

Book I.
Title XIV.

Concerning statutes, imperial constitutions and edicts.
(De legibus et constitutionibus principum et edictis.)

Bas. 2.6.6; D. 1.3.4.

Headnote.

Sources of the law.

During the republic, laws were largely made by popular assemblies which, however, passed out of existence soon after the beginning of the empire. For some time the senate had the power to adopt laws (senatus consulta). But that body, too, gradually lost its power and influence under the empire. Statements (orations) made in the senate, or sent to it, by the emperor, were for some time ratified by it, but this practice ceased in the latter part of the third century, the orations thereafter, whenever made or sent to that body, having the force of law without a vote of confirmation. (Buckland 15.) D. 1.3.9 says that “nobody questions that the senate can make law.” And C. 1.16 confirms that statement. Nevertheless, the right existed theoretically only, since that body was absolutely dependent on the will of the sovereign. C. 1.14.8 shows an enactment of the year 446 A. D. in which the emperor stated that the senate should thereafter be consulted in the enactment of new laws. How far the rule was carried out is not known.

Another source of law in the early days was through the edicts of the praetors, the ordinary judges at Rome. These praetors at the beginning of their year of office would issue a general edict stating what principles, aside from the ordinary rules of the civil (common) law, they would observe during their term of office. The edict tended to become larger from year to year and finally constituted a good portion of the written law. A perpetual edict, embracing most or all of what the edicts of the praetors contained, and other matters, was issued in the time of the emperor Hadrian, after which the annual praetorian edicts ceased. This matter is more fully mentioned in headnote to C. 1.39. The edict is largely preserved to us through the writings of the jurists.

These jurists, more than anyone else, were the real founders of the Roman law. Some of them, commencing with Augustus, were given the right to give answers (jus respondendi) under seal, their answers at first being made binding upon the judge who had requested the answer. Some of the writings of these men have come down to us, mainly through the Digest or Pandects of Justinian’s compilation. They, of course, were only interpreters of the law, and could not make any new laws. After the senate ceased to function, new enactments could be made only by the emperor. In fact it soon became accepted that the emperor was the source of all law. Ulpian (who died in the early part of the third century) wrote: “What the emperor has determined has the force of statute—seeing that...the people transferred to him and conferred upon him the whole of their own sovereignty and power. Accordingly, whatever the emperor has laid down by a letter with his signature, or has decreed on judicial investigation, or has pronounced out of court, or enacted by an edict, amounts beyond question to a statute.” D. 1.4.1. The most common term used for these utterances of the emperor was “constitution,” which, according to Ulpian (D. 1.4.1) included edicts, decrees and rescripts (letters), although these terms are distinguished from each other occasionally. Buckland 18. Edicts were general orders; decrees decisions in specific cases. Mandates (apparently not included in

the term “constitutions”) were usually administrative directions to provincial officials, but occasionally laid down rules of law. Buckland 21. The other forms by which the emperor made or interpreted laws were as follows:

Rescripts, letters, “subscriptions,” adnotationes—these terms might all be translated as “letters.” They were in principle answers to inquiries. Replies to officials usually took the form of independent letters, which then were called simply *epistulae* (letter). *Subscriptio* and *adnotatio* applied to replies to private individuals or communities. The emperor either appended his answer to the request itself or he made notes upon it. His reply in the first case was called *subscriptio*, in the second *adnotatio*, the original application together with the answer being returned to the applicant. The term *rescript* was applied to all of these forms of answers. The term “*rescripti*” or “*scripsi*” (“I have written.”) is found at the end of some rescripts, in the hand of the emperor. The term “*recognovi*” is found at the end of some of them, and probably is the countersignature of the official in charge of the bureau which prepared the answer, certifying that the document correctly represented the decision in the case. The term “*proposita*,” common at the end of many rescripts, indicates the date and place of promulgation. See generally Buckland 7, et seq., Abbott 7 Johnson, Municipal Administration in the Roman Empire 232 et seq. The term “pragmatic sanction” was applied during the later time to laws relating to corporations, guilds, provinces, communities, or to the public service. Willems, Le droit public, 567; C. 1.23.7. See further as to rescripts C. 1.23, and as to mandates C. 1.15.

It may be noted here that legal matters were ordinarily attended to by the quaestor, his [the emperor’s] attorney general, and Justinian provided by Novel 114, appended to C. 7.61.3, that all orders to governors relating to legal matters should bear the signature of the quaestor. See also headnote C. 1.30. And Justinian further provided that imperial orders directing a curial or provincial apparitor to appear in court in another province, or imperial orders made in reference to public affairs, such as public works, for instance, should be filed for record with the praetorian prefect and confirmed by him. Novel 151 is appended to C. 10.35 following Novel 101. Novel 152 is appended to C.1.27, and reference to these Novels is made in the headnote to C. 1.27.

1.14.1. Emperor Constantine to Septimius Bassus, Prefect of the city.

To solve doubts (*interpretationem*) arising between equity and law should and must be left solely to us.

Given December 5 (316).

C. Th. 1.2.3.

Note.

In Bas. 2.6.6, this law is stated as follows: “If the law lays down one thing and equity another, only the emperor can give a decision concerning it, for it is proper that decisions of the kind be made by him.”

1.14.2. Emperors Theodosius and Valentinian to the Senate.

Decisions made by us in regard to transactions laid before the imperial council of the nobles of our imperial palace, pursuant to reports and suggestions of judges made for purposes of consulting us, and the decisions given to any corporation, legates, province,

city or curia, shall not be considered as general laws, but as rules only governing those transactions and persons, for which or whom they were promulgated; nor shall anyone dispute them. For whoever interprets them trickily or tries to defeat them by a rescript which he has obtained shall suffer the mark of infamy, nor shall he enjoy the benefit of the rescript elicited by deception. And the judges who hesitate in such cases, (dissimulaverint) or listen further to such person or permit any allegation to be made, or under color of doubt refer the matter to us, shall be punished by a fine of thirty pounds of gold.

Given at Ravenna November 6 (426).

Note.

The imperial council was composed of certain high officials and most if not all the important questions arising were laid before and decided in the council, the decision of the council being advisory only to the emperor, and he could follow or ignore it. Ordinarily, of course, the advice of the council was followed. Note to C. 12.10.2 mentions the council at greater length and should be consulted. It was the custom for judges and administrators to send reports asking the emperor's advice, judicial decisions, in fact, awaiting the answer thereto. The answers in judicial matters were, of course, ordinarily handled by the legal department of the emperor—namely the quaestor, who, in a measure, may be said to have been the attorney general of the empire. The subject of reports for advice, above mentioned, is fully considered at C. 6. 61, and the quaestor is more fully considered at C. 1.30. By law 12 of this title, Justinian provided that any judicial decisions made by him—which ordinarily would be by aid of the imperial council—should serve as a rule of law in all similar cases, thereby to some extent at least modifying the instant law.

1.14.3. The same Emperor to the Senate.

In the future, laws shall be obeyed equally by all, as general laws, which are either contained in an address sent to your venerable assembly, or are called by the name of edicts, whether we made these laws on our own motion, or whether a petition or report or a pending lawsuit gave the occasion therefore. It is sufficient that they have been denominated by the name of edict, or have been published to all the people by proclamation of judges, or distinctly state (expressius contineri) that the emperors have decreed that which has been decided in specific cases shall also decide the fate of similar cases.

1. And further, if the law is called a general law, or is ordered to apply to all, it shall have the force of an edict. But special orders (interlocutionibus) which we have made or shall make in a single case, not deciding anything as to everybody, and orders made in special cases for certain cities, provinces or corporations, shall not be of general application.

Given at Ravenna November 13 (426).

1.14.4. The same Emperors to Volusianus, Praetorian Prefect.

For a sovereign to acknowledge himself bound by the laws is a statement befitting the majesty of a ruler, and, therefore, our authority depends upon the authority [of] law. And for a sovereign to submit himself to the laws, is in fact a greater thing than imperial power. And by the announcement of the present edict we show what we do not permit ourselves to do.

Given at Ravenna June 11 (439).

Note.

Bas. 2.6.9 states this law as follows: “General laws are also valid, as against the emperor, and every rescript contrary to law is void.” This makes it perfectly plain what was intended by the foregoing law. The emperor deprived himself of the power to violate general laws by any special order or statement (rescript). But that was largely theoretical and often served as a cloak for arbitrary action. D. 1.3.31 states: “The emperor is not bound by statutes. The empress no doubt is bound, though the emperor generally gives her the same exceptional right as he enjoys himself.” And D. 1.4.1 pr. Says: “What the emperor has determined has the force of a statute.”

The reasons for the foregoing law lay in the fact that many persons sought special privileges from the emperor, which, ordinarily did not exist. Inasmuch as the emperor could not hope to investigate each petition laid before him, he laid down general rules, and declared all special privileges in violation thereof to be invalid. As an illustration: Justinian provided that the churches should make no alienations of immovable property, but that an exchange might be made with the emperor, whenever the emperor wanted any of the church property for state reasons. Novel 7. So, to circumvent that law made, many persons besought the emperor to take over some of the property of the church of Constantinople and in turn make it over to them. Novel 55, appended to C. 1.2 shows that innumerable petitions of that sort came before the emperor and were granted. He, thereupon, made a general rule by that novel so as to prevent such petitions being carried out (to which, however, he did not adhere).

1.14.5. The same emperor to Florentius, Praetorian Prefect.

There is no doubt that he violates the law, who, adhering to its letter, violates its spirit; neither will he escape the punishment provided in the laws, who, trickily, seeks an excuse against the intention thereof, by giving a perverse preference to its words. For no pact, agreement or contract shall be considered effectual between those who make a contract which the law prohibits.

1. This shall also apply generally to the interpretation of laws, old as well as new, so that it will only be necessary for the legislator to prohibit what he does not want to be done, and other matters (implied therein) shall be gathered from its intention as though actually expressed; that is to say, those things which the law prohibits to be done, shall not only be ineffectual if actually done, but shall be considered as though not done at all, although the legislator only prohibits things to be done, and does not specially say that if done, they will be ineffectual.

2. In accordance with the aforesaid rule, which must be followed whenever an act is prohibited by law,¹ it is certain no stipulation of that kind shall be binding, no mandate shall have force, and no oath shall be admissible.

Given at Constantinople, April 7 (439).

Note.

Rules of Interpretation.

If the law was clear, it was to be extended to analogous cases, and if it had been long interpreted in a certain way that interpretation governed; custom and authority of constant decisions were given the force of law. D. 1.3.11;23; 37 and 38. If the law was

¹ [Blume] Some insert “nom” before “servare,” making the reading slightly different.

obscure, the meaning which involved no absurdity was to be adopted. D. 1.3.19. “To know the statutes does not mean to have got hold of the actual words, but to be acquainted with their sense and application.” D. 1.3.17. “A man who contravenes the intention of a statute, without disobeying the actual words, commits a fraud on it.” D. 1.3.29. Statutes were to be interpreted indulgently so as to carry out [their] intention and to do justice, and not harshly so as to prejudice those for whose sake [they were] devised. D. 1.3.18 and 25. Older statutes might be used to interpret the new, and new to interpret the old, unless there was a contradiction. D. 1.3.27 and 28. The reasons of the law were not to be inquired into, which doubtless, means that the policy of the law was for the legislator and not the judge. D. 1.3.21. New laws ordinarily applied only to the future. C. 1.14.7. Nevertheless, retroactive laws were passed at times.

1.14. 6. The same Emperors to Florentius, Praetorian Prefect.

We do not want that which has been decreed for the benefit of any persons to be used under certain circumstances to their injury.

Given April 7 (439).

Nov. Th. 14.6.

1.14.7. The same emperors to Cyrus, Praetorian Prefect and designated consul.

It is certain that statutes and constitutions fix a rule only for future transactions, and cannot be applied to past acts, unless special provision was made concerning past time² in regard to matters still pending.

Given September 7 (439).

1.14.8. The same Emperors to the Senate.

We approve as proper that whenever anything indispensable arises in any public or private matter, which requires a general law and is not contained in former laws, it shall,³ conscript fathers, be first considered by all the nobles of our palace as well as your glorious assembly, and that if agreed to by all the judges as well as by yourselves, the matters mentioned shall be put in writing, revised in a full assembly and when all have agreed, then that it be finally read in the imperial council, so that what all have agreed on may be confirmed by the authority of Our Serenity. Take notice, therefore, conscript fathers, that hereafter no statute shall be promulgated by our clemency unless the above mentioned rule shall be followed. For we well know that whatever law is enacted by your advice will redound to the happiness of our reign and to our glory.

Given Oct. 17 (446).

Note.

The imperial council and the senate are more fully considered in note to C. 12.10.2. The council was composed of certain high officials (here called judges—a general name for magistrates who had judicial functions) of the government at the capital. The senate, formerly all powerful, sank to powerlessness during the empire. But some of the emperors favored, or pretended to favor, the senate and still made it think that it had influence. The instant law illustrates that.

² [Blume] “Praeterito tempore” deleted by Mommsen, but that does not seem necessary.

³ Blume’s typewritten original to this point read: “We think it proper that whenever a general rule is necessary in any public or private matter to make a provision not contained in former laws, it should...”

1.14.9. Emperors Valentinian and Marcian to Palladius, Praetorian Prefect.

The sacred laws which bind the lives of all, should be known by everyone, so that after clearer knowledge of the precepts of these laws, all may omit doing acts which are forbidden and act freely in matters which are permitted. If some obscurity is, perchance, found in these laws, it should be clarified by imperial interpretation, and any harshness therein, not consistent with our spirit of kindness should be corrected.

Given at Constantinople April 4 (454).

Nov. Marc. 4.

1.14.10. Emperors Leo and Anthemius.

All, though belonging to the imperial house, must live according to the laws.

Given February 8 (468).

1.14.11. Emperors Leo and Zeno.

If a doubt should arise in a new law, which has not been firmly established by long usage, reference to us by the judge, as well as the authority of imperial decision are necessary.

Given April 22 (474).

Note.

The emperor here seems to have reserved to himself to interpret the laws in case of doubt. C. 1.17.2.21. That could not, of course, have literally been true, and the practical administration of the law required the judges from time to time to solve doubtful points without waiting for the emperor. Still there was a long standing practice to refer many points of doubt to the emperor as already mentioned in note to law 2 of this title, and considered fully at C. 7.61. The instant law evidently meant to encourage the practice, although Justinian found that he had to abandon it to a large extent. See Novel 125 attached to C. 7.61.

1.14.12. Emperor Justinian to Demosthenes, Praetorian Prefect.

If the imperial majesty has judicially examined a cause and has given a decision in the presence of the parties, then all judges within our empire must take notice that this is the law not only in that particular case but also in all similar causes.

1. For what is greater or holier than the imperial majesty? Or who is so swelled up by his own pride as to scorn the royal opinion, when the founders of the ancient law have clearly and lucidly declared that constitutions, proceeding by imperial decrees, have the force of law?

2. Since we have also found it doubted in the ancient laws whether, when the emperor has interpreted a statute, this interpretation should have the force of law, we have both laughed at this foolish subtlety and have deemed it proper to correct it.

3. We therefore decide that every interpretation of laws by the emperor, whether made on petitions, in judicial tribunals, or in any other manner shall be considered valid and unquestioned. For if at the present time it is conceded only to the emperor to make laws, it should be befitting only the imperial power to interpret them.

4. For why do the nobles run to us for advice when a doubt arises in lawsuits and they do not trust themselves to give a decision, and why are ambiguities which are apt to be found in laws referred to us, if true interpretation does not proceed from us? Or who

will be suitable to solve enigmas and make them plain to all, unless it be he to whom alone is granted the right to make laws?

5. These absurd doubts, therefore, being dissipated, the emperors will rightly be considered as the sole maker and interpreter of laws; nor does this contradict the founders of the ancient laws, because the imperial majesty gave them the same right.

Recited within the ** city of Constantinople.

Given October 30 (529).