

7. Eastern Influence.

There is much dispute on the point as to what, if any, influence the East, particularly the Hellenic countries, and the law schools, particularly Berytus, had on the law as laid down in the Corpus Juris. The Code has many texts which have more or less bearing on the subject, and I should not, perhaps, be justified in entirely avoiding the controversy in this paper, although I must necessarily be brief. Professor Riccobono and his school maintain that the law developed organically without such influence. Albertario, Pringsheim, Collinet and others maintain the contrary.⁽¹⁸³⁾ These men are, respectively, illustrious protagonists, and when they cannot agree, it is not a wonder that those of us whose main line of studies lies in a field other than that of the Roman law, still remain in a state of uncertainty. Whatever we may say on the subject is offered in the hope that our doughty protagonists may, without losing patience, continue in their endeavor to

(183) See Kubler in 57 Z.S.S. 414

enlighten us. The subject, to some of us in any event, (184) is not altogether clear, and we shall keep an open mind for any new light which further investigations or new finds among the papyri may shed upon it.

Greek philosophy had more or less influence in shaping the thoughts of educated Romans from the time when Rome came in close contact with Greece. How much influence it had upon Roman law is a matter of conjecture. (185) All or substantially all of Diocletian's rescripts were directed to people in the East, and were intended to combat rules contrary to those of the Roman law. (186) But a change took place, commencing with the time of Constantine the Great. The main capital of the empire henceforth was Constantinople, instead of Rome. That itself was bound, in the long run, to have its influence. The development of the law --- the changes which are made therein from time to time --- depends very largely upon economic, social and psychological factors. While rules once definitely fixed are not, ordinarily, easily changed, they cannot resist these

(184) The writer has not had access to all the literature available on the subject, particularly that of the International Congress at Rome in 1933.

(185) See Riccobono in 2 *Melanges Corneil* 242; Steinwenter in 2 *Studi Bonfante* 329; Kaden in 57 *Z.S.S.* 545; Albertario, 1 *Studi Bonfante* 629 ff.; Stroux, *summen jus summa injuria*.

(186) See e.g. Pringsheim, *Kauf mit fremden Geld*; Felsenstraeger, *Antikes Loesungsrecht*.

factors, if persistent. We must judge Hellenic and Oriental effect on Roman law in that light. The changes made in the law up to and including the time of Justinian are varied in character. I shall mention a few of them, as illustrated in the Code.

A free person could not, ordinarily, become a slave as a result of a private transaction. We find it stated in the Code that "the law is certain that free persons cannot be made slaves by changing their condition by private agreements or by virtue of a private transaction."⁽¹⁸⁷⁾ Again, it is said that "it is clear that free persons cannot change their status by posing as slaves."⁽¹⁸⁸⁾ The only exception which we find is that when a person of age sold himself to share in the price, he became a slave. Even that rule did not apply, if he merely concealed his status, and without sharing in the price.⁽¹⁸⁹⁾ Nor could a free person be pledged as security for a debt.⁽¹⁹⁰⁾ In so far as we could learn from the Digest, these rules remained the same throughout. But that is not the case. Constantine the

(187) C.7,16,10.

(188) C.7,16,39.

(189) C.7,18,1.

(190) C.4,10,12; C.8,16,6; D.20,3,5.

Great engrafted an exception upon the rule by providing that in case of want and poverty, children -- finally confined to nurselings -- might be sold by their parents. (191) The emperor states that the right to make such sale was recognized by former emperors. (192) But we know of no such recognition, except by Constantine himself and his co-emperor. (193) Diocletian, his predecessor, wrote in 294 that "it is plain law that children cannot be transferred by parents either by sale, gift, pledge, or in any other manner." (194) It almost seems that Constantine made the statement just mentioned by way of apology for his enactment. Such a law was not made in the course of the normal development of jurisprudence. It was contrary to the concepts of Christianity which Constantine favored. It is, in fact, rather surprising that it remained in Justinian's compilation. It is true that children were sold in Germany, France, Phrygia, and at one time (195) in Greece, though that is doubtful as of the time of Constantine. (196) While these facts may have influenced the emperor to some extent, the real explanation undoubtedly

(191) C.4,43,2; C.Th.5,10,1; C.Th.11,27,2.

(192) C.Th.5,10,1. Early Roman law, permitting sales, is left out of consideration. That right had ceased long before. See Schultz, Principien, 135.

(193) Vat.fr.34; Bonfante, Scr. Giur. 66-67.

(194) C.4,43,1; See also C.7,16,1.

(195) Weiss, Pfandrechtliche Unters, 29, 61.

(196) Philostratus, Life of Appollonius, 8, 7.

is that he recognized the practice by reason of economic pressure. Of similar character are the laws already mentioned relating to the assignment of choses in action to dignitaries, ⁽¹⁹⁷⁾ and those forbidding debtors to call dignitaries to their aid. ⁽¹⁹⁸⁾ It was pressure, social and economic, which caused the enactment of such laws. One law, at least, ⁽¹⁹⁹⁾ was largely due to the fact that Justinian married Theodora, an actress and woman of low degree. Other laws, particularly those relating to second marriages, ⁽²⁰⁰⁾ and a number of others, were due to the spirit of Christianity. Laws relating to ante-nuptial and post-nuptial gifts were to a large extent due to the customs in the East.

Let me turn now to some laws of a somewhat different character.

We find a rescript of the emperor Alexander ⁽²⁰¹⁾ of the year 231, which states as follows:

"You are wrong in thinking that you have a right of action for dowry promised you by stipulation, but which was not paid, since neither any specific thing nor any specific amount was promised, and the marriage document only states that the woman who married you promised to give a dowry."

(197) C.2,13.

(198) C.4,14; C.11,54.

(199) C.5,4,23.

(200) C.5,9,1-10.

(201) C.5,11,1.

Here the contract apparently was considered void, if it did not point out the specific thing or amount which was promised. Now compare that with another rescript in the same title, purporting to have been written in the year 240, ⁽²⁰²⁾ and which reads as follows:

"If, when you married your wife, the party whom you mention solemnly promised to give you a dowry in her behalf, the amount, not fixed, to be according to his best judgment, but he has failed to carry out the stipulation attached to his promise, you may compel him to do so, by suing him in the proper action; for the stipulation seems to contemplate that the amount to be paid is an amount according to the judgment of a just man."

Here the agreement was construed to mean that the amount could be fixed by a man of good standing, thus making the contract certain, and stating a rule materially different from that stated seemingly nine years before. Now a change of that character did not, of course, necessarily imply an outside influence in order to bring it about. But if one or the other of the texts is interpolated, as seems to be agreed, ⁽²⁰³⁾

(202) C.5,11,3.

(203) Albertario in 1 Melanges Corneil 6; 1 Studi 341; Rabel in 47 Z.S.S. 486; Riccobono in 34 Z.S.S. 180; see Schultz in 48 Z.S.S. 691-2.

it is then a fair question whether it is true that the change was brought about through practice and a normal organic development of the law or otherwise. Let us briefly trace what would seem to be the probable course of development.

During the pre-classical, and until Hadrian's time, the major power which modified the law was that of the praetor. After Hadrian, his functions in that respect ceased. His work, however, was not done. For more than a century his edicts were illustrated, amplified and expanded by great jurists in a manner similar to that by which the judges expanded the rules of the common law. Thereafter jurists ceased, or practically ceased, to function in connection with the development of the law. How, then, was it developed? To some extent by the emperors. How else? The formula was abolished -- by imperial enactment. The extraordinary procedure came. Those of the procedural rules of the praetor, accordingly, which were in fact of substantive character, naturally and by organic development, came to be looked upon more and more as rules

of substantive law. And it was but a step further to make these rules, or some of them, effective by operation of law (*ipso jure*), involving merely the removal of a purely procedural element, thus amalgamating the praetorian and the civil law, or, rather, substituting the praetorian law for the old rules of the civil law. Thus far the course of evolution seems reasonably clear. And we may admit further, that pure rules of procedure are easily neglected and hence may fall into desuetude. Thus it is not too difficult to admit that it was through normal, organic development and practice, and without legislation or special Hellenic influence, that interdicts⁽²⁰⁴⁾ and many proceedings for restitution of rights⁽²⁰⁵⁾ were transformed into simple actions and that the rules of agency, as applicable to lawsuits, were modified. But such course cannot be so readily attributed to substantive rules of law, after the praetor's power was gone, and the great jurists had departed. The judges had no right to change the rules of law. They were

(204) C.8,1,4.

(205) Felsentraeger, Loesungsrecht, 104.

even commanded, apparently contrary to an early rule,⁽²⁰⁶⁾
 not to follow precedents of superior officials.⁽²⁰⁷⁾
 They could not inquire into the reasons of a law, but
 were required to leave that to the legislator.⁽²⁰⁸⁾
 They had no such power as the judges who developed
 the common law. They were required to follow the rules
 of law already laid down. "If," it is stated in C.1,14,9,
 "some obscurity is, perchance, found in these laws, it
 should be clarified by imperial interpretation." So in
 C.1,14,11, it is stated that "if a doubt arises as to a
 new law, not yet established by long usage, reference
 to us by the judge, as well as an imperial decision, is
 necessary."^(209a) We have seen that Justinian enacted nearly
 100 laws in order to settle disputed points among the
 jurists, showing the tenacity of these rules and clearly
 indicating the inability of the judges to change them.
 The fact, if it is a fact, that the extraordinary pro-
 cedure had a greater tendency than the previous proced-
 ure to cause judges to reason by analogy, does not help
 us much in this connection. These judges may have

(206) Pernice, *Parerga*, 20 Z.S.S. 145

(207) C.7,45,13; C.1,14,1 and 3.

(208) D.1,3,21; C.1,14,12,5.

(209a) *Comp. D.* 1,3,27-38

wondered why, e.g., strict rules should be applied to legacies and liberal rules to testamentary trusts. But they had no power to change them. We, too, have, in most of the states, the liberalized procedure. Prof. Riccobono speaks of the fusion of our law and equity. But I cannot, offhand at least, think of any substantive rules of law which have been changed thereby. Reasoning from the foregoing premises alone, we should have to say that a change in substantive rules of law, or rules which amounted to that, was not accomplished by usage or practice, but required an enactment of the emperor, or the equivalent thereof. Thus a woman was enabled to become a guardian only through a statute. (209) The validity of a contract made for the benefit of a third party is a rule introduced by the compilers. (210) Testamentary trusts and legacies were put upon the same footing only by imperial enactments. (211) Liability and benefits under contract could commence after death only after Justinian had so decreed. (212) The rule as to novation was changed by legislation in 530 A.D. (213)

(209) C.5,35,2.

(210) C.5,14,7; Elsele, Beit.76,77; Bas.6,376.

(211) C.6,37,21 (Constantine); C.6,43,1 (Justinian); contra, Riccobono, 2 Melanges Corneil 351

(212) C.4,11,1.

(213) C.8,41,8.

The right to repent of a contract was not found in the Roman law till it was stated in Corpus Juris. (214) The rights of children to property were increased from time to time by a series of legislative acts. (215)

We should ~~not~~, however, go too far in holding that this was universally true. Even substantive rules of law may be abrogated through usage or custom, and this was true in post-classical times as well as before. There were no printed books. Copies of juristic writings and imperial enactments were comparatively scarce. We may assume as a fact well known, writes Egon Weiss, (216) how difficult it was to procure knowledge of the rules of law applicable in individual cases. Interpolations of these rules, some through carelessness, some intentional, and misinterpretations by commentators, seem probable. (217) Of course, offsetting that, large libraries were probably found in the law schools and in the capitals of the empire; (218) rescripts were constantly sent into the provinces from the imperial law-bureau; appeals from lower to higher tribunals were

(214) Gradenwitz, Interpolationen, 146 ff. Kuebler in 55 Z.S.S. 446 (Reurecht).

(215) See laws enumerated in Jors-Kunkel, R.R. sec. 185.

(216) 33 Z.S.S. 213.

(217) See Schulz, Principien, 166; Ebrarb, ad formulam hypothecariam, 79, 80, 133 ff.; Krueger, Herstellung der Digesten 43 ff.; Schulz, Einfuehrung, 38; Riccobono, 35 Z.S.S. 293 ff.; Peters, DigestenKommentare 93 ff.; see cautiously Lenel, 34 Z.S.S. 378; Review of Arangio - Ruiz in 57 Z.S.S. 415; Kuebler, 55

(foot-notes, cont'd from page 70)

(217-cont'd) Z.S.S. 445-6; Kaden in 57 Z.S.S. 548. The subject has received more and more attention since the work of Peters, *supra*.

(218) Krueger, *supra*, 2 ff.

possible, and seemingly were often taken. Still, we find, as Taubenschlag has clearly shown,⁽²¹⁹⁾ a hybrid law in Egypt, and that, perhaps, is true in other provinces.⁽²²⁰⁾ In short, there is no doubt that in some instances an imperial enactment, or the equivalent thereof,⁽²²¹⁾ which abolished a substantive rule of law, abolished one which had actually long before fallen into desuetude, and an enactment which apparently introduced a new rule at times merely recognized a rule already used in practice. We ourselves occasionally find in the statutes a law of the Colonial days which had long before been out of use. In fact, Justinian himself tells us that laws had fallen into desuetude.⁽²²²⁾ He states that to be true, for example, of the *lex Papia*,⁽²²³⁾ relating to lapsed legacies. We may also mention, as illustrating the subject, the law which abolished the difference between *res Mancipi* and *res nec Mancipi*.⁽²²⁴⁾ Special reasons existed for the disappearance of the necessity of mancipation in connection with sales, among them the fact that it applied only to Italian

(219) 1 Studi Bonfante, 367 ff.

(220) Taubenschlag, *Rom. Recht zur Zeit Diocletians* 141.

(221) Any order of the emperor, including those in connection with the compilation. See Krueger, *supra*, 18.

(222) *Const. de nove* 2; *C.1,17,1,10*.

(223) *C.6,51,1,1*.

(224) *C.7,31,1*.

property and only to certain species of property. In the same class of laws we should place the law which abolished the rule that joinder of issue in a suit on a joint and several obligation (correal) with one of the obligors, extinguished it as to all. The old rule had been made unnecessary, or evaded, by the custom of the obligors to make a legal agreement among themselves as to their several liability in case of action. (225) Some laws more readily fell out of use than others. So, too, modifications or interpolations might readily be made in one instance, when it would have been dangerous to do so in another. Thus it is not too difficult to believe that the rules of guardianship were applied to curatorship, and the rules of pledge to hypothecation, without legislation. But such extension could not be so easily made in all cases. Taking into consideration all of the various factors mentioned, and perhaps others, the probability would seem to be that many of the new substantive rules of law which appear in Corpus Juris, some of which I have already mentioned, must have been

(225) C.8,40,28,3; Kerr-Wyllie, Correality, 120, 226; Levy, Konkurrenz 1, 200-202. Apparently two laws were made in this connection. See C.8,40,23.

new in fact when made, and did not merely represent a rule already recognized in the courts. (226) In truth, it would seem that we can hardly be justified in assuming that any new legislative act (I include changes made by the compilers) was merely a matter of form and that the rule covered thereby was in fact already in operation in practice, unless, of course, as is true in some cases, we have reasonably clear proof to that effect. (227) The vast mass of legislation between Constantine the Great and Justinian would seem to negative such assumption. We find in the Code approximately 150 rules of private law of Constantine the Great alone. That book shows over 1300 imperial enactments, most of them on private law, from the time after Diocletian and up to, and not including, the time of Justinian. These were only part of the enactments. The greater part of the laws of the Theodosian Code and many of the laws found in the post-Theodosian Novels are not included

(226) e.g., (in addition to those already mentioned) law changing rule as to dowry, C.5,13,1; law changing rule as to constitutum, C.4,18,2; making promise of gift a contract and requiring registration in certain cases, C.8,53; making contract of sale subject to rescission, if sold for too low a price, C.4,44,2; law as to pledge, accessory to debt, C.4,27,3. As to view of Chiazzese, see 55 Z.S.S. 445, who holds that most of the changes were brought about by practice.

(227) "Doch muss man in der Annahme der desuetudo vorsichtig sein." Krueger, Herstellung 24. See also Collinet, Etudes, 230, and Kuebler, 55 Z.S.S. 446, commenting on view of Lauro Chiazzese.

in the Code of Justinian. If new rules of substantive law, displacing old rules, could by mere practice easily come into being, and be applied in the courts without legislative action of the emperors, it is strange that we find so many imperial enactments.

What conclusions, then, must we draw -- limiting ourselves now to consideration of substantive rules of law? It may be that in many or most cases when an imperial enactment or an interpolation of the compilers merely confirmed a rule already administered in the courts, usage and practice had brought about the change, and mostly, perhaps, through a normal, organic development of the law, although we cannot, by an a priori reasoning, exclude outside influence even in such cases. Practice and usage of the courts, of course, had nothing to do with enactments and interpolations which actually announced a new rule. What -- to return to the subject with which we started -- brought them about? In some instances, they represented, doubtless, merely the logical philosophical development of the law,

without the necessity of ascribing any particular force to outside factors. But that would not be true in all cases. Men and laws are subject to the influence of the atmosphere by which they are enveloped. At least in the case of actually new laws or rules we must reckon with all the economic, social and psychological factors which have a bearing upon and bring about new legislation -- factors confined neither to time nor to country. While there can be no doubt that the main structure of the law remained Roman, and there can be no doubt that no one had the conscious intention of subverting any part of that structure,⁽²²⁸⁾ there can further be no doubt that neither Justinian nor his compilers, no matter how true they meant to be to the Roman law, could withstand persistent pressure of Hellenic or other thought by which they, and those before them, were surrounded and in which they were steeped. Nor should we, it would seem, in this connection, entirely overlook the law schools. Ordinary practitioners are not, as a rule, apt to inquire what

(228) Schoenbauer in 57 Z.S.S. 355.

the law should be, but what it is. Justinian did not turn to them to compile and revise the laws. He chose at least four professors of law schools. Two of them were specially summoned to Constantinople from Berytus, and judging from the work of our Law Institute, we should not be surprised if we should discover that most of the work on the compilation was done by these teachers. Students leave their alma mater, proud of the institution. All their life, they carry with them some of the thoughts instilled into them by their teachers. That must have been true much more so in the case of the students in Roman law schools than it is with us, for the teachers were few. Thus whatever influence practitioners and judges had in shaping the law is, in the last analysis, to a large extent, traceable back to the law schools. In view of the fact that such schools play an important part in the development of our jurisprudence, it is difficult to deny all influence to those which existed in the time of Justinian and before.