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978-1-108-01824-1 - An Introduction to the Study of Justinian's Digest

Henry John Roby

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An Introduction to the Study of Justinian's Digest

Henry John Roby (1830–1915) was a Cambridge-educated classicist whose influential career included periods as a schoolmaster, a Professor of Roman law at University College, London, an educational reformer and a Member of Parliament. First published in 1884, this volume provides an analysis and discussion of Justinian's *Digesta*, a compendium of second and third century Roman legal writings which forms part of the body of Roman civil law issued under Justinian I in 533 AD. It is considered a fundamental work of Roman jurisprudence. Roby discusses the historical context of the *Digesta*, compares extracts in other legal sources with the original text and provides the Latin text of *De Usufructu* (one of the titles from the *Digesta*) with detailed close textual discussion and analysis. This volume was the first published guide to studying the *Digesta* and is considered one of Roby's most important contributions to jurisprudence.

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*Containing an Account of its Composition
and of the Jurists Used or Referred to Therein,
Together with a Full Commentary on
One Title (De Usufructu)*

HENRY JOHN ROBY



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A FULL COMMENTARY ON ONE TITLE
(DE USUFRUCTU)

BY

HENRY JOHN ROBY

FORMERLY

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„Und was darfs viel Worte? das kaysrerliche Recht nach welchem das Römische Reich noch heutiges Tags geregirt wird, ist ja Nichts anders denn heydniſche Weiſheit, welches die Römer, ehe denn Roma von Chriſto gehört hat, geſetzt und geordnet haben. Und ich acht wohl wann iſt alle Juristen in einen Kuchen gebacken und alle Weiſen in einen Trauf gebrant wörden, ſie ſollten nicht allein die Sachen und Händel unangefasſet laſſen, ſondern auch nicht ſo wohl davon reden noch denken können. Denn ſolche Leute haben ſich in großen Händeln müſſen üben, ſind darzu mit großer Vernunft und Verſtand begabet geweſt. Summa ſie haben gelebt und werden nicht mehr leben, die ſolche Weiſheit im weltlichen Regiment gehabt haben.“ LUTHER¹ (*Opp. Altenb. T. 6. f. 203 sq. Ien. 6. p. 156*).

“Dixi saepius post scripta geometrarum nihil extare quod ui ac subtilitate cum Romanorum Iureconsulorum scriptis comparari possit, tantum nerui inest, tantum profunditatis.” LEIBNITZ¹ (*Op. 4, 3. 267*).

Unter ungünstigen Verhältnissen wurden Justinians Sammlungen unternommen, und dennoch geschah die Auswahl mit so viel Sinn und Liebe, daß wir nach Dreizehnhundert Jahren fast bloß aus diesen Büchern, und bei großen Lücken unsrer historischen Kenntniß, den Geist des Römischen Rechts begreifen können....Die eigenen Constitutionen Justinians sind allerdings von verschiedenem Werthe, aber ein großer Theil derselben verdient das Lob der vollständigen Einsicht und Zweckmäßigkeit, und Vieles, was uns als Verunkstaltung des alten Rechts erscheint, ist nur der verständige Ausdruck der Aenderungen, welche ganz von selbst, und ohne Zutun eines Gesetzgebers, eingetreten waren. SAVIGNY (*Geſch. I. § 5*).

“With all their errors and imperfections, the Pandects are the greatest repository of sound legal principles applied to the private rights and business of mankind that has ever appeared in any age or nation.” CHANCELLOR KENT (*Comm. i. p. 541*).

“Hoc non ignoro ueram utilitatem libri pendere ab uniuersa horum studiorum condicione, maxime a felici iuris prudentiae litterarumque Latinarum communione, quae hodie iacet, nec iuri magis operam dant Latine docti quam iurisprudentes Latine sciunt. sunt qui dum huic meae operae fauent putant fieri posse ut studia reuirescant: nec desperandum est. uideant qui hodie iuri operam dant adulescentes ingenui: apud eos enim stat, utrum perduratura sit ars iuris nobilis et liberalis an in artificium sordidum degeneratura. ius Romanum creatum ingenio populi ad id ipsum nati, perpolitum decursu illo mirabili per uiginti saecula nationesque quae fuerunt quaeque sunt omnium principes, tamquam nobile aurum identidem decoctum splendet hodie splendore non imminuto aetate, sed adaucto: et ut caesarum patroni idonei iudicesque sagaces et religiosi etiam eo non adhibito institui possint, tamen ut studium efficiatur liberali homine dignum, id est eo qui hoc intellexit neminem plene uiuere diem praesentem nisi memorem dierum praeteritorum, opus est iure Romano, coniuncto cum ipsorum populorum tam Romani quam nostri creatione et formatione, uitae communi autem neque ita applicato ut animus adulescentis a libero motu statim in sordium eius uincula abripiatur neque ita ab ea alieno ut ex tirocinio ad arma difficilis transitus sit.” TH. MOMMSEN (*Praef. ad Digest. p. lxxx*).

¹ These two passages are given as quoted by Rudorff, *Gesch. i. p. 364*.

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P R E F A C E.

It is not unusual for students who have read the Institutes of Gaius and Justinian to proceed to the Digest. But the Digest is not easy. Neither the arrangement nor the method nor in some respects the phraseology is the same as that of the Institutes, and whatever title is taken up seems to presume a knowledge of a good many other titles. Yet, so far as I am aware, there is no edition of any part of it, at least in modern times, which furnishes help of the same kind as that, which is expected and given in many editions of classical authors. The present book is an attempt in some degree to supply this want.

The first part gives an account of the composition of the Digest and a brief notice of each of the jurists, both those from whose writings the Digest has been compiled and those who are cited or referred to in it. Some information of this kind is given in Histories and Institutional treatises on Roman law, but neither the order of the titles nor the order of the extracts seems to me treated satisfactorily. On the latter point no doubt everyone mentions Bluhme's discovery, but I am not aware of any exposition of it, except Bluhme's own, going into sufficient detail to shew its importance in the practical study and interpretation of the Digest. Further, I have thought it well to shew clearly by juxtaposition of some extracts with the originals, what the character of Tribonian's revision was.

The account of the Jurists is fuller than is found in general histories of Roman law. That this account is after all in

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many cases very meagre, is due, mainly at least, to the want of trustworthy materials. I have refrained here and elsewhere from giving reins to imagination, and have endeavoured to let my readers see what may fairly be treated as known and what is matter of inference and conjecture.

One title fully explained seemed to me more likely to introduce a student to the intelligent study of the Digest than a longer portion less thoroughly treated. Accident determined the selection of the title *de usufructu*, but I have seen no reason for regretting the choice. There is much in the doctrine of usufruct which closely resembles our law of life interests, but there is also much which is specially Roman; and, as will be seen, a good many other parts of the law come naturally into notice in dealing with this. It is also not a little advantage that the corresponding title of the *Basilica* is one of those which have been edited by Zachariä von Lingenthal, with the Byzantine comments conveniently arranged. The Vatican Fragments contain a number of extracts on Usufruct, which furnish important comparisons with the Digest.

The text of the title *de usufructu* is that of Mommsen, with a few conjectural alterations. Whenever it deviates in any matter of moment from the Florentine text (i.e. represents neither that of the original copyist nor of the corrector) the fact is noted at the foot of the page. The arrangement of the text is my own.

My notes it will be seen are legal, philological, and antiquarian. They are of course much longer and more numerous than would properly accompany an edition of the Digest or of a large part of it. It seemed desirable to explain the meaning of a word or expression, not merely so far as the particular passage in question was concerned, but also as the student might find it in other parts of the Digest. A brief summary

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of the law on many matters has been given, partly to remind the student of its relation to the particular question in hand, and partly because what may be already familiar to him from the Institutes will be found to assume a somewhat different aspect under different treatment.

Having had no predecessors in this particular field of annotation I have no special obligations to acknowledge here. Throughout the book I have tried to take my information from the original sources, and to depend on others only when the matter in question was large in itself and not closely connected with my subject. Whenever I have made any distinctive use of modern writers, or have thought the reader might like a fuller or different statement, I have given the requisite reference.

But a vast general debt I am anxious to proclaim. No one who cares for Roman law and philology can fail to feel the heartiest gratitude to the noble school of workers and writers, of whom as jurists, historians and philologists the leaders and types in their respective generations and lines are Savigny and Mommsen.

I have to express my thanks to the Syndics of the University Press for undertaking the publication of this book ; and to the Rev. Joseph B. Mayor, Editor of Cicero's *de Natura Deorum*, for having kindly read and criticised some of the proof sheets.

Corrections will be welcome. One who writes on subjects of this nature, without the assistance and check of colleagues or pupils, and with the resources of a private library only, stands especially in need of criticism from his readers.

H. J. ROBY

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CORRIGENDA.

- Page xxii, line 14 from bottom, for *Theodosian* read *Theodosius*.
 ,, xxxv, line 18 from bottom, for vi read v.
 ,, cxvii, line 12 from top, for 'conspiracy' read 'auspices'.
 ,, 20, Add marginal note to l 48
 '*Heir repairs without direction*'.