; the latter was concerned with relations between individuals. It was the private law to which the Roman lawyers devoted their main interest, and it was the private law which gave to the second life of Roman law its great importance. It is with it alone, therefore, that we are here concerned.

[1] See further below, pp. 51 f. The two great non-European systems—the Hindu and the Mohammedan—are religious in character. In the field of commercial law they have been largely superseded by importations from one or other of the European systems, but in other fields they still regulate the lives of many millions of people.

2. THE CONSTITUTIONAL AND HISTORICAL BACKGROUND

No system of law can be fully understood in isolation from the history of the society which it serves and regulates. What follows can be, however, no more than a sketch of some of the salient features of the history of Rome in the thirteen centuries which end with the death of Justinian in A.D. 565.

The struggle between the Orders, and the Republican constitution. For the history of the first period, ending traditionally in 510 B.C. with the expulsion of Tarquinius Superbus, the last king, we have little reliable evidence, and for its law even less. From this period the Roman Republic emerges as a small city-state, based mainly on agriculture but already acquiring some commercial importance and showing signs of those military abilities which were to extend her frontiers far beyond the Mediterranean world. However, the first century and a half of the Republic (510–367 B.C.) was devoted largely to the internal struggle between the two Orders or classes into which the citizen body was divided—the Patrician nobility and the Plebeians who formed the bulk of the population. The struggle was for equality, partly economic but mainly political. It was important for the early development of the Roman constitution, but since it was finally over by at the latest 287 B.C., and the significant development of the private law did not begin for at least another century after that, we may be content merely to glance at the relevant features of the Republican constitution. This constitution consisted from the beginning of three elements—the magistrates, the Senate, and the assemblies.

The magistrates were the inheritors of the royal power. For the principal political consequence of the revolution which inaugurated the Republic was simply the replacement of the King by two magistrates, eventually known as Consuls. They were endowed with full executive power (*imperium*), subject only to three limitations: in the first place, though each had full power, each was subject to the veto of the other; in the second place, they held office only for a year; and lastly, their power might be limited by legislation. As Rome developed, other major magistracies were created to relieve the Consuls of their duties in specific spheres, but the principle of the *imperium*

remained—each such magistrate had full power within his own sphere, subject to the same limitations and subject also to the veto of magistrates superior to him. How sweeping this power was can be seen from the fact that it was only by legislation that a citizen had the right of appeal to the Assembly from a magisterial order for his execution.

The magistracy which most vitally concerned the private law was the Praetorship, created in 367 B.C. to take over that part of the Consuls' duties which concerned civil (as opposed to criminal) jurisdiction. The Praetor was thenceforth responsible for the administration of the civil law, though the period of his great formative influence upon it was not to come for another two centuries. In about 242 B.C. a division of his functions became necessary and thereafter two Praetors were appointed. One had jurisdiction in cases in which both parties were citizens and was called the Urban Praetor (*praetor urbanus*), and the other had jurisdiction in cases in which at least one party was a foreigner (*peregrinus*), and was called the Peregrine Praetor (*praetor peregrinus*, or, in full, *praetor qui inter peregrinos ius dicit*). In the later Republic the number of Praetors was greatly increased, but only these two were concerned with the private law.

The two Curule Aediles, also appointed for the first time in 367 B.C., were the magistrates responsible for what might be called public works in the city, and also for the corn supply, but their importance for the private law lies in their control of the market place, in connexion with which they exercised a limited civil jurisdiction. This jurisdiction enabled them to make an important contribution to the law of sale.[1]

The Censors, first appointed in 443 B.C., were appointed every four or five years and held office for not more than eighteen months. They had no direct concern with the law, but they exercised a general supervision over morals which might form an important supplement to the law. This supervision of morals derived from their main function, which was the taking of the census. This involved the allotting of each citizen to his appropriate group for political and military purposes and for taxation. In carrying out this duty the Censors might place a mark (*nota*) against the name of any man of whose conduct, in public or in

[1] See below, pp. 181 f.