6. Archaistic Tendency of Justinian.

Pringsheim, some nine years ago,[134] referred to the archaistic tendency of Justinian's legislation. A number of references were made to the Code, and it would seem that I cannot overlook mentioning the subject in this paper, in view of the fact that many old rules were brushed aside in that collection of laws. Pringsheim refers to other authors, particularly Levy, Wlassack, Erman, Wenger, as sustaining his view in certain particulars. Levy writes:[135] "We shall more and more definitely have to take the position that the law of Corpus Juris is not the living law of Justinian's age. It is a world-historical paradox of peculiar sharpness, that the most influential codification of all time never was really in force at any time." These are strong words. I have neither the desire nor the temerity to question the judgment of such pre-eminent men in the field of Roman law. I ask indulgence, however, in making a few suggestions or observations, some of which

(134) 1 Studi Bonfante 551 ff.
(135) 49 Z.S.S. 240, note 5.

may, possibly, aid in appraising the extent of such tendency. I do even that with some degree of hesitancy. We should, in this connection, distinguish between Justinian's legislation and his compilation, for that remnants of old law, not applicable in Justinian's time, were left in the compilation can scarcely be doubted. The contrary would be surprising, especially in view of the rapidity with which the compilation was made. Ever so often we find some of the decisions in our own country stating a rule of law which originated under conditions different from those existing now, and which in fact has no application now.(136) That the compilation was based mainly upon older texts cannot be surprising. Our own statutory compilations are generally of the same character. It would have been a herculean task to have attempted anything else. I need but mention the work of our own Law Institute. True, the compilation of the Digest was based upon texts 300 years old and older.(137) But even that cannot be surprising and does not necessarily indicate an archaistic tendency. The intervening

(136) See e.g., citation of cases in Rinehardt v. Rinehardt, (Wyo.) 75 P.(2d) 340, as to rule of presumption in contracts by married women with husbands.

(137) But see Krueger, Herstellung, 60.

period had been unfruitful. The compilers took the best material available, and this shows that Justinian and his workers were practical men. Of course, the very fact of the use of old laws and of the works of old jurists had the not unnatural effect of clothing the compilation in an historical costume, as Levy expresses it.(138) This was avoided in the West.(139) In Justinian's legislation we find a number of references to the Twelve Tables. These references are made mainly in connection with the statement or desire that the then generation should return to the simplicity of ancient times. And that is due mainly, as Pringsheim points out, to the spirit of Christianity with which Justinian was thoroughly imbued. Some statements referring to ancient times are doubtless due to the pride with which Justinian quite naturally looked upon the long and, in many respects, glorious past. Some are probably due to the desire to bolster up, or strengthen, the new enactments. In some instances, as in connection with the laws of inheritance, a former rule was restored.

(138) 49 Z.S.S. 244.
(139) Idem, 241 ff.

In most instances a repeal of a previous law was but the occasion of introducing a new rule. And we must presume, notwithstanding the language used, that in those cases in which Justinian's enactments purport to go back to the ancient laws, he at the same time expressed his thought and idea of what the law should be then. His enactments would probably have been made in any event, and the reference to ancient laws served merely as a cloak. The reason for that is plain. Every man is the product of the civilization in which he lives. It is inherently difficult for him to consciously entertain[140] ideas of former ages or transplant them to his own, unless those ideas at the same time conform to the standards of the latter, and the more remote the former age, the greater the difficulty.[141] Hence, merely to refer to the good old times of the past cannot be taken too seriously. Every generation is apt to do that. In some instances the acts of Justinian seem to have been misconstrued. Jolowicz, for instance,[142] refers to the fact that Justinian still retained a trace of the

(140) A Code may be adopted -- as in Japan -- all the provisions of which may not be understood or be applicable. But that presents a different situation.

(141) "Giustiniano non intendeva e non poteva resuscitare il diritto antico con tutte le sue divisioni gia morte." Riccobono in 2 Melanges Cornell 272.

(142) Historical Intr. of Roman Law, 223, referring to C.8,37,14.

necessity of the presence of parties in the making of a stipulation, and thinks that "presumably this must be regarded as another instance of his archaistic tendency." It is difficult to see how the eminent author arrives at such conclusion. The contrary of what he states seems to be more nearly correct. It was not an accepted fact among the people that the presence of the parties was not necessary. There were disputes about it, as Justinian tells us, and instead of an archaistic, he took an advanced step, eliminating the requirement of the presence of the parties to a large extent. If that is not quite true, then the most that could be said is that Justinian in this instance showed the conservatism of most of the lawmakers, and conservatism should, it would seem, clearly be put upon a different footing than an archaistic tendency.

Without attempting to further discuss the various laws which are said to represent an archaistic tendency, permit me to make a few observations or suggestions on the rules of procedure in connection with which, as Pringsheim states, this tendency has best

been shown.

There is no doubt that at first blush an archaistic tendency appears in this connection. There seem to be too many useless reminders. We arrive at that conclusion easily by an a priori reasoning, in view of the fact that the later procedure bears an analogy to our Code Procedure. We find, for instance, reference to interdicts, when in fact these had become but simple actions; to praetorian and civil law actions; to analagous and "fictitious" actions; to restitution to former rights as a special proceeding, when the relief sought thereby was, in some cases at least, obtained by direct action.(143) However, the mere use of old terminology does not indicate an archaistic tendency, unless a then impracticable rule is thereby sought to be enforced.(144) There is no evidence that this is true, although, as Savigny pointed out long ago,(145) simpler terminology, more appropriate to Justinian's system of procedure, would have enabled us to arrive at clearer understanding and would have

(143) See Levy in 49 Z.S.S. 241 ff.
(144) See Riccobono in 2 Mel.Corn. 272 as to the difficulties in this respect confronting the compilers.
(145) System 7,112 f.

saved us some headaches in attempting to solve what seem to us to be puzzles. The references, cast as they were in an "historical costume," in fact subserved a useful purpose, as will appear presently. They may show reverence for the author whose text was used, or they may show a lack of energy in not recasting the text, but they do not necessarily show an archaistic tendency, if by that tendency we mean, as I presume we do, a return to old rules then impracticable. Erman believed that forms of action had entirely disappeared in the period preceding Justinian, and that he revived them.(146) He called attention, e.g., to a text in the Theodosian Code(147) which provides that if a woman betrothed to a man refused to marry him, gifts to her by him should be recoverable, without mentioning any action, but that the compilers in putting the law into Justinian's Code,(148) provided that the gift should be recoverable by specific actions, namely by condictio or utilis in rem actio. It cannot be denied that the citations are of some

(146) 19 Z.S.S. 305, note.
(147) C.Th.3,5,8.
(148) C.5,3,15.

significance. The text in the Theodosian Code follows the course taken in the Western part of the Empire.(149) Still, the citations are not altogether too persuasive and the comparison loses its force in view of other textual evidence. Erman apparently did not consider the fragment of "de actionibus"(150) which itself seems to disprove his theory, in so far as the Byzantine Empire is concerned. Collinet and others(151) with textual evidence supporting them(152) believe that the name of the action which was brought was required to be communicated to the defendant. Theophilus in his paraphrase of the Institutes states that the plaintiff might assert his claim by referring to the name of the action. He gives us the formula which the plaintiff might use in a certain case, namely, in substance: "I make a

(149) Levy in 49 Z.S.S. 243.
(150) Collinet, Proc. par libelle 502 ff; 14 Z.S.S. 88-97.
(151) Collinet, supra, 116, 280. Bekker Die Actionen, 2, 234 ff; 358 ff. goes farther in holding that forms of action survived to some extent. So does Schmid, Cessio 1,12. See Levy, Konkurrenz 2, 17 ff. and C.4,28,3; Wlassack, Anklage 176 and note; Wenger, Inst. 256 and note; Riccobono believes that the formulae remained "per indicare in forma stringata la natura dell'azione." 2 Melanges Cornell 261.
(152) Cons. 5,2 and 7; 6,2; See Mitteis in 29 Z.S.S. 471-472; Nov. 35, 14 and Collinet, supra.

claim against you as one under the Salvian interdict."[153] Now the Salvian interdict implied certain facts and certain results consequent upon such facts. The information thus given to the defendant was of no small importance. Levy is right, I think, if I understand him correctly, in saying[154] that by a formula similar to the foregoing the plaintiff impliedly asserted a certain state of facts, made a certain claim and invoked a rule of law covered formerly by the interdict (or law). If that is correct, then leaving in the compilation reference to the various forms of action was of use in Justinian's time. Whether the designation of the form of action by name, as here mentioned, was the only method of using forms of action, as Levy seems to assume, is another question. Theophilus[155] gives us a number of forms, which in so far as they go, are modeled after those in use during the formulary period, except that the first person is used, as: "If it appears that the property is mine, condemn the defendant." He only gives us the intentio and condemnatio.

(153) Inst. 4,15,8 - Ferrini 2,482. In Latin translation: "utilem actionem tamquam ex Salviano interdicto adversus te intendo."
(154) 2 Studi Bonfante 283.
(155) Inst. 4,6; 4,10,2.

It is, however, probable that he merely thought that sufficient for illustration. He tells us that the allegations might be framed in any other manner, showing that the rules were liberal. The assumption that these forms were only taught in the school rooms does not appear to be based upon any too solid foundation. If these forms which he gives were antiquated, and not in use in his time, it would seem that he would have given an illustration of the form of pleading used in his day. A short form of pleading, modeled after the praetorian formula, was not inappropriate, for the details of the facts were given at the time of joinder of issue.(156) Even a note to the Basilica(157) gives us a form of action: "Because I possessed this property in good faith, upon just ground, and prescription was running in my favor, but in the meantime I was cut off from completing it, this property appears to be mine as though I had completed the period of prescription." Of particular significance are texts which contrast one action with another.

(156) C.3,9,1.
(157) Bas. 12,2,7; Heimbach 1,799.

Thus we are told in the Code[158] that the action to recover an inheritance (petitio hereditatis) could be used only in certain cases, and that in other cases it would be necessary to use some other action in rem. It is hard to believe that a positive provision such as that would be left in the compilation if it had no meaning whatever. C.2,57,2 did not abolish all forms of action. It merely provided that no action in a particular form was necessary to be granted by the judge having jurisdiction. An action, according to that text, which was appropriate to the matter in hand was a proper one. And while C.2,57,1 abolished the formula, it abolished only the one theretofore in use, determined and fixed by the praetor or other official. Neither it, nor any other text makes provision, at least directly, as to what should take its place, and that is rather a striking fact. Custom and practices, if once deeply rooted, are apt to be tenacious. Consider the history of our own action in ejectment. References to forms of action are still

(158) C.7,34,4; C.3,31,7; Pernice, Labeo 2,1,394. Code 3,31,7 is thought interpolated. Longo, L'Hereditatis petitio, 68. If that is so, it but emphasizes the argument here made. Other texts contrasting one action with another are: D.17,1,6,1; D.17,1,8 pr.; D.17,1,8 4; D.17,1,10,4; D.17,1,10,5; D.5,3,16,6; D.5,3,19,1.; D.5,3,19,3;

constantly made under our Code procedure. It is, accordingly, not difficult to believe that such forms, however modified, stripped or attenuated, persisted in some manner up to and including the time of Justinian and thereafter, and the texts, therefore, which refer to the various actions, are not as archaic as they otherwise would seem to be. Erman believes[159] that the actio in factum, as an action based on a specific transaction, had disappeared, and was revived by the Byzantines. Now such action necessarily merely stated the facts on which it was based; it exactly fitted into the new system,[160] and the archaistic tendency in mentioning it is not easily perceived. Wlassak[161] refers to the re-establishment by Justinian[162] of the litis contestatio, and particularly the establishment of that institution in criminal matters, as showing that Justinian looked backward. It may be said, however, that this institution, though its meaning had changed, had its use. Justinian provided that civil cases should be finished in three years[163]

(159) 19 Z.S.S. 305
(160) Bekker, supra, 234; Levy, Konkurrenz, 2,20.
(161) See Pringsheim, 1 Studi Bonfante, 562-563; Wlassak, Anklage 228; Wenger, Inst. 278.
(162) C.3,1,9.
(163) C.3,1,13.

and criminal cases in two years,[164] after joinder of issue. Certainly for a rule of that kind no better time could be fixed. And that is not all. In the formulary period the parties went before the praetor. They laid their respective claims before him, so that they had the opportunity of finding out the details thereof. The formula itself was short and succinct. Under the circumstances it did not need to be otherwise. Under the new procedure a different course was required. The written pleading would naturally and ordinarily follow the precedent of centuries, set by the formula -- to make it short and succinct. But the parties had no opportunity previous to the time of such pleading to find out the details of the claims of the plaintiff. So Justinian,[165] to remedy this situation, provided that the detailed information should be supplied at the time when the parties should first meet in court. The oral, detailed statements at that time were called joinder of issue (litis contestatio). That meeting took the place of the meeting before the praetor during

(164) C.9,44,3.
(165) C.3,9,1; C.3,1,14,4; C.2,58,2,pr. Perhaps already introduced before Justinian?

the formulary period. In other words, Justinian thoroughly modernized the joinder of issue and supplied an essential requisite for the new procedure. That a term was used which had a different meaning than it had formerly cannot be of significance. Joinder of issue (litis contestatio) had its use under the new system, and the look backward in that connection cannot, it seems, have been penetrating.

However, whatever archaistic tendency appears, must be interpreted in the light of the laws as a whole, and its extent guaged mainly by whether or not we can say that it embraced and affected fundamental and vital rules. Looking at some general principles, we find that Justinian tells us, as I have already stated, that he has cut out many of the ambiguities in connection with stipulations and agreements. He does not try to re-establish the old system of the oral stipulation. He engrafts a new principle upon the consensual contract of purchase and sale in providing that a sale for only half the value of the property may be rescinded.(166)

(166) C.4,44,2.

He leaves mancipation where he finds it. He even permits the document evidencing ownership to stand for the property itself.(167) He permits new methods for the manumission of slaves. He enlarges the rights of children to property, merely following the tendency prevailing before his time. He virtually abolishes the old rule that a husband is the owner of the dowry brought him by his wife,(168) and follows therein the progress which had already been made in that direction, and was influenced therein, not by the spirit of the ancient law, but by Christian ideals that husband and wife are equal. He abolishes or leaves Latin citizenship where he finds it.(169) He does not attempt to re-establish it. He abolishes the circuities in making contracts transmissible after death, and makes a direct rule in that connection. He establishes new precepts relating to procedure, and in many different ways, too numerous to mention here, freely, unhesitatingly, and even sarcastically(170) leaves ancient paths, and points out new routes to travel. The "acerbity,"(171) the

(167) C.8,53,1; C.8,16,2.
(168) C.5,12,29-31.
(169) C.7,6,1.
(170) Riccobono in 43 Z.S.S. 381.
(171) C.7,54,3,3.

"asperity,"[172] the "scrupulosity,"[173] the "harshness,"[174] the "severity,"[175] the "austerity,"[176] the "subtlety,"[177] the "narrowness"[178] of the law are sought to be abolished, and justice is proclaimed to be supreme.[179] And Justinian tells us specifically that "we who cherish the truth, want only those legal institutes to appear in our laws, which exist in fact."[180]

As I stated before, it was inevitable that archaic rules should be left in the compilation. While Justinian directed that all should be co-ordinated into a harmonious whole, the compilers did not succeed in doing so. It is altogether likely that they did not, in some instances, fully understand the import of some of the ancient texts adopted by them. We find many contradictions. Some were probably the result of oversight. In the case of others, the compilers, interpreting the texts in the light of their day, under the conditions confronting them, probably did not see

(172) C.5,4,28,2; C.8,34,3 pr.
(173) C.7,71,6; C.1,14,12,2; C.8,37,13,1; C.7,40,1,1.
(174) C.1,14,9; C.3,34,6; C.4,21,21,4; C.5,31,8; C.9,7,1; C.10,35,2,2.
(175) C.3,26,8; C.4,29,25,1; C.5,4,28,4; C.9,4,4,1.
(176) C.7,63,5,6.
(177) C.3,23,31; C.2,55,4,7; C.1,3,31; C.3,33,13; C.4,18,2; C.4,11,1,2; C.4,11,1,2; C.5,27,6 pr; C.8,37,13; C.8,53,33; C.7,25,1.
(178) C.6,51,1,1b; C.6,25,7 pr.
(179) Numberless passages.
(180) C.7,5,1; similar const. de auctore 7,10; Omnem 3; Tanta, 1,5,11,16.

these contradictions, and believed that, properly interpreted, the texts could be harmonized. We should at least give them credit for good faith. I must emphasize again that the mere use of old terminology cannot be accepted as a criterion of an archaistic tendency. The criterion necessarily is, as to whether or not an old rule was reintroduced which was impracticable, and could not be made practical, in Justinian's time. If it was capable of an interpretation so as to be of practical value at that time, no archaistic tendency can be attributed to it. These statements would seem to be axiomatic. Take, for example, the texts which state that a mute could not enter into a stipulation. Riccobono considers this rule antiquated and that other texts indicate the contrary.(181) Perhaps so as to stipulations in writing. But of course, the antiquated texts must still have been in force as to oral stipulations, and perhaps were interpreted with that limitation. All in all, it would seem to be at least a question at this time, as to whether or not,

(181) 43 Z.S.S. 268 f; 385 ff.

contrary to the precept above stated, archaic rules were left in the compilation intentionally at least in connection with any fundamental rule, except in those cases where such rules were, for one reason or another, and in the light of the conditions of that day, deemed to be capable of subserving some useful purpose which we are not able to see at the present time.[182]

(182) See 1 Pacchioni, Corso, Appendix II, Sec. 4.