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OUTLINES OF THE EVOLUTION OF ROMAN LAW.*

In a series of works published by me during the last fifteen years, I have endeavored to trace the development of Roman Law. Its course may best be shown graphically by different lines, which, for the period from the XII Tables to Diocletian diverge rapidly and then, from Constantine to Justinian, curve inward and gradually converge into a single line. The diverging lines represent the flourishing formative period of legal development, the converging lines the period of decline, or simplification.

In the first phase, the formative period, the law develops in harmony with the increasing power of Rome. Soon after the Punic Wars, it assumes a more complex form. It then contains various juridical elements, coexistent, and yet diverse, both in their application and because of their intrinsic structure. The juridical elements or branches first to be considered, though developed in successive periods, are the following three:

1. The *ius civile*, personal right of the Roman citizens, which arose from ancient customs, and which was, therefore, narrow, formal, and strict.
2. The *ius gentium*, common right of all free men, whether citizens or outsiders, and which, in contradistinction to

*This article was originally written in Italian. The translation is by Edward Nathan, A. B. 1902, LL. B. 1905, University of Pennsylvania, American Consul at Palermo.

the *ius civile*, was not formalistic and was dominated by the principles of equity.

3. The *ius honorarium*, which embodied various precedents and legal expedients adopted by certain magistrates, particularly by the Prætor, to facilitate the application of the *ius civile*, by supplying what was wanting in, and even correcting, the civil law.

This branch of the law was the last to be evolved, but it had a continuous growth until the reign of the Emperor Hadrian. Every year the Prætor on assuming office decreed in his program *Edictum* what precedents he would adhere to during his term of office. The Edicts of his predecessors were thereby subjected to modifications or additions that had been suggested by experience.

Thus, the *Edictum*, taking account of the needs of daily life, kept pace with the social, economic, and spiritual progress of Roman civilization.

These three elements or branches of the law appear well outlined as we approach the end of the Republic, and already, in Cicero's time, the *ius honorarium* is considered the largest and apparently leading source of law.

This is the meaning of the phrase that appears in the Fr. 8 D 11, "*Viva vox iuris civilis.*" which referred to the Prætor, as also Aristotle¹ had termed the Judge *δίκαιον ἐμφυλον* and Cicero² had called the magistrate, "*legem loquentem.*" The Prætor, therefore, in his practical application of the law gives new life to the old *ius civile*.

From Cicero to Diocletian, the development of jurisprudence is principally concerned with the scientific elaboration of the institutes and the systematizing of law. The various answers to queries (*responsa*), judgments and rules of the ancients were so treated that the forms of law yielded to the exigencies of daily life and equitable ideas. Jurisprudence thereby develops a wonderful analysis of the cases to which it is applied and of the

¹ ETH. NICOM. V, 4, 7 (1132).

² DE LEGIBUS 3, 1, 2.

legal precedents. With surprising acumen it distinguishes in the concrete cases the psychological elements from the extraneous, the ethical from the formal, the historic from the practical. It shows and co-ordinates, in various rules of law, the value and the function of the will (*mens animus*), of agreement and of the consequences of the elements of deceit and *bona fides*, thus opening up new pathways for the progress of law.

The results of such analyses carried out in applying the *ius gentium*, or the *ius honorarium*, are also frequently extended in the application of the *ius civile*. Thus in the classic period, one legal element reacts favorably upon another, creating by a process of fusion, really one system of law.⁸

During the empire, besides the three above cited legal elements, there arises a fourth, which is sometimes called "*ius novum*." This is composed of laws, opinions of the Senate (*senatusconsulta*), constitutions or decrees of the Emperor and above all, of decisions on matters referred to various magistrates, (*Cognitio extra ordinem*), who felt that they were not bound by the ordinary rules of law.

The general tendency during the empire is for strict law to yield to equity. This is accomplished in various ways: by fictions, exceptions, legal constructions, interpretations, analogies as worked out by the Prætor and by jurisprudence, and by the Emperor.

Celsus, the famous lawyer of the time of the Emperor Hadrian, defines law in the Fr. 1 pr. D. 1, 1, as follows: "*Ius est ars acqui et boni*." *Ius*, in this definition, cannot be referred exclusively to the *ius civile*, but covers the whole complex body of the law. However, Celsus states that the *ius* is "a system of the equitable and the good." Thus, what Cicero had so ardently aspired to, on the basis of the dictates of Aristotelian philosophy, had at last been realized in the Roman world, at least, in practical application and legal purpose.

The *ius honorarium* operated identically as the electric power house of the modern metropolis, which continuously ab-

⁸ See also BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE, (1901) Vol. I, p. 97; Vol. II, p. 291.

sorbs the unharnessed energy which nature offers in various forms. This it transforms, stores, and finally distributes according to the exigencies of modern life. Thus the requirements of form and the rigor and restrictiveness of the *ius civile* did not prevent the equitable results demanded by the progress of civil life.

The Prætor is the arbiter of the trial. For him the rules of law of the *ius civile* have no intrinsic value. That with which he is concerned is a basis for jurisdiction over the *actio* which is brought before him. He can decline jurisdiction, but if he allows it, the judges or those who are designated to examine the case and to pronounce judgment, receive an instruction (formula) setting forth the rules of law which they are to apply, in technical terms (*Formula in ius concepta*), or containing an order to condemn the party concerned whenever the fact complained of is proven or admitted. (*Formula in factum concepta*.) Furthermore, the rules of law used in cases covered by the *ius civile* can also be applied by the use of fictions to all cases not covered by the *ius civile*, which in the judgment of the Prætor are entitled to redress. (*Formula ficticiæ*.) It has been well said that Roman law is not a system of laws, but rather a system of actions. And the actions, proofs and other regular methods of procedure, perfected or invented by the Prætor, became the most admired features of Roman law because of their variability, technical precision and the extensive field they covered. This is the secret of the regular continued development of Roman Law and the reason why it did not deteriorate.

In particular, the wise directing power of the Roman Prætor, as already stated, explains the smooth and regular co-functioning of the three juridical elements, which, when regarded separately, constitute a complicated abstruse legal system by reason of different, and frequently contradictory instructions and rules of law in each system. Some arose under the influence of primitive ideas and conditions, and others grew up when human thought and conditions were more advanced.

Today, we are fairly familiar with the rules of law and procedure that prevailed from Augustus to Diocletian. This is prin-

cipally due to a small work of the jurist Gaius, who lived in the second century, under Hadrian. This work was discovered by the great historian, Niehbur, in 1816, in a palimpsest lying in the library of the Cathedral of Verona.

The complex juridical system as expounded by Gaius remained unaltered until the reign of Diocletian. In comparing the law as set forth by Gaius and that codified in the sixth century by Justinian, we find most striking differences in all the institutes, which at first glance appear to be very material. Indeed, all the passages from Gaius and other jurists quoted by Justinian in his work are found to be more or less altered. The latter himself points this out with the words "*Multa et maxima sunt quæ propter utilitatem rerum transformata sunt.*"⁴

Critical examinations, principally of the Digest, carried on during the last few decades have amply confirmed this statement.

Therefore, the gravest problem of the study of Roman law is now that of investigating the causes that brought about the changes in the work of the Legislator. During the Nineteenth Century, scholars considered the various reforms, which were discovered to have been made by Justinian, as entirely arbitrary on his part.

Justinian and his collaborators were rebuked, criticized and denounced for profanation of the most noteworthy monument of human genius. This was a mere repetition of the attitude and judgment of the commentators, who belonged to the schools of Cuiacius and Faber, and opposed Justinian.

Early in the Twentieth Century, the character of the accusation against Justinian changed. When the great number of interpolations are taken into consideration, as well as the brief three-year period to carry out the compilation of the Digest and Amendments which contradict the law of the classical period, Justinian was adjudged to be a charlatan or plagiarist, inasmuch as he had attributed to himself the merit of a work which was essentially the result of studies and works of the Fifth Century. In any case, at least, all the textual changes and differences of

⁴C. TANTA, Para. 20.

redaction were taken from digests, glosses and scholastic compilations made in the Orient during preceding centuries. This opinion is very prevalent today among the younger Romanists who are much to be admired for their keen ardour in the study of the *corpus juris*. They seem, however, to fail to understand the wonderful development of the legal doctrines and the work of the classical jurists. While it is true that the Emperor displays his vanity by posing as a reformer of the Law, yet these latest accusations are too far-reaching and appear to have been made without a deeper examination of the work itself.

Today, it can be stated as a fact that Roman Law underwent continual changes from Constantine's time on. But I have maintained and still maintain that it altered without the aid and co-operation of schools of Jurists and that legislation failed to give proper assistance in the process. The complicated system of classic law was simplified step by step in judicial practice. External factors may have stimulated and helped the process of simplification, but this would nevertheless have been attained in the same manner.

The most striking example of such a change is that of the use of writing for legal purposes, which gradually usurped the place of the solemn verbal forms of classic Roman Law. The conflict between the written and verbal forms manifested itself in the Third Century A. D., after the constitution of Antonine in the year 212, whereby the Emperor extended the privileges of Roman citizenship to all the inhabitants of the Empire.

It would indeed have been incredible that the archaic oral formulæ of the Roman Law should have been allowed to continue when the use of writing had been a characteristic custom in the Eastern countries where Roman Law was imposed.

The conflict was bitter during the Third Century; and it is astonishing with what tenacity Diocletian still unyieldingly insists on the observance of the Roman forms. From Constantine's time on, this insistence stops, but there never was a general rule that written instruments were a substitute for the Roman oral forms. The latter were minimized, altered, and finally disappeared completely, having already persisted too long.

The change probably began in the time of the Republic. Thus Cicero considers a written instrument (*scriptura*), as absolute proof for judgment.⁵ Moreover, the Prætor often considered that the solemn oral requirements had been complied with even when this was not the case, allowing an *actio ficticia*, with the formula *acsi stipulatio interposita fuisset*,⁶ meaning, just as if the formalities required by a stipulation had been gone through. While admitting the influence of oriental customs in this regard, yet their importance must not be exaggerated. If Justinian in his choice between the *stipulatio* of the civil law and the *obligatio literis*, which in its latest forms had a provincial origin,⁷ gave preference to the *stipulatio*, which was then ordinarily done in writing, this means that the Roman legal institutions maintained their force and attractiveness even in the Byzantine period despite the changes they underwent.

But the immediate and direct causes which then operated to make these changes are to be found in the new ordinances which fixed the political constitution of the Empire and its administrative and judicial organization as defined by Diocletian (A. D. 286) and by Constantine the Great. These ordinances brought about:

1. The abolition of the classic system of procedure (*ordo iudiciorum privatorum*) which was replaced by the *cognitio extraordinaria*, a graded state judiciary.
2. The arbitrary prerogatives of the Prætor over the trial were discontinued.
3. The abolition of all formulæ (A. D. 342), which however in fact continued to be used as required to concisely indicate the nature of the action.
4. The use, less and less, of the solemn forms of the *ius civile* ending in their final abolition. This occurs largely through the wide authority of the judge who, in a way, becomes the heir of the Prætor. In the place of the *fictions* employed by the latter, there succeeded *præsump-*

⁵ CIC., TOPIC, 10, 44.

⁶ Cf. FR. 4, 3, D. 27, 7 and 43 ZEITSCHRIFT DER SAVIGNY STIFT. 266.

⁷ GAIUS 3, 134.

tiones, or *tacite obligationes*, introduced in judicial practice. There is thus a complete inversion with regard to the value of writings (*instrumenta*) as evidence, as the latter now become absolute proof, or at least are considered superior to the verbal testimony of witnesses.

5. The influence which Christian ethics exercised in this period on the law must not be overlooked. This was furthered by the enlargement of the *Episcopal Audentia*. At a time when the Empire was stricken with ills and in misery, Christian ethics acted like a tonic for the heart of that great universal organization, whose beating appeared to have ceased. Its beneficial reaction was shown in the case of personal rights, *e. g.*, marriage reform, protection of women and minors, of the weak against the strong, and especially of slaves. It minimized the hardships resulting from pagan individualistic conceptions in all matters, having regard for the general welfare of the community. It favored donations which Roman Law had frowned upon, repressed fraudulent legal practices and all forms of private violence. Above all, it permitted equity to have a wider and more humane scope of action, from ethical and sentimental motives, and from a sense of piety and human brotherhood.⁸

The above concepts of intent consideration, etc., were undeniable.

In the gradual unification of the three above enumerated elements (*ius civile*, *ius gentium* and *ius honorarium*), the Law dropped

1. All institutes, principles, forms and precedents of the *ius civile* which were rendered useless by the *ius honorarium*.
2. A great number of institutes and rules invented by the Prætor, either to operate contrary to, or to support the *ius civile*. Such were the *in integrum restitutio* and *missio in possessionem*.

⁸ Cf. 3 RICCORONO, REVIEW OF CIVIL LAW, Milan, 1909.

The following remained operative:

1. The institutes of the *ius gentium* and the basic elements of the *ius honorarium*, which were used instead of similar elements or institutes found in the *ius civile*, although in some cases, the newer element was incorporated in what survived from the *ius civile*.
2. And in this development of the law there naturally take first place certain important wonderful concepts of Roman jurisprudence, namely, the element of intention in testaments and in dealings, the elements of consideration, etc. (*causa*) and meeting of the minds (*conventio*) in contracts.

The above concepts of intent, consideration, etc., were, however already implied in the formal transaction under the *ius civile*, and the Prætor only brought them to the fore in his equitable administration of justice. Thus equity assumed the form of law and is dominated by Christian ethics.

It should be noted that with such far-reaching changes taking place spontaneously—for neither Schools of Law, nor Legislatures had a part therein—the complex material though carefully subdivided and elaborated by the Romans, became a chaotic mass of institutes and precedents in the hands of the Byzantine practitioners.

The remedies of various Byzantine Emperors to repair this were of no avail. Roman Law looked as though it would be destroyed by its superabundance of rules and remedies.

Justinian continually laments that the Law before his time was all *confusum, perturbatum*, and describes its state by the verbs "*vacillare*," "*variare*"⁹ and speaks of the continuous "*varietates*" and "*ambiguitates*." What he states is true.

His work was successful in bringing about some order in the Law and in classifying the material under important heads. This he did with the abundant aid of certain genuine sources that were then in current use by the Law Schools in the East (as

⁹ This verb also appears in a revised text of the VATICANA FRAGMENTA 49; cf. my article in PEROZZI STUDIES, p. 367, n. 1.

shown by the Sinaitic fragments) as well as by following judicial precedents. The Emperor's self-satisfaction and pride over his accomplishment are fully justified.

In reality, therefore, that which appears as new material in Justinian's work is so only in form, and not in substance.

A large part of the *ius civile* had been dropped, or superseded by new law in classical times through the work of the Praetor. This part dealt with obsolete matters (economic, social, political and personal).

On the contrary, the rules of the *ius honorarium*, as far as their substance went, and those of the *ius gentium*, remained intact. They even replaced similar matters in the *ius civile*.

The *ius gentium* also absorbed the better part of the *ius civile*, for with the disappearance of the formal requirements of the latter, its rules fused with those of the *ius gentium* which prevailed. The *stipulatio* is an excellent illustration in point. In the *ius civile* it was a solemn, verbal act, but it now becomes in substance a mere convention, written or oral. It is modelled on the contracts of the *ius gentium*, from which it no longer can be distinguished. It also conforms to the *nudum pactum* of the *ius honorarium*, which now also gives rise to a cause of action, whereas the rule of the civil law was *ex nudo pacto actio non nascitur*. In their premises and effects both forms of contract are now equally efficacious. All become motivated acts, forms as such having ceased to be used. All *negotia* become nothing but *conventiones*, which imply a motive or consideration. Certainly a great change, but an evolution rather than a revolution, having come about gradually and from changes within the body of the Law and contemplated by it. The principle had been well formulated by Pedius: *conventionis nomen generale est*,¹⁰ in the sense that that technical term covered all the categories of *negotia*, the solemn ones of the *ius civile*, the *contractus* of the *ius gentium*, the *pacta* of the *ius honorarium*.¹¹

¹⁰ FR. I Par. 3 D. 11, 14, and the texts that follow in the title taken from I. IV. to Ed. of Ulpianus.

¹¹ The demonstration of this part appears in my London lectures.

The element general and common to all these forms of law having been recognized as paramount, it necessarily brought about the legal evolution and obliterated all differences. Thus within Roman Law itself there arose the principle, "Every agreement creates an obligation."¹²

The new *ius civile* as compiled is therefore a corpus of the more progressive elements of the whole law—both natural and dogmatic—as was illustrated in the case of the *conventio*. The *ius gentium* and the *ius honorarium* always prevailed over the *ius civile*, the former two elements proving more adaptable for the vicissitudes of social, economic, spiritual and family life, all of which phases had been differentiated by classic jurisprudence.

Even the ordinary civil procedure of the classical period had to yield to the *cognitio extraordinaria*, because the scope of the latter was continually being widened, both in Rome and in the provinces. Nevertheless, the change from one system of procedure to another was only accomplished gradually.

The process of uniting, or rather simplifying the Law was the immediate effect of the above-mentioned causes which operated alike for all institutes. It can therefore be said that the new law is in substance the same Roman Law of which the various component parts had been revised, remodelled and generally simplified.

In the course of this change the basic principle suffered. The Roman legal system had been built up on the ancient classical jurisprudence whose principles and regulations, taken from the *ius civile*, were elaborated with inflexible logic and reflected in a splendid way the severe public and private discipline of the Romans. When the *ius civile* and the *ius honorarium* ceased to cover the same legal ground independently, the latter encroaching on the former, not only the rules but the very principles of the *ius civile* were either necessarily dropped or at least lost their general and inflexible character.

The legal dogma should have been entirely reconstructed for Justinian's compilations. This would have required more

¹² Cf. my article in 43 ZEITSCHRIFT DER SAVIGNY STIFTUNG, p. 338-378.

time and ability than was possessed by the compilers, as no ground had been prepared therefor by the schools of law.

New legal maxims, presumptions, actions and juridical subdivisions which reflected the new phase of the law resulted from the practical application of the law *rebus ipsis dictantibus*, rather than from theoretical studies. It was only after the first Millennium that the scholars of Bologna began to remodel the principles on which the new Roman Law is based.

The Italian commentators down to Alciato (1550), who performed the task left them by Justinian, showed the real character of the Compilation, and really established the foundations of modern law, which gradually spread throughout Europe.¹³ Justinian had rather compiled the old rules of law by following the forms just as they appeared in the works of the classic jurists.

Thus the three elements or branches of the law, *ius civile*, *ius gentium*, and *ius honorarium*, stand out in the *Corpus Juris*, and were regarded by the commentators as though they were still distinct sources from which the law developed.

The error was repeated and became even greater in the Nineteenth Century when the historic school analyzed the *corpus juris* by following what was believed to be the clue given by Gaius.

The work of the glossators and of the commentators was disregarded or considered to be wrong. Texts were interpreted anew and the legal institutes revised to meet their views. The error lay in that by so doing they reconstructed the classic Roman Law and not that of the period of the *Corpus Juris*.

I can now clear up this gross error by showing the method followed by Justinian in making the compilation by comparing it with the evolution which the law underwent during the fourth and fifth centuries, as described in the preceding pages.¹⁴

Justinian neither intended to revive, nor could he have revived the ancient law with all its obsolete subdivisions. In the new laws the distinctions essential to classic law had vanished.

¹³ Cf. VINOGRADOFF, ROMAN LAW IN MEDIEVAL EUROPE.

¹⁴ See also my article in 16 ARCHIV FÜR RECHTS- UND WIRTSCHAFTS-PHILOSOPHIE, 503-522.

(Examples: in the case of legacies (*legata*) as compared with certain trusts (*fidei commissa*), etc.; inheritance (*hereditas*) vs. possession (*bonorum possessio*); title (*dominium ex iure Quiritium*) vs. *in bonis habere*; *stipulatio acceptilatio* vs. *pacta*; *actiones* vs. *interdicta*; *actiones directæ* vs. *utiles*. However he justifies keeping the terminology and ancient distinctions by two reasons, to which we can add a third as follows:

1. Because law as dealt with by the jurists had been made terse and worked out in a formalistic way and because the difficulty of separating it fully and simplifying it was too great.¹⁵
2. Because the fusion of the civil law and the Prætorian law, or, in general, the amalgamation of different institutes covering the same point, each derived from a different branch of the law, would have confused the Roman legal mind trained in the forms as handed down for generations. Therefore, it was considered more expedient and literary to set forth the law as it formerly was, and then note the successive changes. This method was directly and specifically applied to the institutions, but it was also quite regularly followed in the Digest.¹⁶
3. Lastly, because the attempt originally made by the Legislative Commissioners in the first part of the Digest, to consolidate the various ancient institutes that had been unified, had to be abandoned on account of the difficulty of execution, and furthermore, because the urgency of completing the compilation work did not allow sufficient time for this.¹⁷

The large number of interpolations in the Digest show to what expedients the compilers were driven to obtain the most practical results in the least time, as follows:

¹⁵ C. Tanta, 14.

¹⁶ See Inst. II, 20, 3.

¹⁷ Cf. 16 ARCHIV FÜR RECHTS- UND WIRTSCHAFTS-PHILOSOPHIE, cit. 518.

1. The passages taken from the works of the jurists received interpolations, or were changed or abbreviated as required.¹⁸
2. The additions (*adiectioes*) are readily noted by their language and style apart from their contents, which show the law as then in force. But the matter contained in all, or the greater part, of the additions, was taken from classic cases. These cases usually show the application of the *ius honorarium*, the consolidation of various institutes, each from a different branch of the law, or are a selection of one of various decisions on the subject matter, regardless of which of the three legal elements they are based on. Sometimes the compilers selected the most progressive theory expounded by the jurists, or embodied pure judicial interpretations on decisions based on imperial rescripts. They even used fundamental ideas to replace such as rest on procedural and formal matter. Some of the additions have really made positive law, inasmuch as decisions on concrete cases stated in the formal answers (*responsa*) thereby attained general application through the use of various though sometimes contradictory hypotheses, which were introduced by brief clauses beginning "unless" (*nisi . . .*) or by refined distinctions. (If indeed . . . if in truth—*si quidem —si vero.*)
3. To the same end the compilers omitted parts of passages dealing with disputed points, differences due to varied juridical elements (*ius civile*, etc.), on which decisions were based rules of the civil law with analogies and developments that had become obsolete. These omissions or suppressions of certain texts are sometimes difficult to prove, but they assume extraordinary importance in determining what was the classic law. I have thus far

¹⁸ See on the matter, GRADENWITZ, *INTERPOLATIONEN IN DEN PANDERTEN*, 1887; the fundamental works of LENEL: *DAS EDICTUM PERPETUUM* (2d ed., 1907); *PALINGENESIA IURIS CIVILIS*, vols. I, II, 1889; and the valuable article of W. W. Buckland, *Interpolations in the Digest*, 33 *YALE L. J.* 343.

found about a dozen cases of important omissions.¹⁹ In the fragments taken from unabridged classic works, such as the *quaestiones*, the subject matter is sometimes, particularly in the introduction, treated *in extenso*, and then suddenly there is abbreviation or silence. An example of this kind is also found in the Vatican Fragment 50.

4. The changes in text are as evident as the additions. The interpolations which deal with the new terminology in the institutes of private law are nearly all recognized. The new terminology enables us to observe what rules of law have become obsolete or changed, and what institutes have become consolidated.
5. The list of passages which have been condensed is both numerous and important. Of certain titles, which were fully dealt with in the sources, the compilers frequently made only a summary, but they retained phrases and fragments of the classic original in their stilted compilation. Frequently the summary in question covers various texts of the same jurist, or of different jurists.
6. The compilers themselves drew up a large number of brief texts, which are scattered throughout the Digest and the Codex. They contain *maxima*, or decisions, of the new law, and represent the synthesis of the various consolidated juridical elements, the final form of the law as it was evolved during preceding centuries. These passages, which are numerous and distinctive, stand out prominently in the compilation, and are mostly placed at the beginning of the various titles. Thus, the Fr. 1 and 2 D. 37, 1, point out the perfect fusion between *Hereditas* and *Bonorum Possessio*, yet have distinct titles and appear separately in the course of the work.

It is superfluous to add that while it is generally the longer texts which indicate interpolations, they are also frequently found in the shorter texts. But it should be particularly noted

¹⁹ A very striking example can be seen in Fr. 4D. 8, 1, with my illustration in *REVUE D'HISTOIRE DU DROIT*, v. III, p. 335 (Haarlem, 1922).

that it is the law of Justinian's day which is embodied in the interpolated passages as well as in other parts of the text. The Commissioners generally were acquainted with current law and understood how it had been evolved and the causes responsible for the changes it underwent. In no place and for no doctrine did they rely on the teachers or the Oriental schools. They realized their task was only to codify the existing law as it had been consolidated and reformed in judicial practice.

In the Western Empire, the Visigoth texts show that the law had undergone a similar process of evolution and the interpolations are frequently the same therein. Briefly, the Commissioners felt they had fulfilled their task by employing the above-described methods and expedients to adapt what was best in the ancient material for the law of their day. In doing so they succeeded in reducing to one-twentieth of its bulk the three million lines which were contained in the works of the jurists. By careful reading and making excerpts, they succeeded in producing a work containing the essentials of the new law.

The best proof of the above is the analytical test which the code successfully underwent at the hands of the glossators and the Italian Commentators who were the first real interpreters of the *Corpus Juris*. This, however, does not imply that Justinian and his collaborators turned out a work without imperfections. Considered as a code, it was bulky, its structure was archaic and it contained numerous contradictions. Nevertheless, it served as a valuable anthology of historic information, to which the authors attached great importance. Its general value is best shown by its civilizing influence in mediæval and modern times.

The evolution of Roman Law, as above outlined, follows a regular course, which is seen from explicit assertions in the *Corpus Juris* and an analysis of its contents. Historic counterparts confirm same. Indeed, the same simplifying processes which took place in Rome were, in a sense, repeated in England, where the distinction between courts of common law and courts of equity was analogous to that between the Roman civil law and equity, *stricta iudicia* and *iudicia bonæ fidei*.

Likewise even in English law the sharp distinction between

the two judicial elements was gradually attenuated until the Judicature Acts of 1873-1875 brought about the complete fusion of equity and law. Equity naturally becomes the prevailing element as shown by the following clause of Section 25 of the Act of 1873:

“Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity shall prevail.”

There is thus a surprising analogy in the evolution of the English and the Roman legal systems. The Emperors Constantine and Licinius in A. D. 314, also confirmed the prevalence of equity over strict law with the following solemn affirmation:

C. 8. Cod. III-1: *Placuit in omnibus præcipuam esse iustitiæ acqutatisque quam stricti iuris rationem.*

That the law of Constantine may have been subjected to a generalization (*in omnibus rebus*) by the compilers of Justinian's code, is of no importance. This may originally have referred to cases of liberating slaves by the Civil Law, as Kruger believes.²⁰

But at any rate it is certain:

(a) That during the Fourth and Fifth Centuries, the prevalence of equity over law had become so fixed that the compilers could formulate and insert in the Digest the following maxim in the tit. de R. J.: Fr. 90 . . . *in omnibus quidem, maxime tamen in iure, acquitus spectanda est.*

(b) That the prevalence of equity over law arises from an organic evolution within the Roman Law, and it is erroneous to attribute it to the influence of Greek philosophy or even to regard it as was done by Pringsheim.²¹

²⁰ Cf. C. 3 Cod. 722 applied by Kruger and the C. 1C. 1.14 of the year 316 A. D. which is in contrast with general maxims appearing in the C. 8 cit.

²¹ 42 ZEITSCHRIFT FÜR SAVIGNY STIFT. 643.

Law, as stated, was defined by Celsus as: *ars æqui et boni*, and all efforts of the Prætor tended to mitigate the rigor and injustices of civil law, even in decisions based on strict law.

With the disappearance of the Prætor and with the formulæ shorn of all juridical value, the authority of the judge was correspondingly enlarged in all cases, since he now inherited and assumed the powers and mission of the Prætor. His equitable adjudications naturally now had a distinctly Christian bias.

In England the Judicature Acts of 1873-1875 established a code of civil procedure in which the judges were granted great discretionary powers, and consequently, as in the Roman extraordinary procedure, the importance of the different forms of action diminished.²²

Returning to our principal theme, after this brief exposition, I am bold enough to affirm that the rigid change which occurred in Roman Law from Constantine to Justinian has been duly explained.

It is really only the simplification of the originally very complex rules of law as formed in Rome owing to peculiar and historic events and conditions, and which could exist no longer when conditions which had given rise to them were removed.

This explanation, besides solving the various problems concerning the evolution of Roman Law, serves directly as a basis for criticism and interpretation of the *Corpus Juris*, as well as of the institutes of all modern law which is founded on Roman Law.

This article does not permit giving proof of my assertions, which can, however, be found in my other works. I can only state that they are based on special research among various institutes. I must, however, point out that the historic explanation as outlined above, was generally followed by the principal legal historians, beginning with Savigny and continued by Karlowa and Voigt; by Muirhead in England and by Sherman in the United States.²³ But, as can be seen, these authors based their conclusions entirely on a few passages in the Constitutions of

²² Cf. F. W. MAITLAND, *EQUITY*, 2. (1920).

²³ *ROMAN LAW IN THE MODERN WORLD*, v. 1, Para. 122 p. 105.

Justinian, and on other passages which, since the Glosses, had already in the Sixteenth Century been recognized as interpolations. Therefore, when the Digest, because of the many interpolations, was believed to have been more the work of Justinian than of the Roman Jurists, the above explanation of the legal change was regarded by them as valueless. Scholars in their search for a better and more recondite solution, which would also enter more into detail, as often occurs, overlooked the more important element and decisive points. Thus, in Dante's words, they wandered

“—through a dark forest
In which the right way had been lost.”

Salvatore Riccobono.

Palermo, Italy.