

Book I.
Title XXXIX.

Concerning the office of the praetor.
(De officio praetorum.)

Headnote.

Beginning with about 149 B. C., special tribunals began to be created for the trial of cases involving a certain crime. These tribunals were called *quaestiones perpetuae* and were standing tribunals for such cases. See headnote C. 9. In connection with these tribunals Sulla increased the number of praetors from six to eight, who, as a rule, exercised judicial functions in Rome for one year, and were then sent to a province as pro-praetors. By a law passed in 52 B. C., however, consuls and praetors did not become eligible for governorship until after five years after their term of office in the city expired. The number of praetors varies from that time on, there being as many as eighteen in the time of Nerva, and perhaps nineteen in the time of Marcus Aurelius. But their powers began to be diminished almost from the beginning of the empire through the creation of the office of city prefect, who, after Diocletian was the ordinary judge for the city of Rome. After that time, the jurisdiction of the praetors—the number in Rome not being known—was probably limited the same as that of the praetors of Constantinople, as mentioned in law 1 of the instant title. The number of praetors in Constantinople varied, being fixed at three by law 2 of this title. There were no praetors in cities other than the capitals of the empire. The judicial functions in the provinces were performed by the provincial governors or by persons to whom they delegated these duties or by special appointees of the emperor. See C. 3.3. Because of the fact that the praetor was at one time the embodiment of judicial power, frequent reference is made to him throughout the Code, when in fact the successors to him in the performance of judicial functions were contemplated.

In 539, Justinian created for Constantinople what he called the praetor of the people to protect the city and keep it peaceable and exercise criminal jurisdiction. Justinian further reorganized the government in various parts of the empire, as has already been mentioned, and in connection with that he created praetors of Pisidia, Lycaonia, Thrace, and Paphlagonia, by Novels 24, 25, 26, and 29, which are appended to this title. They were made governors of the territories specified with civil and military and judicial power. These Justinian praetors, however, must not be confused with the praetors heretofore mentioned, particularly with the praetors mentioned in law 2 of the instant title, whose powers and authority was very limited.

See generally on the earlier praetors, Smith's Dictionary of Greek and Roman Antiquity under "praetor" and "edictum;" also 2 Bethmann-Hollweg 50-52 and 3 Bethmann-Hollweg 56, 66.

Praetorian Edict. The office of praetor was, next to the consulship, the most important office in the Roman Republic. In the absence of the consuls, he informed the ordinary duties of civil administration. His main function was to preside over the administration of justice. The office seems to have been created in 365 B.C. In about 264 B.C., a second praetor seems to have been appointed for the discharge of that part of the judicial business in which foreigners, residents of Rome and citizens jointly were concerned. He was called praetor *pregrinus*, as distinguished from the praetor who was occupied with

the suits of Roman citizens, who seems thereafter to have been called praetor urbanus, and who maintained his precedency over all other judicial magistrates. It became usual for the praetor, at the commencement of his year of office, to proclaim, by an edict, the principles which, apart from the established civil or common law, he intended to observe in his administration of justice. Eventually this usage developed into an obligation. Such edict was called perpetual edict (*edictum perpetuum*). Technically this edict was not binding upon any successor, but it became the rule as early as the time of Cicero for each successive praetor to adopt, in substance, the edict of his predecessor, with such changes as he deemed expedient. In this way the edict gradually grew into a considerable and permanent body of law, and its excellence was guaranteed by the fact that obnoxious provisions could be omitted by a subsequent praetor. Thus innovations were made from time to time on the law of the Twelve Tables. We find that true, for instance, in connection with the law of inheritance. See headnote C. 6.9. It was in a measure, the same judicial legislation as we find in connection with our common law. A like course seems to have been followed by the aedile and the praetor peregrinus, as well as the provincial governors. The edict in the case of the latter would naturally be somewhat different than the edicts issued at Rome, for the reason that local customs and local laws were ordinarily respected, but, on the whole, the edicts issued by the provincial governors naturally tended more and more to follow, and be similar in import to, the edict issued by the praetors at Rome. See Arnold, Roman Provincial Administration 55-57. In the year 131 A. D., the emperor Hadrian issued, through Salvius Julianus, a revised edition of the perpetual edict of the praetor urbanus, combining with it the edict of the aedile, another official, and probably also that of the praetor peregrinus and parts of the edicts which had been issued by provincial governors. This was the *edictum par excellence* and is the perpetual edict ordinarily referred to throughout the empire. It was arranged according to subjects and titles. Henceforward judicial magistrates ceased to issue their annual edict, and the changes in the law, aside from adopted interpretations of law writers, were made by the emperors by the means of constitutions, edicts, rescripts, and other means.

In 227 B. C., two new praetors were created for the government of Sicily and Sardinia, and thirty years later, two new praetors for the government of Spain, and it became the custom for both the praetor urbanus and peregrinus, as well as each consul, to be sent out to govern a province after the expiration of his term of office.

1.39.1. Emperor Constantius to the Senate.

To the praetor is extended, by our permission, jurisdiction as trial judge to examine into matters involving personal liberty. Decrees are properly issued by him; as when restitution to former condition should be granted, if the proofs warrant it, or when a guardian or curator is appointed by him, and when a diligent slave receives his liberty before him from his master. And the wishes of sons will not fail to be met by the just wishes of fathers, to liberate the sons, when opportunity is offered, from paternal power, and who are liberated by their own showing of respect, when they (the sons) realize that they owe greater respect to their fathers, by whom they know themselves to have been liberated from sacred bonds.¹

Given December 30 (359).

¹ Blume has a question mark in the margin next to this passage, the typed original of which read: "to liberate the sons, as they have the right to do, from paternal power, or rather bind them to show their respect, since they (the sons) realize..."

C. Th. 6.4.16.

Note.

The following jurisdiction was given praetors: first, in cases involving liberty, which included cases where a person was claimed for slavery, or where a person in slavery claimed liberty; second, cases where a person claimed restitution to former condition, arising mainly in connection with minors; third, the right to appoint guardians and curators; fourth, the right to give consent to the manumission of slaves by their masters; fifth, the right to consent to the emancipation of children from paternal power. The jurisdiction was, accordingly, exceedingly limited, was undoubtedly intended to convey the right to consent to emancipation, and to express, in some manner of elegance which cannot be conveyed in the translation, the fact that children emancipated from paternal power owe greater respect to their fathers by reason thereof. As to paternal power, see C. 8.46.2; headnote C. 6.60; as to cases involving liberty, see for example C. 7.16; as to restitution to former condition, see C. 2.25 and subsequent titles; as to manumissions, see C. 7.1, and subsequent titles; as to emancipations, see C. 8.48.

1.39.2. Emperors Valentinian and Marcian to Tatianus, Prefect of the City.

We direct that only three praetors, of outstanding reputation, shall each year be installed in this city pursuant to election by the senate, who shall honestly decide and deal with the cases and transactions within their jurisdiction, provided that these three shall be selected from among those who have their residence in this fair city, and not from among the provincials. Nor shall anyone who happens to come here for any reason from the provinces be called to the praetorship, but only those, as stated, who have their domicile here, and not even they shall be compelled to go to any expense, but their liberality shall be at their discretion.

Given at Constantinople December 18 (450).

Note.

This law related to the praetors of the city of Constantinople. The number of praetors there had varied, as many as eight praetors having been elected, each to serve for a year. The office was not of importance as already shown in law 1 of this title. It had continued because each of them, on taking office was required to give games for the people or make a contribution for public purposes. This law, however, exempted provincials from serving at all, and limited the number to three, and they, too, were not required. Although permitted to give games. This option, perhaps, was but illusory, and the right to give games was probably equivalent to the duty to give them. See fuller note at C. 12.2.1.