GEORGETOWN LAW JOURNAL

VOLUME XIX

1930-1931

WASHINGTON
GEORGETOWN UNIVERSITY SCHOOL OF LAW

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Vol. XIX No. 1

GEORGETOWN LAW JOURNAL

NOVEMBER, 1930

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Subscription Price $2.50 Per Annum 75 Cents Per Number

Published Quarterly During the Academic Year by the
GEORGETOWN LAW JOURNAL ASSOCIATION
WASHINGTON, D. C.

Entered as Second-Class Matter January 24, 1922, at the Post Office at Washington, D. C.
Under the Act of March 3, 1879

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GEORGETOWN LAW JOURNAL

Volume XIX November, 1930 Number 1

FACTORS IN THE PRESERVATION OF ROMAN LAW*

CHARLES SUMNER LOBINGIER

SYLLABUS

I. INTRODUCTORY

"A hundred years ago," said Maine, [1] "virtually universal assumption of juridical writers was that, when the pressure of invading, barbarous races had broken up the territories of the Roman Empire into separate kingdoms, the Roman Law was lost, as the Empire itself was supposed to have been lost. It was indeed plain that, if this were so, the Roman Law must, in some way or other, and at some time or other, have undergone a revival, and this was explained by fables, like the story [2] of the discovery of a copy of Justinian's Pandects at the siege of Amalfi."

*Magisterial address before the Riccobono Seminar of Roman Law, Oct. 30, 1930.

[1] INTERNATIONAL LAW (3d ed.) 16.

[2] "Surveying without prejudice all the known facts, the net result is this: In the 14th century a legend had arisen in Pisa, which attributed the Pisans' possession of the manuscript to a famous military event of the 12th century. But this legend has no adequate verification, and is in conflict with other evidence of the same or much earlier date. And even the chronicles, which give it in some degree an historical status, speak only of the capture of the manuscript; all the rest of the story's ornamentation, particularly its presentation by the Emperor, is without even the slightest plausibility. So the whole affair is more than ever reduced to one of those

Calisse[3] adds: "finally in 1822 Savigny's masterly work[4] put an end forever to that error. It is no longer a living issue."

But while it is now recognized that the survival of Roman Law, through the great upheaval which we call the barbarian invasions, was one of the phenomena of legal history, such recognition fails to tell the whole story. How and why, did it survive? Here again, Maine,[5] has summarized his conclusion as follows:

> "No one explanation can be offered to these facts. In some countries, the Roman law probably never ceased to be obeyed, and the foreign element in its institutions was the barbarous usage. In others the reverse of this occurred; the basis, at least the theoretical basis, of the institutions was barbarous, but the Roman Law, still known to some classes, was rapidly absorbed. A barbarous system of law is always scanty, and if it be contiguous to a larger and more extensive system, the temptation in practitioners to borrow from this is irresistible."

Among the countries of the first class above noticed, we may include not only Italy, where the Roman law continued even in the Lombard regions of the north[6] but also Gaul and perhaps even Spain. Much, however, depended on the locality.

> "It was inevitable, for instance, that Roman law should continue to preside over all transactions which took place in towns. The separate and independent organization of towns had always been a distinctive feature of Roman rule. The political character and relationship of the several towns had always varied much, but there was always a certain amount of self-government present which would tend to keep alive, and to guard against foreign influences, the local laws. These laws, of course, largely related to contracts, sales, marriages, guardianship, wills, and succession; and it is just this part of the Roman law which reappeared in the least mutilated form at the foundation of such of the modern States of Europe as did not entirely succumb to feudalism and its institutions." [7]
>
> "Nor was this necessity disliked by the rulers themselves. They soon perceived that the Roman law, with its tendency to derive

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numerous legends by which the patriotism of the Italians sought to exalt the repute of their native city—like the supposed foundation of the University of Bologna by the emperor Theodosius, which even in the 13th century was romanced about as a documentary fact." SAVIGNY, GESCHICHTE DES ROMISCHEN RECHTS IM MITTELALTER (2nd ed. 1834) IV, 92 (trans. Continental Legal History Series, I, 135n.).

[3] STORIA DEL DIRITTO ITALIANO, I (trans. Cont. Leg. Hist. Ser. I, 88).

[4] See n. 2 *supra*.

[5] INTERNATIONAL LAW, 17, 18.

[6] SAVIGNY, GESCHICHTE, etc. (Cathcart's trans.) I, 167.

[7] AMOS, CIVIL LAW OF ROME (London, 1883), 419, 420.

> all power from the Imperial head of the State, and the Roman official staff, an elaborate and well-organized hierarchy, every member of which received orders from one above him and transmitted orders to those below, were far more favourable to their own prerogative and gave them a far higher position over against their followers and comrades in war, than the institutions which had prevailed in the forests of Germany. Hence, as I have said, all the new barbarian royalties, even that of the Vandals in Africa (in some respects more anti-Roman than any other), preserved much of the laws and machinery of the Roman Empire." [8]

The truth is that various factors and forces worked for the preservation of Roman law and that the system survived in various forms. It will be our task to trace these in some detail.

II. Christianity

1. Roman Lawyers in the Church.

> "St. Paul," it has been well said,[9] "was the chief formulator of Christian doctrine because he was the chief interpreter of the gospel to the gentile nations. * * He afforded a marked contrast to his colleagues in the apostolate in many respects, but most of all in this, that he was a Roman citizen. In his time the citizenship of Rome was much more than a mere social distinction. It was accompanied by incidents which affected every relation of life. * * To the private citizen some considerable knowledge of law was more than an advantage: it was almost a necessity."

That the great Apostle to the Gentiles knew his rights as a citizen of a world empire is apparent from the simple but effective inquiry by which he averted the summary punishment which one of its officials was about to inflict upon him:

> "Is is lawful for you to scourge a man that is a Roman and uncondemned?" (Acts XXII, 25).

Then, when arraigned before the procurator, Felix, (Acts XXIV) in a proceeding "conducted on the lines of Roman criminal procedure, involving the *criminis delatio* the *citatio* etc. ** the apostle successfully defended himself. In two of the three courts he based his defense on Roman law: (1) Rome recognized and authorized Jewish worship as a *religio licita.* His presence in the Temple accorded with that state recognition. (2) He challenged the legality of the trial as a whole since, according to Roman law, the wit-

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[8] Hodgkin, Theodoric the Goth (1897), 149.

[9] Ball (W. E.), St. Paul and the Roman Law (Edinburgh, 1901), 1, 2.

nesses must be produced."[10] Paul's reply (V. 10-21) to "a certain orator, Fertullus" was indeed a masterly one and demonstrated his knowledge of Roman law; but even more so was his (perhaps) unconscious tribute to the majesty of that law, when, in answer to the unauthorized query of the successor of Felix, as to whether he would submit himself to an irregular tribunal at Jerusalem, St. Paul said: (Acts XXV, 10, 11.)

> "I stand at Caesar's judgment seat where I ought to be judged: to the Jews have I done no wrong, as thou very well knowest. For if I be an offender or have committed anything worthy of death, I refuse not to die; but if there be none of these things whereof those accuse me, no man may deliver me unto them. I appeal to Caesar!"

We all know the momentous consequences of that appeal. The record of this prosecution of St. Paul as contained in these few Chapters of "Acts" is one of the most extensive descriptions that has come down to us of the actual administration of the Roman law in the provinces. In teaching Roman law I find them most helpful and instructive to my classes; for, unconsciously, the writer of "Acts" has here preserved for us the almost complete record of a Roman criminal cause. Then where is there an expression of the doctrine of "due process of law" which, equals that of Festus to the native ruler Agrippa as recorded in the same chapter (v, 16):

> "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face and have license to answer for himself concerning the crime laid against him."

On still another occasion, Paul had the opportunity of learning that Roman tribunals were governed by legal rules. For when some of the Jews charged him before Gallio, the "deputy" or proconsul of Achaia, with persuading "men to worship God contrary to the law," that functionary, without waiting for the accused to speak, disposed of the case, with this disclaimer[11] of jurisdiction:

> "If indeed it were a matter of wrong, or of wicked villainy, O ye Jews, reason would that I should bear with you: but if they are questions about words and names and your own law look to it yourselves. I am not disposed to be a judge of such questions." (Acts XVIII, 12-16.)

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[10] MUNTZ (W. S.), ROME, ST. PAUL AND THE EARLY CHURCH (London, 1913), 21 n.

[11] Ramsay's trans., ST. PAUL THE TRAVELLER, 257.

It is almost a proverb in the legal profession that no man may become a lawyer except by actual contact with the courts; but who shall say that St. Paul failed to meet that requirement? His experiences there, may not have been happy, but they were certainly informing both for him and for us. It was probably not, however, in that way alone that he had learned Roman law; for had he not sat "at the feet of Gamaliel," the grandson of Hillel, and been "taught according to the perfect manner of the law of the fathers?" (Acts XXII, 3).

Now Hillel was the first editor of Mishna, basis of the Talmud, whose later contributors drew from Roman law.[12] Altogether it is not strange that "monographs have been written to prove that St. Paul was strongly influenced by legal ideas."[13] for he "was helping to lay the foundations of a great system of jurisprudence"[14]—the Canon Law. It is, therefore, in the Pauline epistles that we find the earliest and basic principles of Christian law; "but it is certain that no satisfactory commentary upon these epistles will ever be produced except by an author who, in addition to other qualifications, is a thorough master of the history of civil jurisprudence."[15]

The apostle was the first, if not the only, writer to propound a philosophy of Christian law. St. Paul regarded it as a new stage in legal development, superseding the (ceremonial) law of Moses. While all that was needful in the latter was retained, its formalism, rigidity, and mechanicalism had been discarded and in its place a "new law" had arisen—"the law of faith" (Rom. III, 27) of which "Christ is the end" (Id. X, 4) and "love the fulfilling." (Id. XIII, 10.)

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[12] JEWISH ENCYC. XII, 36.

In Justinian's time, and probably long before, the Jews were subject to Roman law. See CODEX JUST. I (IX).

[13] DEISSMANN (G. A.), LIGHT FROM THE ANCIENT EAST (Strachan's trans., New York, 1927), 318, where a bibliographical note (2) of 16 titles is appended; in addition to which, see, BALL, ST. PAUL AND THE ROMAN LAW.

[14] FRY, SPECIFIC PERFORMANCE, sec. 20 Cf., BRISSAUD, HISTORY OF FRENCH PRIVATE LAW, 126 *et seq.*

[15] BALL, ST. PAUL AND THE ROMAN LAW, 37.

Now it is not a little significant that in the very lifetime of St. Paul, the secular law to which, as a Roman citizen, he was subject, was undergoing a transformation by no means dissimilar. The old *jus civile,* with many of the features which characterized the "law of Moses," was giving place to *jus gentium* and would eventually merge in *jus novum*—"the new law"—whose ethical standards resembled those of Christianity.[16] St. Paul's conception of law as an institution, developing through successive stages into greater and greater perfection, might, therefore, have been suggested by an intensive study of Roman law.[17] Clearly he displays familiarity with most of its main branches.[18] Take public law *e. g.*: Note how his conception of the Christian Church, or kingdom, reflects the Roman State as it had become in his day through the levelling influence of aequitas and the Praetors—an all, inclusive, universal institution in which there is, theoretically at least, no distinction "whether we be Jews or Gentiles," (I Cor. XII, 12); "for there is neither Jew nor Greek, * * bond nor free * * male nor female (Gal. III, 28)—a body which "hath many members—(I Cor. XII, 12, 20) but a single head—(Col. I, 18), though with various functionaries (I Cor. XII, 28). This last also describes the historic Roman *familia* and admission to it was possible in the same way—by a process analogous to the Roman adoption. For St. Paul "is the only one of the sacred writers who makes use of the metaphor of adoption. Nor is it the word only which is peculiar to him but also the idea."[19]

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[16] "It has been suggested with much probability that St. Paul has in his mind the *jus naturale* as he indicts Gentile nations (Rom. II); for Theophilus, who wrote the early paraphrase of Justinian's *Institutes*, informs us that by it, thefts, murder, adultery, and such crimes were prohibited. Thus it fulfilled for Gentile nations the purpose accomplished by the decalogue." MUNTZ, ROME, ST. PAUL AND THE EARLY CHURCH, 79, 80.

[17] See my EVOLUTION OF THE ROMAN LAW, Chs. XVII *et seq.*

[18] "In the Roman law itself, and its modified form in the East, he found ready to hand a supply of terms and illustrations familiar to his readers, fitted to give expression to spiritual truth: such as the Fatherhood of God and the corresponding spirit of sonship; the unity of the faithful as citizens of an instant celestial kingdom; the privileges of believers as joint heirs with Christ." MUNTZ, ROME, ST. PAUL AND THE EARLY CHURCH, 23.

[19] Id. 6.

Admission to the Christian Church, or kingdom, and adoption into a Roman family were each effected by a formal ceremony and each produced a complete change of status. The Roman ceremony of adoption, which has been characterized[20] as "singularly dramatic," included that of *in jure cessio* in which the adopter claimed the adopted as his child, accompanying his words with "the touch of the *festuca* or ritual wand."[21] The ancient ceremony of baptism, which marked admission to the Church, and to which the apostle seems to allude in Titus III, 5, was accompanied by the sign of the cross and words of reception "into the congregation of Christ's flock."[22]

Again, the feature of *in jure cessio* was employed likewise in the purchase of a slave and St. Paul seems to distinguish between the two ceremonies when he tells the Roman Christians,

> "Ye have not received the spirit of bondage again, to fear, but * * the spirit of adoption, whereby we cry, Abba Father." (Rom. VIII, 17. Cf. Gal. IV, 6, 7.)

Paul was, of course, familiar with the Roman law of slavery and while he did not expressly seek its abolition, his treatment of it, in the one instance which has come down to us,[23] shows how he would have eliminated its horrors. For, in returning the slave, Onesimus, to his master, the apostle asks the latter to receive the former,

> "Not now as a servant but above a servant—a brother beloved, specially to me, but much more unto thee."

In the same connection, Paul recognizes and applies the Roman law of "involuntary representation,"[24] by stating (13) that he "would have retained (the slave) that in thy stead he might have ministered unto me," and (17) "if you count me, therefore, a partner, receive him as myself."

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[20] BALL, ST. PAUL AND THE ROMAN LAW, 7.

[21] GAIUS, INST. I, 134, II, 24.

[22] BALL, *ubi supra*, 7.

Dr. Muntz notes in Rom. VIII, 16, an allusion the witnesses required for the ceremony of adoption. Rome, St. Paul and the Early Church, VII.

[23] Philemon, 10-17.

[24] SOHM, ROMAN LAW, sec. 45.

Another feature of the Roman law of persons which St. Paul employed in his doctrinal teaching was tutelage, "a device for artificially prolonging the *patria potestas*"[25] and the source of our common law guardianship. For him humanity was a child "under tutors and stewards until the time of the father's appointing * * * when the fullness of time was come * * * that we might receive the adoption of sons." (Gal. IV, 1-5.)

In writing the epistle to Philemon, St. Paul says (18):

> "If he (Onesimus) hath wronged or oweth thee, put that on mine account."

Here we seem to have a direct use of the Roman "literal" contract wherein "the obligatory consensus is expressed in the form of an entry in the domestic account book."[26] In the same epistle (17) the analogy of the Roman *societas* or partnership is invoked.

The apostle is thoroughly familiar with the Roman concept of the testament as a promise or covenant to make one an heir, (Rom. IV, 13; Gal. III, 29; Hebrews, VIII, IX); of succession as the transmission, not merely of property but of legal personality,[27] and of the equality of heirs. These two latter conceptions apparently[28] form the basis of his notion of the saints as "heirs of God and joint heirs with Christ." (Rom. VIII, 17.) Thus, at its very beginning, the young church was at once provided with a stock of legal ideas and concepts and advised that their source was available to an unlimited extent for further drafts. Evidence was not long in appearing that the advice had been taken.

The ancient verbal contract of *stipulatio*[29] which was effected by question and answer in a prescribed form, the parties being known respectively as *stipulator* and *sponsor*, seems to have been followed in various church ceremonies. Probably the earliest was the baptismal office, where the

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[25] Id. 30.

[26] Id. sec. 78. Cf. GAIUS, III, 128 *et seq.*

[27] MAINE, ANCIENT LAW (1905) 168, and see my MODERN CIVIL LAW, 40 C. J. 1458 n 69.

[28] See BALL, ST. PAUL AND THE ROMAN LAW, Ch. II; MUNTZ, ROME, ST. PAUL AND THE EARLY CHURCH, Ch. VI.

[29] GAIUS, INST. III, 97 *et seq.*

candidate was subjected to a series of questions, including the creed interrogatively propounded, and where, if an infant, he was obliged to have a *sponsor* to promise for him.[30] The Roman betrothal or *sponsalia* followed the same form and was eventually taken over by the church in its office of matrimony. The same appears to be true of the ceremony of consecrating bishops, coronating monarchs, and even (later) of installing officers of secret societies.

St. Paul was by no means the last of the Christian leaders to utilize his knowledge of Roman law for the service of the church. Minucius Felix (2nd cent.) an advocate at Rome was another.[30a] Tertullian (ca. 155-ca. 222), is said to have been the first to use the term *trinity* (to which he applied the Roman legal conceptions of personality in its theological sense), or to "reduce the church's transcendental doctrines to anything like definite dogmatic form" and his writings appear to have been provided the basis for the Athanasian creed.[31] For, previous to his conversion, about 185, he had been a lawyer, having studied at Carthage and probably also at Rome, where he seems to have practiced. He may have been the author of two legal works written during his lifetime and mentioned in Justinian's Digest, and at any rate "the quondam advocate never disappeared in the Christian presbyter." [32]

Lactantius (ca. 260-ca. 340), one of the Latin fathers, was another Roman lawyer and has been called "the Christian Cicero." In his *Divinarum Institutionum Libri septem*, using a name given first to books on rhetoric and later to those on law, he cites (IV) the unity of the Roman household to illustrate the unity of the godhead. Ambrose (340-397), one of the four "greater fathers," had been a lawyer and consular magistrate at Milan, before his election as bishop of that city; while his famous disciple, Augustine (354-430) studied Cicero's *Hortensius* in his youth and his

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[30] BALL (ST. PAUL AND THE ROMAN LAW, 42), points out that in the phrase translated, "answer of a good conscience," in I Pet. III, 21, the original of "answer" is the word used for the *sponsio* in *stipulatio*.

[30a] See his *Octavius*, translated in Roberts & Donaldson's *Ante-Nicene Fathers* (Am. ed. 1885) IV, 169.

[31] See BALL, *ubi supra*, 75, 83-84.

[32] Encyc. Brit. "Tertullian."

De Civitate Dei shows a deep and comprehensive recognition of the philosophical basis of law.[33] Augustine, too, was a patriotic Roman, proud of his country's thousand years of glorious history, and as confident as Vergil of the high and unifying mission of the Latin race.[34] His famous work, "a permanent possession of the race,"[35] expands the Pauline idea and visions a spiritualized form of the Roman state, which "has no frontiers, * * * draws its citizens from all races and * * * embraces all the faithful on either side of the river of death. *Fundamenta ejus in montibus sanctis.*" Can it be doubted that Augustine loved Roman law and desired its extension?

As the dark ages approach we find few students of Roman law save among the clergy. Gregory of Tours (I, IV, Ch. XLVII) tells us of one Auvergnat Andarchius in his (6th) century who "was very learned in the works of Vergil, the books of the Theodosian law," etc. In the following century, the bishop of Cahors (629-654), St. Didier, according to his MS biography "applied himself to the study of the Roman laws" and toward the close of the same century, the bishop of Clermont, St. Bonet, "was imbued with the principles of the grammarians, and learned in the decrees of Theodosius." [36]

These then are a few of those eminent Christians whose familiarity with, and use of, Roman law are recorded. They are doubtless typical of many others of lesser fame whose names have not come down to us. As the state declined in power and prestige and the church came gradually to supplant it, this small but influential group of ecclesiastics, who were none the less Romanists because they were churchmen, became a potent factor in preserving the legal system which would otherwise have been left without official support. Their influence to this end naturally increased as Christianity became the state religion and its bishops acquired the status of secular judges. In the centuries which follow we shall find them taking a prominent

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[33] Berolzheimer (Fritz), The World's Legal Philosophies (Jastrow's trans., Boston, 1912), 98.

[34] *De Civitate Dei*, IV (XV) Cf. Aeneid.

[35] Dill, Roman Society in the Last Century of the Western Empire (2d ed., London, 1899), 73.

[36] *Acta Sanc Juana*, cl., No. 8; Guizot, History of Civilization (Hazlitt's trans., London, 1901), II, 14.

part in compiling *Leges Barbarorum* and *Leges Romanae* and embodying Roman law into both. On the other hand we shall find them building a new system of their own—the *Lex Christiana*—which the state soon recognized and which was one day to be known as Canon law; but whose materials were drawn largely from Roman sources. Thus, in a variety of ways, but steadily and effectively, Christianity was aiding in the preservation of Roman law.

2. Lex Dei (Mosaicarum et Romanarum Legum Collatio)[37] (Ca. 400)

A concrete expression of the Christian clergy's attitude toward Roman law is found in a work which now bears the above title and which was probably composed in Italy about the close of the 4th century.[38] Its author is unknown but its English editor concludes that he "was probably an obscure clerical official practising in the Bishop's court, who was possibly also a teacher of Roman law" and that the work "was prepared for the instruction of Christian clerics and served as an introduction of the study of the Roman law, perhaps also as an elementary guide in practice." If the latter conclusion be correct, the author was repeating, tho on a smaller scale, the Gaiian experiment of two and a half centuries earlier. There is no mention of the work by any classical author; but Archbishop Hincmar of Rheims, cites it in writing (Ca. 860) of the divorce of Lothar and Tetburga; and it seems to have been well known at the time. Rediscovered in the 16th century and since available to scholars, "it has been of great service in aiding the reconstruction of the ancient works upon the law which are therein quoted."[39]

Comparative institutional law begins with Caesar and

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[37] Otherwise known as *Lex Dei Quam Praecipit Dominus ad Moysen*, a title which "originated with the first editors."

Pithou's edition (Paris, 1573) was the first printed; there have been many since. See *e. g.* GIRARD, TEXTES DE DROIT ROMAIN (4th ed., 1913), 569 *et seq.* In the same year appeared Hyamson's edition with an English translation of the *lex* rendering it available to students unfamiliar with Latin.

[38] Hyamson XIII, XLIII, XLVIII, LVI.

[39] ORTOLAN, HISTORY OF ROMAN LAW (Pritchard & Nasmith's trans., London, 1896), 339.

Tacitus; comparative private law with Gaius. But here was a work in which the comparison, tho limited in scope is detailed as to the field covered, viz. Roman and Hebrew law. For the latter, the author followed the Pentateuch, but was unfamiliar with the Talmud which was then within a century of its completion. For the Roman law he used the five great jurists and the Gregorian and Hermogenian compilations, all in the order named.

The work contains 16 titles, most of which relate to crimes and delicts; but titles VIII and IX treat of Proof, the latter discussing the qualifications of witnesses; title X of *Depositum;* and title XVI of Legal (Intestate) Succession. The latter is the longest in the work and its mode of treatment may be taken as typical. The discussion starts with the later Hebrew law which gave the intestate's estate "to the nearest of those of his tribe," with no discrimination against daughters. Then follows that portion (III, 1-17) of the Institutes of Gaius treating of the XII Tables provisions on the subject. Next comes the discussion of Paulus (Sententiae IV) and lastly Ulpian's *Liber Singularis Regularum* and Institutes. It will be seen that the method is distinctly modern. By introducing the subject with Hebrew law, naturally familiar to the clerical student, he was led from the known to the unknown, according to the approved mode of modern pedagogy; for while the Roman texts "are quoted faithfully and exactly" those from the Hebrew, being already known to the reader, "are given in condensed form."[40]

Again in the excerpts from the classical jurists the development of the law from the XII Tables to the imperial legislation is clearly, but succinctly, shown. For us, however, the work's chief significance lies in its demonstration that Roman law was being systematically and comparatively studied by the Christian clergy; otherwise no occasion would have existed for compiling such a book. This meant that the clergy were being prepared for their role of preservers and interpreters of Roman law and that, when called upon, as they would be, to assist, in the reduction to writing of the *Leges Barbarorum*, they would be able in

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[40] Hyamson, XXXIII, XXXVII.

some degree to supply the latter's *lacunae* by drawing upon Roman sources. This had important results as we shall see.

III. The Codex Theodosianus, 438.

This was an official compilation of imperial constitutions, commencing with the reign of Constantine, prepared by the command of the Emperor Theodosius II (408-450) who in 439 named[41] a commission of nine under the presidency of Antiochus, pretorian prefect, with instructions to include all (even obsolete) constitutions (except the formal parts) and also *responsae* of jurisconsults. This, it will be seen, would have anticipated Justinian by about a century; but the task was never completed. The Emperor appointed[42] a new commission under the same head, in 435, with the power of "eliminating surplusage, adding what should be necessary, changing ambiguities, and reconciling contradictions."[43] In other words the interpolations which Justinian's compilers are now known to have made are here expressly invited. That method long prevailed. The next compilation, without the *responsae* was completed on February 15, 438, and promulgated to take effect in the following year, by Theodosius at Constantinople and by his western colleague Valentinian III at Rome after the Senate in the latter city had approved it with effusive acclaim, including the phrase *notae juris non adscribantur* (Let notes not be added.)[44]

The work consisted of 16 books divided into titles wherein the various constitutions treating of the subject in hand are inserted chronologically. Book I, besides containing the constitutions relative to the preparation of the work, treated of various public officials beginning with the pretorian prefect; Book II of various questions of law and procedure with little regard to logical order; Book III begins with the contract of sale and thence proceeds to discuss marriage and family law; Book IV continues the last named subject and likewise treats of slavery and succession which are continued in Book V; Dignitaries form the subject of Book VI;

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[41] Cod. Theod. I, 1 (5), *De Constitut. Princip.*

[42] Id. (6).

[43] *Et Demendi supervacanea verba et a(di)ciendi necessaria et demutandi ambigua et emendandi inconarua tribuimus potestatem.* Id.

[44] Id. *Gesta Senatus Romani De Theodosiano Publicando.*

military affairs (mainly) of Book VII; minors of Book VIII; criminal law and procedure of Book IX; public finances and revenue of Books X and XI; certain officials and police regulations, XII, XIII; municipalities and corporations, XIV; Public Works and Sports, XV; ecclesiastical affairs, XVI. It is this last book which accounts for the clergy's attachment to Theodosian's Code; for it contains no less than 140 ecclesiastical edicts and there is "ample evidence that here the clergy began that participation in civil legislation which characterized European life for so many centuries."[45] Indeed the Emperor was a well known patron of the clergy.

> "He had memorized the books of sacred scripture and discoursed concerning them like a veteran priest with the bishops." [46]

It is not surprising, therefore, to find in this compilation, which he initiated, a volume of legislation highly favorable to Christianity and the Church and quite as unfavorable to paganism.

Theodosian's Code was ostensibly superseded at Constantinople by the *Corpus Juris*; but by a strange irony of fate the former continued to operate in most countries of western Europe while the latter was unrecognized. Even in Italy

> "We find often that the Lombard legislation, in accepting Roman rules, follows the earlier one, and not that of Justinian. For example, Astolf's statute that a widow on re-marriage loses her life-estate followed a decree of Valentinian, Theodosius, and Arcadius; and not the later rule of Justinian, which forfeited the life-estate only when the first husband had expressly so provided by will. Marriage between cousins had been permitted by Justinian; but the Lombard Edict forbade it, following the earlier Roman rule of Theodosius. And besides other like instances, we find the forms of documents, the technical clauses, and other features, recalling constantly the earlier Roman law, and showing how it had remained well known and in daily use in Italy, independently of the compilations made by Justinian's jurists at his headquarters in Constantinople." [47]

We shall see later how the contents of Theodosian's Code were appropriated and widely diffused by the compilers of *Leges Romanae*. Of the Code's 3,400 enactments

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[45] Boyd, *Ecclesiastical Edicts of the Theodosian Code*, COLUMBIA UNIV. STUDIES IN HISTORY, etc. (New York, 1905), XXIV, No. 2, pp. 13, 14.

[46] SOCRATES, HISTORIA ECCLESIASTICA (Cambridge ed., 1720), VII, 22.

[47] Calisse, *op. cit.*, I, 91, 92.

about 400 were reproduced in Alaric's Breviary.[48] In Gaul, Theodosian's Code appears to have been received soon after its promulgation and in the 5th and 6th centuries it was used as a book of instruction in the schools.[49] Although Charles the Bald's Edict[50] of 864, recognizing the superiority of Roman Law, mentions no specific repository, a Papal Constitution,[51] promulgated 14 years later in Troyes, which modifies "a law of the Emperor Justinian," relating to marriage of the clergy (identified as Codex I (III) (XIII)) was really taken from Theodosian's Code (XVI (II) (XXXIV)). The old French law is largely based thereon[52] and it was not there displaced by the *Corpus Juris* until the Bologna revival had begun to affect France.

> "Of the original monuments (of French Legal History)," declares Guizot,[53] "the most important beyond all doubt is the Theodosian code * *. In a practical point of view it was the most important law book of the empire; it is, moreover, the literary monument which diffuses the greatest light over this period."

Ortolan [54] goes even farther in saying:

> "The Theodosian code forms one of the most important monuments extant concerning the history of law, whether we consider the great number of the legislative enactments which it contains or its application and influence upon the two divisions of the Roman world."

The long dominance of Theodosian's Code in Gaul and France, doubtless accounts for the appearance there of the early modern editions (all based on Alaric's Breviary) the most important of which were those of Cujas (1566) and Godefroy (1665). But the first five books of the code were defective and it was not until the early nineteenth century that rediscovered manuscripts, including one by Niebuhr, the restorer of Gaius, provided a fairly completed text.

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[48] Post, p. 40.

[49] See GLASSON, HISTOIRE DU DROIT ET DES INSTITUTIONS DE LA FRANCE (Paris, 1887), I, 215, 216.

[50] *Edictum Pistense*, Cap. 20 (Baluz., ii, 183 med.).

[51] SIRMOND, CONCIL. GALL., cap. 3, p. 480.

[52] See WALTON, INTRODUCTION TO ROMAN LAW (2d. ed., 1912), 311.

[53] History of Civilization (Hazlitt's trans., London, 1902), I, 293.

[54] History of Roman Law (Pritchard and Nasmith's trans., 2d ed., 1896), 333. Dill in his Roman Society in the Last Century of the Western Empire (London, 1899) frequently cites Theodosian's Code as a source.

Mommsen and Meyer's monumental edition [55] has been used here. During the present century, the code and the period leading up to it, have also been the subject of a series of brilliant studies,[55a] published by Columbia University.

IV. Roman Law Becomes Personal

The conception of law as following the individual, even outside the sovereign's domain, was probably an outgrowth of *jus gentium*.[56] Attempt has been made[57] to distinguish this from the mediaeval conception by claiming that, in the latter,

> "All the systems of law were of equal dignity. Each existed not by concession of some other and sovereign one, but by the authority inherent in itself."

But surely such was not the case in the beginning. What was Alaric's Breviary but a "concession of some other and sovereign" *power*? It was only after other states "of equal dignity" arose—a situation with which imperial Rome was never confronted—that anything approaching comity was recognized. At its root the system seems to have been substantially the same in each case.

From the application of rules "common to Rome and to the different Italian communities" in which "a foreigner was born"[58] it was not a long step to the application of other rules of the foreigner's domicil of origin. So long as Rome

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[55] (Berlin, 1905). It includes the *Constitutions Sirmondianae*, named from their first editor Jacques Sirmond, and consisting of some 18 decrees found with a collection of conciliary decrees in Gaul. See Huttmann. *The Establishment of Christianity and the Proscription of Paganism*, Columbia Univ. Studies in History, etc., LX, No. 2, 128 n.

[55a] Boyd, *The Ecclesiastical Edicts of the Theodosian Code*, Columbia Univ. Studies in History, etc., XXIV, No. 2 (1905); Coleman, Constantine the Great and Christianity, Id. LX, No. 1 (1914); Huttmann, The Establishment of Christianity and the Proscription of Paganism, Id. No. 2 (1914), 259 Cf. Munroe Smith's works, cited *infra*, *passim*.

[56] "The so-called system of personal law of the early middle ages, is only a development of the system which the Romans had already observed." Von Bar, Private International Law (Gillespie's ed.), 15. Cf. Militz, Manuel des Consuls (1837)), ch. II, sec. 4.

[57] Calisse, Storia del diritto italiano (rev. ed., trans. Continental Legal Hist. Ser. I, 61).

[58] Maine, Ancient Law (Pollock's ed., 1907), 51, 52.

was the dominant power it was always the foreigner's law which was thus applied. But after the barbarian invasions had effected the dismemberment of Roman territory, the situations were reversed. The dominant power was now the conquering tribe and its law would normally prevail as a result of the conquest. But there were potent forces operating to prevent that result.

> "The Roman population could not possibly have been subjected to a system so crude, incomplete and alien as that of their conquerors." [59]
>
> "In dealing with the needs and settling the disputes of the large, highly organized communities, into whose midst they had poured themselves, it was not possible, if it had been desirable, for the rulers to remain satisfied with the simple, sometimes barbarous, principles of law and administration which had sufficed for the rude farmer-folk who dwelt in isolated villages beyond the Rhine and the Danube.[60]

One of the early instances of the recognition of Roman law continuing as a personal system is found in this *formula* or instruction of Theodoric the Ostrogoth (reigned 493-526) relating to a *Comes Gothorum*[60a] whom he was sending out to administer justice:

> "As we know that, by God's help, Goths are dwelling intermingled among you, in order to prevent the trouble *(indisciplinatio)* which is wont to arise among partners *(consortes)* we have thought it right to send to you as Count, A B, a sublime person, a man already proved to be of high character, in order that he may terminate *(amputare)* any contests arising between two Goths according to our edicts; but that, if any matter should arise between a Goth and a born Roman, he may, after associating with himself a Roman juris-consult, decide the strife by fair reason. As between two Romans, let the decision rest with the Roman examiners *(cognitores)*, whom we appoint in the various Provinces; *that thus each may keep his own laws*, and with various Judges one Justice may embrace the whole realm."[60b]

We shall find the Ostrogothic ruler extending Roman law over his own people; Visigothic and Burgundian providing special compilations for their Roman subjects. The Frankish monarchs handled the problem somewhat differently, tho their recognition of the personality of law was not less clear.

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[59] CALISSE, *ubi supra* I, 61.

[60] HODGKIN, THEODORIC THE GOTH (1897), 148, 149.

"The *Comes Gothorum* is the most important, in fact almost the only new dignity in the Gothic State, and the formula of his installation is the chief proof of the coexistence of Roman and Gothic law in this kingdom."

[60a] DAHN, KÖNIGE DER GERMANEM (Leipzig, 1899) IV, 157.

[60b] HODGKIN, LETTERS OF CASSIODORUS, VII, 3.

"It is doubtful," to Pollock & Maitland,[61] "whether the Salian Franks made from the first any similar concession to the provincials whom they subdued; but, as they spread over Gaul, always retaining their own *Lex Salica*, they allowed to the conquered races the right they claimed for themselves. . . As the Frankish realm expanded there expanded with it a wonderful 'system of personal law.'[62] It was a system of racial laws. *Lex Salica, e. g.*, was not the law of a district; it was the law of a race. The Swabian, wherever he might be, lived under his Alamannic law, or, as an expressive phrase tells us, he *lived* Alamannic law (*legem vivere*)."

Lex Salica, e. g., frequently discriminated between Franks (and other Germans) on the one hand and Romans on the other. Thus the composition for the homicide of a Frank or barbarian "who lives by Salic law" is 8000, denarii; for that of a Roman 4000.[63] The significance of the passage consists not alone in the fact that a different amount is fixed in each case; but more in the implied recognition that Romans do not "live by Salic law."

The *Lex Ribuaria*, or compilation of the western Franks, is according to Calisse,[64] "the earliest to mention unmistakably the system of personality" altho, Savigny[65] considered this proof of its later compilation than *Lex Salica*. At any rate the former[66] "admits a difference quite unknown to the Salic law and requires a larger composition for the Franks than for the foreign Germans." More pertinent to the present inquiry is the provision (XXXI, 4)

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[61] HISTORY OF ENGLISH LAW, I, 13, 14.

[62] Citing BRUNNER, GRUNDZUGE DER DEUTSCHEN RECHTSGESCHICHTE (4th ed., Leipzig, 1910), I, 259.

[63] LEX SALICA (Hessel & Kern's ed., 1880), XLIII, 1, 6. Cf. Behrend's ed. (Weimar, 1897), 79-81. The edition of Pardessus (Paris, 1843), 305, gives 12000 for the Roman. See Savigny's comment on this, in GESCHICHTE DES ROMISCHEN RECHTS IM MITTELALTER (Cathcart's trans.), I, 104-6.

[64] STORIA DEL DIRITTO ITALIANO (trans., Continental Legal Hist., Ser. I, 64).

[65] GESCHICHTE DES ROMISCHEN RECHTS IM MITTELALTER (Cathcart's trans., I, 106).

[66] LEX RIBUARIA, XXXVI (*Monumenta Germaniae Historica*, V, 220).

"*quod si damnatus fuerit, secundum legem propriam, non secundum Ribuarium, damnum susteneat.* (If anyone is condemned according to his own law, and not according to the Ribuarian, let him respond in damages.)

Here we have a still stronger implication that one might be tried by other laws than of the tribe (Ripuarian) and while the preceding section mentions only Franks, Burgundians and Allemani, it is hardly to be doubted that Romans were accorded a similar privilege. The constitution[67] of Chlotaire I (560) directed (Cap. IV) that transactions between Romans be governed by Roman laws. To Savigny[68] this appeared "the first distinct evidence of the uninterrupted continuance of the Roman law among the Franks"; but it seems hardly more distinct than the clauses above noticed in the Frankish codes.

In the *Formulae* (I, 8) of Marculfus[69] (ca. 660) we find a form of the commission issued to counts and dukes in which the designate is enjoined to govern the people of his district, whether Franks, Romans, Burgundians, or any other, *according to their own law and custom.* Within two centuries the liberal and enlighted Bishop Agobard[70] (770-840) of Lyons records: "It often happens that five men, each under a different law, may be found walking or sitting together."

That this included Roman law is clear from the following declaration[71] by Charles the Bald in the same century (864). "*Super Illam legem* (*Romanam*) *vel contra ipsum legem nec antecessores nostri quodcunque capitulum statuerunt, nec nos aliquid constituimus.* (Over that Roman law, or against it, our predecessors have established no capitulary nor have we.)

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[67] CAPITULARIA (Baluz. ed.), T. 1, p. 7. Georgisch, p. 465.

[68] *Ubi supra*, 110.

[69] A monk of the Paris diocese during the reign of Clovis, who collected and wrote down "the customs of the place of my nativity." According to T. Smith "his work has been ever esteemed as the most precious monument of barbarous jurisprudence. For many ages it was the repository whence the village jurists of France drew their legal lore." Address before Leicestershire Literary Soc., 1836.

[70] Opera, Migne, Patrol. CIV, Col. 116.

[71] *Edictum Pistense* (Baluz. II, 183 med.). Cap. XX.

In a case[71a] involving the monasteries of St. Denis and Fleury, on the Loire, pending in a Frankish court.

> "It was found necessary to adjourn, because both plaintiff and defendant were ecclesiastical corporations, and as such, entitled to a judgment according to Roman law, of which none of the judges were cognizant; experts in Roman Law are summoned as assessors, and the trial proceeds at the second meeting of the tribunal. The parties would like to prove their right by single combat between their witnesses, but one of the assessors of the court protests against the waging of battle, on the ground that such a mode of proof would be contrary to Roman Law. The point at issue is therefore examined and decided according to Roman rules of procedure, that is, by production of witnesses and documents. St. Benet, however, the patron of the Abbey of Fluery, was seemingly prejudiced in favor of the Frankish mode of proof-by-battle, as he revenged himself on the too forward assessor by striking him dumb."

In the Frankish empire, according to Munroe Smith,[72] Romans invoked their own law, even in controversies with Franks. Some of Charlemagne's capitularies[73] expressly recognize the force of Roman as well as Germanic law and his *missi dominici*[74] were instructed to inquire of each his law.[75] In the capitularies[76] of Louis de Debonnaire everyone is enjoined to possess according to his own law, without unnecessary disturbance.

Italy. According to Pollock and Maitland[77] "Lombardy was the country in which the principle of personal law struck it deepest roots." Certain parts of Rothari's Edict (643), the earliest compilation of Lombard law, give a different impression. For one section (CCLXXXVI) near

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[71a] *Miracula S. Benedicti, Monumenta Germaniae Historica*, XV, 490 (Trans. VINAGRADOFF, ROMAN LAW IN MEDIAEVAL EUROPE (2nd ed., 1929) 26, 27).

[72] DEVELOPMENT OF EUROPEAN LAW, sec. 20.

[73] Capit. 6. a. 803 art. 2 (Baluz. ed. I, 401; Georgisch, 675); Capit. 2. a. 813 (Baluz. ed., I, 505; Georgisch, 775).

[74] "It was their duty to administer the oath of fidelity, to hear and decide appeals when on circuit and to correct all abuses in the administration of the law that might come under their notice. They were chosen annually by the king from the highest ranks of society and were usually bishops or counts." Taylor-Cameron, Roman Law in the Early Middle Ages, Juridical Rev. VIII, 119.

[75] *Per singulos inquirant qualem habeant legem ex nomine. Capitulari Missorum*, 786. Cf. *Capitula Italica*, 143.

[76] Ludovici P. divisio imp. a. 817. art. 9 (Baluz. ed., I, 576). Cf. Capit. a. 819, art. 4, 9; Capit. 2, a. 819, art. 8. (Baluz. ed., I, 600, 606).

[77] HISTORY OF ENGLISH LAW, I, 21.

the close declares: "This law protects all our subjects," while another (CCLXXXIV) penalizes "any freeman under the rule of our kingdom." Nevertheless a distinction is drawn between Lombards and others as will appear from the following:

Siquis cum ancilla hentili fornicatus fuerit, componat domino ejus solidos XX. Et si cum Romana XII solidus (CXCIV).	If anyone fornicate with a female slave of the (Lombard) nations he shall pay her master 20 solido. If with a Roman woman, 12.
Nulle mulieri libere subregni nostri dictionem legis langobardordorum viventi siceat in sue votestatis arbitrium (CCIV).	No free woman living under our rule according to the law of the Lombards, may live under her own free will.

"This," as Hodgkin observes,[78] "clearly implies that King Rothari had subjects who were *not* living according to the law of the Lombards." So the provision

Omnes liberti qui a dominis suis Langobardis libertatem meruerint, legibus dominorum et benefactoribus suis vivere debeant. (CCXXVI).	All freed men who shall have received their liberty from Lombard lords ought to live under their laws and for such benefactors;

"certainly looks as if, for some persons and at some times, 'living by the law of the Lombards' was not a privilege to be sighed for but a duty to be avoided." [79]

Finally, in fixing the status of *vuaregang* (foreigners) within the Lombard kingdom it is provided (CCCLXVII) that "they ought to live by the laws of the Lombards unless through our piety they are privileged to live by some other law"; which correctly notes Hodgkin,[80] "clearly shows that there were other laws besides those of the Lombard invaders prevalent within the peninsula."

It is the opinion of Calisse[81] that

> "When the edict had no express provision, or when no public policy forbade, or when no Lombard was a party, the Romans were left to be ruled by Roman Law. * * * Rothar's plan to provide rules in common for the two peoples did not extend beyond a portion of the legal field. The rest remained as it was."

So to Pollock & Maitland[81a] "it would seem that among the Lombards, the Romani were afforded to settle their

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[78] ITALY AND HER INVADERS, VI, 199.

[79] *Ibid.*, 208. Cf., 231.

[80] VI, 231.

[81] *Ubi supra* (Continental Legal History Ser., I, 31).

[81a] HISTORY OF ENGLISH LAW, I, 14.

own disputes by their own rules; but Lombard law prevailed between Roman and Lombard."

In the Laws of Liutprand (713-735) the recognition of Roman law as a personal system becomes more explicit. The Lombard woman who marries a Roman acquires his status and their children "live by Roman law" (CXXVII). Notaries were instructed to draft documents according to Lombard or Roman law but no other (VI, 37). Of course that situation did not cease with the conquest of the Lombard kingdom by the Franks; for "when Charles the Great vanquished Desiderius and made himself king of the Lombards, the Frankish system of personal law found a new field."[82]

Professiones Juris. "It was long before the old question, *Qua lege vivis?* lost its importance"[83] and the answer to it might require a "profession" (declaration) from anyone as to his personal law. Charlemagne included it in the instructions to his *missi dominici* who

> "would, on arrival in their circuit, assemble the people and inquire of each what law he lived by. Of such sort was the inquest held at Rome in 824 by order of the Emperor Lothar; the imperial justices there made inquiry as to the law professed by every subject. But, much oftener, the declaration of a man's law was made, not by exaction at an official inquest, but by reason of his wishing to do some legal act, such as becoming a litigant or a witness,[84] or swearing loyalty to the emperor or contracting marriage or some other obligation. In such cases the party's declaration of his law was a preliminary for determining how the act was to be done by him. Hence the notaries' documents, reciting these declarations became their chief repositories and served to transmit them in abundance to posterity."[85]

Did the subject have the option of choosing his law? Calisse thinks not and that one was obliged to declare the law of the nation into which he was born, though there were exceptions.[86]

Survivals. "In the British India of today," observe Pol-

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[82] *Id.*

[83] *Id.* 21.

[84] Cf. the custom of requiring witnesses in the Philippine courts to produce their "cedulas."

[85] CALISSE (Trans. Continental Legal History Ser. I, 63, 64), citing *Capitulari Missorum*, 786; *Capitula italica*, 143; *Boretius*, I, 67, 323.

[86] *Id.* 64.

lock & Maitland,[87] "we may see and on a grand scale what might be called a system of personal laws."

The learned authors might have instanced another contemporary survival of that system in the institution which we know as Extraterritoriality,[88] which was developed in Italy during the centuries following the period just reviewed, has played an important part in modern history and continues in several countries, including China, Persia, and Egypt.

Other forms of extraterritoriality are the privileges granted to ambassadors from a foreign nation, and that formerly extended to the Vatican by the kingdom of Italy, the jurisdiction exercised by a sovereign state over its war vessels and those of its nationals, the French concession to the Moslem and Jewish communities of Algiers, each to live under its own law, the continental doctrine that penal law follows the subject and the theory that continuity of law necessarily implies extraterritoriality.[89] A more permanent and increasingly important survival of the age of personal law is the system known as private international law or the conflict of laws.

> "A system of personal laws implies rules by which 'a conflict of laws' may be appeased and of late years many of the international or intertribal rules of the Frankish realm have been recovered. We may see, *e. g.*, that the law of the slain, not that of the slayer, fixes the amount of wergild and that the law of the grantor prescribes the ceremonies with which land must be conveyed. We see that legitimate children take their father's—bastards their mother's law." [90]

Slowly the conception became more systematic—and more complicated.

> "The payment of fines for crimes was apportioned according to the law of the criminal, and not of the offended person. As regards contracts, each party was held bound by the rule of its

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[87] HISTORY OF ENGLISH LAW, I, 15. Cf. Saul V. His Creditors, 5 Mart. N. S. (La.) 569, 590 (1827).

[88] See the present writer's article on the subject, CORPUS JURIS, XXV, 301. "Instead of saying * * * that extraterritoriality was in 'accordance with usage which became generally recognized with the gradual extension of commerce', we should prefer to believe that it was in accord with a universal prior custom prevailing in the first half of the Middle Ages." Wigmore, Ill. Law Rev. X, 451.

[89] CORPUS JURIS, XXV, 306-308.

[90] POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, I, 14, 15.

> own law; but if the contract was accompanied by a wager, it was interpreted according to the law of the party making the wager. In the case of a contract corroborated by a deed (*carta*), the legal form and interpretation depended on the status of the person executing the deed. Some cases were rendered more complex by the fact that the courts found it necessary to consider not only the legal status of the grantor, but also the quality of the disposable property." [90a]
>
> "Two principles here came into play:" says Calisse,[91] * * * "(1) so far as possible all competing laws should be given effect, *e. g.*, if persons having different laws were entering into a contract, the age or other element affecting their legal capacity was determined by the respective laws of each * * * (2) When one only of several laws must be followed the preference was to be given to the law of the person whose interest was dominant. This gave rise to two subordinate rules: (a) either the chosen law prevailed throughout the entire transaction or (b) different person's law prevailed in turn. * * * The other applied, *e. g.*, to marriage questions. The husband's law was followed in what personally most concerned him, *e. g.*, dowry, the security for it, the payment of the 'mefio' (price for the purchase of marital power). But the law of the wife's 'mundoald' (guardian) was followed for his transfer of his right (mundium) to the husband, his delivery of the woman."

But far surpassing, in its importance to us, its part in the beginnings of International Law and of Extraterritoriality, is the relation of this doctrine of personal jurisdiction to Roman Law. For the latter was both a cause and an effect—"the germ of the system of personality"[92] and the one most effectively preserved by it. The barbarian systems were, by their very nature, ephemeral. Once protected (as it was by personality) from submergence by them, the future of Roman law was assured.

V. Leges Romanae

1. The Historical Background [93]

That the credit of preserving Roman law is not restricted to any one form of Christianity is evidenced by the aid rendered by nations of the Arian faith; for they were the ones among which collections of Roman law were prepared for the use of the Roman element of the population. To understand how and why this came about we must digress briefly into the realm of ecclesiastical history.

[90a] Vinogradoff, Roman Law in Mediaeval Europe, 27.

[91] Calisse. (Trans. Continental Legal History Ser. I, 66, 67).

[92] *Id.* 62.

[93] On the general subject of this section see Hodgkin, Italy and her Invaders (Oxford, 1912), I, Pt. I, Ch. I, III; Theodoric the Goth. (1897) Chs. I-IV.

When the Emperor Constantine (311-337) became the patron of Christianity he found it in the throes of a controversy over the nature of Deity and Christ's relation thereto which had raged within the church from its early days. The Ebionites of the 1st and 2nd centuries "denied the divinity and the virginal birth of Christ," [94] Paul of Samosata, patriarch of Antioch,[95] and Lucian of Antioch "a man of the most exceptionable virtue [96] and "the greatest critic of his time," [97] expressed similar views in the 3d century, while at the beginning of the 4th, Arius, a disciple of Lucian, and "a grave and blameless presbyter of Alexandria,"[98] became their recognized champion,[99] tho he was supported by such eminent prelates as Eusebius, bishop of Caeserea, the famous church historian "hardly surpassed by Origen himself" and his namesake, the bishop of Nicodemia, "Constantine's chief eastern adviser." [100] The opposition was led by Athanasius, who, in 328, became bishop of Alexandria, and to end the dissension, which threatened the unity of his empire, tho not as a partisan [101] of either group, Constantine convoked at Nicaea, not far from his capital, an Oecumenical Council of bishops. The Athanasian party prevailed in the overwhelming adoption of the Nicene creed; but that result was not generally accepted outside the council. Constantine himself "permitted the return of the exiled Arians, countenanced the deposition of Athanasian bishops, * * and was finally baptized by an Arian."[102]

Nay more, about a decade after the Council of Nicaea he exiled Athanasius to Gaul and for over a half century,

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94 CATHOLIC ENCYCLOPEDIA, V, 243.

95 *Id.* XI, 589.

96 *Id.* IX, 409.

97 GWATKIN, THE ARIAN CONTROVERSY (1889), 5.

98 *Id.*

99 CATHOLIC ENCYCLOPEDIA, I, 719.

100 GWATKIN, THE ARIAN CONTROVERSY, 15, 21; CAMBRIDGE MEDIEVAL HISTORY, I, 119, *et seq.*

101 "With his view of Christianity as essentially monotheism, his personal leaning might be to the Arian side: but if he was too much of a politician to care greatly how the question was decided, he could quite understand some of the practical aspects." *Id.*, 119, 120.

102 Boyd, *Edicts of the Theodosian Code*, COLUMBIA UNIV. STUDIES IN HISTORY, etc., XXIV, 2 p. 38.

Constantinople, both court and people, adhered to the Arian cause. It was not until after the accession of Theodosius I (379-395), the Spaniard, that an emperor officially espoused the Athanasian side,[103] and among the Germanic tribes of the west, Arianism continued for two or three centuries longer.

The Arian Nations

For it was during this period of Arianism's ascendancy that most of the Germanic nations accepted Christianity and naturally they received the Arian form of it. The first among them to do so, were the Goths whose conversion was largely the result of the labors of one who has been called [104] the third greatest character of the fourth century, "the missionary bishop of the Goths and the first translator [105] of the Bible into a barbarian tongue—the noble hearted Ulfilas." (311-381.)[106]

The Goths were then located in two great divisions in the region north of the Danube and extending into the Ukraine. To the east, as their name implies, were the Ostrogoths and their neighbors on the west were correspondingly called Visigoths. Both tribes felt the shock of the Hunnish invasion of the 4th century. The Ostrogoths at first submitted and indeed for eighty years were more or less under the sway of the Huns. The Visigoths evacuated their land,

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[103] See Hodgkin, Italy and her Invaders, I, (I) Ch. VI pp. 368-373, where the Edicts of Theodosius I, issued in 380 and 381, and later incorporated into Lib. XVI, tit I,(II) of his grandson's Code, are translated.

[104] Hodgkin, Italy and Her Invaders, I, pt. I, 80. The Byzantine Emperor called him "the Moses of our day." Philostorgius, II, 15. "But" adds Hodgkin, "if he was the Moses of the Gothic people, he was also their Cadmus, the introducer of letters, (author of their alphabet), the father and originator of all that Teutonic literature which now fills no inconsiderable space in the libraries of the World." Italy and Her Invaders, I, 83. Cf. the same author's Theodoric the Goth, 179.

[105] This is the traditional view. Leo Weiner disputes it at great length, contending "that the Gothic Bible * * * was not written before the end of the 8th century." Commentary to the Germanic Laws and Mediaeval Documents. (Cambridge, 1915).

[106] "Two great monuments of Gothic history are the memory of Ulfilas and the fragments of his book." Scott, Ulfilas (Cambridge, 1885) X.

crossed the Danube in 376 with the Roman Emperor's permission, but later engaged the imperial forces upon more than one occasion and in 410, under their king, Alaric I,[107] captured and sacked the Eternal City. Two years later his brother-in-law and successor, Ataulfus,[108] led the Visigothic nation into Gaul where, in 414, at Narbonne, capital of the chief province, he was united in marriage[109] with Placidia, daughter of the deceased emperor, Theodosius I, who had been captured during one of the sieges of Rome. In the following year the Visigoths moved on into Spain, fixing their capital first at Barcelona and later at Toulouse to the north of the Pyrenees, and founded the first modern European kingdom.

Meanwhile in 454, the Ostrogoths broke away from their Hunnish conquerors,[110] likewise crossed the Danube and with Roman consent occupied the region known as Pannonia, which includes the present-day Austria. Thence about 461 the emperor took as a hostage the young Prince Theodoric (454-526), son of the Ostrogothic king Theudemir, and reared him at the imperial court in Constantinople. Important as was this event to the lad and his people

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[107] "Alaric Ala-Reiks. As to the termination *Reiks* there is no difficulty. Allied apparently to the Latin *rex*. (cf. the Indian *Rajah* and the German *reich*) it is the regular equivalent of prince or ruler in Ulfilas's translation of the Bible. * * * This Reiks is, of course, the final *ric* in the Vandal Genseric and Hunneric, the Frankish Chilperic, the Ostrogoth Theodoric, the Spanish Roderic and the English Leofric. The first part of the name, Ala, is, perhaps not quite so clear as *alls* (all) in Gothic is generally spelt with two l's. * * * But we do find (all-men)" etc. HODGKIN, ITALY AND HER INVADERS, I, Pt. II, 676.

He was born on an island in the Danube delta, probably between 360 and 370, seems to have been elected king about 395, died in 410 and was buried beneath the bed of the Busento river in Italy. *Id.* 651, 653, 809.

[108] "The name Alta-ulfus is a word of four syllables, possibly derived from Atta-wulfus, Father-Wolf, and so equivalent to Wolfson. It survives in the modern Adolf." *Id.* 821 n.

[109] Hodgkin sees in this union and event to which "we can hardly attribute too great an importance as symbolical of that amalgamation between the Roman and the Germanic races which was yet to be." V. *Id.* 831-3, where a graphic description is given of the royal wedding.

[110] *Id.* III, 13 *et seq.*

it was even more so to Roman law. For, in the decade or more which he spent in the world's capital, he came to

> "see more or less plainly that the soul which held all this marvellous body of civilisation together was reverence for the Law. He visited perhaps some of the courts of law; he may have seen the Illustrious Praetorian Prefect, clothed in Imperial purple, move majestically to the judgment-seat, amid the obsequious salutations of the dignified officials, who in their various ranks and orders surrounded the hall. The costly golden reed-case, the massive silver inkstand, the silver bowl for the petitions of suitors, all emblems of his office, were placed solemnly before him, and the pleadings began. Practised advocates arose to plead the cause of plaintiff or defendant; busy short-hand writers took notes of the proceedings; at length in calm and measured words the Prefect gave his judgment; a judgment which was necessarily based on law, which had to take account of the sayings of jurisconsults, of the stored-up wisdom of twenty generations of men; a judgment which, notwithstanding the venality which was the curse of the Empire, was in most instances in accordance with truth and justice." [111]

Thus in time Theodoric, like Ataulfus (for both had once been enemies of Rome)

> "saw that a nobler career was open to him as the preserver of the priceless blessings of Roman civilisation, and he spent his life in the endeavor to induce the Goths to copy those laws without which a Commonwealth ceases to be." [112]

Theodoric succeeded his father as king of the Ostrogoths, in 474 and after fourteen years of varying fortunes, entered into a compact [113] with the Emperor Zeno, by which the former became virtually the latter's delegate and as such undertook to recover for the empire Italy, then under the rule of a German king Odovacar, who had succeeded the last western emperor, Romulus Augustulus in 476.

Crossing the eastern Alps over a route previously followed by Alaric I and other barbarian chiefs, Theodoric's army emerged upon the Italian plains in July, 489, defeated Odovacar's forces at Isonzo (long afterward so conspicuous in the World War) again at Verona and, in the following year, with the aid of Alaric II, king of the Visigoths, near Milan. Then, after a siege of two years and a half Ravenna, to which Odovacar had fled, surrendered in 493 to Theodoric, who made it his capital, and reigned there nearly a third of a century as "King of the Goths and Romans in Italy."[114] Indeed his realm

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[111] HODGKIN, THEODORIC THE GOTH (1897), 46, 47.

[112] *Id.* 5, quoting OROSIUS HISTOR., VII, 43.

[113] HODGKIN, ITALY AND HER INVADERS, III, 128, *et seq.*

[114] HODGKIN, THEODORIC THE GOTH, 131.

> "might in fact almost be looked upon as a mere continuation of the old Imperial system, only with a strong, laborious, martial Goth at the head of affairs, able and willing to keep all the members of the official hierarchy sternly to their work, instead of the ruler whom the last three generations had been accustomed to behold, a man decked with the purple and diadem, but too weak, too indolent, too nervously afraid of irritating some powerful captain of the *foederati*, or some wealthy Roman noble, to be able to do justice to all classes of his subjects." [115]

According to Savigny,[116]

> "The East Gothic empire in Italy, notwithstanding its brief endurance, may be classed among the most remarkable phenomena of the middle ages; and the name of the great Theodoric, like that of Charlemagne, has been rendered immortal, both in poetry and authentic history."

Besides the Goths, other Teutonic nations embraced Arianism.[117] Between the two Gothic divisions were the Burgundians and across the Mediterranean in Africa were the Vandals whose Arianism was militant. To the north were the Alamanni and beyond them the Thuringians and the Lombards, who later overran northern Italy. To the east were the Franks of whom, like the Goths, there were two main divisions—the Salic, occupying parts of what are now Belgium and Picardy, and the Ripuarian (from *ripa,* bank) located on the west side of the Rhine.[118] The Salic Franks are remembered for one of their chieftains, the famous

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[115] *Id.* 149. Contrast this grudging description by Smith: "An Ostrogothic Empire, with its capital at Rome, included for a time the Danubian provinces, the northern part of Italy, and southeastern Gaul." DEVELOPMENT OF EUROPEAN LAW, XIX.

[116] GESCHICHTE DES ROMISCHEN RECHTS, IM MITTELALTER (Cathart's trans.), I, 315-16. "Theodoric the Ostrogoth may rank with the greatest statesmen of the empire." GWATKIN, THE ARIAN CONTROVERSY, 165.

[117] "The work of Ulfilas was not in vain. Not the Goths only, but all the earlier Teutonic converts were Arians." GWATKIN, THE ARIAN CONTROVERSY, 164.

"It is possible that some remembrances of the mythology handed down to them by their fathers made them willing to accept a subordinate Christ, a spiritualised "Balder the Beautiful," divine yet subject to death, standing as it were upon the steps of his father's throne, rather than the dogma, too highly spiritualised for their apprehension, of One God in Three Persons." HODGKIN, THEODORIC THE GOTH, 178.

[118] HODGKIN, ITALY AND HER INVADERS, VII, 4. For a map of the territory, mostly contiguous, occupied by the Arian nations, see Wells, Outline of the World's History (1929), 529. Cf. HODGKIN, ITALY AND HER INVADERS, III, 1; Continental Legal Hist. Ser., I. 1.

Clovis (Chlodovech (466-511), and also for their laws. They alone of all the barbarian invaders remained outside the Arian fold. Until nearly the end of the 5th century they were still pagan.

Theodoric, though reared, as we have seen at Constantinople, after it had become Athanasian, retained the faith of his fathers; but he must have realized quite early the isolation and consequent dangers which the situation involved. For his Roman subjects were mostly Athanasian and so was now his imperial master at Constantinople. In this we may find the true source and explanation of his official policy whose main features were (1) complete toleration of all faiths [119] and (2) close alliances looking toward his hegemony of the Arian nations. Both of these undertakings had important legal consequences. For the second there was also the consciousness of racial kinship, strongest as regards the two great divisions of Goths, [120] which, though long separated and never, in historic times, politically united, yet had often cooperated and usually pursued a common policy. To a lesser extent this feeling extended to the other Germanic tribes above mentioned; for all were of low German stock. Accordingly we find Theodoric, early in his reign (495), contracting a matrimonial alliance with the sister of

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[119] HODGKIN, ITALY AND HER INVADERS, III, Chs. VIII, XI. "We cannot command the religion of our subjects, since no one can be forced to believe against his will." Theodoric to the Jews of Genoa, Letters of Cassiordorus, II, 27.

"Theodoric was the first genuine apostle of toleration; he was willing even to suffer for the principle. Firm in maintaining his own faith, he was no less determined in protecting the liberty of others. He defended the Jews from the malice and persecution of the Italians, enforcing a general levy to compensate their losses in a riot. Towards the Catholics he showed the greatest consideration, accepted the post of arbitrator between rival candidates for the Papacy, and decided with most careful judgment; paid honour to their saintly men, and sent contributions to their famous shrines. Had he been a pagan he would have been extolled." SCOTT, ULFILAS, 169.

"We may fairly say that Theodoric's designs were as noble and as statesmanlike as those of the great Emperor Charles, and that if they had been crowned with the success which they deserved, three centuries of needless barbarism and misery would have been spared to Europe." HODGKIN, THEODORIC THE GOTH, 6.

[120] Only when so compelled by their Hunnish masters and as against Odovacar, a Visigoth, did the Ostrogoths fight their kinsmen.

Clovis; giving in marriage to Alaric II, a daughter by a former wife; to Sigismund, son of Gundobad, king of the Burgundians, another daughter; to Trasamund (496-523), king of the Vandals, a sister; and to the king of the Thuringians, a niece.[121]

> "Here," says Hodgkin,[122] was a vision of a 'family compact', binding together all the kingdoms of the West, from the Scheldt to Mount Atlas, in a great confederacy, filling all the new barbarian thrones with the sons, the grandsons, or the nephews of Theodoric; a matrimonial State-system surpassing (may we not say?) anything that Hapsburg or Bourbon ever succeeded in accomplishing, when they sought to make Venus instead of Mars build up their empires. We shall see however that, when it came to the tug of war between one barbarian chief and another, this family compact, like so many others in later days, snapped with the strain. Yet it was not at once a failure; for one generation at least the position of Theodoric, as a kind of patriarch of the kingly clan, was one of grandeur and influence, and did undoubtedly promote the happiness of Europe."

The "tug of war" here referred to was initiated by Clovis who, in 493, had married Clotilda (Chrotchildis), a devoted Catholic, though a niece of Gundobad, who was an Arian. Due, it is said, largely to her influence, Clovis, after three years of wavering, likewise became a Catholic, the first royal "eldest son of the Church," and the traditional founder of the French State.

The first result of the changed situation was manifested in secret correspondence during 499 between Clovis and certain subjects of Gundobad, including his brother Godegisel whom Clovis actually supported in overthrowing Gundobad. The latter, when advised to change his religion, declared that he would "not worship three gods."[123] Clovis next attacked and expatriated the Alemanni to whom Theodoric gave refuge, at the same time (504) writing Clovis "not to touch the panic-stricken refugees."[124] Three years later Clovis "announced to his warriors . . . 'I take it very ill that these Arians hold so large a part of Gaul; let us go and overcome them',"[125] referring to

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121 HODGKIN, THEODORIC THE GOTH, 242, *et seq.*

122 ITALY AND HER INVADERS, III, 355-6.

123 *Id.* 384.

124 LETTERS OF CASSIODORUS, II, 41.

125 HODGKIN, ITALY AND HER INVADERS, III, 392.

Alaric II and his subjects. Time enough elapsed before the expedition, however, for Theodoric to tender his good offices, asking Clovis [126] to "refer the matter to our arbitration," and assuring Alaric [127] that "your enemy will be mine also." At the same time he wrote to the Kings of the Burgundians,[128] Thuringians [129] and others, urging them to support his efforts and persuade Clovis to "seek redress from the laws of nations (*leges gentium*)." Here are clearly some very modern concepts of international law—arbitration as a substitute for war, *leges gentium* used for the first time in its modern sense and in an entirely different sense from *jus gentium*.[130]

But Theodoric's well-meaning and enlightened efforts were vain. In spite of them Clovis led his forces to the south and attacked Alaric at Vouille (Vouglé) ten miles from Poitiers. The Visigoths, hampered by lack of resources and disappointed at the non-arrival of reenforcements from Theodoric (deterred probably by the defection of Gundobad) offered but a brief resistance and then fled; while Alaric was slain, it is said, by Clovis himself. The Visigothic state, however, was not destroyed. Arles, where Euric's laws had been ratified, held out against besieging Franks and Burgundians until the tardy arrival, in the following year, of the relieving force of Theodoric, who, for the remainder of his reign, ruled Spain in his own name but as protector of his grandson, Amalaric, son of the slain king.

> "There was thus," observes Hodgkin,[131] "for fifteen years a combination of states which Europe has not witnessed before or since, though Charles V and some of his descendents were not far from achieving it. All of Italy and all of Spain (except the northwest corner, which was held by the Suevi) obeyed the rule of Theodoric, and the fair regions of Provence and Languedoc, acknowledging the same master, were the ligament that united them."

The Visigothic kingdom lasted until overthrown by the Saracens in 711 and was the forerunner of the once nearly

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126 LETTERS OF CASSIODORUS, III, 4, adding "it would be a delight to me to choose men capable of mediating between you."

127 *Id.* III, 1.

128 *Id.* 2.

129 *Id.* 3.

130 See my EVOLUTION OF ROMAN LAW, Ch. XVII.

131 THEODORIC THE GOTH, 205.

world-wide Spanish empire. But the Arian faith disappeared there after King Reccared (586-601) became a Catholic.[132] The historian [133] foresees that

> "a few Gothic names may survive, and even 'the blue blood' of the future Spanish hidalgo will faintly keep alive the memory of those fair-skinned warriors of the Danube, who in the fifth century descended, conquering, among the sun-burnt population of the South."

Their linguistic legacy, however, is much more than "a few Gothic names"; for, long after the Moorish conquest,[134] Gothic speech prevailed in Spain and its remnants are found in some four hundred modern Spanish words taken from the Gothic, in the Teutonic plural and in many other features of the language. But the Visigoths' greatest contribution to posterity, after their spectacular sweep across southern Europe, was their law-making activity into whose details we shall now enter.

2. Theodoric's Edict, ca. 500.

Nowhere is the internal policy of the great Theodoric better exemplified than in his laws. Instead of subjecting his Roman population to crude, barbaric customs, he sought to raise to their level his own fellow Goths by providing a compilation of law for both races.[136] This was

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[132] See Scott's Ulfilas (Cambridge, 1885), Ch. VII, for an account of Arianism's decline.

[133] Hodgkin, Italy and Her Invaders, I, (Pt. II), 839.

[134] "In Spain the Gothic language existed as late as the year 1091 for it was in that year prohibited by a decree of the Synod of Leon." Wiener, Commentary to the Germanic Laws and Mediaeval Documents, Int. XXXVI.

[135] On the date of this compilation see Calisse, Storia del diritto italiano (trans. Continental Legal Hist. Ser., I, 10-12).

[136] According to Munroe Smith (Development of European Law, 85) Theodoric made "no attempt to establish a common law for Goths and Romans; in each case the rule binding the Goths is based on Gothic custom, and that binding Romans, on Roman laws." The fact is that certain articles, by their terms, apply to one race only; *e. g.*, "*Barbaris*," (XXXII), "*Circa Judaeos*" (CXLIII), "*Siquis barbarorum*" (CXLV). But in the absence of such restrictive words, and in view of the preamble, which refers to them as laws *quae barbari Romanique sequi debeant*, Calisse appears to be correct when he says: "Undoubtedly the Edict was to be binding upon Goths and Romans alike. No exemption was conceded on any ground of official title or status. Magistrates who did not strictly enforce it were to be pun-

his famous "Edict."[137] It contained 155 articles, relating largely to public law, crimes, and procedure. Compiled in Italy, it was promulgated at Rome [138] for the peninsula and was later extended to Provence and the other adjacent regions under Theodoric's rule. The compiler, evidently a Roman, made extensive use of Theodosian's Code, as well of its predecessors, the Gregorian and Hermogenian, and also of the *Sententiae* of Paulus and certain manuals in common use. An interesting illustration of the method employed is found in connection with article 139 of the Edict which reads:

> *Auctor venditionis, etiamsi privilegium habeat sui judicis, tamen defensurus venditionem suam, forum sequatur emptoris.*[139]
>
> The author of a sale, even though he has the privilege of his own judge, must resort to the purchaser's forum to defend the sale.

This appears to be nothing more than the condensation of a *responsum* of Paulus which Justinian later preserved for us as follows:

> *Venditor ab emptore denuntiatus, ut eum evictionis nomine defenderet, dicit se privilegium habere sui iudicis: quaeritur, an possit litem ab eo iudice, apud quem res inter petitorem et emptorem coepta est, ad suum iudicem revocare. Paulus respondit venditorem emptoris iudicem sequi solere.* (Dig. V (I XLIX)).
>
> A vendor, called upon by the purchaser to defend him in an action by one who claims the subject-matter as owner, asserts a special right to his own judge; the question is whether he may remove the cause from the court where it was begun to that of his own judge. Paulus responded that it is the practice for the vendor to accept the purchaser's judge.

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ished with exile. . . . Theodoric's Edict was to serve as a law common to both peoples." (Trans. Cont. Legal Hist. Ser., I, 14).

[137] Smith speaks of it "as an edict (of which today we have no manuscript, but which has come down to us in the form of the first printed edition, which itself, of course, must have been based upon the manuscript since lost)." DEVELOPMENT OF EUROPEAN LAW, 85. The text of the Edict is reprinted in *Monumenta Germaniae Historica*, V, 145, *et seq.* and in Padelletti, *Fontes juris italica mediiaevi* (Turin, 1877).

[138] On "the date of Theodoric's formal entry into Rome . . . the king did make a 'law,' as the chroniclers expressly tell us, and there are reasons for thinking that it was this very Edict. For it is recorded that Theodoric, on entering Rome, inflicted the death penalty on certain corrupt judges who were not rendering justice to litigants, and the opening chapter of the Edict deals with this very offense." CALISSE, *ubi supra* (Cont. Legal Hist. Ser., I, 12).

[139] "Theodoric appoints the competency of the court to be decided,

So far as it extended then, this was a compilation of Roman law[140] which, as Calisse[141] well points out, made the Ostrogoths "familiar with many principles of Roman law hitherto unknown to them" and "modified, too, or extirpated, many of their own customs which were in conflict with the policies of the new State." At the same time it left the Romans undisturbed in the full enjoyment of their own law where the Edict was silent. In this way an important element of Roman law was preserved at a critical time and place, when its fate might otherwise have hung in the balance; and this without antagonizing the new and dominant race. For it was Theodoric's policy as announced in the Edict's prologue to promote harmony between Ostrogoths and Romans. Thus the effect of the Edict far outlasted its duration as actual law; which was little more than half a century. For, while Savigny[142] saw in it only "the rudest and the worst of all the collections," Calisse,[143] with a broader viewpoint, considers "its influence upon the civilization of the Germanic tribes important" and that "the legislative labors of Theodoric were not without beneficent consequences even though the main purpose—the amalgamation of the two races—was impossible of achievement in his day."

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according to the nation of the original defendant, that is, of the purchaser—emtoris, or actual possessor. His nation alone, therefore, formed the rule for determining the court." Savigny, Geschichte des Romischen Rechts im Mittelalter (Cathcart's trans.), I, 322n.

140 "The *Edictum Theodorici* was derived exclusively from Roman sources." Cambridge Mediaeval History, I, 441. This is not literally true. Some provisions intended for the Goths alone were taken from their customs. Savigny even says that "sometimes even the faintest traces of the Roman Law can, with difficulty, be discovered." Geschichte des Romischen Rechts im Mittelalter (Cathcart's trans.) I, 12.

141 Storia del diritto italiano (trans. Cont. Legal Hist. Ser., I, 15).

142 Geschichte des Romischen Rechts im Mittelalter (Cathcart's trans.), 12, where he adds, "The edict of Theodoric is distinguished, by this peculiarity. In it, all the sources are modelled into a new system: the old Jurists and Emperors no longer speak, but the author of the Edict alone."

143 *Ubi supra* (Continental Legal Hist. Ser., I, 15).

3. Alaric's Breviary, 506.

Theodoric's noble experiment was not long in bearing fruit. His ally and son-in-law, Alaric II, was in a similar, though graver, situation. Threatened with attack by the now Catholic Clovis, it was highly important for the Visigothic ruler to retain the loyalty of his Roman subjects who, likewise, were mostly Catholics.[144] To that end he appointed "a commission of provincial lawyers and bishops" who prepared a compilation, mainly of Roman law, for use by his Roman subjects. After approval by a council of bishops and nobles, it was published in 506 at Aire in Gascogne. The prologue recites the purpose of collecting useful excerpts from the Roman laws and directs the deposit of the original in the royal treasury and the distribution of copies, attested by the royal refendary (chancellor) Anianus[145] and no other, to the

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[144] Such at least is Dahn's explanation (*Könige der Germanem*, IV, 377 *et seq*). Compare ZIEGLER, CHURCH AND STATE IN VISIGOTHIC SPAIN (Washington, 1930), who says (27) "It seems quite probable that Alaric gave this code as a propitiary gesture toward his Catholic Roman subjects, whose loyalty he needed in his war against the Franks."

[145] "For this reason the code came to be called the Breviary of Anianus, and it is still so described by the majority of Spanish legal historians. In other European countries it is known as the Breviary of Alaric or the Roman Law of the Visigoths. It had no short official title. In his attests Anianus describes it as a 'codex selected from the laws of the Theodosian code, from legal decisions and from various books.' This is a fairly accurate description." SMITH, DEVELOPMENT OF EUROPEAN LAW, 94, 95.

"Goyaric sent authorized copies to the provincial authorities accompanied by the *Commonitorium* in which curious information of the history of this code is given." WALTON, CIVIL LAW OF SPAIN AND SPANISH AMERICA (Washington, 1900), 31.

"It is known usually as the '*Breviary of Alaric.*' But it went also by various other titles, '*Liber legum Romanarum,*' '*Corpus Legum,*' '*Lex Theodosii,*' '*Lex Romana,*' '*Liber Theodosianus legis Romanae,*' and especially '*Lex Romana Visigothorum.*'" CALISSE, *ubi supra*, Continental Legal Hist. Ser., I, 17.

Modern Editions. According to Tardif (*Histoire des Sources du Droit Francais.* (Paris, 1890), 136, 140), no less than seven abridgments of the Breviary have appeared from time to time. Jacques Cujas (1522-1590) published an edition in 1566 and in 1848 Gustav Haenel at Leipzig brought out his *Lex Romana Visigothorum*, containing the Latin text with notes and supplemented with valuable charts illustrating the law of descent as found in the Breviary.

counts and other officials. Roughly speaking the first half of the Breviary consists of excerpts from Theodosian's code, all of whose sixteen books are represented therein; but none are reproduced entire and many of them are fragmentary only.[146] Thus out of 34 enactments in Book I of the Code, only 11 reappear in the Breviary; Books II and IV are much the same in each work; of 32 enactments in Book III, but 18 are found in the Breviary and of 20 in the former not more than 10 appear in the latter. Of the code's 38 enactments in Book VI, which treats of public officers, only V is used in the Breviary and of 27 military provisions the latter takes but I.[147] Elimination is perhaps most notable in Book XVI, treating of ecclesiastical affairs, and, as we have seen, compiled under Athanasian influences. The Arian compilers of the Breviary left

> "little of the * * * extensive privileges of the Catholic church * * * 201 constitutions were reduced to eleven. All laws against Arianism, the Constitution of Valentinian III on the authority of the Apostolic See in the West, and many privileges of the Catholic hierarchy were omitted."[148]

The second part of the Breviary, comprising nearly one-fourth of the whole, is composed of extracts from the post-Theodosian novels. These two elements furnish that portion of the Breviary which modern commentators[149]

Fifty-five years later at the same place Dr. Max Conrat published his monumental work (*Breviarium Alaricianum Romisches Recht Im Frankischen Reich*) with the Latin text rearranged in logical order and a German translation on the same page. Between the two (1896) appeared the edition of the Spanish Academy of History from the Palimpsest Code, with parallel pages of the original script, in facsimile and modern printed text with notes; all in Latin.

[146] A comparative table showing the titles of enactments appearing in code and Breviary will be found in Mommsen and Krueger's edition of the former (1905, pp. 5-26).

[147] In these instances, observes Vinogradoff, the "shrinkage . . . arises not so much from a change of intellectual culture as from a difference in administrative arrangements and the decay of governmental institutions." ROMAN LAW IN MEDIAEVAL EUROPE, 21.

[148] ZIEGLER, CHURCH AND STATE IN VISIGOTHIC SPAIN, 27n.

[149] SOHM, INSTITUTES OF ROMAN LAW (Ledlie's trans., 3rd ed.), 128; VINOGRADOFF, *ubi supra*, 18 *et. seq.* The latter would seem to give the impression that *jus* precedes *leges* in the Breviary as in the Pandects; but such is not the case.

term *leges*, in contrast to the portion constituting the remaining fourth, which they call *jus*. For this the Institutes of Gaius were first utilized—not in their original form but in an abridgment [150] in two books from which all historical, controversial and other matter considered obsolete had been eliminated.[151]

Following these excerpts from Gaius, more than twice as much matter from the *Sententiae* of Paulus is included and that work has been preserved for us largely in the Breviary.[152] Then come excerpts from the so-called codes of Gregorian and Hermogenian and finally one from the responses of Papinian. All of the excerpts, other than from Gaius, appear to be unchanged from the original; but comments under the title of *Interpretatio* [153] are interspersed throughout the work except in the portion taken from Gaius. The compilers, in other words, did, in a crude way and on a smaller scale, what Justinian's commission accomplished a generation later; except that the latter resorted to *interpolatio* instead of *interpretatio*. This, thought Vinogradoff [154] "was rather a fine performance of the 'barbarian' Visigothic king" for Justinian had "infinitely greater resources at his disposal." Tardif[155] summarizes the Breviary's outstanding features as follows:

> (1) "It shows the earnest desire of the Visigothic king to avail himself of the civilizing advantages of the Roman Law;" (2) "no ancient code has so successfully escaped the ravages of time;" (3) "it has preserved and handed down to us a large and

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150 The WEST GOTHIC EPITOME or *Liber Gaii*.

151 "Some important parts of the Institutes were surrendered in the course of this process of simplification; for example, the teaching on sources of law, on the contrasting systems of the *jus civile* and the *jus gentium*, and the whole of Gaius' treatment of actions." VINOGRADOFF, ROMAN LAW IN MEDIAEVAL EUROPE, 19.

152 See CONRAT, DER WESGOTHISCHE PAULUS (Amsterdam, 1907).

153 "The glosses of the Breviary were formerly regarded as unimportant. But legal historians now recognize that they represent the custom of the later fifth and sixth centuries; indeed, that they are derived from older glosses now lost, and therefore are to be taken as a direct survival of later classical law." Boyd, *Ecclesiastical Edicts of the Theodosian Code*, COLUMBIA UNIV. STUDIES IN HISTORY, etc. XXIV, No. 2, p. 110n.

154 VINOGRADOFF, ROMAN LAW IN MEDIAEVAL EUROPE, 18.

155 HISTOIRE DES SOURCES DU DROIT FRANCAIS, 136 *et seq.*

important part of the learning of the old Roman lawyer Paulus;" (4) "it exhibits in a remarkable manner the direct and positive influence of Roman law upon barbaric customs."

Stocquart [156] is even more laudatory:

"In fine, the influence of Alaric's Breviary has been great, extensive, infinitely superior to the other barbaric codes. It has acquired for the prince who gave it his name, an imperishable glory. Placed on the boundary line between the ancient world and the middle-ages, it has saved the Roman Law from the great wreck of the old institutions; it has preserved the respect for the paternal power, in this noteworthy epoch, the first condition for the prosperity and morality of the family. It has disseminated everywhere, in the customs, a sentiment of equity, a respect for the law, a love of lawfulness."

The Breviary's Vogue.

In the year following its publication, its royal sponsor was slain, as we have seen, and his territory dismembered by the Franks. But even they paid him the very sincere tribute of

"adopting it as the system of law for all their Roman subjects. * * * In the southern parts of the Frankish empire the Breviary of Alaric * * * which had survived the Frankish conquest, was widely known. There the Romans greatly predominated and as they were allowed to retain their own law, this compilation was constantly referred to. Charlemagne is said [157] to have confirmed and reissued it for the use of his Roman subjects and there can be no doubt that it was largely resorted to by the counts and envoys of the Frankish kings."[158]

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[156] *Le Breviaire d'Alaric.* Revue de l'Universite de Bruxelles, XI, 567, 577, (*Extrait de l'Apercu de l'evolution juridique du mariage*, t. II, *Espagne*, ch. V).

[157] "Its forty manuscripts, nearly all found in Frankish territory, the frequent occurrence of portions of it in the manuscripts of other collections of laws, the seven epitomes or minor codes for which it is the source, are evidence of the popularity of the Breviary in mediaeval jurisprudence. Something more than tradition indicates that Charlemagne recognized and approved it as a source of justice, for the statement that 'it was received and placed among the laws by Charles and his son Pippin' coincides with their recognition and confirmation of folk law, by which each nation was given the privilege of amending its own 'wherever that was necessary and committing it to writing, in order that the judge might make decisions by written law . . . and all men, poor and rich, have justice in the kingdom.'" Boyd, Columbia Univ. Studies in History, etc., XXIV, No. 2, pp. 118, 119.

[158] Taylor-Cameron, *Roman Law in the Early Middle Ages*, Juridical Rev. VII, 247, VIII, 122.

Meanwhile, in the Visigothic kingdom itself, the Breviary continued in force for about a century and a half when it was superseded by the *Fuero Juzgo* (*Forum Judicum*) to which, however, it contributed not a little.[159]

> "Outside of Spain," says Munroe Smith,[160] "the Breviary of Alaric has largely used as a source of Roman law wherever the Roman provincials were still living according to their own laws. It was so used in Gaul, since no compilation of Roman law was made under the authority of the French kings, and it seems to have been frequently used, whenever Roman law was wanted, in all parts of the Frankish Empire, except Italy."

As to this supposed exception, Calisse [161] tells us:

> "When in 534 the Burgundian kingdom was overthrown by the Frankish conquest, the Breviary survived in influence the Burgundian statute, and diffused itself even among the Roman Italians who had been subject to the latter sway, as well as among those in other localities. Throughout the Middle Ages the Breviary preserved a great authority. In Italy, indeed, it never went out of vogue, partly because of the intimate intercourse between Italy, Gascony and Spain, partly because the Breviary contained a large part of the Theodosian Code already there accepted. The Frankish conquest must also have helped to spread its influence anew north of the Alps. Charlemagne and Pepin both ordered it to be included in their legislation; and Pepin, who was the sole ruler in Italy, would not have done this if the Breviary had not in that country been authoritative. Several manuscripts of it, indeed, have been discovered in Italy; legal documents there reveal traces of its Theodosian passages; the commentaries and the compendia of it are of Italian origin. All these circumstances go to confirm the conclusion that the Breviary, even after it had lost its legal authority in its original home of Gascony and Spain, continued in Italy to be known and used as the principal source preserving the ancient law of Rome and surviving alike in the traditional customs and in the practice of litigation."

Smith [162] further says that the Breviary

> "was well known in England also, and down to the 12th century it was the chief and almost the only source from which Roman law was drawn in western Europe. Nearly all references to Roman law in French, Gorman or English literature down to the

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[159] "From the two compilations of Euric and Alaric . . . was formed the *Forum Judicum*." SCOTT, THE VISIGOTHIC CODE, Preface, XXIV. Cf. SMITH, DEVELOPMENT OF EUROPEAN LAW, 95.

[160] DEVELOPMENT OF EUROPEAN LAW, 95. Cf. VON WRETSCHKO, *De Usii Breviaii Alariciani forensi et scholastico per Hispaniam, Galliam, Italiam, regionesque vicinas, Theodosiani libri XVI, I, II, CCCVII-CCCLXXVII* (Berlin, 1905).

[161] STORIA DEL DIRITTO ITALIANO (trans. Continental Legal Hist. Ser., I, 19). Cf. Patetta, *II breviario alariciano in Italia* (in *Archivio Giuridico*, 1891).

[162] DEVELOPMENT OF EUROPEAN LAW, 95.

> 12th century and nearly all bits of Roman law inserted in the law books of the period can be traced back to this Visigothic compilation."

It was thus one of the most widely diffused law books of the middle ages and, notwithstanding its compilers "excluded . . . most of the legislation . . . favorable to the Catholic church,"[163]

> "it was from the Breviary also that the ecclesiastical authorities derived many of those legal principles which gave the canon law its distinctive character as a system of justice. The rules that the accuser in a criminal action who fails to prove his charge must suffer the penalty involved, that those accused of crime and not proved innocent cannot give testimony in a criminal process, that the judge cannot examine until a formal accusation has been made, and the extension of the conception of crime from physical injury to libel—these principles of the canon law have their source in the Breviary of Alaric."[164]

4. Lex Romana Burgundiorum.[165] (*Post 500*)

This was the briefest and most ephemeral of the three barbarian collections of Roman law which we are now considering; but it well illustrates the extent of the movement which produced them that, while Theodoric's Edict was preserving Roman law in Italy and Alaric's Breviary there and elsewhere, a similar collection was in force in the kingdom whose ultimate domain stretched from the Rhone to the Alps with its capital at Geneva—the realm of Gundobad (476-516), the Burgundian. Like Theodoric, that king ruled Romans as well as Teutons and in his compilation (*ca. 501*) of laws for the latter, undertook the preparation of another for the former; and "everything points," thinks Calisse[166] "to the fulfillment of his promise in this collection." But a reference to his son Sigismund "as if he were the author" and the appearance therein of Roman Law excerpts not found in the Breviary, suggest a later date.[167] At any rate its legal force

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163 Ziegler, Church and State in Visigothic Spain, 59.

164 Boyd, *Ecclesiastical Edicts of the Theodosian Code*, Columbia Univ. Studies in History, etc., XXIV, No. 2, p. 120.

165 Also known as *Liber* (*Responsorum*) *Papinani* or *Papian*, from the mistaken notion that the extract from Papinian which closes the Breviary belonged to this collection which was bound with it.

166 *Op. cit.* (trans. Continental Legal Hist. Ser., I, 18).

167 "If, then, he is to be regarded as the author, not merely of a revision, but of the original, the earliest dates for it would 517." Calisse, Storia del diritto italiano (trans. Cont. Legal Hist. Ser., I, 18).

ended in 534 when the Franks overthrew the Burgundian kingdom. Like Theodoric's Edict, this collection in its 47 articles [168] related to crimes and procedure and drew not only from Theodosian's and the two preceding codes, as well as the *Sententiae* of Paulus, but also from the *Novellae* and from Gaius. Whether these were consulted in the original or in the Breviary depends upon the other question, still unsettled as we have seen, whether the latter was then extant. "In particular parts," thought Savigny,[169] "the sources are given pure and unchanged and in this respect it is much preferable to the East Gothic (Theodoric's) Edict." But there was also Germanic material and some relating to civil or private substantive law.[170] Despite its brief period of legal force, its influence continued longer and it served, like Theodoric's Edict, to familiarize the Germans with, and thus to preserve, Roman Law.

V. The Corpus Juris.

It was not until a generation after the *Leges Romanae* that Justinian brought forth the codification [171] which bears his name. By that time the original Roman Empire had not only been divided but the western half had ceased to exist as such. The various parts into which it had separated retained Roman law derived, as we have seen, largely from Theodosian's Codex. Among the countries which had separated from the Empire in fact, though not always in name, was Italy itself. But in the latter part of Justinian's reign it and other lands were recovered in the campaigns of his generals, Narses and Belasarius.

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[168] The Latin text, preceded by a Table of Contents, appears in *Monumenta Germaniae Historica, Legum Tomus*, III, pp. 595-624.

[169] *Ubi supra*, I, 12.

[170] See *e. g.* XXI. *De Divortiis;* XXII. *De Donationibus;* XXVI. *De his qui debitas filiis de maternis bonis non tradiderint portiones;* XXVII. *De puellis vel mulieribus sponsatis;* XXVIII. *De Luctuosis hereditatibus;* XXXI. *De praescriptione temporum;* XXXVI. *De tutelis minorum;* XXXVII. *De nuptiis legitimis sive naturalibus filiis;* XXXVIII. *De pactis et transactionibus haec forma servanda est;* XLV. *De testamentis.*

[171] See my Evolution of the Roman Law, Ch. XXXI.

The *Corpus Juris* had naturally been promulgated for the Eastern empire as it then existed. But about 540 Justinian issued his *Edictale Programma* [172] providing for the publication in Italy of the "law or statutes inserted in our codes." The complete conquest of the Peninsula later appeared to call for a more specific provision and in 554 the emperor promulgated the following constitution:

Jura insuper, vel Leges Codicibus nostris insertas, quas jam sub edicitali programmate in Italiam dudum misimum, obtinere sancimus; sed et eas, quas postea promulgavimus Constitutiones, jubemus sub edictali propositione vulgari ex eo tempore, quo sub edictali programmate evulgatae fuerint, etiam per partes Italiae obtinere, ut una, Deo volente, facta Republica, Legum etiam nostrarum ubique prolatur auctoritas. (Pragmatica Sanctio).

We decree that the laws or enactments inserted in our codes, which some time ago, we sent into Italy and published by edict, shall have full force: and we command by a general edict that those constitutions, too which were promulgated later, shall have force also in Italy from the time at which they were promulgated, so that, since the republic is become one through the will of God, the authority of our laws also may be extended everywhere.

It does not appear that this legislation was ever formally abrogated; though naturally, not all parts of the *Corpus Juris* came equally into use. That, as we shall see, was not the case even in the real Eastern Empire itself. Pollock and Maitland,[173] after stating that "in 1076 the Digest was cited in the judgment of a Tuscan court," add: "Apparently the most industrious research has failed to prove that between 603 and 1076 anyone cited" it. And there were special reasons for this. For while, to its authors and to us, the Digest was the most important part of the *Corpus Juris*, to the former's degenerate successors, both east and west, the very merits of the Digest rendered it difficult of use. This difficulty was accentuated by another circumstance. A professor in the Public Law School of Constantinople named Julian, the successor of Theophilus, one of the compilers of the Institutes, published, about the end of Justinian's reign, a Latin epi-

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[172] "Let all our judges in their respective jurisdictions, take up this law and, both within their own provinces and in this imperial city observe and apply it." *Constitutio Tanta* (Confirming the Digest), 24, (Dec. 16, 533).

[173] HISTORY OF ENGLISH LAW, I, 23 and n.

tome [174] of a part (125 out of the 170 or more which have come down to us) of the *Novellae*. Now the ages which followed Justinian became increasingly fond of epitomes (witness the *Ecloga* and the *Hexabiblos*) and the mere fact that the Novels were epitomized while the Digest was not, gave the former a much greater vogue. Finally, while Ortolan [175] tells us that "official Mss. of the Institutes, the Digest, and the Code, and the Novellae of Justinian were forwarded to and deposited at Rome," the fact seems to be that few copies of the Digest were available in Italy before the Bologna revival.[176] Hence, when historians of this period mention the Corpus Juris, they usually mean the Novels—never the Digest. Thus, Calisse [177] to prove the force and rapid diffusion of the *Corpus Juris*, instances "the legal documents of the early middle ages," adding,

> "Expositors of the law, moreover, are found referring to it. An interesting work of this sort is the 'Glossa' of Turin, composed probably (at least in its original portion) in the very period of Justinian, but certainly later than 543, as it cites a Novel of that date. It's author's care in giving definitions and etymologies shows that its purpose was to teach and make known, in the schools and at the bar, the then newly promulgated body of law."

A century after that date, King Rothari of the Lombards who called his compilation of law an "Edict" in "blind imitation of Roman terms" and "a result of the Roman conceptions dominant still in Italy,"[178] appears to

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[174] *Juliani Novellarum Epitome*. The novels were composed mainly in Greek and while Julian's work may have been intended primarily for his students, as Ortolan thought, the fact that it was composed in a language not much used in Constantinople, supports Biener's and Puchta's view that Julian had Italy in mind. At any rate, the Epitome's principal vogue was in the West and if there was an official translation of the *Novellae*, as Ortolan further thought, it does not seem to be mentioned and in any case the Epitome would have been preferred for the reason mentioned in the text.

[175] HISTOIRE DE LA LEGISLATION ROMAINE (Pritchard & Nasmith's translation, 2nd ed., 1896), 409.

[176] CONRAT, GESCHICHTE DER QUELLEN DES ROMISCHEN RECHTS IM FRUHEREN MITTELALTER, (1889), I, 69.

[177] STORIA DEL DIRITTO ITALIANO (rev. ed. 1912), I (translated, Continental Legal History Ser., I, 21), citing "the collections of Marini and Fantuzzi."

[178] *Id.* 27, 91.

have taken his preface literally from Justinian's Novel VII. He adopts the Roman notarial system,[179] largely found in the Novels LII (II), IXXIII (I), CLXII (I) and the Code directing the circulation of his edicts in copies certified by the royal notary and prescribing either Lombard or Roman forms in drafting documents. All this was reenacted in the laws of Liutprand some two centuries later.[180]

> "Testamentary succession, female inheritance, prescriptive title, transfer of ownership, marriage, mortgage, obligations, possession, usufruct, guardianship—these and many lesser legal ideas and methods were introduced or modified through the Roman law. The commentators on the Edict cited continually the books of Justinian, which indeed became virtually one of the sources of Lombard law." [181]

Here again, we must assume, the author means the Novels; upon one (CXVIII) of which "the law of succession in most countries of Europe is founded."[182] So in the succeeding 9th and 10th centuries, a few French writers refer to the Novels and always of Julian's Epitome.[183]

But if the Digest was for the most part an unknown book in the West, the Institutes were not. Damian (988-1072), bishop of Ostia, tells us in his work [184] of a discussian at Ravenna concerning degrees of consanguinity in which the authority of the Institutes was invoked and the doctors directed to consult it.

Pollock and Maitland [185] add: "These Lombards knew

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179 "*The Notaries* were accustomed to follow fixed forms, which they copied literally, in so far as the peculiarities of each case would allow. Among the Franks particularly, these forms were often collected into separate books. From this cause, there arose a great uniformity and regularity in the written legal proceedings; and not only expressions and forms, but many legal ideas and abstract law-propositions were preserved and circulated by the travelling Notaries. This explains, why law-doctrines are often met with in unexpected places and times." Savigny, *Geschichte des Romischen im Mittelalter* (Cathcart's trans.), I, 456-7.

180 *Leges Lombardi*, I, (XXIX, 2).

181 CALISSE, *ubi supra* (Continental Legal Hist. Ser., I, 91).

182 WALTON, HISTORICAL INTRODUCTION TO ROMAN LAW, 306.

183 LAFERRIERE, HISTOIRE DU DROIT FRANCAIS (Paris, 1852-3) IV, 284-6.

184 *De Parentalae Gradibus* (Paris, 1663), III, 77. Cf. ORTOLAN, HISTOIRE, etc., sec. 612.

185 HISTORY OF ENGLISH LAW, I, 22.

their Institutes and, before the 11th century was at an end the doctrine that Roman law was a subsidiary common law for all mankind (*lex omnium generalis*), was gaining ground among them."

So much for northern Italy. Meanwhile, as we shall see,[186] successors of the *Corpus Juris* were being applied as law in the south.

> "This accounts for the making and using of numerous compends of Byzantine law in the southern Italian provinces, as well as for the numerous traces of it in local custom and in the subsequent legislation of the Norman and Suabian dynasties. In Sicily, too, the Roman and Byzantine law did not disappear, even under the dominion of the Arabs. The latter preserved for the conquered population its existing law and even its own courts." [187]

Outside of Italy the authority of the *Corpus Juris* extended more slowly but not less surely. The first country of western Europe to come under its influence appears to have been Spain. For while Altamira [188] thought that "the Justinian element did not attain importance in the peninsula until the 13th century," a later investigator [189] finds unmistakable "evidence that the framers of the *Liber iudiciorum* borrowed from Justinian." Within a score of years after promulgating the *Corpus Juris,* that emperor had sent an army to the Peninsula at the invitation of the Gothic king Athanagild (554-557) and occupied the coast cities of the east and south which the Byzantines held for two generations.[190] So in Castilla the sovereigns

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[186] See my *Continuity of Roman Law*, 4 TULANE LAW REV. 354, 361.

[187] CALISSE, STORIA DEL DIRITTO ITALIANO, I (trans. Cont. Legal Hist. Ser., I, 22).

[188] Cont. Legal Hist. Ser., I, 628.

[189] ZIEGLER, CHURCH AND STATE IN VISIGOTHIC SPAIN, 75.

[190] "Justinian was only too ready to accept the opportunity thus offered of planting his foot within the breach of another Gothic kingdom. Athanagild gained his purpose, but sixty years afterwards his successors were still struggling to dislodge the Byzantines, and loosen their grasp upon the land." SCOTT, ULFILAS, 194-5.

"This probability (of the Digest's introduction) is strengthened by the fact that from 554 to 624 there was a Byzantine province on the Levantine coast of spain, whose capital was Catalonia." Boyd, *Ecclesiastical Edicts of the Theodosian Code*, 114.

> "favored and encouraged the study of the Roman civil as well as that of the Roman canon law. In the university of Salamanca, founded early in the thirteenth century, Alphonso X maintained two Roman lawyers and three canon lawyers." [191]

As it was the last named monarch who caused the preparation of *Las Siete Partidas*, the explanation of the large amount of material therein from both Institutes and Digest is not far to seek. Thus to recapitulate

> "from the sixth century onwards, the *Corpus Juris* of Alaric, King of the Visigoths, and the *Corpus Juris* of Justinian, confronted each other as rivals, the former predominating in the West, the latter in the East. Which was to be the *Corpus Juris Civilis* of the future? The question was decided in favour of Justinian's code. . . . The *Corpus Juris* of the German king was destroyed by the *Corpus Juris* of the Emperor of Byzantium."[192]

And in that triumph the preservation of Roman law for the modern world, was assured and completed.

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[191] SMITH, DEVELOPMENT OF EUROPEAN LAW, 276.

[192] SOHM, INSTITUTES OF ROMAN LAW, 133, 134.

THE ORIGIN OF EQUITY

CHARLES A. KEIGWIN

Part V.*

Four Vices of the Common Law. Of the specific vices inherent in the common law or incidental to the administration thereof, there are four which are usually mentioned as especially pernicious and most requiring correction and as therefore accounting for the necessity of a new court and an independent jurisdiction. These are:

(1). The legal policy of observing precedents and deciding cases in accordance with principles established by former adjudications;

(2). The use of the formulary system, the administration of the law in certain fixed forms of action and with reference to certain authorised writs, each of which embodied and made effective some specific legal principle;

(3). The rigor of the law, by which is meant the frequent harshness of legal rules, or perhaps a want of humane consideration for the misfortunes of humanity and an indifference to the hardships occasionally resulting from those rules; which quality of the common law is often confounded with that feature of the system next to be specified but may advantageously be differentiated therefrom; and,

(4). The rigidity of the common law, by which is meant the generality of legal principles and the judicial practice to apply such principles with logical and sometimes literal consistency and without allowance for exceptional cases and for circumstances which made the usual rules produce unjust results.

The distinction here suggested between the rigor or harshness of the law and the rigidity or inflexibility of legal rules will be found of some materiality in the ensuing consideration of the defects incident to the common

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* For Part I, see (Nov. 1929) 18 GEORGETOWN LAW JOURNAL 15;
For Part II, see (Jan. 1930) 18 *id.* 92;
For Part III, see (March 1930) 18 *id.* 215;
For Part IV, see (May 1930) 18 *id.* 299.

law and of the manner in which Equity operated with reference to the different kinds of such defects. No doubt the unbending character of certain rules as enforced by the judges sometimes had or seemed to have the effect of hardship; but that result, which was often obviated in equity, is not identical with the inherent harshness or oppressive operation of some legal doctrines, which was and is (generally at least) not relieved by equitable mitigation. As will hereafter appear, what has been called the rigor or native inclemency of some common law doctrines causes instances of hardship which offend modern notions of humanity or perhaps of morality: these have been largely modified by legislation, in part by a species of judicial legislation. On the other hand, what is here distinguished as the rigidity of the law, which is owing to the necessary generality of its rules, is prevented from working injustice by equitable moderation.

The Observance of Precedents. At a very early point in their history, apparently from the very beginning, the benches adopted the policy of deciding controversies according to definite legal principles. The law being thus declared in decided cases, those cases became evidence of the law therein declared and were deemed to be precedents affording rules for the decision of subsequent cases presenting the same points, and thus giving guidance to the later judges as well as to the people in the conduct of their lives and business. Indeed, it was in this respect for precedents that the practice of the common law courts most distinctly differed from that obtaining in the disorderly popular assemblies which were the local courts; and it was by reason of this very difference, more than for any other reason, that the royal judiciary acquired the public preference and in the result drew virtually all the business away from the older tribunals. The effect of the policy mentioned was to impart stability and definition to the doctrines and practice of the common law, which thus became a system of settled principles fixed by successive adjudications and embodied in reported cases. The quality of certainty so acquired by the rule of following precedents was evidently that which is intended and accomplished by the present day doctrine of *stare decisis*, the rule that, when a point of law has been established by judicial decision, the deci-

sion constitutes a precedent which is not in later cases to be departed from.

This practice of building up the legal system by a succession of precedents making fast rules of decision for future cases has been, by several eminent authorities, pronounced vicious because it caused the common law to frame itself into a body of definite dogmas and fixed rules of conduct. That result is, depreciatingly, called a hardening of the law, by which seems to be meant that the originally vague and fluctuating jurisprudence of the Anglo-Saxon *regime* lost its fluidity of indetermination and crystallised into the precise and certain principles which make our modern rules of property, tort and contract. And it is said that such fixation of legal principles made the common law so final and inflexible that it had no possibility of expansion and of adopting itself to the changing needs of society, which condition made necessary a system of equity to afford relief against the cramping rigidity of the law so made certain by a succession of building precedents.

So often and with such emphasis has this theory of the equitable jurisdiction been propounded by writers deserving the highest respect that the explanation must be questioned only with becoming modesty and cautious diffidence. Yet in view of the historical facts heretofore stated, it is difficult to accept the fundamental assumption that the common law was ever hampered in its growth by the observance of precedents, and it is plainly impossible to agree that the law was incapable of expansion. The obvious fact is that the legal system did expand, and in the long run expanded immensely; at times its growth was very rapid; and this rapidity of development was most marked in the early centuries when judicial conservatism is supposed to have been strongest and the influence of precedents is said to have been most paralysing. Morever, this development was not accomplished by overruling or disregarding prior adjudications, but on the contrary by adding new decisions to the old in a process of deduction from previously fixed doctrines and of amplifying principles found in precedent cases. In this way England became

> "A land of settled government . . .
> Where Freedom broadens slowly down
> From precedent to precedent."

The Doctrine of Stare Decisis. Whether or not this slow broadening of the common law was made slower by respect for established doctrines, the method of enlarging the legal system was unquestionably that which has always obtained and obtains today, in all English and American courts. If it be granted that the policy of deciding in accordance with precedents cramped the growth of the law and made it unduly narrow in scope, still the undeniable fact remains that the law did grow, despite the precedents perhaps, but always in the mode of developing new doctrines out of the precedents; and our contemporary jurisprudence is developing upon precisely the principle that the larger law is to be made by elaborating the lesser law already established by decision. The very respectable authorities who have just been mentioned are sometimes quite copious and very vigorous in condemning the early judges for their adherence to the law as they found it settled by prior decisions. Yet none of these writers has found it necessary or worth while to explain wherein the ancient policy of accepting precedents differed in principle or in operation from the still prevailing doctrine of *stare decisis;* nor does anyone impugn the soundness and the present necessity of that doctrine. Manifestly, if it were competent for courts of equity or for any other depository of judicial power to shake the fixity of the law or to impair the authority of adjudications, our whole legal system would be in a state of perpetual *flux;* indeed we should have no law at all.

Such, certainly, is not the office of Equity at this day. On the contrary, one of the fundamental principles of the present chancery practice is that Equity follows the law; by which is meant that "wherever the rights or the situation of parties are clearly defined and established by law, Equity has no power to change or unsettle those rights or that situation." Nor is there any reason to suppose that the former attitude of the Chancery was different. It does not appear that the early chancellors ever assumed to overset any of the supposedly arbitrary and absurd institutes of the common law, or to afford relief against the prevalence of precedents in the legal practice, or even that they sought by argument or authority to persuade the judges that it was impolitic and iniquitous to accept adjudicated cases as fixing the rules for subsequent adjudication. At any rate, the

learned writers who censure the early judges for their consistent adherence to the law as settled by decision do not cite any instances in which equity courts reprehended the doctrine of *stare decisis* or rectified judgments upon the ground that the observance of precedents had produced bad law.

In the cases which have been stated as exemplyfying the exercise of equitable jurisdiction it will be observed that the relief was not afforded upon the ground that the law courts had followed decided cases or adjudged according to settled principles, or even because those cases and those principles were deemed unsound; and still less did the Chancery interfere upon any theory that the legal practice of giving effect to precedents had narrowed or hardened the law or made it unsuited to the purposes for which the law was intended. In Lady Audley's Case, in the Case of the Two Executors, and in the enforcement of the duties incident to uses, the propriety of the principles acted upon at law was not at all questioned, nor is there any suggestion that the judges had made the legal system objectionable by reason of their pursuing a consistent course of ruling. So far from implying any reprobation of the fixity or the narrowness of the common law, the action in these cases manifestly assumes that the principles established by precedents in the law court were correct and wholesome, and perhaps even necessary; and the result of the equitable relief afforded was to leave the common law of property, of contract and of procedure in full operation as before. The function of Equity in reforming legal system must therefore be found in some other activity than that of prohibiting the judges to observe precedents and of compelling the law to become lawless.

The Formulary System. The formulary system of actions upon which the practice of the common law courts was moulded, the nature of that system and the reasons for adopting it, are subjects with which the student will have acquainted himself in previous reading. The merits of that system as a means of giving effect to legal rights, and the expediency of replacing it by a scheme wherein all controversies are litigated in what is called a single form of action are matters for consideration in connection with other courses of study. At this point we are concerned

with the forms of action only so far as they affected the competency of the common law courts to do justice, and our sole inquiry relates to the effect of the writ system in necessitating the erection of a superior tribunal and to the sufficiency of the forms as explaining the collateral jurisdiction of the equity courts.

Many eminent authorities have found in the forms of action a more or less complete explanation of the equitable jurisdiction. Indeed, one body of distinguished jurists, in a document of historic importance, once declared that the formulary system, of itself alone, accounted entirely for the creation of a court of equity. Of course this theory is wholly untenable upon historical grounds, since we know now—what was unknown or imperfectly understood when the document mentioned was written (A. D. 1848)—that there was an administration of equity long before there were any common law actions.

Moreover, if the system of equity owed its origin wholly to the effect of the formulary system, the abolition of the forms would be obliterate all differences between law and equity. Certainly, if in addition to discarding the actions, a single court should be given the combined legal and equitable jurisdiction, there would no longer be occasion to distinguish between the two branches of jurisprudence, and both could be administered indifferently and without attention to the former dichotomy. In fact, the eminent jurists just mentioned projected precisely such a scheme of judicature; and the two features suggested, the abolition of the formulary system and the fusion of legal and equitable authority in one court of composite jurisdiction, are the cardinal characteristics of the Code which they formulated and of the similar codes which now regulate the procedure in most of the American States. A like abrogation of the formulary system and the same merger of the two jurisdictions has obtained in the English courts for nearly sixty years. Yet both in England and in the United States the distinction between law and equity persists and is at least as strongly marked as ever in practice and in adjudication; and the study of Equity is certainly not less, but apparently more, important that it was when the formulary system was universally accepted.

No New Remedies in Equity. Equally evident is it that the chancellors did not relieve against the restrictive rigor of the formulary system, and amplify the contracted ambit of the common law, by asserting a power to declare additional legal rights and to give them effect in the courts of equity. It would be very convenient to explain the equitable jurisdiction—and it is sometimes so explained—by saying that a succession of religiously disposed chancellors, observing that the common law failed to enforce the moral law in all its fullness, took upon themselves to accomplish righteousness in those cases wherein justice was cramped by those absurd procedural limitations of the courts and by the hard consciences of the secular judges. But historical verity does not admit such simple account of the legal reformation.

It is quite true, as is emphasized by those writers who attribute to Equity the whole amelioration of the common law, that the legal rights available at any given period were, by the theory of the formulary system, limited to those defined by the writs which were, at the time being, found in the Register and so placed at the disposal of suitors. The obvious result was that a plaintiff could not obtain a standing in court unless he could show a state of facts which lay within the compass, and was described by the language, of some one of these writs. It is true also that at any time in the medieval period the writs were so few in number and of so confined operation that the law courts could not afford what to modern notions is adequate justice. Indeed, much of the most elementary morality lay outside the scheme of common law remedies.

Thus, at one time there was no writ for the action of Trespass, and therefore no redress could be had (in the King's courts) for the most atrocious assault or the most grievous depredation upon property. As has been mentioned, for two hundred or more years after such wrongs became actionable in the royal courts, redess could not be had for a wrongful appropriation of goods not accompanied by a trespass, or for the breach of a simple contract, because there was no writ in Trover or in Assumpsit. So it was only in the course of centuries, and by the successive formulation of new writs in the form of Case, that many of the most common and most iniquitous torts became ac-

tionable, such as libel, malicious prosecution and swindling by deceitful representations. In the period, therefore, in which the equity jurisdiction was defining itself and is assumed to have been most vigorous in reforming legal institutions, the law embodied in the existing writs was scandalously incomplete, manifestly unmoral and woefully in need of additions accordant with good conscience.

Now, it is conceivable—and it seems to have been so conceived as the fact—that this palpable inadequacy of the law could have been effectually aided by the assertion of an authority to realise righteousness outside the limits of the law, to accomplish justice independently of the Procrustean writ system and in disregard of the formulary theory. Quite possibly—had there been no popular opposition to such ultra-legal methods and no other public sentiment supporting the ancestral law—the chancellors might have taken upon themselves to supply remedies for those wrongs which the formed actions did not reach and to vindicate morality in those cases wherein the judges held themselves incompetent because of the paucity or the rigidity of their writs. In this way (perhaps) the Chancery might have supplemented and moralised the common law by creating a collateral legal system which should be untrammeled by the formularies and able to do complete justice according to conscience rather than in accordance with a miserably meager body of writs. Had this been done, and done successfully, the equity courts would have punished trespassers when there was no action of Trespass, would have exacted recompense for property converted without waiting for the writ in Trover, and would have awarded damages for breaches of simple contracts before the law courts ever conceived the form of Assumpsit.

As history happened, however, these things were not in fact done; the redemption of the common law was not accomplished in any such way. Indeed, no one has ever asserted that the chancellors acted in the manner suggested. Even those writers who dwell most insistently upon the influence of Equity in liberalising the law, although they seem to assume that the Chancery caused the law to enlarge by creating legal rights beyond the limits of the formulary system, do not specify any instances wherein equitable relief was granted against wrongs of legal nature or

wherein the equity courts declared new legal rights lying outside the scope of the common law writs. Had the chancellors undertaken to enlarge the law by enforcing rights not within the scheme of the existing actions, and by administering independently of the law courts that sound morality wherein the formulary system was so deplorably lacking, we should now have remedies in equity for the things just mentioned and for all the other torts and contractual delinquencies which obtained comparatively recent recognition as wrongs actionable at law. As it is, these very wrongs are the matters which are most distinctly and most indubitably outside of the equity jurisdiction. And even today, the fact that a wrong is without remedy at law does not render it possible to obtain relief in equity.

The Forms Not Discarded. Notwithstanding the obvious considerations last suggested, an influential school of legal philosophy finds in the formulary system a fact which necessitated a body of jurisprudence collateral to that administered by the common law courts, and the fact which chiefly, it not altogether, accounts for the functions assumed by the Court of Chancery in the development of its equitable jurisdiction. That effect of the forms is explained —somewhat obscurely it seems to one who frankly confesses his inability to understand the explanation—by saying, in the first place, that the only rights which could be realised at common law were those which were defined and made enforceable by the writs found in the register of precedents and so made available to those seeking justice; and these writs were so few in number and so limited in function that, taken collectively, they did not supply the requisite modes and a sufficient extent of relief against all the wrongs demanding redress. Moreover, so it is said, this body of writs was fixed, rigid and incapable of expansion to meet the newly arising needs of an advancing civilisation; whence it resulted that, as new rights were recognised by the moral sense of society, it was impossible to effectuate these higher ethical ideals consistently with the Procrustean limitations by which the common law had hemmed in its scheme of remedies. In this way the growth of the law was arrested and all legal development was cramped by the necessary narrowness and the ineluct-

able fixation of the formulary system; wherefore, as the explanation seems to go, the Court of Chancery was given power to declare and actualise new legal rights and to furnish remedies outside the confined scope of the legal actions. In this way the judges were constrained to expand their system and to administer a much larger body of law upon more liberal principles; and thus Equity caused the common law to grow and develop accordantly with the enlightened conceptions of the community conscience.

The primary objection to this hypothesis, so far as it assumes the inhibitory effect of the common law actions, lies in the obvious fact that all the growth of the common law and the immense accession of legal principles were accomplished without discarding the forms of action, without at all curtailing the scope of the doctrine underlying them, and without in the least impugning the theory of the formulary system. The enlargement of the common law by steady growth through a period of seven hundred years is a visible physical fact, patent to any one comparing the early law with the modern, the law of any given generation with that of the next. All this expansion took place during the prevalence of the formulary system—notwithstanding the handicaps imposed by that system, some may think, but undeniably in the presence and under the operation of that system and in accordance with its principles. Before the forms of action had been anywhere abolished, prior to the year 1848, the scanty common law of the twelfth century had developed into the immeasurable law of the nineteenth and our legal jurisprudence had attained substantially its present proportions. Whatever, then, may have been the function of Equity in enlarging the common law, it is clear that the equitable impulse must have been exercised, not by abolishing, limiting or disregarding the common law forms, but through and by means of formed actions and by operating upon the scheme of procedure which required fixed forms.

Thus, the early common law afforded no remedy for the conversion of goods committed without a trespass or for the breach of a parol contract, the actions of Trover and Assumpsit not being added to the judicial repertory until the courts of the King had been in operation for two hundred and fifty years or longer. If now we could see that

we are indebted to the Chancery for the novel legal principles which give redress for the wrongs mentioned, we should see by the same act of vision that the beneficent endeavor of Equity was accomplished by the addition of two new actions to the prior forms. Assuming (without any proof) that Trover and Assumpsit were invented in the Chancery, it is evident that, whether established by the Chancellor or by the judges, these actions were fitted into the traditional formulary scheme and operated in complete harmony with the theory of the old writ system.

No Actions Invented in Equity. Nor does it appear that the Court of Chancery or any other equitable authority caused the common law to expand by developing the formulary system into a larger body of writs. New writs were invented from time to time, in the ultimate aggregate a very great number of new writs, and in the course of a few centuries the *Registrum Brevium* increased enormously in volume. But many of these added actions—such as Trespass and Covenant and numerous real actions—originated long before there was a Court of Chancery and at a time when whatever organ of the State exercised equitable jurisdiction did not think of such things as falling within the function of such Equity as there then was. There is no reason to suppose that the actions formed after the Chancery began to administer Equity originated in that court. No one was ever said that some chancellor draughted a writ in Trover or in one of the other species of Case and sent it over to the Common Pleas with a decree requiring the judges to insert the new form in their Register and to give effect to the novel principle of law embodied in the writ. It is not recorded that any court of equity, deploring the contemporary narrowness of Covenant and Case, ever assumed to say that those actions must be extended to include breaches of parol contracts or conversion. The chancellors of the fifteenth century would not compel the delinquent carpenter to compensate for his failure to build a house, although the action of Assumpsit, as it then operated, was concededly inadequate to the requirements of sound morality and public policy.

Very likely the clerical chancellors exerted much spiritual influence toward inducing the judges to enlarge and uplift their law. When the forms of action admitted of no

redress for sins like the conversion of goods, libel and deceitful representation, any churchman must have felt that such modes of wickedness ought to be restrained by legal remedies. And no doubt religious pressure of this kind, combined with economic and other considerations, contributed to increase the number of the actions. But these influences did not emanate from the courts of equity; and the enlarging of the law, so far from impairing the principles of the formulary system, only operated to swell the bulk of the Register by the addition of new writs.

The Statute Westminster II. The Statute of Westminster Second (A. D. 1285) is frequently cited as evidence of such inherent insufficiency in the common law, and of such incorrigible incompetency in the judges who administered it, as rendered necessary a supervisory tribunal and a body of collateral equity to enlarge and remodel the legal system. That enactment authorised the formulation of new writs creating additional forms of action which should afford remedies in cases of like nature, *in consimili casu,* with those covered by the existing actions and falling within the same established principles of law, *sub eodem jure.* It is sometimes supposed, and even quite positively declared, that this strictly limited grant of added power was intended to confer upon the courts of common law an universal jurisdiction, and that the statute enabled those courts to take over the whole jurisprudence of the country; which construction, if correct, would entitle and require the common law courts to extend reliefs of equitable as well as of legal nature, and so dispense with all need of a chancery court. In this understanding of the statute, its enactment was an expression of popular protest against the restrictive policy of the courts and a legislative admonition that, the judges must improve their methods, acquire a more liberal disposition and administer a larger measure of justice. As a corollary from this conception, the act is by some scholars supposed to embody an implied condemnation of the formulary system, which is regarded as the primary and most efficient cause of the stringency characterising the common law of that and later periods. Accordingly, the failure to discard the forms of action and to assume the entire equitable jurisdiction is

made ground of reproach to the judges and assigned as reason for creating an independent court of equity.

Looking to the mere statutory text, only a most erratic exegesis can find in this grudgingly phrased grant of power to formulate a few new writs a legislative intent to confer upon the law courts an unlimited jurisdiction. The new actions authorised must be limited to cases which can be consimilated in nature with those covered by already established forms. These cases must be within the scope, or at least the analogy, of principles operating in preexisting writs, and the forms to be invented must not imply the adoption of added doctrines. Moreover, the authority to originate actions is vested, not in the courts, but in the Chancery, the secretarial agency of the Council, now become the Parliament, and to this legislative body all doubtful innovations are reserved for ultimate judgment. And so far from contemplating an abandonment of the formulary system, the enactment expressly provides that the permitted reforms shall be accomplished in accordance with the existing scheme of procedure, that is, by framing new writs to function precisely as did those formed by the anterior common law.

Evidently, there was no expectation that the law courts should remodel their procedural methods: on the contrary, any departure from the established order would be at variance with the plain intention of the Legislature. It is equally evident that the judges could not have administered the system of Equity without remoulding the practice of their courts in the most revolutionary fashion. Thus in cases like that of Lady Audley, the very reason for equitable relief was the impossibility of adapting the legal procedure to the justice of the situation. Other cases mentioned and to be mentioned will disclose similar difficulties in an endeavor to realise the rights of the parties in accordance with the system necessarily employed in the law courts.

The contemporaneous history makes the proposed conception of this statute even more evidently impossible. Having regard to the political and social conditions of the thirteenth century, to the conflicting motives which actuated the legislation of which the provision for new writs was an incident, and to the well settled policy fixing the constitution and the function of the law courts no one can

imagine that a parliament in the year 1285 would confer upon the judges an unlimited power to enlarge their jurisdiction and to make over the whole law of the land. No modern legislature, though not restrained by constitutional inhibitions, would impart to the courts, or to such an administrative office as was the Chancery, any such control over legal institutions or any such boundless liberty to take unto themselves the entire domain of rights and wrongs. The Parliament which enacted the Statute of Westminster 2nd was comprised of a baronage, a clergy and a body of great landed proprietors; all of these had courts of their own wherein they exercised for their own profit the prerogative of judicature; this power they guarded jealously and they grudged every inch of jurisdiction acquired by the King's courts in derogation of their own. In that assembly also was vested the power to regulate the operation of the law, to say in what conditions legal principles should be modified or denied effect, that discretionary power which was in nature legislative and which we have learned to recognise as essentially equitable and the germ of modern equity. This particular prerogative the lords and the clergy and the manorial magnates were least disposed to abdicate; nor would they willingly impart power of that character to the judges who were creatures of the Crown and whose interest prompted them to promote the royal policy of encroachment upon the vested rights of the older jurisdictions.

The Intent and Effect of the Act. This curious misconception of the purpose embodied in the Statute of Westminster Second is evidently based upon the notion that the common law courts were the only courts in the country and that the system of law administered in those courts constituted the entire body of the national jurisprudence.

That such was the condition of juridical affairs was at one time quite generally understood and sometimes explicity asserted. But, as we have seen, neither of the assumptions mentioned was true in the year 1285; and at that time and for centuries afterward neither was intended or desired to be true. In the reign of Edward I, such a supposition would have been absurdly at variance with existing facts. At that time no one, except possibly the King himself and the common law judges who were identified in in-

terest with the policy of the Crown, thought of a single omnicompetent court, administering the whole body of national law, as a fact possible or to be proposed. The actual jurisdiction was still distributed among a numerous and heterogeneous group of courts, more or less mutually independent; and the law of the land was yet for the most part a congeries of local customs and parochial usages Even that fractional jurisdiction which had been assumed by the Crown was exercised by several judicial organs, of which the courts of common law could hardly be considered the most important.

In point of fact, the Act of 1285 did result in a very great enlargement and diversification of the law. Professedly in pursuance of the statutory power to frame new writs *in consimili casu*, but really acting in excess of any authority possibly implicit in that meager provision, the courts created new actions which collectively came to be called the form of Case, of which two species were eventually distinguished as Trover and Assumpsit. These forms, which as procedural additions were made possible by the Westminster Statute, embodied numerous novel principles which were successively adopted as law; and in this way, by the gradual increment of legal doctrine, the common law of the thirteenth century was expanded so as to afford remedies for such torts as negligence, conversion and deceit and also for breach of simple contract by adapting (A. D. 1504) the action of Assumpsit to the enforcement of parol promises.

All this, however, does not in the least account for the Court of Chancery or at all explain the existence and the development of the equity jurisdiction. The many new actions made possible by the legislation of 1285 were all legal in nature, that is, within the scope of tort and contract law, and were invented and carried on in the law courts. No one of the novel doctrines thus established had origin in the courts of equity or has ever been within the competency of such courts to administer. Nor does it appear that this evolution of larger legal doctrines from primary principles was in any degree due to aid or pressure from the Chancery. The action of the chancellors in those instances which have been mentioned was manifestly not in the way of creating new forms of action or of coercing the

judges to give effect in their courts to additional rights. Even in those cases, before mentioned, wherein the law courts were influenced by emulation of the equity tribunals, the enlargement of the legal remedies in ejectment and Assumpsit was not prompted by any persuasion from the Chancery, but rather was inspired by a policy of opposition to the augmenting assumptions of that court and a spirit of hostility to the clerical pretensions of superior morality.

The Rigor of the Law. To say that the rules of the law are rigorous may import one or both of two things; and the statement is true in both senses. The law is rigorous in the sense that it is certain and its rules are fixed, being intended for general application and for the safe guidance of men in the conduct of their affairs. The other effect of the expression is a necessary corollary of this necessary fixity, namely, that a rule of general application will work occasional hardship and will have in particular cases the result of harshness, which sometimes in its nature approximates actual injustice; and such results are unavoidable so long as the law is definite, however wisely and with whatever regard for humanity and justice the legal rule is framed.

For example, any possible provision regulating the descent and distribution of property left by an intestate decedent will in many instances operate to the prejudice of the most deserving relatives. Likewise, any possible enactment giving testamentary power will occasionally validate a will betraying iniquitous insensibility to moral obligations and even to public decency. Again, the very wholesome general rule that contracts ought to be performed will often result in unmerited and unintended hardship, as where changing circumstances create difficulties not anticipated: thus, one who engages to build a house is held to exact performance of his promise although his almost finished work is ruined by lightning, and the tenant who covenants to keep the demised premises in repair may be obliged to rebuild the landlord's house which has been destroyed by an earthquake. Such cases manifestly cause great hardship, which often seems like injustice. But, manifestly, there must be some law applying to such cases; and that law, no matter what it is, must operate uniformly and without regard to occasional misfortune. Which is to say that the applicable law is apt to be rigorous in both senses of the term as just explained.

It is sometimes said that the function of Equity is to mitigate the rigor of the law; indeed, Cicero, having regard to the *aequitas* of the Roman law, called that element of Latin jurisprudence the *laxamentum legis;* and in one conception of equity, as we have it now, there is, more or less definitely, the infused idea that the equitable jurisdiction was (and to some extent yet is) exercised to obviate the hardships incident to general legal principles and to nullify the harshness of the common law as it operates contrary to the justice or the humanity of the individual case.

Whatever may have been the praetorian discretion in the Civil Law, and although in the rather fluid philosophy of the ecclesiastical equity chancellors occasionally relieved hard cases resulting from the common law, it was never established as a general principle of equity jurisprudence that the Court of Chancery has power to relieve hard cases because the law produces hardship. Certainly, no chancellor of modern times has ever assumed to abrogate a legal institution because he deemed it harsh, impolitic or productive of injustice. On the contrary, as has been mentioned, Equity follows the law, and in accordance with this principle courts of equity often follow the law to results which are at least deplorable if not actually unjust, as modern morality conceives justice.

Rigors Not Relieved. A will giving all of a testator's property to his mistress in exclusion of his wife and children was no doubt as shocking to a chancellor of the sixteenth century as it is to a clergyman of today. To modern minds, in the United States at least, the principle of primogeniture seems unfair and impolitic and the rule which excluded relatives of the half blood from inheritance appears very harsh. To hold that lands descending to an heir are not subject to be taken for the ancestor's debts, or even by the creditor who advances the money which paid for the property, looks to us like crass immorality; and it is scandalous to say that, after a married woman is dead, her husband may enjoy her whole fortune without paying the dealer who supplied her wedding clothes. It is safe to assume that a clerical chancellor, having power to make the law or feeling at liberty to relieve hardship and injustice, would have annulled the legal principles leading to such consequences, or would at least have afforded remedy

against such uncommendable results of legal rules. Yet even recent chancellors have confessed themselves unable in cases like these to mitigate the rigor of established law.

So today a tenant who covenants to keep the leased premises in repair must rebuild the house if it burns down and he can not be relieved of this obligation by the most liberal equity. Nor will a court of equity, in most jurisdictions, prevent the maintenance of a spite fence or relieve against a bargain from which one party derives nothing at all; and although the common law respecting the slander of women has been denounced as barbarous, no lady has ever persuaded a sympathetic chancellor to decree damages against a mendacious blackguard or to protect her reputation against unkind gossips who say that she is no better than she should be.

Even in cases within the exclusive jurisdiction of equity the court is sometimes, in deference to the fixed rules of equity itself, constrained to deny property to the claimant who is, in point of good morals and paramount merit, entitled to it.

(*To be concluded.*)

THE OPTIONAL CLAUSE

WILLIAM HEPBURN

1. What is the "Optional Clause"?

"SIGNING the Optional Clause" has become a familiar expression to people interested in international affairs. What is the Optional Clause, where does it come from, to what are its signatories bound? The following paper attempts to show what is its origin, and in a measure what it means, but, as to its full implications, the writer feels some hesitation. As in most legal documents, they will depend, in a large measure, upon the Court which interprets its terms. The most precise language is never precise enough and may be open to the charge of ambiguity.

The Optional Clause is a declaration which Members of the League of Nations and the "States mentioned in the Annex to the Covenant" [1] may make, when signing or ratifying [2] the Protocol of Signature of the Statute of the Permanent Court of International Justice, or at a later date. In making this "Declaration of Acceptance" they accept the *compulsory* [3] jurisdiction of the Court in all cases in

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[1] Thus including the United States which signed but did not ratify the Treaty of Versailles, of which the Covenant forms the first part.

[2] The Protocol of Signature of the Permanent Court of International Justice is by its terms subject to ratification. This is not so of the Optional Clause. 6 League of Nations Treaty Series 380, 384. Some States, as Portugal, ratified both. Others ratified only the protocol of Signature, and thus became bound by the Optional Clause unless their Declaration of Acceptance was made subject to ratification.

[3] It should be noted that the Optional Clause is not the only source of the Court's compulsory jurisdiction. Articles 336, 337, 386, 416 of the Treaty of Versailles. See also the Locarno Conventions as illustrating how the compulsory jurisdiction may be extended by agreement among nations concerned over particular questions. 54 L. N. T. S. 303, 311; 315, 323; 327, 335; 341, 349. Cmd. 2525.

which another State which has accepted "the same obligation" summons the first State before the Court, providing always that the dispute is a "legal dispute" according to the terms of Article 36, par. 2 of the Statute of the Permanent Court. It is this Article of the Statute which created the Optional Clause and which, therefore, must determine its scope.

2. Origin and History

Article 14 of the Covenant of the League of Nations provides that "the Council shall formulate and submit to the Members of the League" plans for establishing a Permanent Court of International Justice. [4] Accordingly, on February 13th, 1920, at the second session of the Council,[5] M. Léon Bourgeois suggested the appointment of a Committee of International Jurists to shape the regulations for the proposed Court under Article 14 of the Covenant. The Committee, appointed the same day, held its first meeting at the Peace Palace at the Hague on June 16th of that year. During the subsequent meetings,[6] lasting through a period of about five weeks, the jurists attempted to lay the foundations of a "system of obligatory adjudication in differences of a judicial nature" which should be extended to all other differences covered by conventions between the Parties.[7]

But when the Draft Scheme of the Committee of Jurists was brought before the Council in October, the obligatory character of the jurisdiction proposed in Article 34 was found to be unacceptable. It was felt that it went too far, and that it might even entail premature modification of certain Articles in the Covenant.[8]

For a month, from November 15 to December 13, 1920, the matter of the Court's Draft Statute was before the Assembly and its Committees and sub-Committees, by ref-

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[4] League of Nations, Official Journal, Feb., 1920, p. 6.

[5] Id., March, 1920, p. 36-38.

[6] Permanent Court of International Justice, Proces-Verbaux of the Proceedings of the Advisory Committee of Jurists.

[7] League of Nations, Off., Journal, July-August, 1920, p. 239.

[8] League of Nations, Off. Jour., Nov.-Dec., 1920, pp. 13-15. Proces-Verbaux of the Proceedings of the Advisory Committee of Jurists, p. 679, Draft Scheme, Art. 34.

erence from the Council.[9] A revised and amended Draft Scheme was brought before a plenary meeting of the Assembly on December 13, 1920, and was unanimously adopted, with one slight change. Its final form provided in Article 36, par. 2, for the signature of the Declaration called the Optional Clause, to be attached to a separate Protocol.[10]

The Protocol of Signature of the Statute, which had been adopted by the Council at its meeting on December 14th, was opened for Signature on December 16th, 1920.[11]

On the following February 25th a report of the progress of signatures was considered by the Council. Twenty-seven Members had signed the Protocol of Signature of the Statute, whereas only seven States had signed the Optional Clause. Of the latter, all had signed conditionally, as was permissible under paragraph 3 of Article 36. Six of these imposed the condition of reciprocity; of the six,

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[9] League of Nations, Records of the First Assembly (1920) Plenary Meetings, pp. 48, 52.

I Meetings, of the Committees, pp. 282-284, 296. See also Annex 7, p. 533 for the text of the revised draft.

[10] Article 36, par. 2 of the Statute of the Permanent Court provides:

[10] Article 36, par. 2, of the Statute of the Permanent Court, provides:

"The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning: (a) The interpretation of a Treaty; (b) Any question of International Law; (c) The existence of any fact which, if established, would constitute a breach of an international obligation; (d) The nature or extent of the reparation to be made for the breach of an international obligation."

League of Nations, Off. Jour., Jan.-Feb., 1921, p. 21.

Under the provisions of the above Article, the Optional Clause reads:

"The undersigned, being duly authorized thereto, further declare, on behalf of their Government, that, from this date, they accept as compulsory, *ipso facto* and without special agreement, the jurisdiction of the Court in conformity with Article 36, par. 2, of the Statute of the Court, under the following conditions: . . ." League of Nations, Official Journal, January-Feb., 1921, p. 14.

[11] *Id.*, p. 14.

three stipulated that the declaration was good for five years. Portugal recognized the compulsory jurisdiction "in relation to any other Member or State accepting the same obligation," as had four of the other six. But these four identified the expressions "reciprocity" and "in relation to any other Member or State accepting the same obligation," evidently feeling that they had the same sense. We shall inquire later whether this was a correct interpretation of the Statute.

By February 25th, 1921, the Optional Clause had been signed, then, by Costa Rica, Denmark, Portugal, Salvador, Switzerland, Uruguay and Luxemburg.[12] It is perhaps noteworthy that the Great Powers universally held aloof.

In the succeeding nine and a half years what progress has been made? On September 2nd, 1929, the Protocol of Signature of the Statute had obtained fifty-two signatures, and all but ten of them had been followed by ratification. Our subject, however, is not the Statute of the Court, acceptance of which imposed few if any obligations which had not already come into existence, but the Optional Clause, which bound its signatories to come before the Court as defendants or Respondents in certain cases. On the same date, twenty-one States had accepted the Optional Clause, since it came into being. Eleven acceptances had expired, but eight had been renewed, leaving eighteen then in force. The renewals were in every case for ten years, whereas the original signature or ratification had been for five years only.[13]

Many signatures to the Optional Clause were obtained in September, 1929, including such important ones as those of the United Kingdom, and the various British Dominions, Italy, Czecho-slovakia and Peru.[14]

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[12] *Id.*, pp. 154-155.

[13] Annex to the Suppl. Report on the Work of the Council & the Secretariat to the 10th Ordinary Session of the Assembly of the League of Nations, Geneva, Sept. 2, 1929.

[14] League of Nations, Official Journal, December, 1929, p. 1809.

(a) League of Nations Official Journal, December, 1929, pages 1809-1810.

(b) C. L. 60. 1930. V.

(c) League of Nations Official Journal, March, 1930, page 258.

(d) Brazil's Declaration of Acceptance, dated November 1st, 1921, stipulated for reciprocity, and was to be good for five years. It was

On June 1, 1930, the situation regarding the Optional Clause was that forty-three States had signed, and the

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not to become effective, however, until the compulsory jurisdiction under the Optional Clause had been recognized by at least two of the Powers represented permanently on the Council of the League. It would seem, however, that the Acceptance would expire necessarily five years from the above date, and not five years from the time when the suspensive condition had been fulfilled. The Brazilian Declaration of Acceptance reads: "We declare to recognize as compulsory, . . . the jurisdiction of the Court for the period of five years, on condition of reciprocity, and as soon as it has likewise been recognized as such by two at least of the Powers permanently represented on the Council of the League of Nations." PUBLICATIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, SERIES D., No. 5, PP. 68, 76.

If, however, we accept the argument that as soon as the compulsory jurisdiction had been accepted by two other Powers permanently represented on the Council, then the five-year period for which Brazil was to be bound would begin to run, it will be recalled that Germany's acceptance of the Optional Clause became effective February 29, 1928, and that of Great Britain on February 5th, 1930, and upon this date Brazil's acceptance of the Optional Clause became effective. Compare the Monthly Summary of the League of Nations, February, 1930, p. 43.

(e) China signed the Optional Clause on condition of reciprocity and for five years, May 13th, 1922. She ceased therefore to be bound, May 13th, 1927, and has not renewed her acceptance of the compulsory jurisdiction. (May 1st, 1930) PUBLICATIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, SERIES D., No. 5, PP. 68, 76; SERIES E., No. 5, P. 136.

(f) Declaration undated. PUBLICATIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, SERIES D., No. 5, PP. 70, 75.

(g) LEAGUE OF NATIONS OFFICIAL JOURNAL, April, 1930, p. 303.

(h) Nicaragua, though having signed the Optional Clause unconditionally, has not yet ratified the Protocol of Signature of the Court, and is, in consequence, not bound. The method adopted in the LEAGUE OF NATIONS OFFICIAL JOURNAL, November, 1929, page 1488, for indicating those States for whom the Optional Clause is in force, is misleading, due to the manner of printing. Reference should be made also to page 1482 of the same issue, showing signatures and ratifications of the Protocol of Signature. Compare, also, LEAGUE OF NATIONS, OFFICIAL JOURNAL, DECEMBER, 1929, PP. 1809-1810.

(i) C. L. 55. 1930. V.

(j) League of Nations Monthly Summary, May, 1930, p. 112.

Signatures and Ratifications of the Optional Clause—Other References: League of Nations Treaty Series: Vol. 6, page 384; vol. 11, p. 404; vol. 15, p. 304-305; vol. 27, p. 416; vol. 39, p. 165; vol. 45, p. 97; vol. 50, p. 159; vol. 54, p. 387; vol. 69, p. 70; vol. 52, p. 452; vol. 78, p. 435.

Clause was in force between twenty-six, or, if we include Brazil, twenty-seven, as indicated below.

*States Bound by the Optional Clause (June 1, 1930) and Signatories not bound (indicated by *)*

	Date of Ratification, if required or deposited.	
ABYSSINIA	July 16, 1926	(a)
UNION OF SOUTH AFRICA	April 7, 1930	(b)
AUSTRIA (renewal)	March 13, 1927	(a)
Australia *		(a)
BELGIUM	March 10, 1926	(a)
UNITED KINGDOM	February 5, 1930	(c)
Brazil *		(d)
BULGARIA	August 12, 1921	(a)
Canada *		(a)
China *		(e)
Costa Rica *		(a)
Czechoslovakia *		(a)
Denmark (renewal)	June 13, 1926	(a)
Dominican Republic *		(a)
ESTHONIA (renewal)	May 2, 1928	(a)
FINLAND (renewal)	Declaration not subject to ratification, April 6, 1927	(a)
France *		(a)
GERMANY	February 29, 1928	(a)
GREECE	Declaration not subject to ratification, Sept. 12, 1929	(a)
Guatemala *		(a)
HAITI	Declaration not subject to ratification 1921	(f)
HUNGARY	August 13, 1929	(a)
INDIA	February 5, 1930	(a)
Irish Free State *		(a)
Italy *		(a)
LATVIA	February 26, 1930	(g)
Liberia *		(a)
LITHUANIA (renewal)	January 14, 1930	(c)
Luxemburg *		(a)
NETHERLANDS (renewal)	Declaration not subject to ratification, Aug. 6, 1926	(a)
Nicaragua *		(h)
NEW ZEALAND	March 29, 1930	(i)
NORWAY (renewal)	Declaration not subject to ratification, from October 3, 1926	(a)
PANAMA	June 14, 1929	(a)

	Date of Ratification, if required or deposited.	
PORTUGAL	October ..... 8, ...1921	(a)
Peru *	....	(a)
SIAM	May ..... 7, ...1930	(a)
Salavador *	.... (a)	(j)
SPAIN	Declaration not subject to ratification, from September 21, 1928	(a)
SWEDEN (renewal)	Declaration not subject to ratification, from March 18, 1926	(a)
SWITZERLAND (renewal)	July .....24, ...1926	(a)
URUGUAY	September ....27, ...1921	(a)
Yugoslavia *	....	(a)

[Recent ratifications have increased the total number of States bound by the Optional Clause to 30.]

Denunciation of the Sino-Belgian Treaty. The first and the only proceedings to have been had so far under the Optional Clause [15] were instituted on November 25th, 1926, by Belgium, basing its Application on a Treaty [16] with China, of November 2d, 1865, which China claimed the right to denounce. The Treaty was "based on the common interest of the two countries" and provided in Article 46 for denunciation by *Belgium* at the end of successive ten year periods.[17] Belgium objected that any denunciation by China was contrary to that Article, and asked the Court to give judgment that the Chinese Government "is not entitled to unilaterally denounce the Treaty." Judgment was asked whether the Chinese Government should be present or absent, and, in addition, the Court was requested to indicate provisional measures to be taken, pending judgment, for the protection of Belgian rights in China. Although we shall not follow the details of the proceedings of this case, in which China never appeared before

[15] Signed by China, March 13th, 1922; by Belgium, Sept. 25th, 1925, and ratified March 10, 1926.

[16] *Traité d'amitié, de commerce et de navigation entre la Belgique et la Chine*, signed at Peking, Nov. 2d, 1865. Ratifications exchanged at Shanghai, Oct. 27, 1866. 56 Br. & For. State Papers 667.

[17] The provisions of Article 46 do not in fact seem to go so far as to provide for "denunciation." "*Si dorénavant le gouvernement de sa Majesté le roi des Belges jugeait utile d'apporter des modifications a quelques-unes des clauses du présent traité. . . .*"

the Court [18] and which was finally withdrawn by the Belgian Government on February 13, 1929,[19] after various dates had been fixed, and successively changed, for the filing of proceedings, nevertheless the case is important, in spite of the fact that it never went to judgment. It represents not only the first time that the jurisdiction of the Court was invoked, in virtue of the Optional Clause, but shows the salutary effect of the mere existence of the compulsory jurisdiction, even though the case does not proceed to judgment: (1) Provisional measures were directed to be taken, in the absence of which a serious situation might have arisen; (2) The countries concerned were brought to a mutual understanding by knowledge of the proceedings pending before the Court.[20] It seems

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[18] For the steps in the proceedings, see PUBLICATIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, SERIES A (COLLECTION OF JUDGMENTS), Nos. 8, 14, 16, and 18.

China's acceptance of the Optional Clause expired on May 13th, 1927, while proceedings were still pending. In such a situation, the Court having taken jurisdiction under the Optional Clause, though the Respondent has never appeared, is the Court's jurisdiction ousted by the fact of the expiration of the Respondent's acceptance of the compulsory jurisdiction? If it were, it would constitute a serious handicap on the jurisdiction, and would encourage delay.

[19] Publications of the Court, Series E, No. 5, p. 203. The President of the Court preferred not to act alone, and the official sanction of the Court was not given to the withdrawal of the Belgian Government until its Sixteenth (Extraordinary) Session, when, on May 25th, 1929, it was stated that since the Respondent had never taken any proceedings in the suit, there was nothing to prevent the unilateral withdrawal of it by the Applicant. The Court instructed the Registrar to remove the case from the Court's list.

[20] "In a serious situation between two Governments, resort to the Court has undoubtedly facilitated direct negotiations, just as in municipal law the filing of an action not infrequently serves as an aid to *rapprochment* between the parties to a dispute. Moreover, the indication of provisional measures, not wholly unlike a temporary injunction, may have contributed a stabilizing influence to the situation." Manley O. Hudson, *The Sixth Year of Permanent Court of International Justice.* 22 AMERICAN JOURNAL OF INTERNATIONAL LAW 3.

The understanding between the two Governments is embodied in the Treaty of Nanking, signed November 22, 1928. 87 L. N. T. S. 287, Article 1, provides that customs shall be regulated exclusively by the respective national laws. It is also provided that the nationals of each Party in the territory of the other Party, shall be subject to the Courts of the latter.

clear, then, that the value of the Optional Clause does not lie entirely in the judgments given under its authority. It is a potent force in bringing nations together in working agreements, as national courts do for individuals.

3. Interpretation

a. The Meaning of "Legal Disputes." The expression "legal disputes" as contrasted with "political disputes," has a history in international law. The words legal and political have likewise been distinguished in municipal law, but on a different basis.[21]

In international law the disputes which nations have been willing to submit to arbitration or judicial settlement have, in general, been called legal.[22] Those supposed to involve domestic questions, honor, independence, or vital interests were commonly called political.[23] It was not the character of the question which determined its classification, but its importance. Those which were of first importance were thought to be subject only to the careful manipulations of diplomats or an appeal to arms.

Article 36, paragraph 2 of the Statute of the Permanent Court provides that the signatories of the Optional Clause shall recognize the compulsory jurisdiction of the Court

> "in all or any of the classes of legal disputes concerning: (a) The interpretation of a Treaty; (b) Any question of International law; (c) The existence of any fact which, if established, would constitute a breach of any international obligation; (d) The nature or extent of the reparation to be made for the breach of an international obligation."

The word "legal" in the first line of this quotation is subject to several interpretations. Two of them are more or

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[21] In some cases, purely on the theory of the separation of powers; Massachusetts v. Mellon, 262 U. S. 447; 43 S. Ct. 597 (1923). In others, there is the underlying theory of the separation of powers, together with the unwillingness of the courts to embarrass the government in the conduct of its foreign relations; State of Yucatan v. Argumedo, 92 Misc. 547, 157 N. Y. S. 219 (1915).

[22] J. H. Ralston, International Arbitration from Athens to Locarno, p. 35.

[23] Compare Sir John Fischer Williams, Chapters on Current International Law (1919), p. 35.

less obvious: (a) it is superfluous, merely stating what seems clear; that is, that disputes which the Court is to decide are therefore legal disputes.[24] This interpretation is open to objections, principally on the ground that Article XIII of the Covenant had previously used the wording of classes (a) to (d) without calling disputes of these classes legal. When the term *legal* was added in the Statute there must have been a purpose in so doing. Legal, as we have said, had become a term of art, and can hardly have been without significance. Finally, in interpreting a legal instrument, a word should be given a meaning where possible.

(b) A second fairly obvious interpretation of the term in question is that its use was necessary to make it clear that Article 36, paragraph 2, referred to legal disputes of the classes mentioned, and *only* to *legal* disputes, not to "political" ones. Objections are not so apparent here, and such a reading of the Statute seems to be the natural one. Yet, there is one fundamental difficulty: if the suggested meaning is given to the Article and the paragraph, the Court's compulsory jurisdiction loses much of its force. If disputes of the classes (a) to (d) *may* be at times political, any nation summoned before the Court under the provisions of the Optional Clause could refuse to come on the ground that the particular dispute *is* political. It cannot be doubted that any dispute may, and most certainly do, involve both legal and political considerations. If we admit that in regard to the disputes mentioned (a) to (d), it is likely that the Court's jurisdiction will be subjected to dangerous attacks. The last paragraph of Article 36, permitting the Court to decide whether it has jurisdiction, will hardly suffice. Any party called into the Court as Respondent can say that the subject matter of the dispute is so completely political that the Optional Clause has no reference to it at all. The situation then becomes like that where States reserved disputes involving their vital interests, honor, etc.

It seems necessary to find another meaning for the word "legal" in Article 36. There is thought to be one which,

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[24] James Brown Scott, THE JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES, pp. 34, 36. "The mere submission to a court divests the political sovereign of the power to decide and the question becomes judicial although the law be not determined by the submission."

though not in exact accord with the phraseology of the Article, is not in conflict with it, and which can be supported. The suggestion offered is that "legal" is used as a term to be defined in classes (a) to (d) and that it *is* defined by them. This seems to be the view of Ralston.[25] It is also in accord with the words of Judge Hughes:

> "Now there is a class of controversies which governments ought always be willing to submit to judicial settlement. These are controversies over what are essentially questions of law as distinguished from questions of mere policy. They are disputes concerning questions of international law, as to the interpretation of treaties, as to the existence of facts out of which international obligations arise, or as to the reparation that should be made when there has been a breach of an international obligation. Questions of this sort in all civilized countries are normally disposed of by judicial tribunals. . . . We have not taken the unreasonable position before the world that we would take the law into our own hands and that where we had a legal dispute with another country we should insist on deciding it for ourselves. . . . In the class of questions I have just described, the Statute of the Court provides that the States supporting it may, if they choose, sign what is called an optional clause accepting compulsory jurisdiction." [26]

It is not difficult to infer that Chief Justice Hughes would subscribe to the proposition that "legal disputes" are defined as the disputes of classes (a) to (d) of Article 36, paragraph 2, of the Statute.

It is natural to ask why the wording of the Statute is not clearer, if the interpretation suggested is the proper one, and was intended by those who drafted the Statute. It would have been easy for them to say that the jurisdiction of the Court under the Optional Clause extended to legal disputes, such being defined in the classes (a) to (d). It may be that there was thought to be some value in obscurity. A clear expression of the meaning contended for would have looked like an arbitrary extension of the technical term of diplomacy "legal." It would have seemed, to many at least, to cover a much wider range of

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[25] Ralston, *op. cit.*, pp. 36-37.

[26] Charles Evans Hughes, *The Organization and Methods of the Permanent Court of International Justice.* Address before the Association of the Bar of the City of New York, January 16, 1930.

subjects than ever before. But, as the habit of submitting disputes to the Court increases, it will be possible for the *Court* to give "legal" a more and more inclusive meaning.

There may be some difference of opinion as to whether *all* legal disputes were meant to be covered by the classes (a) to (d). If the meaning which we have suggested for "legal" is accepted, this difficulty is also solved, since "legal" and the classes (a) to (d) are mutually all-inclusive. Sir John Fischer Williams thinks that it is obvious that *all* legal disputes are not included by the Optional Clause.[27] On the other hand, Professor Walter Schücking has said:

> "But, in reality, these categories include the whole range of legal disputes which can arise between two nations." [28]

The interpretation of the term "legal disputes" is one of the important questions raised in connection with the Optional Clause. International jurisprudence could not but profit by having a fairly clear and workable definition.[29]

b. Reciprocity. As has been pointed out,[30] from the beginning, signatories of the Optional Clause, when making their Declarations of Acceptance, tended to identify

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[27] *Supra.*

[28] *Supra.*

[29] Other official uses of the word "legal" throw little light on the interpretation to be given it in the Statute of the Court. It occurs, for example, in the 1907 Convention for the Pacific Settlement of International Disputes (Art. 16) and in the similar Convention of 1899 (Art. 38). These cautious attempts at definition are of no scientific value whatever, and are dictated by the vagaries and whims of the moment. On the other hand, the very inclusive nature of the terms used in the Locarno Treaties may turn out to be hardly less vague. The Treaty of Mutual Guarantee, for example, provides that:

> "Any question with regard to which the parties are in conflict as to their respective rights shall be submitted to judicial decision, and the parties undertake to comply with such decision." (Art. 3.)

The vague word "question" is further qualified by words "with regard to which the parties are in conflict as to their respective rights." It is difficult to see how wide or how limited the meaning may turn out to be. *Quaere* whether the fairly broad definition of the Optional Clause could not have been profitably used.

[30] Page 4, *supra.*

two distinct expressions in Article 36, and give them the same meaning. Thus Denmark recognized the compulsory jurisdiction of the Court

> "in relation to any other Member or State accepting the same obligation, that is to say, on the sole condition of reciprocity." [31]

It seems highly questionable whether there is any justification for saying that the two expressions "in relation to any other Member or State accepting the same obligation" and "on condition of reciprocity" can mean the same thing in Article 36, of the Statute.

First let us examine the Optional Clause itself, wherein the signatories declare that they

> "accept as compulsory *ipso facto* and without a special convention, the jurisdiction of the Court in conformity with

Article 36, par. 2, of the Statute of the Court under the following conditions:" (Here follow the conditions) [32]

Article 36, par. 3, says:

> "The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time." [33]

These quotations permit us to raise, in its simplest form, the question of what is "reciprocity" under the terms of Article 36. They will be considered first without examining the other expressions used in Article 36, paragraph 2, in conformity with which all declarations accepting the compulsory jurisdiction under the Optional Clause are made. It may be that "reciprocity" is not meant to refer to the particular *conditions* contained in various other declarations of acceptance, as to time or certain classes of disputes, but to the *fact* of acceptance of the compulsory jurisdiction by certain States, as though State "A" should accept the compulsory jurisdiction under the Optional Clause on condition that State "B" should also accept it. This is a satisfactory interpretation of the

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[31] PUBLICATIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, SERIES D., No. 5, p. 73.

[32] See note 10, *supra*.

[33] LEAGUE OF NATIONS, OFF. JOUR., Jan.-Feb., 1921, p. 21.

whole expression "reciprocity on the part of several or certain Members or States." It is also significant that it is the *declaration* which is made conditional upon another declaration. Reciprocity is used in connection with the acceptance of compulsory jurisdiction, and with no reference whatever to the limitations to be stipulated for as regards that jurisdiction. And it is possible that such an interpretation has found favor among the signatories. Similar to the Danish declaration of acceptance, which we have quoted above,[34] were those of Switzerland, Uruguay, Luxemburg, Finland, Netherlands, Liberia, Sweden, Norway,[35] &c. They indicate that a very common interpretation of "on condition of reciprocity" is that it means "in relation to any other Member or State which accepts the same obligation." In fact, the very care with which the expressions are coupled in the declarations of acceptance may indicate the uncertainty attached to them separately.

But before trying to resolve the possible conflict in meaning, and without reference to the expression "in regard to any other Member or State which accepts the same obligation," our first inquiry is, What would a State signing the Optional Clause on condition of reciprocity intend to bind itself to?

It seems fairly reasonable to say that reciprocity cannot be given a very extreme meaning: State "A," having signed for five years, could hardly claim that it was in no way bound to State "B" which had signed for a shorter or a longer period. Nor could State "C," which had recognized the jurisdiction of the Court for classes (a) to (d) very well say that it could under no circumstances be summoned into the Court under the Clause by State "D," which had agreed to the jurisdiction except for one of the four classes.

It is thought that a more useful interpretation would permit the question of reciprocity to be raised only for a particular dispute. It would be a jurisdictional question, to be decided by the Court under the last paragraph of Article 36.

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[34] Page 13, *supra*.

[35] For the Declarations of Acceptance of the States mentioned, see PUB. OF THE PER. CT., SERIES D., No. 5, Pp. 73-79, 68-72.

Our conclusion is, then, that when two States have accepted the jurisdiction of the Court as to class (a), and a dispute within that class arises, they are not concerned with knowing whether each other have accepted the jurisdiction for the other classes or not. That is, a State may not object to the Court's jurisdiction on the ground that the condition of reciprocity has not been fulfilled if, for the purposes of the case, the other State's obligations under the Clause are as great as those of the first State.

Let us suppose, on the other hand, that State *"A"* and State *"B"* have agreed to accept the compulsory jurisdiction of the Court on condition of reciprocity, and State *"A"* makes the further condition that all disputes must be based on facts occurring subsequent to its acceptance. State *"B,"* however, makes no stipulation as to when such facts may have occurred. In a dispute between the two, based on facts happening prior to *"A"'s* acceptance, jurisdiction under the Optional Clause could not be invoked: State *"A"'s* express reservation of such disputes would be effective if State *"B"* sought the jurisdiction of the Court as Applicant. And the mutuality normally inherent in the idea of reciprocity would not permit State *"A"* to appear as Applicant under the Clause against a State which would not itself have the same privilege. As we saw above, reciprocity involves a question to be raised only as to the particular dispute. In addition, it is equally applicable to both parties, though one only of them had signed on condition of reciprocity *plus* certain other conditions. Our examination of the expression "on condition of reciprocity" so far leads to the following conclusions, *if both parties have stipulated for reciprocity,* (and if we reject the possibility that reciprocity refers in very general terms to the mere acceptance of the Optional Clause, a possibility which the existence of the expression "in relation to any other Member or State which accepts the same obligation" completely negatives) : (1) Reciprocity refers to the particular conditions imposed by each signatory, but does not demand more than that for *the case in hand* the obligations of the Applicant should be as great as those of the Respondent; (2) if one of two parties only has stipulated for reciprocity and in addition has imposed certain other conditions which are not fulfilled, and the other party has stipulated for

reciprocity but not the other conditions, the case may not come up under the Optional Clause.

It is thought that the discussion in the following paragraphs will strengthen these conclusions and offer additional ones. One of these needs little exposition. It is that, since a declaration of acceptance may be made either unconditionally or on condition of reciprocity, if it is made unconditionally, the condition of reciprocity is waived completely, even though the other party to the dispute might claim it were the situation reversed.

The Expression "In Relation to any Other Member or State Accepting the same Obligation." A declaration made unconditionally is nevertheless made in conformity with the terms of Article 36, paragraph 2, which provides that the signatories of the protocol to which the Statute is adjoined may declare

> "that they recognize as compulsory *ipso facto* and without special agreement, *in relation to any other Member or State accepting the same obligation,* the jurisdiction of the Court," &c., (Italics are author's)

That is, a declaration of acceptance may be made either on condition of reciprocity or not, but *every* declaration of acceptance is in terms made *in relation to any other Member or State accepting the same obligation.* It is impossible to accept the conclusion that these words are merely repeated by the phrase "on condition of reciprocity." If that were so, every signature is made on condition of reciprocity; it is not possible to sign "unconditionally."

We have already indicated a possible meaning for the word reciprocity. What is meant by the "same obligation"? Does it mean "THIS obligation" or does it mean the "same obligationS" (in the plural)? If it is the former, the obligation is merely that of recognizing in general terms the compulsory jurisdiction of the Court under the Optional Clause. This obligation is owed to every State which also recognizes the compulsory jurisdiction. It has no reference to the extent of the jurisdiction, but merely to its existence. In a particular case, the recognition of the compulsory jurisdiction in general terms would be subject only to such conditions as had been made by each party for its own benefit.

The effect of such an interpretation would be to permit State "*A*," which had accepted the compulsory jurisdiction only for disputes based on facts subsequent to acceptance by State "*A*," to be the Applicant under the Optional Clause in a case arising from facts prior to "*A*" 's acceptance, if the Respondent had made no condition as to when facts upon which the dispute was based should have happened. That is, "*B*," the Respondent, having accepted the compulsory jurisdiction of the Court, did it for all cases which might involve "*B*" as Respondent, provided only that the other party had accepted the compulsory jurisdiction under the Optional Clause, but irrespective of the conditions placed by that party on its acceptance. A signatory which had not stipulated for reciprocity should not be able to profit by it. The wider the jurisdiction of the Court, the more useful it will be. One State may not profit by the conditions, or exceptions from jurisdiction, which other States thought their interests required.

If, on the other hand, the "same obligation" means the "same obligations" or "all the identical obligations," there is little reason to suppose that the expression "on condition of reciprocity" adds any thing to what had already been said.[36] It then becomes impossible to give any meaning to the word "unconditionally." A State may not then have in fact an opportunity to sign *either* "unconditionally or on condition of reciprocity."

As an example of the practical consequences which might follow from an interpretation of the meaning of the terms we have been considering, it will be recalled that Portugal had signed the Optional Clause, recognizing the Court's compulsory jurisdiction simply "in relation to any Member or State accepting the same obligation." [37] There was no reference to reciprocity as such. It is possible that the question may arise as to how

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[36] C. Howard-Ellis, *op., cit.*, p. 387, note 2. "The reference to reciprocity is really redundant in view of the previous statement that compulsory jurisdiction applies only in relation to states accepting the same obligation."

[37] PUBLICATIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, Series D, No. 5, p. 73. There was no limitation as to length of validity. The terms of the acceptance were regarded as involving reciprocity, by the editor of this volume of the publications of the Court. See p. 71.

far Portugal may insist on reciprocity in regard to other States which signed subject to certain conditions. It seems doubtful whether Portugal, as Respondent, could ever object that the Applicant had accepted the compulsory jurisdiction on condition of reciprocity *and* on other conditions, of such a nature that they would enable the Applicant to contest the Court's jurisdiction if Portugal were Applicant and the other party Respondent. Summary of conclusions in regard to Reciprocity:

> A.
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> (1) "On condition of reciprocity" has reference to the *conditions* imposed by each signatory. (2) Its existence is material for a particular case, not for all possible cases between the parties. (3) If both parties have stipulated for it, additional unfulfilled limitations by either will bar the case under the Clause. (4) A party which has failed to stipulate for reciprocity can demand nothing but that the Clause be in force as regards the other party.
>
> B.
>
> (5) "In relation to any other Member or State accepting the same obligation" is general. It merely limits the application of the Optional Clause to cases where both parties have accepted it. (6) This expression should not be interpreted as meaning "on condition of reciprocity. (7) Such an interpretation would make an "unconditional" signature impossible.

c. Reservations and Conditions of Acceptance. The terms of Article 36 refer in two ways to limitations which signatories may place upon their acceptance of the compulsory jurisdiction created by the Optional Clause. First, they may declare that they recognize the jurisdiction

> "in *all or any* of the classes of legal disputes"

enumerated under the headings (a) to (d). Further, this declaration may be made, as we saw in the preceding section

> "unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time."

From the second of these passages, it appears that a declaration of acceptance which is not made unconditionally, may be made *only* on condition of reciprocity, or for a certain time. Thus a natural meaning of the first pro-

vision is strengthened: "all or any of the classes" refers to (a), (b), (c), & (d) as "classes," any of which may be omitted from the scope of a particular signature; but, if this is so, "classes" can hardly refer to *cross-sections* of the "classes" (a) to (d). For example, there is no authority for the reservation of all past disputes from the compulsory jurisdiction of the Court.[38]

Even though we accept this view as to the narrow scope of the reservations or conditions which may be made in the declarations of acceptance,[39] it will hardly be extended to those of another type, which do not qualify the jurisdiction, once it has been accepted, but suspend its acceptance. Brazil's acceptance was not to take effect, for instance, until at least two of the Powers permanently represented on the Council of the League of Nations had also accepted the Optional Clause. Similar in legal effect, it would seem, was the reservation by France of the "faculty of denunciation in the event of the Protocol of Arbitration,

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[38] Among the early declarations containing such a proviso was that of the Netherlands, which became effective August 6th, 1921. Acceptance was limited to "any future dispute in regard to which the Parties have not agreed to have recourse to some other means of friendly settlement." This declaration was renewed September 2d, 1926. PUB. OF THE PER. CT., Series D, No. 5, Pp. 74, 79. *QUAERE* whether the second declaration covers disputes which arose during the continuance of the first.

[39] Mr. William Latey, in an undated letter published in the *London Times*, September 8th, 1929, page 8, notes that the Optional Clause makes no provision for reservations excepting as to time limit and reciprocity. He continues: ". . . and *semble* the Court would have the right to ignore all reservations outside the provisions of the clause if the question of jurisdiction arose." Mr. Latey fears that "the prestige of the Court may be affected by this policy of reservations that tend to stultify the 'Optional Clause' while paying lip service to it."

An article by H. W. Malkin, *Reservations to Multilateral Conventions*, VII BRITISH YEAR BOOK OF INTERNATIONAL LAW, p. 141, is also of interest. Relying, to large extent, on the theory of *consideration*, the author concludes that "in principle a party to a convention is only entitled to make such reservations as the other parties are content that it should make." Even though we accept this line of thought, it may be questionable whether it is applicable to obligatory arbitration agreements. In them the obligation to arbitrate has always conflicted with the idea of inalienable soverign rights and "implied reserves." *Cf.* Robert R. Wilson, *Reservation Clauses in Agreements for Obligatory Arbitration*, 23 AM. J. INT. LAW 68.

Security and Reduction of Armaments. . . becoming ineffective." [40]

The question of elucidating the text of Article 36 of the Statute was discussed at the meeting of the First Committee, September 11, 1924.[41] M. Rolin (Belgium) observed that the

> "protocol, for the drafting of which all credit was due to M. Fernandes, was remarkable for its elasticity, since it made it possible for all States to select any class of disputes which seemed to them ripe to form the subject of international jurisdiction."

M. Uden (Sweden) continuing the discussion, said that

> "as M. Rolin has said, the clause in Article 36 was very elastic. Every country could make it therefore as precise as it wished without actually changing the form of the clause."

In reporting the work of the First Committee on this matter, the *Rapporteur*, M. Politis, argued as follows:

> "So far such compulsory jurisdiction has only been accepted by a small number of countries. The majority of states have abstained because they did not see their way to accept compulsory jurisdiction by the Court in certain cases falling within one or another of the classes of dispute enumerated above, and because they were not sure whether, in accepting, they could make reservations to that effect.
>
> "It was for this reason that the Assembly in its resolution of September 6th, requested the First Committee to render more precise the terms of Article 36, paragraph 2, inorder to facilitate its acceptance.
>
> "Careful consideration of the Article has shown that it is sufficiently elastic to allow all kinds of reservations. Since it is open to the States to accept compulsory jurisdiction by the Court in respect of certain of the classes of disputes mentioned, and not to accept it in respect of the rest, it is also open to them only to accept it i nrespect of a portion of one of those classes; rights need not be exercised in their full

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[40] PUB. OF THE PER. CT. OF INT. JUSTICE, Series D, No. 5, pp. 76, 77.

[41] League of Nations, Fifth Assembly, Minutes of the First Committee, pp. 22, 23. The subject had been referred to the First Committee for study, by an Assembly Resolution of September 6th, 1924. League of Nations, Plenary Meetings of the Fifth Assembly (1924), pp. 77, 79. In the course of the discussion preceding the vote, M. Politis pointed out (p. 69) the unwillingness of the Great Powers to accept the Optional Clause.

> extent. In giving the undertaking in question, therefore, States are free to declare that it will not be regarded as operative in those cases in which they consider it to be inadmissible." [42]

The ingenuity of the argument is not entirely convincing, but it is probable that such a construction was necessary to insure the effectiveness of the Clause. On October 2d, 1924, the Assembly passed a Resolution, recommending

> "States to accede at the earliest possible date to the special Protocol opened for signature in virtue of Article 36, par. 2, of the Statute of the Permanent Court of International Justice." [43]

This was passed in view of the fact that the study of the terms by the First Committee had shown them to be sufficiently wide "to permit States to adhere . . . with the reservations which they regard as indispensable." The Resolution of October 2d, 1924, was referred to in another Resolution of the Assembly on September 26th, 1928. Having noted that the 1924 Resolution had not so far "produced all the effect that is to be desired," it urged States which did not see their way clear to adhere without qualification, "to do so subject to appropriate reservations limiting the extent of their commitments, both as regards duration and as regards scope." [44]

On September 19th, 1929, his Majesty's Government of the United Kingdom signed the Optional Clause on condition of reciprocity and for ten years, or longer, for disputes arising after ratification of the declaration, with regard to situations or facts subsequent to ratification.[45]

With the exception of the Irish Free State,[46] all the Dominions and India made declarations in identical terms. In addition to the conditions mentioned above, all of these declarations excepted disputes where, by agreement, the parties have recourse to some other method of peaceful

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[42] Records of the Fifth Assembly, Plenary Meetings, Annex 30, p. 484.

[43] League of Nations, Off. Jour., 1924, Special Supplement, No. 21, p. 20.

[44] Official Journal, 1928, Special Supplement, No. 63, p. 18.

[45] Official Journal, 1929, p. 1484. Memorandum on the Signature of the Optional Clause. Cmd. 3452, p. 4.

[46] The Irish acceptance was for a period of 20 yrs., on the sole condition of reciprocity. L. of N., Off. J. (1929), p. 1487. Cmd. 3452, p. 5.

settlement, disputes between Members of the British Commonwealth of Nations, and disputes which international law regards as within the domestic jurisdiction of the signatory. There is in each case also a final proviso permitting the signatory to refer a dispute to the Council before it has been dealt with by the Court.

In the White Paper issued by the British Government in December, 1929,[47] it is evident that the interpretation placed on the terms of Article 36, par. 2, by the First Committee in 1924 has prompted the statement:

> "The terms of Article 36 have been regarded as admitting the making of a reserve or exception of any kind when accepting the compulsory jurisdiction of the Court, because the jurisdiction of the Court may be accepted *'in all or any'* of the classes of legal disputes enumerated."

What then is the situation as regards reservations which may be made by signatories of the Optional Clause? In short, it is that, though the actual words of the Article of the Statute do not authorize it very clearly, interpretation of the Clause by the First Committee in 1924, under the necessity of attracting more signatures, has made it possible to place any sort of condition or reservation whatever upon one's signature. And such an interpretation is not only necessary, but would seem to be wise apart from necessity. Nations are even more sensitive than individuals, it seems, and resent untempered compulsion. If the scope of reservations is unlimited they need never go before the Court unwillingly, in theory, however much that may be true in an actual case. And most important of all, each new signature, although greatly qualified, adds increasing dignity to the Court.

What are the types of conditions made by various signatories of the Optional Clause? It has already been noted that disputes are frequently excepted with regard to which the parties have agreed (or "shall agree") to have recourse to some other method of pacific settlement. Such conditions were imposed by Abyssinia, the Members of the British Commonwealth of Nations except the Irish Free State, Belgium, Esthonia, Germany, Greece, Netherlands, Spain, Czechoslovakia, France, Italy, Latvia, Peru, and Siam.

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[47] Cmd. 3452, p. 3.

Specific reference is made, in several declarations of acceptance, to submission of the dispute to the Council. The terms which provide for such submission differ a good deal in particular declarations. For example, the Czechoslovakian acceptance provides that *either* party to the dispute may, *before recourse to the Court,* submit the dispute to the Council of the League of Nations. But, could a signatory which had not made such a condition, and had not stipulated for reciprocity, take advantage of this provision in a dispute with Czechoslovakia? In the final proviso of the declaration of acceptance by the United Kingdom, however, it is provided that his Majesty's Government (not the other party to the dispute also) may require that *proceedings in the Court* shall be suspended. The declarations of acceptance of France, Italy and Peru also contain specific reference to settlement by submission to the Council. All such provisions probably have roughly the same purpose: "to cover disputes which are really political in character though juridical in appearance." This was the explanation given by the Government of the United Kingdom.[48] It is merely a recognition of the fact that the "political" side of some questions requires delicate handling.

Another common sort of reservation is that of "domestic" questions. It might be thought that such a reservation is unnecessary, but several signatures, except Ireland, Greece and the Members of the British Commonwealth of Nations, have thought it well to impose this condition. Under the British declarations, what is such a dispute is to be determined by international law. But no explanation of who is to interpret international law on the point is given either in the declarations of acceptance or in the White Paper issued in explanation of them.[49] One is inclined to say that it must be the Permanent Court of International Justice, in virtue of the last paragraph of Article 36 of the Statute.[50]

Somewhat similar to reservations of domestic questions is that contained in all of the acceptances by Members of

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[48] Cmd. 3452, p. 6.

[49] Cmd. 3452, p. 6.

[50] Compare also Advisory Opinion, No. 4. Tunis-Morocco Nationality Decrees. PUB. OF THE PER. CT. OF INT. JUST., Series B, No. 4.

the British Commonwealth of Nations except Ireland, to the effect that no disputes between Members of the British Commonwealth of Nations shall come before the Court. Since the Members of the British Commonwealth of Nations are persons in International Law, such a reservation was certainly necessary.[51]

4. PRIZE LAW

The signature of the Optional Clause by representatives of His Majesty's Governments on September 19 and 20, 1929, evoked vigorous comment in the British press.[52]

Mr. George F. S. Bowles, in a letter dated September 20th, published in the TIMES of the 27th, wrote as follows:

> "Your leading article of today recalls its ancestors of September 30, 1907, dealing with the proposal of that day to set up an 'International Prize Court.' 'This project,' you said then, 'is utterly inadmissible by this country. It is nothing less than the surrender into the hands of this novel tribunal of rights and interests which the most sagacious of our race have ever deemed essential to our greatness and to our safety. It has handed over some of our supreme interests to the uncovenanted mercies of an alien tribunal. We cannot ratify it.' And we did not. Nor, it is hoped, after all our experiences since 1907, shall we now consent to ratify that very same proposal presented to us once again under another and more specious name."

Similar in tone were other letters to the TIMES: those of Lord Salisbury, published September 24th and October 5th, in which he urged the "novelty of the Court," the importance of the issues, "the incurable vagueness of the law on which the International Court has to adjudicate"; that of Mr. J. L. Brierly, published on October 5th, suggesting that a question of prize "might easily involve the interpretation of a Treaty such as the Declaration of

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[51] Cmd. 3452, p. 6. ". . . The members of the commonwealth, though international units individually in the fullest sense of the term, are united by their common allegiance to the Crown. Disputes between them should, therefore, be dealt with by some other mode of settlement, and for this provision is made in the exclusion clause."

[52] Manley O. Hudson, *The Eighth Year of the Permanent Court of International Justice.* 24 AMERICAN JOURNAL OF INTERNATIONAL LAW 20, 41 note.

Paris" and urging the uncertainty of getting reciprocity; one from Mr. Anton Bertram, approving the views expressed by Professor Pierce Higgins in a letter dated September 24th, where he had said that "the Permanent Court of International Justice has been constituted a Permanent Court of Prize, before which parties aggrieved by decisions of British Prize Courts will be able to compel the British Government to appear."

Arrayed on the other side were M. A. P. Fachiri and Lord Parmoor whose letters appeared on September 25th and October 7th, as well as Mr. H. A. Smith, who had written on September 28th, that the divergent national views on prize law, "though legal in form . . . are political in substance" and "rest ultimately on national policy . . . The whole purpose of the British reservation is to ensure that we retain our right to bring before the Council instead of before the Court any dispute which we deem to be in substance political."

No doubt both sides were right in part. It is conceivable that a decision of a British Prize Court might be maed the basis of an International claim by an unsatisfied neutral.[53] But that would, in no proper sense, make the Permanent Court of International Justice a Court of Prize. Adverse decisions in the Permanent Court would doubtless restrain the activities of British vessels in matter of Prize. On the other hand the British reservations seem ample to protect all of her legitimate interests. Lord Parmoor, in his letter to the TIMES, analysed the situation neatly when he said that there are only two cases in which the question might arise, (1) Britain goes to war in violation of the Covenant. But this is an impossible situation and should not be considered. (2) Britain is called on by the League to act against a nation threatening to violate its obligations under the Kellogg Pact and the Covenant. This risk, as regards an International Prize Court, is negligible.

In December, 1929, the British Government stated its official position in the Memorandum on the signature by his Majesty's Government, &c., of the Optional Clause.[54]

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[53] Cmd. 3452, pp. 11, 12.

[54] Cmd. 3452.

The argument runs as follows: The Kellogg Pact is without machinery for the settlement of disputes. The Optional Clause furnishes this machinery. Signature of the Optional Clause cannot wait upon the codification of International Law into a complete system, but must be built up by decisions as the Common Law has been. The final proviso of the British acceptance will take care of so-called "political" disputes through reference to the Council. As to the British action at sea in time of war: Only Members of the League (it is assumed) could bring British naval action before the Permanent Court under the Optional Clause; under the Covenant and the Kellogg Pact Britain cannot be involved in war except in violation of these instruments by the aggressor, or acting as a belligerent under the obligations imposed by Article 16 of the Covenant, in either of which cases other Members of the League, by the terms of the Covenant, could not remain neutrals; since no Members of the League can ever be neutral as regards any other Member which has signed the Kellogg Pact, no Member of the League can ever hail Britain into the Permanent Court by virtue of the Optional Clause.

Further, it is noted that questions of Prize Law are not considered by his Majesty's Government as being "questions which by international law fall exclusively within the jurisdiction of the United Kingdom," an argument which had been advanced by Mr. Fachiri in his letter to the TIMES of September 25th.

Thus it will be seen that the principal objection to signature of the Optional Clause, as raised in England—that British action on the sea in time of war would be hampered by the exercise of an International Prize jurisdiction by the Permanent Court of International Justice, is answered by a persuasive line of reasoning. This, it seems, has two possible weaknesses: (1) The United States' position as a possible neutral is practically ignored; (2) there would be a technical difficulty in determining who is the aggressor, in case Britain should claim that she was attacked.[55]

[55] But see the Report on the Work of the First Committee, on Arbitration, Security, etc., submitted to the Fifth Assembly by M. Politis, Records of the Fifth Assembly (1924); Minutes of the First Committee, Annex 16, p. 127.

5. Advisory Opinions and the Optional Clause

As acceptance of the Optional Clause becomes more general, to what extent will the usefulness of the Court's power [56] to give Advisory Opinions be impaired? Only

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[56] Article 14 of the Covenant of the League of Nations has been the subject of dispute because of a possible difference in meaning between the English and French texts. The last sentence of the Article reads, in English: "The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." The French is: "*Elle donnera aussi des avis consultatifs sur tout differend ou tout point, dont la saisira le Conseil ou l'Assemblee.*" League of Nations, Official Journal (1920) p. 6.

It has been said, on the one hand, that "in practical operation full effect has been given to the French version and the Court has never questioned its duty to give, when the legal situation permitted, an opinion upon its being asked." J. H. Ralson, *International Arbitration*, etc., p. 329.

During the preparation of the Rules of Court, however, the question of the Court's right to refuse to give Advisory Opinions was raised. It was thought better not to insert anything to this effect in the Rules, since it would be in the nature of an interpretation of Article XIV of the Covenant, and could not bind the Court, which must decide the point in each case, as it arose. Publications of the Permanent Court of International Justice, *Preparation of the Rules of Court*, Series D, No. 2, p. 161. The opinion in the Eastern Carelia dispute—Advisory Opinion, No. 5—is a reassertion of the principle considered during the drafting of the Rules of Court. It is not proper to conclude, of course, that the Court may, at any time and on other facts, refuse to give an Advisory Opinion. What, for instance, would the Court have done if Russia, though not a member of the League, had been bound by the Optional Clause? Probably the result would have been the same. But an Advisory Opinion is binding on no one. Russia, in the circumstances supposed, could not therefore urge that it had agreed to compulsory jurisdiction only in relation to any other Member or State accepting the same obligation. The Court might very well feel that a State bound under the terms of the Optional Clause could not properly object to an Advisory Opinion.

It is interesting to compare the opinion in the Eastern Carelia dispute with that in the Mosul question (Advisory Opinion, No. 12). In regard to the latter, "the Court took the view that though the question under consideration offered some analogy with that of Eastern Carelia . . . , in that one of the interested Parties held aloof from the proceedings, the circumstances in the present case were distinctly different, since the question before the Court referred, not to the merits of the affair, but to the competence of the Council, which had been duly seized of the affair and could undoubtedly ask for the Court's Opinion on points of law . . ." Publications of the Per. Ct. of Int. Justice, Series E, No. 3. Third Annual Report of the Court, p. 226.

a prediction can be made, but it would seem that there are some important differences between Judgments and Advisory Opinions.

Whatever definition for "legal disputes" under the terms of the Optional Clause may be accepted as correct, it is clear that not only *such* disputes, but many others also, are covered by the last sentence of Article XIV of the Covenant, which reads: "The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." Advisory opinions may be concerned not only with "any dispute" but with any "question" referred to it by the designated bodies. The Court's field of activity seems, without much doubt, to be much wider under its advisory function, than under the Optional Clause. Though any dispute submissible under the latter might be made the subject of an Advisory Opinion, the converse is not true.

The disputes covered by the Optional Clause are limited to those in which the parties are Members of the League of Nations or States mentioned in the Annex to the Covenant. No such limitation is placed on disputes referred to the Court for an Advisory Opinion. More important still is the situation involving a question concerning an international organization, such as the International Labor Organization. Such questions may relate to the competence of the International Labor Organization, as in Advisory Opinions nos. 2, 3 and 13, or to the validity of action taken by a member of the International Labor Organization, as in Advisory Opinion no. 1. In each of the four [57] opinions, one of the interested "parties," and the one most directly interested, was an international organization. Article 34 of the Statute of the Court provides that: "Only States or Members of the League can be parties in cases before the Court." The International Labor Organization could never be a party in a case,

[57] The Advisory Opinions of the Permanent Court of International Justice are printed in PUBLICATIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, Series B. These Opinions are analysed and reviewed in Manley O. Hudson, The World Court, 1922-1928, pp. 47-87, and in The Advisory Opinions of The World Court, an Address delivered by Mr. Hudson at the Annual Meeting of the National Council for Prevention of War, Washington, D. C., Oct. 30, 1929.

but it may be primarily concerned in the answer to a "question" presented for an Advisory Opinion. It is important to note that the Court cannot deal with constitutional questions of this sort except by Advisory Opinions. A universal accepance of the Optional Clause would leave outside its scope all such matters.

Advisory Opinions nos. 11 and 15 were given on the legal questions involved in appeals to the Council of the League of Nations from decisions of the High Commissioner of the League of Nations at Danzig. Under Article 39 of the Convention of Paris of November 9th, 1920, both Danzig and Poland "retain the right of appeal to the Council of the League of Nations" from the decisions of the [58] High Commissioner, to whom by the same Article, the Parties had agreed to submit any matter affecting the relations between them. Here we have two "disputes" (not "questions") which could not be submitted under the provisions of the Optional Clause.

Enough has been said, perhaps, to show that even though the Optional Clause were universally accepted, there would still be situations in which compulsory jurisdiction could not be asserted, either because the matter involved a question of the constitutional law of an international organization, or because a dispute, under treaty agreements, was referable to the Council for settlement.

It may be that the disputes involved in the other Advisory Opinions *could* have been settled in the Court, under the Optional Clause, if both parties to the dispute were bound thereby. These disputes were, in general, "legal disputes" concerning either the interpretation of a treaty or some question of international law. The six Advisory Opinions already discussed could not, by any chance, have been decided under the Optional Clause. Excepting from the discussion the Fifth Opinion, it is not thought that the disputes involved in the others, even though submissible as regards parties and the dispute in question, would have been submitted in as effective a manner under the Optional Clause. There is no doubt that the Council acts as a shock

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[58] *The Convention of Paris*, of Nov. 9th, 1920. LEAGUE OF NATIONS, TREATY SERIES, VOL. VI, P. 189. Advisory Opinion, No. 11, p. 6; Advisory Opinion, No. 15, p. 9.

absorber. All international questions are in part political. The political aspects are the most troublesome, and if they can be shelved for the moment, while the Court attacks a purely legal problem, something is gained. Advisory Opinion No. 4 furnishes an example. The dispute concerned the nature of the Tunis-Morocco Nationality decrees. It might have led to serious difficulties. It may be inferred, from the fact that when the opinion was announced an amicable agreement was preferred to a submission of the case on its merits, that if recourse to the Court's advisory function had not been possible, the dispute would not have been settled without reaching a serious crisis. The question for the Court in this case had been reduced to its simplest terms: is a dispute over nationality decrees by international law solely a matter of domestic jurisdiction? [59]

The Court has never been requested to give Advisory Opinions on abstract questions of law, nor to decide political disputes in the sense of what policy should be followed. Conceding that all the disputes might have been put into a form which would have satisfied the requirement of "legal disputes" in Article 36, par. 2, of the Statute, still, it may be important to point out that the Assembly has never requested an Advisory Opinion. It is not unreasonable to suppose that the larger body, if it ever makes such a request, may not confine itself so narrowly as the Council has done thus far. Nor need the Council do so either, for that matter. Caution at first will do no harm, but the field of advisory jurisdiction may very well become wider and wider.

Though Advisory Opinions have dealt with legal questions, they have been intimately concerned with political differences in many cases, at least in the form in which the dispute came before the Council. The tempering influence of the Council is a most important element, as well as the undeniable fact that an Advisory Opinion *is* advisory. It

[59] PUBLICATIONS OF THE PERMANENT COURT OF INT. JUSTICE, Series B. No. 5, pp. 7-8.

A. P. Fachiri, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, p. 155, "This case shows that the advisory jurisliction offers, in cases of a legal nature, an indirect means of access to the Court which, in practice, is capable of being used as a not ineffective substitute for direct compulsory jurisdiction."

is, therefore, difficult to accept at its face value a portion of the report made by the Committee appointed by the Court on September 2d, 1927, to examine the question of amending Article 71 of the Rules:

> "In reality, where there are in fact contending parties, the difference between contentious cases and advisory cases is only nominal. The main difference is the way in which the case comes before the Court, and even this difference may virtually disappear, as it did in the Tunisian case. So the view that advisory opinions are not binding is more theoretical than real." [60]

One or two additional points should, perhaps, be examined to re-enforce the conclusion that compulsory jurisdiction under the Optional Clause can but rarely replace the Advisory function, though the latter may often replace the former. As has been suggested, it may be important in delicate situations to have the legal aspects of the disputes isolated and clearly defined, but the strict application of the views expressed in the opinion left to the Council or the parties themselves. There is certainly much value in a recognition of the fact that in theory a party is not bound. Because it retains perfect freedom, its dignity may require acceptance of an opinion from an impartial court.

When the Court has given an opinion, upon request from the Council, the latter may modify its application. This was the course taken in regard to Advisory Opinion No. 6. On December 17, 1923, the Council adopted, among others, the following resolution:

> "(2) Since it appears impossible for practical reasons to re-establish in their properties the settlers who have already been expelled, which would be, strictly speaking, the proper course, those settlers should receive from the Polish Government just compensation for the losses which they have suffered as the result of the fact that they have not been left in undisturbed possession of such properties." [61]

This flexibility of the advisory procedure is of inestimable value in assuring a wise and acceptable solution of difficul-

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[60] PUBLICATIONS OF THE PERMANENT COURT, Series E, No. 4, p. 76. FOURTH ANNUAL REPORT OF THE PER. CT.

[61] LEAGUE OF NATIONS, OFFICIAL JOURNAL (1924), pp. 359-361.

ties. It is a more welcome method for the handling of highly charged disputes because of its sensitiveness and adaptability.

The value of Advisory Opinions is also shown in cases where States are over-hesitant in taking needed action, or where they prefer to have the initial proceedings emanate from the Council. International efficiency demands some such possibility where States feel their interests too indirectly involved to take the matter to the Court under the Optional Clause, assuming that it would be applicable as to parties and subject matter. In the dispute over the acquisition of Polish nationality by German settlers (Advisory Opinion No. 7), we have an example. Aside from the fact that the Council wished a statement as to its competence, Germany, who was interested in her nationals, was not a party to the Polish Minority Treaty of June 28, 1919. The Principal Allied and Associated Powers might very well never have acted except through the medium of the Council.[62] In another way, international efficiency may be served, by referring technical matters to a suitable Committee before bringing the legal question before the Court. This was done in the case concerning the jurisdiction of the European Commission of the Danube (Advisory Opinion No. 14).

In conclusion we may say that there are certain "questions" which can be submitted to the Court for an Advisory Opinion, but which, because of the lack of the requisite parties, could never come up under the Optional Clause; that there are disputes which *must* be referred to the Council for settlement, that method being designated by international agreement; that there may be disputes of a sort not covered by the definition of the Optional Clause; that there may be disputes covered by the Optional Clause, but which, because of their complexity, are better submitted through the Council for an Advisory Opinion; and that there are other disputes which, for reasons of efficiency or convenience, it may be thought wiser to submit through the Council, and that, though the Optional Clause were uni-

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[62] League of Nations, Official Journal (1923), pp. 998-1000. Documents and Resolution of the Council bearing on the question.

versally accepted, the benefit of the Court's Advisory Opinions would still be indispensable. [63]

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[63] The mooted point of whether a request for an Advisory Opinion may be made by a simple majority vote has some bearing. Arnold D. McNair, *The Council's Request for an Advisory Opinion from the Permanent Court of International Justice.* VII., BRITISH YEAR BOOK OF INTERNATIONAL LAW, 1.

". . . If the Council can by a majority request the Court to give an advisory opinion, there is already in existence a degree of obligatory jurisdiction which will be effective in the vast majority of cases; because, if one party or both parties to a dispute refuse to go to the Court directly in a litigant capacity and ask for judgment, they may find themselves compelled to go indirectly and to assist the Court in gifing an advisory opinion." Mr. McNair's view is that, except in matters of procedure, the Council's request for an advisory opinion must be absolutely unanimous.

GEORGETOWN LAW JOURNAL

Published Quarterly During the Academic Year by the

GEORGETOWN LAW JOURNAL ASSOCIATION

VOL. XIX, NO. 1 NOVEMBER, 1930

Subscription Price, $2.50 per annum. **75 Cents Per Number**

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NOTES

JOINT OWNERSHIP of personal property, with special reference to bank accounts payable to "A or B or the survivor of them."

In the law of real property it has been well settled for centuries that two or more persons may have a present, subsisting and active interest in one parcel of land at one and the same time. This interest may be the seeming paradox of an ownership of the whole land as well as an undivided half (if there are only two cotenants) interest in it, a tenure *per my et per tout*, with the result that if one cotenant dies, the title to the whole land passes to his survivor or survivors, as the case may be, to the exclusion of his heirs or devisees.[1] So well fixed in the law is this form of tenancy, that despite the general abolition of tenures and the policy of the law to favor the heir, joint tenancy is generally recognized as a fact, even by the statutes which abolish it.[2]

Since this form of ownership can exist without the system of feudal tenure, there appears to be no reason why it should be applied only to real property. Indeed, all of the authorities of the past century and a half appear to agree that personal property can be owned by two or more persons at the same time with a right of survivorship.[3] To be sure, the mobility and other characteristics of personalty render such an arrangement more difficult and less satisfactory than joint tenancy of real estate, but in the eyes of the law there is no more distincition between the two than the academic one of calling the one a joint tenancy and the other a joint ownership.[4]

As indicated in the title, the main subject of this essay will be joint ownership of the most movable and negotiable of all personal property, money. It will be considered here as involving money that has been deposited in a bank subject to withdrawal by either of two parties or the survivor of them. For the sake of convenience we shall treat joint ownerships as involving two owners only, for all joint ownerships may be ultimately reduced to that form.[5]

First of all, is the question, how may joint ownership of a bank account be brought about? It is well settled that a tenancy, to be joint, must have the four unities of time, title, interest and possession.[6] Then tenants must take title at one and the same time, by one

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[1] 2 BL. COM. 180, *et seq.;* TIFFANY, REAL PROPERTY (1st Ed.) 371, *et seq.;* 1 WASHBURN, REAL PROPERTY (4th Ed.) 641, *et seq.;* WILLIAMS, REAL PROPERTY (4th Am. Ed.) 128, *et seq.;* 4 KENT COM. 357, *et seq.*

[2] TIFFANY, REAL PROPERTY, 374-5 and notes.

[3] SCHOULER, PERSONAL PROPERTY (5th Ed.) 222, *et seq.;* WILLIAMS, PERSONAL PROPERTY (18th Ed.) 518, *et seq.;* DARLINGTON, PERSONAL PROPERTY, 302, *et seq.;* 2 KENT COM., 350.

[4] SCHOULER, *ubi supra.* But Kent applies the term "tenancy" to personal, as well as real property.

[5] TIFFANY, *ubi supra.*

[6] *Supra* note 1.

and the same instrument, enjoy the same duration and quantity of interest, and enjoy one and the same undivided possession. And it may be laid down as a general rule that to have a true joint ownership there must be the same unities as to personal property.[7]

The unity of time offers no difficulty when a third party establishes two others as joint owners of a bank account. And theer should be little more when, as is usually the case, the owner of money desires to make another a joint owner. In the first place, he may employ the ancient device of real estate conveyancers and obtain a "straw man" to make the transfer.[8] Secondly, the bank itself may be constituted the transferrer. In that case, the situation resolves itself into one where the original owner of the money enters into a contract with the bank whereby the latter becomes a debtor of the joint owners of the account.[9] Where the doctrine of the third party beneficiary is not recognized, a novation is effected and the obligation of the bank remains the same.[10]

Though the classification of the four unities has been criticized as being merely a symmetric-sounding formula,[10a] the unity of time, at any rate, is essential when the question of survivorship, which is the chief characteristic of joint ownership, is to be determined. It is clear that the survivor must have had title to the entire property at some time before his co-owner's death,[10b] else his interest would arise not by survivorship but by descent or quasi-testament. This being so, there is no point in the co-owners' lives at which each may be said more logically to have acquired his interest than the time when the joint account was opened, whether by an independent donor, or a straw man, or a bank-transferrer.

Unity of title is less important in cases of personal than of real property, as title to the former may be passed without formal instruments. But the unity may be satisfied by the bank's issuance of a pass book or receipt.[11]

It is in the unities of interest and possession that the practical difficulty of joint ownership is encountered, but we shall see that where there is a true joint ownership, the parties are equal in the

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[7] *Supra* note 3.

[8] Van Raalte v. Epstein, 202 Mo. 173, 99 S. W. 1077 (1906).

[9] Chippendale v. North Adams Savings Bank, 222 Mass. 499, 111 N. E. 371 (1916).

[10] Deal's Admr. v. Merchants and Mechanics Savings Bank, 120 Va. 297, 91 S. E. 135, L. R. A. 1917C, 548 (1917). See also, note (1929), 15 Cornell L. Q. 96, 100-1, where the authorities are collected.

[10a] TIFFANY, *op. cit.* 371 and note.

[10b] Kellogg, J., in Moskowitz v. Marrow, 251 N. Y. 380, 391-2, 167 N. E. 506, 66 A. L. R. 870 (1929). See Schippers v. Kempkes, 67 A. 74, 12 L. R. A. (N. S.) 355 (N. J. 1907), where the statute of wills has a bearing.

[11] Atty. Gen. v. Clark, 222 Mass. 291, 110 N. E. 299, Ann. Cas. 1917B, 119, L. R. A. 1916C, 679 (1915).

duration and quantity of their interest and that they own the personalty as they would hold realty, *per my et per tout.*

Before investigating the truth of these assertions, it must be remembered that in modern times the affairs of banks are largely regulated by statute, and consequently the matter of joint accounts is to a great extent statutory.[12] But since the common law will recognize joint ownership of stock,[13] a leasehold interest in lands,[14] an insurance policy,[15] or a promissory note,[16] it will also recognize joint ownership of a bank account.[17] For there exists between the bank and the depositor the relation of debtor and creditor and the account amounts simply to a *chose* in action[18] which is subject to the characteristics of personal property in general.

But this is to be observed about common law joint bank accounts. They will be construed very closely, and if there is a lack of consideration or incomplete delivery of possession, the relation between the co-owners will be construed as one of trust[19] or of agency[20] or it will be found that there was an unconsummated gift,[21] and the property will go to the executor of the real party in interest, and not to the survivor.

The statutes, on the other hand, notably that of New York,[22] where most of the law on the subject has been evolved, tend to establish that where the account is opened in the form prescribed by the statute, the law will recognize that a joint "tenancy" has been

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[12] *Cf.* N. Y. BANKING LAW, §249, sec. 3. But it is to be observed that this statute applies only to savings banks, so that other joint accounts must be governed by common law principles.

[13] Williams v. Henshaw, 1 John. & H. 546 (1861).

[14] Burns v. Bryan, 12 App. Cas. 184 (1887).

[15] Farr v. Grand Lodge, 83 Wis. 446, 53 N. W. 738 (1892).

[16] People's Bank v. Keech, 26 Md. 521 (1867).

[17] Atty. Gen. v. Clark, *supra* note 11.

[18] 7 C. J. 641-2 and cases cited.

[19] In re Finn's Estate, 44 Misc. 622, 94 N. Y. S. 1005 (1904); Hemmerich v. Union Dime Sav. Bank, 205 N. Y. 366, 98 N. E. 499, Ann. Cas. 1913E, 514 (1912).

[20] In re Bolin, 136 N. Y. 177, 32 N. E. 626 (1892) and cases in note 21, *infra.* If both parties have control during their joint lives, but there is no intent that there be survivorship, the relation is one of agency. If survivorship is intended, but only one party has control during the joint lives, the question is as to whether a gift has been completed, and that, in turn, rests largely upon the question of intent. See *infra* notes 21, 26-28.

[21] Savings Bank of Baltimore v. McCarthy, 89 Md. 194, 42 A. 929 (1899); In re Brown's Estate, 113 Iowa 351, 85 N. W. 617 (1901); In re Bolin, *supra.* But see Kimball v. Leland, 110 Mass. 325 (1872); Farrelly v. Bank, 92 App. Div. 529, 87 N. Y. S. 54, aff'd 179 N. Y. 594, 72 N. E. 1141 (1904).

[22] *Supra* note 12.

created. This end is accomplished by a set of presumptions which in some cases are *prima facie*, and in others are conclusive. The quality of the presumption varies according to the relation between the parties in controversy.

Disputes as to joint ownership generally arises between six sets of parties. 1. Between the co-owners themselves. 2. Between the survivor and the co-owner's executor. 3. Between the survivor and the bank. 4. Between the executor and the bank. 5. Between the State and the survivor. 6. Between a joint owner and a third person.

As between the co-owners, an action by one against the other for withdrawing more than his moiety may resolve itself into a question whether a true joint account was created. If there was no joint ownership, then the controversy must be decided according to the true ownership of the property. If there was joint ownership then each party may withdraw one-half, but no more. In deciding this problem, the answers to the following questions are pertinent. Whose money went into the joint account?[23] Did both parties contribute?[24] If only one party deposited money, was there consideration springing from the other?[25] What was the intention of the party who furnished the money?[26] If a gift is claimed, was there sufficient delivery?[27] Was it the intention of the parties that the donee should exercise control over the account during the life of the donor?[28] All of these questions are pertinent as between the joint owners, whether the account is a common law one or statutory. In the latter class, there is a presumption that an account in the statutory form (*A* or *B* or the survivor of them) establishes joint ownership, but it is only *prima facie* and may be rebutted.[29]

When the dispute arises between the survivor and the co-owner's executor it becomes material whether the account operated under the common law or a statute. At common law, the executor could take

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[23] Schultz v. Dry Dock Sav. Inst., *infra* note 26; Meyers v. Albert, 76 Wash. 218, 135 P. 1003 (1913).

[24] Atty. Gen. v. Clark, *supra* note 11; Supple v. Suffolk Bank, 198 Mass. 393, 84 N. E. 432, 126 Am. St. Rep. 451 (1908).

[25] Taylor v. Coriell, 66 N. J. Eq. 262, 57 A. 810 (1904); Roller v. Roller, 201 Iowa 1077, 203 N. W. 41 (1925).

[26] Mack v. Mechanics' and Farmers' Bank, 50 Hun. 477, 3 N. Y. S. 441 (1888); Orr v. McGregor, 43 Hun. 528 (1887); Schultz v. Dry Dock Sav. Inst., 135 Misc. 343, 238 N. Y. S. 149 (1929); Hahn v. Ironbound Trust Co., 94 N. J. Eq. 123, 118 A. 744 (1922); Robinson v. Bank, *infra* note 27; Gorman v. Gorman, 87 Md. 338, 39 A. 1038 (1898).

[27] Carlin v. Carlin, 64 A. 1018 (N. J. Prerog. 1906); Matter of Fonda, 206 App. Div. 61, 200 N. Y. S. 881 (1923); Robinson v. Mut. Sav. Bank, 7 Cal. App. 642, 95 P. 533 (1908); Schippers v. Kempkes, *supra* note 10b.

[28] Carlin v. Carlin, *supra;* Gordon v. Toler, 83 N. J. Eq. 25, 89 A. 1020 (1914).

[29] Scanlon v. Meehan, 216 App. Div. 591, 216 N. Y. S. 71 (1926).

the property by showing that his testator was the sole party in interest and that there was an incomplete gift, or a trust, or an agency relation.[30] But under the statute, the presumption becomes absolute in favor of the survivor. Where the party in interest dies leaving the account in the statutory form, it goes by survivorship to his co-owner and the executor is not allowed to show that there was never a true joint ownership.[31] It has even been held that where the party who furnishes the money withdrew the whole sum from the joint account and deposited it to her individual credit and then died, though intending to redeposit it jointly, the presumption was conclusive against her executor that there had been a joint account in the first place and the testatrix had not affected the title by withdrawing it, so that the whole sum passed to the survivor.[32]

The true value of the statutory presumption is seen when the dispute is between the third and fourth sets of parties mentioned above, between the bank and the executor or survivor. Perhaps there was no true joint ownership and the party not in interest withdrew funds for his own use. At common law, the bank might protect itself on the theory that the party not in interest was an agent.[33] But it must prove authority given that agent. Or, it might seek to defend itself on the ground that it contracted to pay to the order of either party, and find itself held liable in tort for negligence.[34] It was chiefly to remedy this situation that the statutes were enacted. They serve notice upon the party in interest that if he desires to open an account jointly with his agent, or trustee or companion in avoiding succession taxes, the risk of whatever may happen under such an arrangement must fall not upon the bank, but upon himself. The statute conclusively presumes, in such a case, that the relation between the parties was that of joint tenants, and no evidence may be adduced to show the contrary.[35]

When disputes arise as to the right of the State to levy a succession tax against the survivor of a joint ownership, the reported opinions give a clear insight into the nature of a title by survivorship, which is the very essence of this kind of ownership.

First of all, it may be gathered that the picturesque phrase *per my*

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[30] Wood v. Zornstorff, 59 App. Div. 538, 69 N. Y. S. 241 (1901); and authorities *supra* notes 19-21.

[31] Moskowitz v. Marrow, *supra* note 10b; Hill v. Badeljy, — Cal. App. —, 290 P. 637 (1930).

[32] Marrow v. Moskowitz, 230 App. Div. 1, 242 N. Y. S. 523 (1930).

[33] Mulcahey v. Emigrant Industrial Sav. Bank, 89 N. Y. 435 (1882).

[34] Gish Banking Co. v. Leachman's Admr., 163 Ky. 720, 174 S. W. 492, L. R. A. 1915D, 920, Ann. Cas. 1916D, 525 (1915); Neiman v. Beacon Trust Co., 170 Mass. 452, 49 N. E. 748, 64 Am. St. Rep. 315 (1898).

[35] Brooks v. Erie County Sav. Bank, 169 App. Div. 73, 154 N. Y. S. 692 (1915).

et per tout is a misnomer.[36] True it is that each owner has an undivided one-half interest in the subject matter. This interest he may maintain against the whole world. But his interest in the whole is not absolute, but dependent upon the will of his co-owner. The latter may at any time sever the jointure, for he, too, holds an undivided one-half interest. Thus, at any time during the life of both, each may take his share and go his way. But when one of the owners dies, then the survivor holds *per tout* as well as *per my*. Consequently, though the survivor's right in the whole property might be asserted during the lives of both owners against anyone but the co-owner, survivorship entails a beneficial interest, for it signifies the cessation of the possibility that the survivor might fail to enjoy the whole property.[37] It is this benefit which is levied upon by a succession tax. The tax is levied, not upon the amount of the account, but upon one-half of it, which is the extent of the beneficial interest accruing by survivorship.[38]

In this connection, it is worthy of note that in several instances succession taxes have been levied against survivors upon the full amount of property which was in the joint names of the owners. But it is believed that analysis of all these cases will show that the ownership was not truly joint. For example, where a husband places property in the names of himself and his wife but retains control in himself, intending that the wife should take by survivorship whatever remains upon his death, there is no true joint ownership, because the unity of time is certainly lacking, as are those of interest and possession.[39]

But the statutes which impose succession taxes upon joint interests, especially those existing between husband and wife, seem to recognize that the form of the account is designed for convenience of the parties, and that as between the parties themselves, as a practical thing, the title does not change. The statutes provide that if the survivor is the party who furnished the money, it is competent for him to prove that fact and escape payment of the tax.[40] Such a provision is reasonable in view of prevalent financial arrangements between husband and wife, though in the absence of it, a surviving real party in interest would undoubtedly be taxable once it is established that both parties had dominion over the funds and the account was thus truly a joint one.

When we come to the last of our six classes of disputes, those between one of the joint owners and a creditor of the other, we find

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[36] Matter of McKelway, 221 N. Y. 15, 116 N. E. 348, L. R. A. 1917E, 1143 (1917).

[37] Matter of McKelway, *supra;* Marble v. Jackson, 245 Mass. 504, 139 N. E. 442 (1923).

[38] Marble v. Jackson, *supra;* But the survivor's interest is not taxable in the absence of a special statute. Atty. Gen. v. Clark, *supra.*

[39] Matter of Kane, 246 N. Y. 498, 159 N. E. 410 (1927), 247 N. Y. 219, 160 N. E. 17 (1928).

[40] *Cf.* N. Y. Tax Law, §220, sec. 5, as amended in 1929.

surprisingly little authority on the point. The question, of course, is whether the creditor may satisfy his claim by means of the joint bank account or any part of it. If the analogy of joint tenancy in real property is followed, the creditor may undoubtedly levy upon the debtor's undivided one-half interest.[41] But whether the same rule applies to personal property, especially to bank accounts, is as yet unsettled.

If the account can be reached at all, it must be by garnishment, not by attachment.[42] All of the cases seem to agree upon that point But aside from that, the question is virtually untouched. A *per curiam* opinion in Rhode Island overruled the creditor's exceptions to the order limiting him to one-half the account of husband and wife when it was shown that each owned one-half the money.[43] The alternative that garnishment proceedings should not be allowed at all was not considered by the court. Five years later, there was a square holding to this effect in Saskatchewan.[44] The text writers point out that a debt due jointly to a defendant and another cannot be reached in garnishment proceedings because the garnishment can confer no greater rights than the defendant had, and as he could not proceed alone to collect his debt, the proceedings will gain the plaintiff nothing.[45] But it is submitted that this reasoning has no application to the kind of joint ownership under consideration, for though the deposits are commonly called joint, they are in reality joint and several, and may therefore be collected by one of the joint owners.

One other expression of judicial opinion on the matter of creditors' claims has been found. The Supreme Judicial Court of Massachusetts recently held that where one party supplied all the money, and the other party secured credit by means of the joint deposit, the real party in interest might come into garnishment proceedings as claimant and upon showing the true ownership of the deposit, might be decreed to have the right to withdraw the money.[46]

With the above as premises, it is submitted that the rule in such cases should be similar to that which obtains in disputes between the co-owners. If the issue is raised as to the existence of a joint ownership, the garnishment should be decided according to the real ownership. If a joint ownership is established, then the creditor should, as in *Catlow* v. *Whipple*,[47] be allowed to charge the garnishee with the debtor's share of the deposit.

In the law of real property, joint tenancy has always been intimately associated with tenancy by the entirety. And it has been

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[41] Thornburg v. Wiggins, 135 Ind. 178, 34 N. E. 999, 22 L. R. A. 42, 41 Am. St. Rep. 422 (1893).

[42] Sturdee v. Cuba Eastern R. Co., 196 Fed. 211 (C. C. A. 2d, 1912). PATON'S DIGEST, ops. 451-453.

[43] Catlow v. Whipple, 83 A. 753 (R. I., 1912).

[44] Runk v. Jackson [1917], 1 W. W. R. 485.

[45] 28 C. J. 97-98.

[46] White Co. v. Lees, — Mass. —, 166 N. E. 705 (1929).

[47] *Supra* note 44.

decided that there may be ownership by the entirety of personal property.[48] Massachusetts has held that where husband and wife owned shares of stock in the names of themselves and the survivor of them, a sale by the husband in which the wife refused to join, vested in the purchaser only the right to dividends during the joint lives of husband and wife, and a right to the shares themselves only in the event that the husband was the survivor.[49]

But though it has been said that tenants by the entirety hold *per tout et non per my*, so that neither can defeat the other's right of survivorship, it is established that neither tenant has such a vested right during the coverture as to excuse payment of a succession tax as survivor.[50] One court pointed out that the phrase *per tout et non per my* is based upon the legal fiction of unity of man and wife and that even the right of survivorship is not necessarily vested and could be destroyed on the termination of the coverture by divorce.[51] There have been other justifications of the tax that, though the survivor was the owner of the property during coverture, she nevertheless acquired *control and possession* of it upon the death of the other spouse and is taxable as having received this benefit.[52]

Several opinions have stopped to consider whether bank deposits of husband and wife, payable to either or the survivor were owned by the entirety, and none have been found to be so owned. While none of the courts said that such deposits could not be held by the entirety, it is submitted that such an assertion could safely be made. As indicated above, these deposits are several as well as joint, and either spouse may, without the consent of the other, transfer the whole property. Such a possibility is inconsistent with the underlying principle of entireties that neither party can destroy the other's interest in the whole. Accordingly, if ownership by the entirety is desired, the deposit must be in the conjunctive, not the disjunctive form, and payable to A *and* B and the survivor of them.[53]

J. D. O'R., Jr.

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[48] George v. Dutton, 94 Vt. 76, 108 A. 515, 8 A. L. R. 1014 (1920). This rule, however, is not universal. There is an extensive annotation which collects numerous authorities on both sides of the question whether there may be estates by the entirety in personal property. 8 A. L. R. 1017.

[49] Phelps v. Simons, 159 Mass. 415, 34 N. E. 657 (1893).

[50] Matter of Klatzl, 216 N. Y. 83, 110 N. E. 181 (1915), 218 N. Y. 734, 113 N. E. 406 (1916); Matter of Lyon, 233 N. Y. 208, 135 N. E. 247 (1922).

[51] United States v. Tyler, 33 F (2d) 724 (C. C. A. Md., 1929), reversing, Tyler v. United States, 28 F. (2d) 887 (D. C. Md., 1928). But see Dime Trust Co. v. Phillips, 30 F. (2d) 395 (D. C. Pa., 1929); United States v. Provident Trust Co., 35 F. (2d) 339 (C. C. A. Pa., 1929).

[52] Matter of Klatzl, *supra*.

[53] See Irwin, *Joint Banking Account of Husband and Wife in Pennsylvania* (1930), 34 Dickinson L. Rev. 156.

MASTER AND SERVANT—Assumption of Risk; Simple Tool Doctrine; Federal Employers' Liability Act.

It is the positive duty of a master to furnish his servant with reasonably safe instrumentalities wherewith and places wherein to do his work. This obligation is rarely, if ever, made an express stipulation of the agreement between the employer and the employee; but whether it is to be regarded as an implied term of the contract, or as created by operation of law as incidental to the relationship, it is universally treated as existing.[1] The master is not an insurer, however, of the servant's safety in the use of tools, machinery and appliances employed in the business, and he does not guarantee the safety of the place in which the servant works.[2]

A servant is bound to exercise ordinary care in the use of tools furnished him by the master; but no affirmative duty of inspection is required of him to discover defects in appliances not so obvious that with ordinary care, in their proper use, he would naturally discover them.[3]

One of the several defenses which an employer has against an action by the employee to recover for injuries sustained in the course of his employment is that of assumption of risk.[4] In the instant case the action is brought under the Federal Employer's Liability Act. Under this Act the master was deprived of one of his defenses, viz., that of contributory negligence. But the defense of assumption of risk is available under the act,[5] which by its terms is limited to rail-

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[1] N. Y. R. Co. v. Vizvari, 210 Fed. 118, 126 C. C. A., 632 (1913). Assumption of risk is a rule of common law, based on contract by implication of the servant's act of involuntary exposing himself to danger. McFarland v. Chesapeake & O. R. Co., 177 Ky. 551, 197 S. W. 944 (1917).

[2] Balto. etc. R. Co. v. Mackay, 157 U. S. 72, 15 Sup. Ct. 491 (1895); Barrett v. Young, 78 N. J. L. 733, 75 Atl. 896 (1910); Mills v. Roberts, 136 Ark. 440, 206 S. W. 751 (1918).

[3] Chicago R. I. & P. R. Co. v. Payne, 141 Ark. 617, 217 S. W. 810 (1920); Buchanan v. Rome etc. Ry. Co., 10 N. Y. St. 326 (1885). A rule imposing liability under such circumstances would be far reaching in its consequences and would extend the rule of *respondeat superior* to many of the vocations in life for which it was never intended. It is a just and salutary rule, designed for the benefit of employees. Meador v. Lake Shore Ry. Co., 138 Ind. 290, 37 N. E. 721 (1895).

[4] "The acquiescence of the ordinary prudent man in a known danger, the risk of which he assumes," Taft, J., in Narramore v. Cleveland C. C. & St. L. R. Co., 96 Fed. 298, 48 L. R. A. 68 (1899); *certiorari* den. 175 U. S. 724, 44 L. Ed. 337 (1899).

[5] 45 U. S. C. 51-59, Sec. 51, Chapter 2. Congress in enacting the Federal Employees Liability Act intended to base the action upon negligence only, and to exclude responsibility of carrier to employees for defects not attributable to negligence. Balto. etc. R. Co.

road employees, to the same extent as at common law[6] except in cases especially provided for, that is, in cases where the railroad has violated same statute[7] enacted for the protection of its servants, and except in cases where the injury is due to the negligence of fellow servants.[8] It is argued that inasmuch as the act has specifically designated the case to which it is applicable, it clearly shows the legislative intent that in all other cases the defense of assumption of risk shall have its common law effect.[9]

According to the Simple Tool Doctrine which is almost universally adopted and upheld throughout the United States[10] a master is not obliged to inspect common[11] or simple tools and his failure to do such does not constitute negligence.[12] Nor is he termed negligent when he knowingly supplies defective simple tools to his servant. Where the defects are so obvious that any ordinary prudent man of average intelligence could detect them readily, the servant or em-

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v. Whitacre, 124 Md. 426, 92 Atl. 1063; St. Louis etc. Ry. Co. v. Ingram, 118 Ark. 386, 176 S. W. 695 (1915); Yazoo & M. Valley Ry. Co. v. Mullins, 249 U. S. 531 39 Sup. Ct. 368 (1919).

[6] Boldt v. Penna. Ry. Co., 241 U. S. 441, 245 U. S. 310 (1918); Dibble v. N. Y. N. H. & H. R. Co., 100 Conn. 130, 123 Atl. 124 (1924); Louisville & N. R. R. Co. v. Reverman, 228 Ky. 500, 15 S. W. (2d) 300 (1929).

[7] It must be a Federal statute before the defense is available to the employer; Lauer v. Northern Pacific Ry. Co., 83 Wash. 465, 145 Pac. 606 (1915) (Overruling Opsahl v. Northern Pacific Ry. Co., 78 Wash. 197, 138 Pac. 68); Gilmer v. Yazoo & M. V. R. Co., 4 F. (2d) 963, C. C. A. Miss. *Certiorari* den. 268 U. S. 705, 45 Sup. Ct. 639, 69 L. Ed. 1167 (1925). When negligence does not amount to a violation of the Safety Appliance Act, the defense remains intact, Dubrey v. Penna. etc. R. Co., 265 Pa. 215, 108 Atl. 620 (1919).

[8] Delaware L. & W. R. Co. v. Tomasco, 256 Fed. 14 (1919).

[9] Seaboard Airline Ry. Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635 (1914) (leading case). Followed in Reed v. Director General of Railroads, 258 U. S. 95, 42 Sup. Ct. 191 (1922). For critical discussion on this point, see 28 Harv. L. Rev. 163.

[10] Rule does not obtain in Missouri, Texas, Montana, and there are some cases in North Carolina contrary to the rule. Mercer v. Atlantic Coast Line R. Co., 154 N. C. 399, 70 S. E. 742 (1911). See discussion of cases in American Car & Foundry Co. v. Nachland, 47 Ind. App. 204, 93 N. E. 1083 (1911).

[11] "One so simple that it invokes no expert knowledge, which the servant uses and handles, and of which he is, therefore, presumed to know more than does the master." Smith v. Hines, 194 Pac. 318, 41 Sup. Ct. 447 (1921).

[12] Prescott v. Norfolk Western Ry. Co., 188 Ky. 204, 221 S. W. 552 (1920), a case of facts similar to the instant case. A pick was held to be a simple tool and master not liable for an injury resulting from a defect therein.

ployee is presumed to have knowledge of the risks attached thereto[13] on the theory that one knows what is his duty to know.[14] But, of course, the application of the rule is no broader than the reason for it, and it does not apply to machinery of an intricate nature even though it is in the possession and control of the servant.[15]

The rule, as declared by the Supreme Court and in cases arising under this Act, seems to be that an employee of a railroad company in entering upon his employment assumes all the ordinary risks thereof, but not the extraordinary risks and hazards to which the negligence of the railway company may, from time to time, subject him; and to which he has the right to assume that his employer will not expose him. He may act on this assumption unless the dangers are so open and apparent as to cause an ordinary prudent man to appreciate them.[16] Hence the doctrine of assumed risk applies and is limited in its application to dangers which the employee should know or actually knows.[17] Accordingly, knowledge is the watchword of the defense of assumption of risk.[18]

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[13] Grover v. N. Y. etc. R. Co., 76 N. J. L. 237, 69 Atl. 1082 (1908).

[14] Millett v. Indianapolis Northern Transit Co., 45 Ind. App. 88, 86 N E. 432 (1908). *Contra:* Swain v. Chicago Ry. Co., 187 Iowa 466, 174 N. W. 296 (1919); also, Gekas v. Oregon, Wash. Ry. Co., 75 Oreg. 243, 146 Pac. 970 (1915); also, Carey Roofing etc. Co. v. Black, 129 Tenn. 30, 164 S. W. 1183 (1914), which includes simple as well as complex tools within the Federal Employers Liability Act, making the employer liable for any defect in either.

[15] Coal & Coke Ry. Co. v. Deal, 231 Fed. 608 (C. C. A. 4th, 1916); C. & O. Ry. Co. v. DeAtley, 241 U. S. 310, 36 Sup. Ct. 564 (1916). "According to our decisions the settled rule is, not that it is the duty of an employee to exercise care to discover extraordinary danger that might arise from the negligence of his employer, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person under the circumstances would observe and appreciate them. Gila Valley Ry. Co. v. Hall, 232 U. S. 94, 101 (1914). Seaboard Airline Co. v. Horton, *supra* note 9, 233 U. S. at 504. Followed in Smith v. Payne, 269 Fed. 1 (1920).

[16] N. Y. C. & St. L. R. Co. v. Peele, 80 Ind. App. 297, 164 N. E. 106, *certiorari* den. 49 Sup. Ct. 263, 73 L. Ed. 988 (1929); Chicago etc. Ry. Co. v. Hughes, 64 Okla. 74, 166 Pac. 411 (1917); Kansas City etc. R. Co. v. Finke, Tex. Civ. App. 190 S. W. 1143, *certiorari* den. 245 U. S. 656, 38 Sup. Ct. 13, 62 L. Ed. 534 (1917); Union Trust Co. v. Davis, 97 N. J. L. 259, 117 Atl. 43 (1922); Seaboard Airline Ry. Co. v. Horton, *supra* note 9.

[17] Bradburn v. Wabash Ry. Co., 134 Mich. 575, 96 N. W. 919 (1903).

[18] Cobic v. Atl. Coast Line R. Co., 188 N. C. 487, 125 S. E. 18 (1924); Louisville & N. R. R. Co. v. Reverman, *supra* note 6; 26 Cyc. 1202. "In order to charge the servant with assumption of risk

Another point of importance offered for consideration by the instant case is the effect of the servant's continuation in service after complaining of the defect and pursuant to the master's promise to repair or replace the tool. The general rule is that such circumstances, where a simple tool is involved, will not alter the master's defense;[19] since knowledge in conjunction with continuation in the service operates as a waiver of the right to make the master liable; and furthermore, because the obviousness of the defect of the tool coupled with the imminent danger of injury which might result from its use, should preclude reliance on the master's promise.[20]

There is much authority to the contrary, however, and in some jurisdictions a promise to repair or an assurance of safety by the master after complaint by the servant, has been held sufficient to render the master liable, even if the implement or appliance was such a simple tool as relieved the master of the duty of inspection to ascertain its safety for the use to which it was devoted.[21] These courts consider the promise such as negatives all inferences that the servant willingly assumed the risk of injury from the use of the defective tool.[22] Some say that the promise is the only inducement for the servant's continuance in the service[23] and should therefore, be relied upon.

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by reason of knowledge thereof, actual knowledge is not indispensable but it is sufficient that the defects and the dangers were so open and notorious that he should have known the risks that might entail." Western Coal Co. v. McCallam, 237 Fed. 1003, 151 C. C. A. 65 (1916).

[19] Turkey Foot Lumber Co. v. Wilson, 182 Ky. 42, 206 S. W. 14 (1918), where in facts very similar to the instant case, a promise to sharpen a tie-pick from which an injury subsequently incurred, was held not to relieve the master of the defense of assumption of risk; Kueckel v. O'Connor, 76 N. Y. St. 829, 73 App. Div. 594 (1902); York v. Rockcastle River Ry. Co., 62 Utah 76, 217 Pac. 971 (1923), where a section hand assumed the risk of injury by steel flying from a hammer used for driving railroad spikes; Kansas v. Chicago & N. W. Ry. Co., 165 Wis. 578, 162 N. W. 923 (1917), where the risk of injury from flying chips in peeling ties with a dull hatchet was held to be assumed.

[20] C. & O. Ry. Co. v. DeAtley, *supra* note 15; Donahue v. Louisville etc. Ry. Co., 183 Ky. 608, 210 S. W. 491 (1919); Southern Ry. Co. v. Burford, 120 Va. 157, 90 S. E. 616 (1916).

[21] Sweeney v. Berlin & Jones Co., 101 N. Y. 520, 5 N. E. 358 (1886); Swain v. Chicago Ry. Co., *supra* note 14; Gekas v. Oregon Wash. Ry. Co., *ibid.;* Carey Roofing etc. Co. v. Black, *ibid.;* Weeks v. Scharer, 111 Fed. 330, 49 C. C. A. 372 (1901); Preifer v. Allegheny Steel Co., 243 Pa. 256, 90 Atl. 152 (1914).

[22] Cash v. Cleveland C. C. & St. L. R. Co., 244 Ill. App. 1 (1927).

[23] Washington Terminal v. Sampson, 53 App. D. C. 179, 289 Fed. 577 (1923).

CONCLUSION

The very broad field over which the ramifications of this subject might extend has limited the scope of our discussion considerably. It is safe to say that the courts are almost uniform on the rule concerning the simple tool and the servant's assumption of risk of any injury resulting therefrom. This, as mentioned *supra*, seems to us to be a just and salutary rule. Its absence would only serve to extend the doctrine of *respondeat superior* too far. It would only be placing a premium on the carelessness and indifference of the servant and adding unfair and unjust duties and liabilities to the large number which the master ordinarily has to bear.

A. A. S.

RECENT DECISIONS

BANKS AND BANKING—Deposits payable to either of two parties or the survivor of them.

Three recent cases, two of them involving the same parties and decided in New York courts, and the other decided in California, suggest some interesting questions as to property rights in the so-called "joint" bank deposit whose use has become very widespread in recent years.

In the New York cases, a grandmother deposited money in several savings banks to the credit of herself or her granddaughter or the survivor. She delivered the pass books to the granddaughter. Later, she wrote to the banks and directed them not to honor drafts drawn by the granddaughter. She visited the banks and had them change the accounts to her individual credit. Still later, she changed her mind, and while she was ill, she asked the granddaughter to summon representatives of the banks to her bedside. All of the banks except one complied, and the grandmother had the deposits in these institutions changed to the original form, payable to either herself of her granddaughter or the survivor. Upon the grandmother's death, a month later, the granddaughter withdrew the money from the banks, and the administrator obtained the money from the bank which had refused to send a representative to the grandmother's bedside. The granddaughter and the administrator brought actions against each other to recover the amounts that each had withdrawn from the banks *Held*, in *Moskowitz* v. *Marrow*, 251 N. Y. 380, 167 N. E. 506, 66 A. L. R. 870 (1929), that the administrator could not recover, because the statutory presumption of joint tenancy is conclusive in cases in which the survivor is a party, and it was incompetent for the administrator to prove that the form of the deposit was merely for the convenience of the grandmother. *Held*, in *Marrow* v. *Moskowitz*, 230 App. Div. 1, 242 N. Y. S. 523 (1930), that the granddaughter should recover from the administrator, though the deposit was not in the joint form at the time of the grandmother's death. The statutory presumption establishes

that there was a joint ownership, and this being established, the act of the one joint owner withdrawing the whole deposit could not affect the title of the other joint owner in the absence of the consent of the latter.

In the California case, *S.*, an immigrant from Jugo-Slavia, accumulated $10,000. He deposited $7,000 in the *A* Bank, where he explained that he was going to Europe and wished to deposit it so that *J.*, his cousin, could send it to him as he needed it. He did not wish to write direct to the bank, and was warned that a joint account would enable *J.* to withdraw the whole balance. He voiced his disbelief that *J.* would do such a thing and *S.* and *J.* entered into a joint account with the bank. *S.* went to Europe and soon died, leaving by will all his property to his sister. *J.* consulted an attorney and withdrew the $7,000 as survivor. The administrator c. *t. a.* of *S.* brought action to recover the money. *Held*, that, it being found as a fact that there was no fraud or undue influence in the formation of the deposit, *J's.* right of survivorship must be upheld in view of the Bank Act (DEERING GEN. LAWS, SUPP. 1925, ACT 652, No. 15a) which conclusively presumes that a deposit made in the statutory joint form creates joint ownership, and though as between *J.* and *S.*, during the latter's life, the true nature of the deposit might have been shown, it is too late, after the death of *S.*, to contest the right of *J.* *Hill* v. *Badeljy*, — Cal. App. —, 290 P. 637 (1930).

For a discussion of the questions raised by these cases, see NOTES, *supra* p. 100. J. D. O'R., JR.

CONFLICT OF LAWS—Corporate Existence—Effect of the Acts of Unrecognized Governments—De Facto Directors.

The plaintiff, a Russian bank, chartered by the Imperial Government of Russia, had deposit accounts with the defendant bank in New York. By the terms of its charter, the governing body of the plaintiff was vested in a directorate, consisting of seven members. Following the Soviet revolution of 1917, the assets of the plaintiff were confiscated by the revolutionary government, and the directors were driven into exile in France. They held meetings there to arrange for the collection of the assets of the plaintiff. The defendant refused to surrender the deposits, and contended that the plaintiff is no longer a juristic person, and that, even if it be, the directors are without authority to bind it. On appeal from a judgment in favor of the defendant, *held*, reversed. *Petrogradsky Nejdunarodny Kommerchesky Bank* v. *National City Bank of New York*, 253 N. Y. 23, 170 N. E. 479 (1930).

The Court reaffirmed the doctrine followed in the majority of decisions in this country and in England, that with respect to juristic beings such as corporations, "that which the law has created, the law alone can destroy." *Matter of Huss*, 126 N. Y. 537, 542 (1891); *Folger* v. *Columbia Ins. Co.*, 99 Mass. 267 (1868); *People* v. *Manhattan Co.*, 9 Wend. 351 (N. Y., 1832); *Russian Commercial and Indus-*

trial Bank v. *Compton, D'Escompte and Others*, 40 Times L. R. (H. L.) 837 (1924), Greenleaf on *Evidence* (Thirteenth Ed.), Vol. 1, sec. 41. The decree of dissolution that the defendant relied upon was that of the Soviet Government. The Soviet Government is not recognized as either *de facto* or *de jure* government of Russia. The Kerensky Government is the recognized government of Russia in the United States; *Russian Government* v. *Lehigh Valley R. Co.*, 293 Fed. 133 (S. D. N. Y., 1923); 21 F. (2d) 400 (1927). Courts of this country are bound to follow the executive's determination in such matters. *Kenneth* v. *Chambers*, 14 How. 38 (U. S., 1852); *Russian Government* v. *Lehigh Valley R. Co., supra.* Therefore it follows that the Soviet decrees have no effect in this country. *Sokoloff* v. *National City Bank*, 239 N. Y. 158 (1924); *James & Co.* v. *Second Russian Ins. Co.*, 239 N. Y. 248 (1925); *Russian Reinsurance Co.* v. *Stoddard*, 240 N. Y. 149 (1925); *Banque de France* v. *Equitable Trust Co.*, 33 F. (2d) 205, 207 (1929); *Matter of Case*, 214 N. Y. 199 (1915); *City of Berne in Switzerland* v. *Bank of England*, 9 Ves. 347 (1804); *Luther* v. *Sagor Co.* (1921), 1 K. B. 456.

There is also the fact that the State of New York presumes the identity of foreign corporation law with the domestic. *Munroe* v. *Douglas*, 5 N. Y. 447 (1851); *Squier* v. *Houghton et al*, 226 N. Y. S. 174 (1927); unless proved otherwise, and this the defendant has failed to do. The plaintiff is still a corporation, clothed with all the powers incident to its existence, among them being the power to sue and be sued. At the time of the revolution in Russia, the directors had been duly elected. Since that time, no meetings of the stockholders have been held and the term of office of the directors has ended. It cannot be said that the corporation, with assets and liabilities in the corporate name, is a derelict. In such a situation there is no dissolution. *Kinkaid* v. *Dwinelle*, 59 N. Y. 548 (1875); *Russian Commercial & Ind. Bank* v. *Compton, D'Escompte and Others, supra.* The officers in charge of the corporation hold over, not in their former capacities, but as *de facto* officers, who, in default of other representatives, have the authority to manage the affairs of the corporation and to sue in the name of and for the benefit of the corporation. *James & Co.* v. *Russia Ins. Co.*, 247 N. Y. 262 (1928); *In re Second Russian Ins. Co.*, 250 N. Y. 451 (1929).

In rejecting the defense of double liability, the court distinguished the present case from *Russian Reinsurance Co.* v. *Stoddard, supra.* The latter involved an equitable action while this is an action at law, and, as the defendant cannot interplead the Soviet Government, they cannot set up, as an equitable defense, the possibility of double liability. The court also pointed out that such controversies are not governed by any technical rules of law, but by the largest consideration of public policy and justice.

The question which now arises is, what effect would the recognition of the Soviet Government by this country have upon this judgment? Recognition once awarded is retroactive and would validate all acts of the state from the date of its origin, unless agreed to the contrary. This was definitely decided in this country, in the

case of *Oetjein* v. *Central Leather Co.*, 246 U. S. 297, 38 Sup. Ct. 309 (1918). The Supreme Court, considering the effect of the recognition of the Carranza Government in Mexico, upon title to property seized by General Villa, sold, and found in New Jersey, rendered judgment for the defendant in suits commenced prior to recognition. Justice Clarke, in rendering the opinion for the court, said: "The result of the interpretation by this court of the principles of international law, is, that when a government which originates in revolution or revolt is recognized by the political department of our government as the *de jure* government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence."

In England a similar question arose in the case of *Luther* v. *Sagor and Co.*, *supra*. The plaintiff originally recovered judgment because in the absence of recognition, no effect was given Soviet decrees. The Courts of Appeal reversed this judgment, largely on the authority of the American cases, *Williams* v. *Bruffy*, 96 U. S. 186 (1877); *Underhill* v. *Hernandez*, 168 U. S. 253 (1897); *Oetjein* v. *Central Leather Co.*, *supra*, solely because in the meantime recognition *de facto* had been extended to the Soviet regime. In justification of the decision in the instant case it is of interest to note that the French courts, even though France has recognized the Soviet regime as the *de jure* government of Russia, have failed to give effect to titles having their basis in decrees of confiscation, Wohl, *Nationalization of the Joint Stock Banking Corporations in Soviet Russia* (1926), 75 U. OF PA. L. REV. 385 392, 395. In the event that recognition is given to the Soviet Government, an apt solution of this problem would seem to be the insertion in the treaty, of a provision that would relieve the courts of this country from the duty of following the doctrine of *Oetjein* v. *Central Leather Co.*, *supra*.

J. M. K.

CONSTITUTIONAL LAW—United States—Jurisdiction over Federal territory within the boundaries of a state.

The defendant was indicted in the District Court of the United States for the District of Nebraska for a murder alleged to have been committed on a freight car on the right of way of the C. & N. W. Ry. Co. on the Fort Robinson Military Reservation in Nebraska. The jurisdiction had been ceded to the United States, "Provided, that the jurisdiction hereby ceded shall continue no longer than the United States shall own and occupy such military reservation."—Laws Neb. 1887, p. 628. Congress had granted the right of way in question to the Ry. Co., Act Jan. 20, 1885, c. 26 (23 STAT. 284). The defendant filed a plea to the jurisdiction of the United States upon the ground that the right of way was within the jurisdiction of the state of Nebraska The district court sustained the plea, 35 F. (2d) 750 (D. C. Neb., 1929). The government appealed under the Criminal Appeals Act, 34 Stat. 1246, U. S. C. tit. 18, sec. 682 (18 U. S. C. A., sec. 682). *Held*, that the grant of the right

of way to the railroad company was entirely compatible with exclusive jurisdiction ceded to the United States. Judgment reversed. *United States* v. *Unzenta*, 50 S. Ct. 284 (1930).

Congress has power to legislate "over all places purchased by the consent of the legislatures of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." Const. Art. I, sec. 8, cl. 17. The exclusive power of legislation necessarily includes the exclusive jurisdiction. *Western Union Tel. Co.* v. *Chiles*, 214 U. S. 274 (1908). The exclusive jurisdiction over places occupied for military purposes, when the site has been acquired with the consent of the legislature of the states in which it is situated, is vested in the national government. *United States* v. *Holt*, 218 U. S. 245 (1910). And while the United States may purchase or acquire lands within a state without its consent, yet under Art. I, sec. 8, cl. 17, it cannot exercise exclusive jurisdiction over such lands, unless the state consents to the purchase or acquisition of the lands, or by a direct cession grants to the United States its own jurisdiction over the same. *Pothier* v. *Rodman*, 291 F. 311 (R. I. 1924). As above stated, the central government may acquire title to land within a state without the consent of the state and this may be done by the exercise of the power of eminent domain, if the acquisition be for a constitutional purpose. *Kohl* v. *United States*, 91 U. S. 367 (1875). The acquisition of land in such a manner and in any case where not purchased with the state's consent, does not give to the United States permanent authority over such land. *Gill* v. *State*, 210 S. W. 637 (Tenn., 1919). But the United States will hold the land and the buildings erected thereon for the uses of the general government, free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed. *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525 (1885). In any such case the state may impose *conditions* which will not impair the effectual carrying out of the purposes of the acquisition. *Divine* v. *Unako Nat. Bank*, 140 S. W. 747 (Tenn., 1917); *Fort Leavenworth R. R. Co.* v. *Lowe*, *supra; Ch. R. I. & P. Ry. Co.* v. *McGlinn*, 114 U. S. 542 (1885). So in the case of *Anderson* v. *Ch. & N. W. Ry. Co.*, 168 N. W. 196 (Neb., 1918), a state statute requiring railroads to inclose their tracks was held not to operate with regard to a railroad right of way across a Government Military Reservation, such being incompatible with its effective governmental use. But a provision by the state for service of criminal and civil process within the lands acquired by the Federal Government as provided in Const. Art. 1, sec. 8, cl. 17, is not invalid and does not render the cession conditional. *Concessions Co.* v. *Morris*, 186 P. 655 (Wash., 1919). And the state courts have no jurisdiction over crimes committed thereon. *Palmer* v. *Barrett*, 162 U. S. 399 (1896); *People* v. *Hillman*, 159 N. E. 400 (N. Y., 1927). Where Congress has not acted in the matter of exercising jurisdiction in such cases the laws of the state and the jurisdiction of its courts remain unaffected. *Barrett* v. *Palmer*, 31 N. E. 1017 (1892).

In the principal case the query was whether or not the granting of the railroad right of way across the reservation, by the Federal

Government, operated to destroy its jurisdiction. In *Benson* v. *United States*, 146 U. S. 325 (1892), it was held by the court, that a temporary use of a portion of the Fort Leavenworth Military Reservation for farming purposes did not work a withdrawal of the land so used from the federal jurisdiction. And while in the instant case the grant contemplated a permanent use, yet as the court pointed out, "this does not alter the fact that the maintenance of the jurisdiction of the United States over the right of way, as being within the reservation, might be necessary in order to secure the benefits intended to be derived from the reservation, and that the right of way for railroad purposes was entirely compatible with exclusive jurisdiction ceded to the United States. M. D. R.

HUSBAND AND WIFE—Nature of the Husband's Right to his Wife's Services and Society.

Plaintiff sued for damages for loss of companionship and services of his wife, alleged to have been caused by personal injuries inflicted upon her by defendants at their place of business by negligent operation of an electric waving machine applied to her hair. Defendants demurred on the ground that the petition showed the alleged cause of action was barred by a Statute of Limitations which provided: "An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose." The statute in force prior to the one quoted provided that an action should be brought within four years "for the recovery of personal property, for taking, detaining or injuring it." This latter statute was amended by striking out the words "or injuring it," and on the same date the two year period statute was enacted. The statute providing the two year period was passed after the decision in the case of *New Amsterdam Casualty Co.* v. *Nadler*, 115 Ohio St. 472, holding that "bodily injury of any person" could not reasonably be held to include the kind of loss suffered by the husband. The trial court sustained the demurrer, but on appeal the judgment was reversed. The court held that it was evident that the legislative intent was only to reduce the limitation period for actions for injuring personal property and for bodily injury from four to two years. *Cliff* v. *Seligman & Latz*, 38 F. (2d) 179 (C. C. A., 6th, 1930).

"The term (property) is said to be *nomen generalissimum* and to include everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal, choses in action as well as in possession, everything which has an exchangeable value, or which goes to make up one's wealth or estate." 32 Cyc. 648. Clearly, a husband's right to his wife's services and society would be included within this definition. The cases involving the point raised in *Cliff* v. *Seligman & Latz*, *supra*, freely admit that the husband's right is a property right, and those cases which have denied a recovery have done so on the ground that the word "property" as used in the statute controlling the case was used in a restricted sense. In *Larissa* v. *Tiffany*, 42 R. I. 148, a statute provided: "If any person shall suffer or receive bodily injury

or damage to his property," etc., and it was held that a husband could recover under this statute for the loss of his wife's services, on the ground that the word property was used in its fullest sense. In *Foote* v. *Card*, 58 Conn. 1, the court said: "So far as the husband is concerned, from time immemorial the law has regarded the right to the conjugal affection and society of his wife as a valuable property." In *Chidsey* v. *Town of Canton*, 17 Conn. 475; *Harwood* v. *City of Lowell*, 4 Cush. 310, and in *Roberts* v. *City of Detroit*, 102 Mich. 64, the husband in each case failed to recover for the loss of his wife's services and society under a statute allowing recovery for injury to property. The court, in each case, admitted that the husband had suffered an injury to his property but held that the word property was used in the statutes in a restricted sense and that it was the evident intent of the legislaure that it should apply only to tangible, corporeal things. W. H. H.

INTERNAL REVENUE ACT, 1921, ss. 2, 214 (a) (11)—Charitable Purposes.

In *Bok* v. *McCaughn*, 42 F. (2d) 618 (C. C. A. 3d, 1930), the Collector of Internal Revenue refused to allow a deduction from the 1921 income return of the late Mr. Bok, holding that the Philadelphia Award was not for "charitable . . purposes" under the Revenue Act, 1921, ss. 2, 214 (a) (11). The Circuit Court of Appeals vacated the judgment of the District Court denying a recovery for the amount of the tax paid under protest.

In 1921 Mr. Bok transferred securities valued at $210,000 to named trustees so that the latter could each year award the sum of $10,000 and a certificate to that resident of Philadelphia or vicinity who "has rendered a service of such advantage to the city or to its inhabitants as to be eminently worthy of public recognition and reward." The opinion was written by Mr. Justice Buffington, the senior Circuit Judge of the Federal Judiciary, and is characteristic both in his approach to the question and his literary diction. In defining a charitable purpose he used the language of the thirteenth chapter of first *Corinthians*, and the language of Horace Binney: "Whatever is given for the love of God, or the love of your neighbor, in the catholic and universal sense, given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private or selfish." *Vidal* v. *Girard's Executors*, 2 How. 128 (1844). The Court took judicial notice of the acts of the trustees in making the awards, naming the persons honored. Last year's award was to Mr. Cornelius McGillicudy.

The public interest is assuredly furthered by such awards, and it is only proper that they be tax exempt, *a fortiori* when specifically covered by the Revenue Act of 1921 both as to language and spirit.

LEWIS C. CASSIDY.

MASTER AND SERVANT—Assumption of Risk; Simple Tool Doctrine; Federal Employers' Liability Act.

Martin was employed by the railroad company as a section hand. His labor consisted in the use of a pick, in aiding the removal of old ties. While working he swung the pick, missed the tie and struck the rail with the point, a sliver or chip of which flew up and struck his eye, causing the loss of sight. At the time of the accident, Martin knew that the point was dull; that the handle was crooked; and that the head of the pick was loose in the handle. *Held*, as a matter of law, Martin assumed the risk of injury from the flying chip, since it was a "common tool," notwithstanding the fact that a complaint was made to the foreman as to tools in general and the foreman's promise that new tools would be furnished. (Federal Employer's Liability Act; 45 U. S. C. No. 51-59.) *Penna. R. Co.* v. *Martin*, — Ind. App. —, 170 N. E. 554 (1930).

For discussion of the principles involved, see NOTES, *supra* p. 108.

A. A. S.

TAXATION—Power of State to indirectly tax bonds of the United States.

Appellant, an insurance company organized under the laws of Missouri, maintains that a section of the revised statutes of Missouri, Sec. 6386, was repugnant to the Constitution and the laws of the United States. The section provided that all the propery of insurance companies should be subject to taxation. The company made its return and included within it, some bonds of the United States. The board of equalization held that the bonds were not taxable but the Missouri Supreme Court held that they were. A writ of certiorari from the United States Supreme Court was issued. The latter court held that bonds of the United States were not taxable by the state government so could not be considered as part of the assets to be taxed by the State. *Missouri ex. rel. Missouri Ins. Co.* v. *Gehner* 281 U. S. 313, 74 L. Ed. 870 (1930).

This case is another link in the attempt of the Supreme Court to hold that government bonds are not taxable by a state government either directly or indirectly. But never has the Supreme Court gone so far as it has in this case. Here was no attempt neither directly nor indirectly to tax the bonds of the United States as such. Nowhere is there the attempt to "retard, impede, burden or in any manner control the operation of the constitutional laws enacted by the United States." *Weston* v. *City of Charleston*, 2 Pet. 449 (1829). It was in the case just cited, that the court laid down the rule which it has been following that "a contract made by the Government in the exercise of its power to borrow money on the credit of the United States is independent of the will of the states and is exempt from taxation." The bonds of the United States are contracts with which the federal government proceeds in its business and to allow the state to tax them would hinder the government in its operations. The situation here presented was an attempt by the

state to tax the assets of a corporation organized under its laws, and within its limits, the taxing power of the state is supreme. However, the court in line with some of its decisions, holds that even such a tax as here attempted is invalid as being without the limits.

Collector v. *Day*, 11 Wall. 113; *McCulloch* v. *Maryland*, 4 Wheat. 316.

Some time later the question arose as to whether a state could tax the aggregate of the property held by a taxpayer, practically the same question as presented in this case. Yet notwithstanding, that the court held that such a tax was not maintainable this case is nowhere cited in the principal case under review. *People* v. *Commissioners of N. Y.*, 2 Black. (67 U. S.) 620 (1862). Here the court stated that the attempt of the state to tax the stock is regarded as a tax upon the exercise of the power of Congress to borrow money on the credit of the United States. Following this rule the court held that the capital of banks invested in the stock of the United States was not taxable. *People* v. *Commissioners of N. Y.*, 2 Wall. 200 (1864).

Proceeding upon such authority, some state courts in which the question was presented, held that even the interest or income received from such bonds were not taxable, for to tax the interest as it becomes due would in effect tax the debt. *Bank of Ky.* v. *Com-Monwealth*, 72 Ky. 46 (1873). *Opinion of the Justices*, 53 N. H. 634 (1873). *Mosely* v. *State*, 86 S. W. 714; 115 Tenn. 57 (1905). *Polloch* v. *Farmer's Loan and Trust Co.*, 157 U. S. 422. And in a later decision the United States Supreme Court holds that to directly tax the income from securities amounts to taxation of the securities themselves. *Northwestern Mutual Life Insurance Company* v. *Wisc.*, 275 U. S. 136 (1927). From a review of the cases, it would seem that the rule as laid down is that the state cannot tax the income from federal government bonds or the bonds themselves either directly or indirectly.

There is a dissenting opinion filed in the principal case by Mr. Justice Stone in which Mr. Justice Brandeis, and Mr. Justice Holmes concurred. Mr. Justice Stone contends that as long as the tax is not upon the bonds of the United States as such, then it is valid. He claims that since the court has held inheritance and gift taxes on federal bonds valid that upon the same principle since the bonds themselves are not to be taxed as such, the court should hold the present tax as valid. *Plumer* v. *Cole*, 178 U. S. 65.

There are two cases that seem to wander from the general rule and support Mr. Justice Stone. In the *First National Bank* v. *Board of Equalization*, the Arkansas court held "a state may tax shares of stock in a national bank at their actual value without regard to the fact that a part of the whole of the capital stock may be invested in non-taxable bonds or securities, for taxation of the shares of stock is not taxation of the bonds." 122 S. W. 988; 92 Ark. 335 (1909). And a federal court held that a tax on the shares of a national bank which included bonds of the United States owned by the bank was good. *Hager* v. *American National Bank*, 159 Fed. 396 (1908).

It seems that the court impliedly assented to such a statement for in *Miller* v. *Milwaukee* it held a tax upon stock invalid because the only avowed purpose was to reach indirectly what it could not reach directly. 272 U. S. 713 (1926). As Cooley says, the test to be applied, is whether the tax deprives the person of the power to serve the government. Cooley on *Taxation*, Sec. 607, pg. 289. Here no person was deprived of his power to serve the government. However, as the court holds in its latest decision such a tax must be held to be invalid until the question will be again presented, as no doubt it will for sooner or later a case is bound to arise where a person either natural or artificial, has all or the most of his assets in government bonds which are sought to be taxed by a state.

S. G.

BOOK REVIEWS

BOOK REVIEWERS

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PRACTICE AND PROCEDURE IN THE SUPREME COURT OF THE UNITED STATES—by Reynolds Robertson. Revised edition. Prentice-Hall, Inc., New York, 1929. Pp. xlii, 418.

Since May 13, 1925, the Supreme Court of the United States has been acting under a new dispensation. Almost since the beginning, it had been struggling vainly to cope with the growing volume of its business and finally the Congress by the Act of February 13, 1925,[1] afforded a remedy against the overcrowding of the court's docket. The general effect of the Act was to transfer numerous classes of cases from *obligatory* review by the Court on appeal or writ of error to *discretionary* review by *certiorari*. More particularly it shut off access to the Supreme Court as a matter of right from the Court of Claims, the courts of the dependencies and the Court of Appeals of the District of Columbia.[2] Obligatory review of the decisions of the Circuit Courts of Appeals is abolished save where a state statute is held repugnant to the Constitution, treaties or laws of the United States, and direct review of the decisions of the district courts is abolished except as to five strictly limited classes of cases: (1) Suits under the Anti-Trust and Interstate Commerce Acts; (2) Suits to enjoin the enforcement of state statutes or administrative orders; (3) Suits to enjoin orders of the Interstate Commerce Commission; (4) Suits under the Stockyard and Packers Act of 1921; and (5) Writs of Error by the United States in criminal cases.

And finally, the litigation coming as of right to the Supreme Court from state courts was restricted to two categories: (1) where the validity of a state statute under the Federal Constitution was questioned sustained; and (2) where a Federal Statute or Treaty was invoked and its validity denied.

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[1] 43 STAT. L. 936 (1926).

[2] There may be some doubt as to this in those cases where a state statute has been held repugnant to the Constitution, treaties, or U. S. Statutes by the Court sitting as a Circuit Court of Appeals, but a reading together of sec. 240 (a), (b) and (c) of the Judicial Code as amended by the 1925 Act leaves this impression.

The general result of this Act is that only issues of national concern or of widespread importance can be carried to the Supreme Court as a matter of right, all others being relegated to the domain of grace exercised by the Court through *certiorari*. The particular results we shall examine later on.

It is believed that the Act was not intended to contract the volume of annual dispositions of the Court but to guard against their increase and the inevitable congestion which would result. Available statistics of the Court's business in the period 1923-1927, indicate a decrease in opinions and an increase in *per curiam* decisions; and an increase of reversals over affirmances.[3] The Court's obligatory jurisdiction is likely to keep the state courts as its principal feeders. The enlargement of its discretionary jurisdiction could have only one natural result and it now appears that the future administration of the Court's business will turn largely on *certioraris*,[4] with a growing absorption of the Court's time not in the adjudication of cases and the writing of opinions, but in deciding whether cases should be adjudicated. Its fear of further absorption in such preliminary work is reflected in its new rules.

The results of this legislation are encouraging, however, for in June, 1928, the Court had reached for argument on the regular calendar for the first time in 100 years cases docketed during the term.[5] As to the character of the Court's business, it appears from recent studies that common law controversies constitute only about 5 per cent, leaving 95 per cent to cases arising on some question of public law.[6]

Such was, in short, the state and nature of the Court's business when the first edition of Mr. Robertson's Manual appeared in 1928.

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[3] Frankfurter and Landis, *The Supreme Court under the Judiciary Act of 1925*, 42 HARV. L. REV. 1, 6 (1928); and see generally, by the same authors, THE BUSINESS OF THE SUPREME COURT (1927).

[4] Frankfurter and Landis, *op. cit. supra*, 11.

[5] See Mr. Justice Stone, *Fifty Years' Work of the U. S. Supreme Cout*, 14 A. B. A. J. 428 (1928).

[6] Frankfurter and Landis, *op. cit. supra*, 11.

Then the Congress by Act of January 31, 1928,[7] professed to simplify the Superior Court's appellate procedure by abolishing writs of error, substituting the appeal, and allowing appeal in all cases where it might be taken as of right to be had by merely notice on the adverse party. The proviso of Section 2 of the Act was so ill drawn that considerable doubt existed whether the writ of error still remained as a mode of review by the Supreme Court open to parties in a State Court of last resort. Mr. Robertson in Appendix D of his first edition reprinted the hearings held before the Senate Judiciary Committee upon this Act; and his revised edition devotes a chapter to the consideration of the effect of the Act and is amending Act of April 26, 1928.[8] Although the original Act reversed methods of review which had prevailed since 1789, it does not appear to have been thoroughly considered by the Congress or its implications canvassed.[9] The need of corrective legislation became, therefore, soon apparent, and the amending act provided that the statutes regulating the right to a writ of error should be applicable to the new "appeal" substituted by the prior Act for the writ of error. Mr. Robertson is of the view that the two Acts are procedural, not jurisdictional, and that the scope of review remains unaltered, but acknowledges that while the effect has been, theoretically, only a change of nomenclature, certain practical difficulties flow from it (p. 94 *et seq.*).[10]

Finally the Court adopted on June 5, 1928, new Rules of Practice,[11] effective July 1, 1928. These are well deserving of examination as showing the Court's efforts to conserve its energies and prevent encroachments on its time. Except as to appeals from Circuit Courts on certified questions, it requires a preliminary examination on printed briefs. In cases arising on *certiorari* the writ is allowed

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[7] 45 STAT. L. 54 (1928).

[8] 45 STAT. L. 466.

[9] For the legislative history of the Act, see 41 HARV. L. REV. 673 (1928).

[10] Rule 46, of the Court's Revised Rules, specifically states that appeals in equity are not affected by the new legislation, 275 U. S. 595, 630.

[11] *Ibid.*

only upon printed petition and opposing brief, where filed.[12] A jurisdictional statement is required of the appellant in all appeals, which in its extent is almost tantamount to a brief, and the appellee is allowed to answer.[13] Moreover, an assignment of errors in all appeals is now required.[14] Whether this practice accomplishes any useful end in shortening the court's labors would seem very doubtful in those cases where the appellant adopts his whole record as such an assignment, as is said by the author to have been done on a number of occasions (p. 162).

These new statutes and the ensuing new rules have fully justified a new edition of Mr. Robertson's valuable manual.

Through the mazes of procedure in perfecting an appeal and in obtaining a review by *certiorari* Mr. Robertson leads the reader with commendable clarity. He also gives consideration to motions, briefs, orders, and procedure in original actions. Throughout his method is expository and not critical, accepting matters as they are, explaining how they are, but never wasting breath on how they should be. As the author states that he served seven years in the office of the Clerk of Court (Preface, v), it may be regretted that he has not given us the benefit of his considerable theoretical knowledge and practical experience in the form of constructive criticism of Supreme Court practice. Had the author been writing as a Government official preparing a public document to be published at the Government Printing Office, such modesty and reticence as to his own views of practice might have been expected, but in the circumstances of publication they seem hardly explicable.

No quarrel can be had, however, with the admirable way in which the author has described the details of procedure, and the book judged solely as a handbook of practice is excellent. A valuable collection of forms has been added in an appendix, set up even in the type conformable to the Court's Rules (p. 171), so that none need go

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[12] Rule 38 (3), *ibid.*, at 623.

[13] Rule 12 (1, 2), *ibid.*, at 603.

[14] Rule 9, *ibid.*, at 600.

astray. The three Acts discussed above are given in another appendix, while the Court's new Rules appear in a third, and an index concludes the volume. An error was noted on page 99, where the act referred to was clearly intended to be that of February 13, 1925.

The book is authoritative in its field and can be fully commended.

MANGUM WEEKS.

Washington, D. C.

WIT, WISDOM AND ELOQUENCE—by R. L. Gray. The Harrison Company, Atlanta, 1930. Pp. 266.

This compilation of amusing stories and anecdotes, historic debates, jury speeches and bits of eloquent wisdom by talented men, is the work of a lawyer of the old school who, in years of his active practice, preserved in a scrapbook much of the material, and has now published it for the edification and entertainment of the legal profession and other readers.

The book is redolent with the silver-tongued oratory of the South represented by many excerpts from speeches of Henry W. Grady, Col. Robert Taylor, Senator John W. Daniels, Daniel W. Voorhees and others. In fact, oratory of the platform and hustings forms the greater part of the book. Selections from several of Lincoln's stirring speeches are given space. President Andrew Jackson's defense, Daniel Webster's eulogy on General Washington, and Henry Clay's farewell are representative of the best that the book contains.

Too much space has been given to the writings of Robert G. Ingersoll and but little devoted to verse. Some of the most beautiful expressions of wisdom and eloquence have been written in meter, and it is regrettable that the taste of our compiler did not cause him to give many stanzas that he could have found appropriate for this work.

JOSEPH D. SULLIVAN.

Georgetown University School of Law.

BLACK ON BANKRUPTCY—by Henry Campbell Black. Second edition by Editorial Staff of the Publisher. West Publishing Company, St. Paul, 1930. Vol. XVI, pp. 905.

By this time opportunity has been afforded to test this volume, though only published this year, by reference to it in the use of the case book carried in class room work. Always this is helpful in attempting to arrive at a judicious and practical review of a new treatise on any subject of the law.

In the preface to this edition the publisher more than admits that "important and far reaching amendments" have been made to the Bankruptcy Law since the publication of the first edition of this work in 1925. These "have materially affected both the principles of substantive law and procedure in bankruptcy," it is stated. References are made to the fact that "many sections of the Bankruptcy Act of 1898 were directly amended by" Congress in 1926, "including those relating to bankruptcy courts, acts constituting acts of bankruptcy, compositions, discharge, time within which claims must be proved, and priorities"; that the Act of Congress of 1925, amending the Judicial Code, affected particular appellate procedure in bankruptcy, and that bankruptcy procedure has been further affected by the Act and Amendatory Act of Congress, respectively of January 31st, 1928, and April 26th, 1928, abolishing writs of error in Federal courts, or from the Supreme Court of the United States to the state courts and substituting relief by appeal only.

"The effect of these statutes having become an integral part of the Bankruptcy Law, has therefore," says the publisher, "become a matter of the highest importance to the students of that law at the present time."

While the new edition incorporates these in the text and includes in the appendix supplementary forms and orders in bankruptcy as promulgated by the Supreme Court, including those of April 13, 1925, and January 13, 1930, nevertheless, the new edition contains the exact number of pages that made up the first edition and of the same type of print. This is possible, of course, only as the result of using the same plates of the first edition with only such changes here and there as all too succinctly and unsatisfactorily treat of the amendments of Congress

admitted to be of the highest importance. The explanation for this is given that on account of the recentness of them their "construction by the courts remains largely a matter for the future." No annotations appear of a date subsequent to those of the first edition. No table of cases has been included in either edition.

A noteworthy correction made in the second edition is that in section 27 relative to the presence of insolvency on the part of the debtor proceeded against for having made a general assignment. In the first edition both the statement in black letter text, and in the treatment following had been made, and the important decision of the Supreme Court of the United States in Geo. M. West Company v. Lea, 174 U. S. 590, had been cited in support of the proposition that "insolvency at the time of filing the petition is always necessary to be shown," while the Supreme Court in that decision had held just to the contrary if the act of bankruptcy was that of making a general assignment.

While insertion of the words, "or permitted" has been made in the text on pages 616 and 618, no explanation or discussion is indulged in as to why these words were added by Congress in one of the amendments of 1926; in fact, the emphasis on the word "required" tends to mislead or confuse. Not even the decision by Chief Justice Hughes when he was first on the bench in 1916 in the case of Carey v. Donohue, 240 U. S. 430, and which resulted in the amendment of the pertinent provision of the act, is referred to, nor is the case to be found in the annotations of either edition.

The rather vexing problem set forth in Carey v. Donohue, has been treated of in 29 Harvard Law Rev. 766; 5 Mich. Law Rev. 465; 14 Mich. Law Rev. 578; 15 Mich. Law Rev. 69; 16 Mich. Law Rev. 258, and 14 Columbia Law Rev. 440, and yet no reference is made to these helpful discussions, nor is any law review material given reference to in the volume at any point.

The new edition has failed to clarify the treatment of the first edition as to fraudulent and preferential transfers, particularly, the question of the element of intention involved. While the treatment in both editions is superior to that found in some of the smaller treatises on bank-

ruptcy, it still remains quite short of the clear and definite and satisfying statements and discussion that such transfers justly call for at this late date at the hands of an authoritative text writer or commentator.

Notwithstanding defects such as those regrettably noted, this volume, as did the first edition, partially fills a want as well or better than any other treatment of a subject such as the well known Hornbook Series, of which it is one, affords.

A text edition on the subject, brought up to date with clarity and with authoritative exposition, that can be conveniently carried along by students with their case book, not in any sense to take the place of or supplant the full and larger treatments in more than one volume by such authors as Remington and Collier, and which, of course, are found in all law school libraries, would be welcomed cordially.

The intricacies and technicalities of the subject as evidenced by the welter of conflicting decisions of the lower Federal courts, seem out of proportion to the comparative status of it, yet the fact that they unfortunately exist and in the midst of this conflict of interpretation of the act may be said to persist, would seem all the more to challenge a searching analysis and an illuminating exposition by some one infected with the "student's restless zeal for learning."

WILLIAM JENNINGS PRICE.
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COMMERCIAL LAW: PRINCIPLES AND CASES—by Charles Newton Hulvey. Macmillan Company, New York, 1930. Pp. viii, 643.

Principles of Commercial Law have been made available to college students generally by either of two methods: the case method or the text method. The *Cases on Business Law*, edited by Britton and Bauer, exemplify the first method and *Huffcutt's Elements of Business Law* (Bogert edition), the second. Mr. Hulvey's has chosen to combine the two methods. Having used both methods of instruction, their combination now seems to the writer more advantageous than either alone. The advantages of the case method are not apparent to the average law

student until his second year, but there is no second year course for the business law pupil and it is important that he have a grasp of leading principles. Time does not allow for the proper distinguishing of cases which is the basis of the case system.

Appendices cover the Uniform Partnership Act as well as the Bankruptcy Act and other important forms. The cases cited are teachable ones and their principles are clearly set forth in the text. The six chapters on Contracts are the best in the book, but the first chapter, dealing with "General Principles of American Law" could be revised in a second edition. References to Roman Law in section 2 are misleading and meager and might well have been entirely omitted, and references to "Blackstone, Pomeroy, Kent, Story, Williston and Pound" as having "rendered great service through legal research" is achronological with reference to Pomeroy, and Dean Pound is primarily a legal philosopher and educator, although qualified to write a lasting treatise on any legal subject.

Blackstone's definition of law is as obsolescent (sec. 1) as reference to a corporation (Sec. 222) as an artificial person. There is nothing artificial about corporate personality, for the state may make anything it desires to a person, that is, the subject of legal rights and duties. Professor Beale, in his masterly restatement of the Conflict of Laws, defined corporate personality as a quality, and properly so.

Mr. Hulvey's book is well written, sufficiently inclusive, and will be widely used. The difference between Homer and modern authors was said to be that Homer knew what not to say, and this text does not cover too much. For succinct statement of the law, Professor Bogert's edition of *Huffcutt's Business Law,* different in scope, has not been surpassed, and teachers of Commercial Law should be reminded that Professor Williston delivered in 1915 before the Boston chapter of the American Bankers' Association a series of lectures on Business Law which should be reprinted and more widely used.

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T. J. F.