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Roman Responsa Prudentum and English Case Law; Their Resemblances and Differences.

Formerly in England and more recently in the United States there was a prejudice against the study of Roman law, and the absorption of its equitable principles into the body of the common law. Knowledge of the Roman law in England, except among professed canonists, declined rapidly after the reign of Edward II. There was no question of hostility. The sixteenth century was the time of recrimination between common lawyers and civilians and perhaps of some real danger to the common law, but the more able jurists of later times appreciated the importance of a thorough knowledge of this most wonderful system of jurisprudence. Sir Matthew Hale frequently said that "the true ground and reason of law was so well delivered in the Digest of Justinian that a man could never well understand law as a science without first resorting to the Roman law for information," and he lamented that it was so little studied in England.

Lord Holt admitted that the laws of all nations were raised out of the ruins of the civil law, and that the principles of the English law were borrowed from that system and grounded upon the same reason. While the study of Roman law is exceedingly important and inter-

[1]Pollock, The Expansion of the Common Law p. 88.

esting, a thorough knowledge of it would require a vast amount of application and research.

Chancellor Kent in his Commentaries, Lecture 23 says, "I am satisfied that no part of the civil law can be examined and no period of its history can be touched, by a person not educated under that system, without finding himself at once admonished of the difficulty and delicacy of the task by reason of the overwhelming mass of learning and criticism which presses upon every branch of his inquiry. Nevertheless the civil law, as a system of jurisprudence, framed by wise men and approved by the experience of ages, must in every country and in every age furnish principles which, modified and applied as circumstances may require, will greatly contribute to the real interest and welfare of society,[2] for it is truly "the art of what is good and fair,"[2] in other words the law of nature, which is as much the law of today as it was when the first human society was established on earth, and is as binding on the Almighty as upon human beings who in case they violate it are automatically punished. It is the law of right and wrong which does not change because it cannot change[3] and certainly should control the actions of all men and no less so the will of God, for any other conception of the volition of the Diety would belittle our idea of him.

Roman Judicial Procedure

Before minutely considering the subject Responsa Prudentum, it will be well to take a view of the constitution of the Roman courts civil law procedure, inasmuch as the Responsa Prudentum had to do with the administration of justice in the Roman courts.

It seems that court proceedings were very largely under the direction of the Praetor, a Roman officer, or

[2]Gayle vs. Cunningham, Harp S. C. Equity, pages 124-133.
[3]Morris, History of the Development of Law, p. 25.

magistrate, appointed annually for that and other purposes.

The Praetor

It was the duty of the Praetor to make up the issue for each case from the preliminary statements of the parties. This was called the formula. This function of the Praetor was a very important one in advancing the final determination of the case and it must have facilitated the trial of the cause very much to have this done by an unprejudiced official. Many times in the trial of causes, under common law procedure, the court is puzzled to ascertain just what the issue is from the allegations and statements of the counsel in the case, for it sometimes happens that if the client has a weak case, it might be dangerous for his counsel to state clearly and concisely the real issue; again others do not have the knowledge and ability to do so.

If the facts submitted were agreed upon and the only question presented was one of law, the Praetor decided the case without submitting it to the Judex. The formula being made up, the determination of the question at issue was delegated to the Judex.

The Judex

The functions of the Judex were not the same as of our judges, but it would seem more nearly like those of a jury, or referee, in the English courts, for although the law was not in all cases laid down for him by the Praetor, still he acted within narrow limits, the case being made up for him with directions as to what his findings should be if certain allegations were proved, and while it sometimes became necessary for him to decide points of law and apply them during the progress

of a trial, yet if such application of the law was wrong, or a law was invoked which did not fit the case his findings could be overruled by the Praetor, and if the Judex went intentionally outside the formula submitted to him and assumed to determine an issue not submitted, he became liable to a penalty.

The Judex was usually chosen, or nominated, by the plaintiff from among a certain number who had been designated by the Praetor, at the beginning of his term of office, to act in that capacity. These persons were not ordinarily such as were versed in the law.

The Patroni or Orators

The parties were assisted in their presentation of the cause by Orators or Patroni, who made an opening of the case and a closing argument much as our advocates do today. Even these functionaries were not expert lawyers, as was admitted by Cicero, one of the most famous of them, who said of himself, that he had very little legal learning and intimated that a small amount of it was adequate for the purpose of his profession, as when it became desirable to know the law applicable to each particular case it could be ascertained by applying to the jurisconsulti, the authority who rendered the Responsa Prudentum.

The Judex had no power to enforce his findings or verdict. This was reported back to the Praetor and the judgment in the case was enforced by him. This and other features of the powers and functions of the Judex suggest our jury system, which system in all probability came to England from the Continent, possibly having been derived from the Roman law.

The Jurisconsulti

The Jurisconsulti were the ultimate sources of legal knowledge. The Praetor was at first a patrician and

was elected in the *comita centuriata,* though the office in time became accessible to plebians. Business soon required a second Praetor to preside over the causes of foreigners, called praetor peregrinus and praetors were afterwards allotted to the provinces as the Empire extended.

Under Augustus, the praetors had increased to sixteen and in the time of Pomponius, there were eighteen, one of them being a judge *de fidicommisso.*

The Praetor's Edict

Every Praetor on entering into office, promulgated certain rules and forms as the principles and methods by which he proposed to administer justice for his term, which was one year. He had no power to alter these rules and this *jus praetorium vel honorarium* tempered the ancient law by the spirit of equity and public utility and it was called "the living interpretor of the civil law." The edicts of the Praetor were generally declaratory of the customary, or unwritten, law and practice of his predecessors. But as the Praetor was apt to vary from his annual edict, and to change it according to circumstances, which opened the way to many frauds, it was provided by a law enacted at the instance of the tribune Caius Cornelius, that the Praetor should adhere to his edict promulgated on the commencement of his magistracy. These praetorian edicts were studied as the most interesting branch of Roman law and they became a substitute for the knowledge of the twelve tables. They were frequently commented upon and a large part of the matter of the Responsa Prudentum related to the praetor's edict.[4]

[4]Kent's Commentaries, Note 1, p. 524.

Roman Jurists

Taking up the jurists of Rome, we find they fall into three classes:

1. The pontiffs and early lay jurists whose chief work was *"interpretatio."*

2. The jurists, called the *"veteres"* who came after the period of "interpretatio" and before the time of the classical jurisprudence.

3. The classical jurists.

The Interpretatio

First, the *interpretatio* of the pontiffs. The close relation between law and religion which seems characteristic of early times renders comprehensible the fact that originally the knowledge and practice of the Roman law was confined almost entirely to the College of Pontiffs, who choose one from among their number each year to superintendent disputes between citizens. It seems surprising that this condition of things which amounted to a practical monopoly should have continued for more than a century after the publication of the XII. Tables which took place 449 or 450 B. C.

When Gaius and Justinian tell of the jurists as the makers of the law, they allude to a much later class of persons learned in the law in the time of the Empire, but these earlier ecclesiastical persons are also entitled to be regarded as exercising legislative powers; because though theoretically they simply expounded the law as promulgated in the XII Tables, still by the construction they give to it, a large body of new law was evolved. Case law in England and America rests on much the same fiction. As Sir Henry Maine has shown, an English judge never admits that he is making new law; he is simply applying known rules to different sets of circumstances; but whenever he determines a case to which no existing custom, statute or precedent applies, he creates a

new precedent which, save in the comparatively rare case of reversal on appeal, will be followed by other judges under like circumstances, and so form a new law.

The Veteres

Second. The Veteres. About 300 B. C. Appius Claudius Caecus made a record of the *legius actiones* which Flavius, the son of a freedman, who was acting as secretary to Claudius, stole and published to the world in 304 B. C., as the Jus Flavianum. Some fifty years later, Tiberian Coruncanius, who was pontifex maximus, took to giving public oral expositions of the law to any one who desired to attend, "publice profitere."

In the year 204 B. C., the legal formula for actions was made public property for a second time by Sextus Aelius in the *Jus Aelianum.* From this time therefore the monopoly of the pontiffs was at an end, and a knowledge of the law was made possible for priests or laymen and so we come almost at once to the school of the early lay jurists the "veteres" as opposed to their juniors the later "classical" lawyers. The work of the Roman jurists is summed up in four words: *scribere, agere, respondere, cavere.* Scribere embraced the compilation of legal treaties and probably written responsa or advise given in particular cases; agere referred to the conduct of a suit in court; respondere, giving answers to questions on matters of law; cavere, safe-guarding the interests of a client in the preliminary stages of a case, especially in the make-up of the formula. The *veteres* were probably more concerned in the work implied by the makeup of the formula than in written systematic exposition; were in fact rather lawyers than jurists; but they may be regarded nevertheless as starting the juristic literature which their followers, the classical jurists brought to perfection.

Two important developments are to be found in the time of Augustus: first the placing of the more

distinguished jurists in a position of pre-eminence by means of the *jus respondendi;* secondly, a division of the jurists themselves into rival schools—the Proculians and the Sabinians.

Classical Jurists

Third, the period of classical jurisprudence is generally considered as beginning with the reign of Hadrian. Prominent among the classical jurists was Gaius, who wrote in the time of Antonieus and whose insitutes for more than three hundred years performed the same service for Roman law students as Blackstone's commentaries did for successive generations of young English lawyers. Another was Papinian, the greatest of all Roman jurists, whose most important works were nineteen *"libri responsorum"* and thirty-nine *"questionum libri."* Ulpinus was a contemporary of Papinian, whose writings are represented in Justinian's Digest, to a greater extent than any other jurist's, about one-third of the Digest being made up of the same. From the writings of Modestinus, a pupil of Ulpianus there are three hundred and forty-four extracts in the Digest. The period of classical jurisprudence then, began in the second century, reached its climax with Papinian and ended abruptly in the middle of the third century, for after Modestinus the development of Roman law was carried on almost entirely by Imperial constitutions.

The influence of classical jurists may be summed up as follows; their work was four-fold.

(1). After the *"interpretatio"* of the early ecclesiastical lawyers had come to an end, the development of Roman law was carried on mainly by means of the reforms effected by the Praetor's edict; for although the "veteres jurisprudentes" undoubtedly did improve the law, it was probably less by their writings than by the direct influence which they brought to bear upon the Praetors. The growth of the Praetorian law, however, came to an

end with the "Edictum perpetuum" in Hadrian's time and the first task of the later jurists was to take the law as stated in the edicts where it had grown up bit by bit, and reduce it to some sort of order and system.

(2). The edict had resulted in a "duplication of institutions." A given transaction might be governed by one set of rules at *jus civile*, by another at *jus honorarum*. The classical jurists, to some extent, but by no means finally, reconciled their divergencies.

(3). The division of jurists into the schools of Proculians and Sabinians has given rise to endless differences in point of detail. Here again the jurists did something by the way of reconcilation, though many of the disputes were settled only by Justinian himself.

(4). The law contained in the edicts was not final. Political reasons had rendered it impossible to effect further improvement in the law by its means, but there were new legal problems waiting solution. These the jurists solved by what Sohm happily called a "new interpretatio." Just as at an earlier date the XII Tables had to be "interpreted," so now it was necessary to subject the Pretorian edict to a similar process. And in the result, especially in the domain of obligations, the classical jurists built up a body of law which, alike in substance and form, remains a model for all time.[5]

In their origin the Responsa Prudentum were nothing more than private opinions of particular lawyers, but after they had been generally adopted by the legal profession, and recognized by the judicial tribunals, they acquired the authority of law and they proved an important factor in the evolution of law from the time of the XII Tables.[6] For statutes like the XII Tables must necessarily be interpreted by legal experts after thorough forensic discussion. And furthermore by the

[5]Leage R. W., Roman Private Law pages 26-29.
Roby Introduction to Justinians Digest, p. 15.
[6]Roman Law by Lord Mackenzie.

constitution of Roman society in those early days prominent citizens were expected to assert and defend the rights of a numerous array of relatives and clients, which contributed to produce a class of jurisconsulti. And so there grew up in Rome, an important class of men who made it their chief business to apply the law to the numberless complications of social life and to advise those who sought their opinions, and the outgrowth of such a system was stimulated by the peculiar relation of patron and client. The opinion of such experts would be sought by magistrates and referees as well as by private persons so in the order of development came the Responsa Prudentum, the answers or decisions of the jurisconsulti, as a part of a growing system. At first, their opinions, while they were freely sought both by the judge and party, were not binding but merely advisory, though naturally very persuasive. In the time of Augustus, however, they received official and imperial sanction, and in the time of Tribonian were defined as follows in the Institutes of Justinian, to wit:

Jus Respondendi

The Responsa Prudentum are decisions and opinions of persons authorized to determine the law. For anciently it was provided that there should be persons to interpret publicly the law who were permitted by the Emperor to have the Jus Respondendi and who were called jurisconsulti, and the authority of their decisions and opinions when they were unanimous was such that the judge could not refuse to be guided by these responses. These answers to legal questions resemble in some respects our case law in their influence on the growth of the legal system.

Whether they were interpretations of the words of the XII Tables, of a statute, an edict, or decisions of concrete controversies, they naturally went to form a body of precedent, doctrine and literature to build up

the law (jura condere), though at first legislative force was not accorded to them till long after the death of their authors by the law of the succeeding period.[7]

Gaius in his Institutes, Book 1. Sect. 7, speaks of Responsa Prudentum as "the answers of jurists or the decisions and opinions of persons authorized to lay down the law. If they were unanimous their decision has the force of law, if they disagreed the judge may follow whichever opinion he chooses, as is ruled by a rescript of the late Emperor Hadrian." "If the number of jurists passing upon a given point were equally divided and Papinian was one of them, the judge was bound to follow the opinion given by the side on which Papinian was."

Under the Republic the jurists were in the habit of giving opinions (responsa) both on hypothetical cases put by their pupils and also when consulted by the litigants, or the judge, in actual litigation, but although the responsa were sought and forthcoming, they bound nobody, they had as much weight as, and no more than, that attached to the opinions of an English barrister of today. If the jurist consulted was of great eminence and skill, and the facts had been properly stated and grasped by him, his opinion in all probability represented the legal position, but only probable, for the judge was absolutely free to decide in the opposite if he thought right.

The change came with Augustus who instituted a practice which was continued by later Emperors, under which certain of the more distinguished were given a sort of patent, called the jus respondendi, the effect of which was that if after being consulted, a jurist invested with this peculiar right gave a written and sealed opinion, such opinion was to be considered as having the sanction of the Emperor.

During the time of Gaius, the Responsa Prudentum were a recognized source of law peculiar to the Ro-

[7]Short history of the Roman Law, P. F. Girard p. 546.

mans, but it is evident from his account that the functions of these privileged citizens were limited to a declaration of their opinion of what was law in a given case, and did not extend to making new rules of law, which is the proper province of the supreme authority of the state, but gradually the idea seemed to have been evolved, probably about the time of Constantine, that the writings of a few of the greatest jurists had a kind of special sanctity as "quotable authority" and a difficulty must have presented itself as to what was to be done, when, as was often the case, they differed. A partial remedy was found by Constantine who (321 A. D.) abolished the notes of Palus and Ulpianus on Papinian so as to restore "Papinian" uncorrupted, and at the same time confirmed the authority of the "Sententiae" of Palus.

The responsa were not of as high authority as the constitutional leges, but they were law for the case, and they applied to future cases under the character of principles of equity, and not of precepts of law. In the ages immediately preceding Jusinian, the civil law was in a deplorable condition by reason of its magnitude and disorder and scarcely any genius, says Heineccius, was bold enough to commit himself to study out such a labyrinth. When the Emperor Justinian came to the throne (527 A. D.) Roman law was in almost as chaotic a state as the law of England is at the present time.

In England, in order to find what legal rules govern a given set of facts it may be necessary to search the statutes of the realm, one by one, back to feudal times, and to thread one's way through countless cases and text books, for text books, though never an actual source of law, are sometimes the only place where undoubted rules of common law, which have never been expressed in a judicial decision are to be found. At Rome the possible field was even wider.

The Responsa Prudentum resembled English case law in that all legal language adjusted itself to the as-

sumption that the text of the old code, e. g., the XII Table remained unchanged, so there were certain fictions in the Roman laws, as in particular cases the allegation that a party was a Roman citizen could not be denied suggesting the undeniable fictions in the English law as to common recovery, and, the allegation of the plaintiff being the King's debtor in cases he brings in the exchequer. The form of the Responsa Prudentum differed at different periods of the Roman history. Whatever was the particular advice given to the client, the responsum treasured up in the note books of listening students would doubtless contemplate the circumstances as governed by a great legal principle, or included in a sweeping rule. Nothing of this sort has ever been possible in England or America, and it should be acknowledged that in the many criticisms passed upon the English law the way in which it has been enunciated seems to have been lost sight of. The hesitancy of our courts in declaring principles may be much more reasonably attributed to the comparative scantiness of our precedents, voluminous as they appear to him who is acquainted with no other system, than to the temper of the judges.

It is true that in the wealth of legal principle, we are much poorer than several of the nations of continental Europe, but they, it should be remembered, took Roman jurisprudence for the foundation of their civil institutions. They built the debris of the Roman law into their walls; but in the materials and workmanship of the residue, there is not much which distinguishes it favorably from the structure erected by the English judicature.[8]

It would be impossible to say how much Roman law has been absorbed into the English common law. In all probability there has been very much more added to the common law than is generally supposed. There is

[8]Maine's Ancient Law, p. 38.

also evidence that certain English judges in rendering their decisions, and giving their opinions, have copied largely from the Roman law without giving credit for the same. There are also innumerable cases, both in the English and American decisions, where credit has been given to the Roman law for legal principles which have been taken from it. Doubtless, also, much has been taken from the Roman law inadvertently. Many facts would seem to conspire to produce this result. It is hardly to be supposed that the occupation of Britain by the Romans for four hundred years would leave no trace of their laws on the country. The fact, too, that England is so closely allied in many ways to countries which have the Roman law for their basis must have had some influence.

The Canon law is confessedly from the Roman law and as it was largely the repository from which the rules of equity were taken, we have in equity, a judicial system built up almost entirely from the Roman law and apparently that system is destined to fill a much larger sphere in Anglo-American law than it has heretofore done. Our Admiralty law has also been largely adopted from the civil law. Besides, many of the English colonies have inherited the Roman law from their former occupants, having been governed by different continental countries of Europe, whose basic law was Roman. Large areas of the United States were settled by people who brought with them the principles of the civil law, notably Louisiana and the vast southwest. Even the east, particularly New York and New England have taken some beneficial principles from the civil law by the way of Holland. So it seems there are many ways in which the Roman law has beneficially influenced the common law. Owing to the diversity of jurisdictions where the common law is administered, we find it much less difficult to find out what the Roman law was in the time of Justinian than to know what the common law is today in

certain cases. In the Roman law we find many fine distinctions drawn which we do not have in Anglo-American law. Following out these distinctions, we see in most cases they are founded on reason; and therefore in many points the common law is much more crude than the older system, which perhaps is not to be wondered at when we consider that the Romans had many more centuries in which to perfect their system than we have had, and furthermore they availed themselves of whatever was good in legal systems that had preceded them, particularly in what they borrowed from Greece, while we have in certain cases refused to incorporate from the Roman law what might have been of great benefit to our system. We have had, and still have to a certain extent, an opportunity to profit by the experience of others and wisdom would direct that we avail ourselves of the opportunity rather than to act the part of the immature youth who will not listen to the counsel of those who have travelled the road which he must follow.

As an example of a fixed rule in the Roman law, we find this as to percolating water in Justijanian's Digest Book 39, Title 3 C. 12. He, who digging in his own land, draweth away the water of his neighbor, nothing can be done, for he has no action for his grief and he ought not to be held guilty in this he did, not with a notion of injuring his neighbor, but of improving his own land. Another example is that of the civil law as to survivorship in case of a common disaster. Take for instance the laws of California on this subject, adopted from the civil law, as follows, to wit:

1. If both of those who perish, were under the age of fifteen years, the older is presumed to have survived.

2. If both are above the age of sixty, the younger is presumed to have survived.

3. If one be under fifteen and the other above sixty, the former is presumed to have survived.

4. If both are over fifteen and under sixty, and the sex be different, the male is presumed to have survived; if the sex be the same, then the older.

5. If one be under fifteen or over sixty and the other between those ages, the latter is presumed to have survived.

Presumptions like these are not alien in spirit to American jurisprudence and yet survivorship laws have been adopted in only two of the states, to wit: in Louisiana and California.[9]

The elaborate ceremony of mancipatio used in the early days of Rome, wherein a transfer of property was effected in the presence of six Roman citizens of full age, one of whom acted as libripens, or balance holder, and the other five as necessary witnesses, was calculated to give dignity and publicity to the transaction and to preserve reliable evidence of the same and was somewhat similar to the English ceremony of livery of seisen.

Here is an interesting English blend of the Roman laws. Twenty years adverse possession and immemorial prescription, in the common law, hereditaments are acquired by usage from time immemorial; but according to Stephen and other authorities enjoyment of real estate for twenty years raises a presumption that it is immemorial. The Roman law requires that the party who prescribes must begin his occupation in good faith, but here English law apparently differs from the Roman, for at common law the possession need not originate bona fide.[10] While we have our Equity and Admiralty law from the civil law, Primeogeniture is modern; there is not the faintest trace of it among the Romans.[11]

In the Roman law the rights and duties of tutors and curators which correspond to our guardians are regulat-

[9]Cal. Code of Civil Procedure No. 1963, subd. 40.
Stephen's Comm. Bk. II part I Chap. 33.
[10]Markby, Elements of Law Sec. 582; Williams Inst. of Justian, p. 100.
[11]Dwight's Introduction to Maine's Ancient Laws, p. XLVIII.

ed by wise and just rules. Likewise the rights in property, absolute and usufructuary, and the various ways by which property may be acquired, enlarged, transferred and lost and the various incidents and accommodations which justly belong to property are very admirably and clearly discussed and set forth in the Roman law, and very refined and equitable distinctions are pointed out and vindicated. Trusts are established and enunciated through all their many modifications and complicated details, in the most equitable and rational manner. Also the many rights and duties which flow from personal contracts of all kinds, whether expressed or implied and according to the infinite variety and shapes which they assume in the business and commerce of the world, are defined and illustrated. with a clearness and brevity unequalled. Not only in these respects, but also in many others the Roman law exhibits proof of a very high civilization and refinement, and those who study it closely cannot avoid the conviction that it was the fruitful source of those extensive views and grand principles which were applied to enrich the jurisprudence of modern times. The grand total of the Roman law will evoke neverfailing praise and curiosity and will receive the homage of the learned, as a grand monument of wisdom. It fills so large a place in the sphere of human reason; it affects so many interests of mankind in their social and civilized relations, it embraces so much of study, meditation, experience and work, it conducts us such distance into antiquity and it has existed so long against the waves and storms of time that it is impossible while contemplating the system not to be struck with veneration for it.[12]

The common law of England is not to be taken in all respects as that of America. Our ancestors brought with them its general principles and claimed it as their

[12]Kent's Commentaries, p. 548.

birthright but they brought with them and adopted only that portion which was applicable to their situation.[13]

In many cases wherein the common law was inadequate, the American states have adopted rules and principles from the Roman law. Witness the adoption laws transplanted into the legal systems of each one of the states of the union. The civil law system of reckoning degrees of relationship, which is much more simple and scientific than the other systems, has been adopted in many states in place of the common law plan. The laws of descentt and distribution as set out in Novel 118 of the Constitution of Justinian, being the most equitable mode of distributing property of an intestate, have been adopted in part or in toto by many of the American states. While these are examples of statutes of the Romans which have endured to the present time, we find that the canons of descent as given by Blackstone, have been discarded and the more humane laws of the Romans adopted in their place.

The responses of the early Roman jurists were not published in the modern sense by their authors. They were written down and edited by their pupils and were therefore in all probability not arranged according to any scheme or classification The rule of *stare decisis* as used and adopted in the common law is responsible for our court made law, wherein if a wrong principle is once adopted into the law it is apt to be continued and copied into other cases and sometimes into other jurisdictions and is a detriment to the sysem in this respect; and so a rule founded on a bad principle is given the dignity of law. This confuses the functions of the judiciary department with those of the legislative which is contrary to the American idea of government.

The courts of civil law countries not being bound by previous decisions are not subject to this danger. A possible reason why the doctrine of *stare decisis* was not

[13]Van Ness vs. Pacard, 2 Peters 137.

adopted in the early days of Rome may have been that the Responsa Prudentum was not rendered by the bench but by the bar. The decisions of a Roman tribunal though exclusive in the particular case had no ulterior authority except such as was given by the professional repute of the magistrate who happened to be in office for the time being. Properly speaking there was no institution at Rome during the republic, analogous to the English bench. There were indeed magistrates, invested with important judicial functions in their especial department, but the term of office of the magistrate was only for a year, so that they are much less aptly compared to a judiciary than to a cycle of offices briskly circulating among the leading members of the bar.

Doubtless there might be very much said on the origin of a condition of things which looked to us like a startling anomoly, but which was in fact much more congenial than our own system to the spirit of ancient societies, tending as they always did, to split into distinct orders which, however, exclusive themselves, tolerated no professional hierarchy above them.[14]

In our own time and country, we find in our legal system things which remind us of the Responsa Prudentum. Take for example that most excellent provision in the constitutions of Massachusetts and Maine, which empowers the legislature to refer a measure pending in that body to he Supreme court for its opinion as to whether if such measure were enacted into law, it would be constitutional. This provision has frequently prevented the enactment of unconstitutional laws and pointed the way to the enactment of constitutional ones, thus avoiding a vast amount of trouble and litigation. Another instance of a fundamental principle taken from the Roman law is to be found in the very first part of the Declaration of Independence wherein it is declared that

[14]Maine's Ancient Law, p. 34.

"all men are created equal," a statement taken from Book 50 T., 17 C. 32 of Justinian's Digest, "omnes homines natura aequales sunt,"[15] and which we have made the corner stone of our republic.

The history of the development of our law as to mortgages, especially with regard to the rules of equity as applied to those instruments, is quite similar to the history of the development of the same law among the Romans and the results arrived at in the two systems are practically the same. Are there not other branches of our law yet in a crude state which in their development will follow the Roman? The two systems have both worked for the same results, to wit: the adoption of the best rule to secure good results. That being the case, how eminently proper and profitable is a thorough acquaintance with the principles embodied in the Roman law.

In connection with the subject of conveyancing one is also reminded that our new plan for the registration of land titles as carried out in the Torrens system of confirming real estate titles is in a slight degree at least suggested by the Responsa Prudentum. That is to say the fact as to whether a person has a good title to land is pre-judged to the extent that he is immune to the results of future suits concerning his title to that land; similarly to the pre-judgments of the jurisconsulti in giving their Responsa Prudentum. We are also similarly reminded of Roman methods by our various actions to quiet title and somewhat so by proceedings in the courts having probate jurisdiction wherein a form for the petition is furnished you by the court.

In order to avail ourselves of that which is good in the Roman law, it is as necessary to know what not to take as it is to know what to take from it. If Blackstone had been more familiar with the principles and workings of the *patria potestas* he would never have

[15]See writings of Ulpian; also Maine's Ancient Law, p. p. 89, 92.

made the mistake he did in trying to explain the reasons why half bloods should not be permitted to inherit with the whole bloods, a principle which need not have been absorbed into our law for the reason that certain conditions which prevailed among the Romans did not exist in England, and the rule could not be applied, and was not applied as it formerly had been in Rome, for there the agnostic half bloods never were excluded but only the uterine ones. So now we find that this law which at the time of its adoption from the Roman law was only partially understood is being discarded in many jurisdictions. Nevertheless there is much in the Roman law which suits modern conditions for it existed so long that it became a great storehouse of legal principles, for "that which is just and true" lives forever. The Roman legal system has the longest known history of any judicial system. All the changes that it underwent have been fairly well ascertained. From its commencement to its close, it was continually being modified for the better, or for what the authors of those modifications conceived to be for the better, and the course of improvement was continued through periods at which all the rest of human thought and action materially slackened its pace and repeatedly threatened to settle down into stagnation.[16]

Lex Regia

It has been said that it was an indelible and foul blot on the civil law as digested under Justinian that it expressly avowed and inculcated the doctrine of the absolute power of the Emperor, and that all the right and power of the Roman people was transferred to him. This had not till then been the language of the Roman law and Gravina with much indignation charges the introduction of the *lex regis* to the fraud and servility of Tribonian. Be that as it may be the slaim of depotism

[16]Maine's Ancient Law, p. 23.

became afterwards a constitutional principle of imperial legislation.[17] But this law in no way affected the private law unless in fact it may have had a tendency to improve it, for where there was so much power and responsibility there would naturally be a desire to retain it by enacting laws which would be acceptable to the people, indeed this course would be almost a necessity with an inteligent constituency. In any event the *lex regia* came so late and the private law of the system had been so fully developed that it was not likely to be marred even by an imperial decree.

On the other hand the English law started out with the idea of centraliation in that it was built upon the feudal system, and the Roman and American doctrine that all men are created equal was never enforced or attempted to be enforced in England. In fact the English doctrine is that all men are not created equal. The principles inherited from the feudal system have never met the requirements of our free American institutions and we have in the well developed civil law something that is more fitted to our needs.

There are still doubtless many matters that might arise where we would have no law to fit the case and wherein the civil law might be used to advantage by being incorporated into our law, as for instance, in the case of the law of survivorship in a common disaster, and also in the case of the murder of an ancestor, in which case many of our states have no express law while the civil law has made provision for such cases, as it had minute and salutary laws concerning such matters even going so far as to provide expressly that if the beneficiary attempts the life of the testator, he cannot take under the testament. Some courts have followed the civil law in certain cases where the common law gave no direction. In the case of Acton vs. Blundell,

[17]Digest 1-4-1 Codex 1-14-12. Inst. 1-2-6.
[18]Riggs vs. Palmer, 115 N. Y. 506.

reported in 12 M. & W., the court said: "The Roman law forms no rule binding in itself upon the subject of this realm; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it prove to be supported by that law, the fruit of the research of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries of Europe."

Again in admiralty cases where the defendant has a claim against the plaintiff, which he desires to plead and have allowed, resort is had to the Institutes of Justinian.[19] Likewise as to the natural increase from property subject to a chattel mortgage, the common law courts have unquestionably adopted the rule of the civil law on the subject.

The lawyers and people of England have always shown a jealousy, both of the principles and practice of the civil law. But by degrees in cases where the civil law is clearly right, jealousy gives way to good sense and justice.[20] Our probate and testamentary laws are confessedly no part of the common law, which did not admit of devises, and the civil law is the repository of the principles by which international intercourse is regulated. Likewise it originated the law mercantile and maritime and it is copious on the subjects of contracts, covenants and other obligations which are topics of frequent discussion in the commercial world.[21]

In questions of rational law, no cause can be assigned why we should not shorten our own labor, by resorting occasionally to the wisdom of ancient jurists, many of whom were the most ingenious and sagacious of men. What is good sense in one age, must be good

[19]Institutes 4-6-30 and 39. The C. B. Sanford 22 Fed. 863.
[20]Tilghman C. J. 3 Binney 507.
[21]North American Review, Oct. 1820.

sense, all circumstances remaining the same in another; and pure unsophisticated reason is the same in Italy and in England in the minds of Papinian and of Blackstone.[22]

The Corpus Juris Civilis bears marks unquestionably of great precipitation; but with all its imperfections, it is a most valuable mine of judicial knowledge. It gives law at this day to the greater part of the world and though few English lawyers dare make such an ackowledgment, it is the true source of nearly all our English laws that are not of feudal origin.[23] In comparing the two legal systems, the comments of the writers in one or the other system are certainly competent and relevant.[24]

Admiralty

The general rules of practice in Admiralty come to us directly from the Roman law. The form of the libel and answer, the securities, or stipulation taken to enforce the jurisdiction of the court, the interrogatories put to the parties, in the progress of the trial, after the pleadings are completed, the method of proceeding by default and successive decrees, are all derived directly from the practice of the Roman forum, or from that practice as it is modified by the usages of civil law courts in modern times.[25] The affidavit required of the libelant to the debt or claim on which the action is brought corresponds to the oath of calumny required of the actor by the Roman law: *Quod non calumniandi animo litem se novisse, sed existimando bonam causam habere.*[26] Our practice in Admiralty following the Roman law, requires the defendant to verify his answer by his oath.[27]

[22]VIJones on Bailments p. 604.
[23]Life of Sir Wm. Jones by Lord Teignmouth p. 308 4th ed.
[24]Gayle vs. Cunningham, 1 Harper (S. C. Esq.) p. 110.
[25]4 Blackstone's Comm. p. 446, Brown's Civil and Admiralty Law Vol. II p. 348.
[26]Inst. 4-16-1 Codex 2-59-2.
[27]Clavik's Praxis I p. 24.
Gammell vs. Skinner 2 Gall. 45.

Vexatious Suits

In all countries, and under all systems of jurisprudence, it was found necessary to establish some check to causeless and vexatious litigation. In the jurisprudence of the common law the principal check is the liability to costs. But in the jurisprudence of ancient Rome, it appears that a party was not liable for costs of the adverse party, merely because judgment was rendered against him. He was liable only when he instituted an action without probable cause; that is, when the suit was vexatious, or, in the language of the Roman law, calumnious; and the costs were not given against him as a part of the judgment, but could be recovered only by a new action called an action of calumny, corresponding to an action for malicious suits at common law. By this action the party could recover ordinarily a tenth, but in some cases a fifth and even a fourth, of the sum in controversy in the former action. This was given as an indemnity for his expenses, in being obliged to defend himself against a vexatious suit.[28]

In the time of Justinian, and perhaps at an earlier period, the action of calumny had fallen into disuse, and he as a substitute required the oath of calumny. The oath required was in substance an affidavit on the part of the actor, that the debt or cause of action, on which the suit was brought, was in his opinion, well founded, and on the part of the defendant, that the defense was made in good faith and in the belief that it was a good defense.[29]

Another part of the Roman jurisprudence from which our admiralty practice has been in part derived, is the interrogatory actions of the Roman law. These were derived from the edicts of the Praetor and constituted a part of that large portion of the law of Rome

[28]Gaii Comm. Lib. 4, sec. 176-8, Justinian's Inst. 4-16-1.
[29]Codex 2-59-2. Inst. 4-16-1.

called *Jus Praetorium* or *Jus Honorarium.* They were resorted to in all cases where the actor required a discovery: *ubicumque judicem aequitas moverit, aeque opotere fieri interrogationem, dubium non est.*

Custom

Both the English case law and the Responsa Prudentum are intended to be exponents of custom. The common law grew out of the general customs of the country, and consists of definitions of those customs and of those ancillary principles that naturally accompany them, or are deduced from them. The common law of one country or century is not necessarily the common law of another, because customs change. This is the sort of law that is and must be recognized as valid in all countries and it is created by the people themselves and not by any legislative act.[31] Its precepts abound in the Roman law, and their authority is thus defined: *Diutura consuetudo pro jure et lege observari solet, non minus quam ea jura quae scripta sunt? Et non solum suffragio legislatoris, sed etiam tacito consenses omnium per desuetudinem abrogentur.*[32] Coke and Bracton expressed very similar principles.[33]

Common law, then, is founded on popular custom, and when the judges declare it, they merely discover and declare what they find existing in the life of the people as the rule of their relations; and it is thus that general customs have always found their way, as law, into our treaties and reports If the custom passes away, the laws that grow out of it go with it, on the principle, *cessante ratione, cessat lex.*

[30]Codex 3-10-2. Inst. 4-6-33.
[31]Effinger vs. Lewis, 32 Penn. St. 367.
[32]Digest 1-3, C. C. 32-33-35.
[33]Inst. 97b, 110b, 113a, Bracton 1-3-2 and 1-5-5.
[34]Effinger vs. Lewis, 32 Penn. St. 367.

Tendencies in Modern Law

In comparing the characteristics of the two systems we find that from the time of the old Roman law to the present there has been a gradual dissolution of family dependency and the growth of individual obligation has taken its place. The tie between man and man which replaces those rights and duties which have their origin in the family is contract. It was the tendency of former law to fix the condition or *"status"* of persons by positive rules; in modern times, the condition of persons is commonly the immediate or remote result of agreement. The movement has been from *status* to *contract,* from *fixed position to voluntary choice.*[35] Thus the modern tendences in our laws are to develop and increase individual rights, and, other things being equal, the country wherein its citizens have the most rights, consistent with like rights in others, is the most progressive and prosperous and the most desirable in which to live.

Whereas many people were slaves under the Roman law and more recently by our own law and such people had no rights, or next to none, now every human being under the American law has what is intended (theoretically at least) to be equal rights. In Rome the *patre filleas* practically owned his children till the time of his death. In English speaking countries children are emancipated as soon as they are full grown and the control of the parent over them is not primarily for his benefit but for that of the children during the tender years of development. In the Roman law the wife was in the power of her husband, practically under his absolute control. In the Anglo-American law of today her individuality is not lost. In early Roman law the plebians had few individual rights and by the early English law the common people had but slightly more than such people had in ancient Rome, while in

[35]Dwight Introduction to Maine's Ancient Law, pp. 32, 40.

America today the people are theoretically equal and the working out of that theory is each year increasing the rights of the individual, at least the rights of those who before did not enjoy all the rights which it was feasible and safe for them to enjoy. The development of both systems increased individual rights, that is, in both systems the importance of the individual was increased.

By the Roman law a person did not become *sui juris* till he was twenty-five years of age and not fully then in the sense in which he does now at twenty-one by our law. The ultimate finite existence is that of the individual and all true philosophy recognizes that society exists for the individual, and not the individual for society.[36]

Extent of the Two Systems

The civil law is a world system of law. It was such up to the fall of Constantinople, on May 29, 1453, and in a certain sense has been full as much, or much so, since that date inasmuch as it is the basic law for a large part of Europe much of Africa, a considerable part of Asia and North America, and the whole of South America. The common law next to the civil, comes the nearest to being a world system, although a considerable part of the Anglo-American law comes from the Roman. Thus we see the truth and force of the words of D'Aguesseau that, "the grand destinies of Rome are not yet accomplished; she reigns throughout the world by her reason after having ceased to reign by her authority."

Women Under the Two Systems

The position of woman in the ancient law is explained by the *patria potestas*. The *agnate* bond in her

[36]History of the Development of Law, Morris, p. 12.

case was not released by the death of her parent. She could never become the head of a family, as her brother might. When her father died she came under perpetual guardianship of her nearest male relative. This rule of ancient law however disappeared from the matured jurisprudence of the Roman Empire. At this point we observe a remarkable contrast between ancient and modern law. Under the early system woman was subordinate to her relatives; under the modern, to her husband. Under the early Roman law, marriage could be contracted in any one of three forms, one of which was religious and the other two civil. In view of the law, the wife became the husband's daughter and he exercised over her the *patria potestas.* He could appoint a guardian over her whose authority continued after his death.

In the later Roman law a form of marriage was recognized which left the wife theoretically under the care of guardians whom her parents had appointed, but practically when that guardianship became obsolete under no control whatever. In modern law, there is a two-fold element. The later Roman jurisprudence has been adopted so far as to emancipate married women from the control of their male relatives, while married women, though the influence of religious sentiment and early notions prevalent among the dominant races from which modern nations have sprung, are governed by rules of an imperfect civilization. These systems of law are the most severe upon married women; they borrow their rules from the Canon law.

As to the married woman under the common law, her real estate practically belonged to her husband during their joint lives as he had the use of it for that period, and should there be a child born to them during the coverture he had such use till the time of his death. He was entitled to the benefit of her leases for his life time and if he choose to dispose of them, her future right

to them was extinguished. If he outlived her they belonged to him absolutely. Her choses in action belonged to him if he chose to reduce them to his possession and her tangible personal property became his at the moment of marriage. The legal personality of the wife was merged in that of her husband and she had no power to make a contract. Her earnings belonged to him and he could collect them in an action at law. The wife could not convey her land except by the fictitious judicial proceedings of fine and recovery. The Statute of Wills gave her no power to make a will and she could not make a testament of her personal property except by permission of her husband.[37]

Lawyers and Jurisconsulti

The comparison between English case law and the Responsa Prudentum suggests a statement by Howe in his studies of the civil law wherein he says: "It will not be asked of the lawyer how many verdicts did he gain by appeal to the meaner passions of a jury; nor how many times did he successfully wrench and twist the rules of law in such a way as suited his client's case; but what was his influence in developing in fair and fruitful form the jurisprudence of his country; what old abuse did he destroy? What new and needed reform did he construct? Did he, like Tribonian, convert the laws of an Empire, which had been a wilderness, into a garden; did he, like Domat, trace the civil law in its natural order as it flowed from these two great commands of love to God and love to man; did he like Hardwick, become the father of equity; did he, like Stowell, well nigh create for modern commercial nations the rules of beligerent rights; did he, like John Marshall, expound the constitution of a great and new country; did he put the result of his experience in a good book

[37]Maine's Ancient Law, pp. 36, 37 and 38.

for the benefit of his successors in the profession? If any of these questions, or questions of a like nature can be answered in favor of the lawyer, fame and honest fame shall be decreed him.[38]

Growth of the Civil Law in the United States

The common law and the civil law have not maintained their respective positions in the United States. The situation is that of transition from the common law to the civil law. It is natural that the same should have been gradual and almost imperceptible, instead of being brought about at once; and the change has been surely and unerringly going on ever since the establishment of our colonies, but of course more thoroughly since the establishment of American independence. Ever since the Fourth of July, 1776, the law-making power has been continually at work to eliminate the feudal law and to substitute for it the principles of the civil law. One of the very first acts of each and all of the states was to repudiate the laws of inheritance as laid down in the English law, with all their feudal incidents, and to enact laws of inheritance in substantial accord with those of the civil law; the state of New York even going so far as to declare that the tenure of land should be allodial, as in the Roman law, and not feudal as by the common law, although this had practically been previously established by the adoption of the Roman law of inheritance.

The work of substitution and elimination has gone on gradually but surely. Almost every salient feature of the common law of England has been banished from our social system and from our jurisprudence. We have abolished the invidious distinctions between males and femlaes in the inheritance laws; we are also rapidly abolishing them in our political laws and we have discarded as far as possible all the intricate incidents of feudal tenure—their name is legion and they cannot

[38] Howe's Studies in the Civil Law p. 370.

all be reached at once and possibly some of them are innocuous.[39]

The Romans certainly had a genius for discovering the true principles of law. No race before or since their time have contributed so much to the world's stock of enduring law as the Romans. No nation of Christendom would today occupy anywhere near as advanced a position as it now does, had it not been for the influence of the Roman law or its judicial system. Her jurists delighted in discovering rules of law which would advance the cause of justice and equity, and what greater satisfaction can one have than the contemplation of the fact that he has contributed to the world's permanent store of rules calculated to enhance the comfort and convenience of the human race for all time. For once a good law becomes fully established its existence will probably be known through all the ages.

We may not be able to say that in all cases the Roman system, which had as one of its features the Responsa Prudentum, is better than the English case system. The Responsa Prudentum had the advantage that it was delivered at, or before the time of the trial and not as in the court opinions, in some instances weeks, or even months, after the hearing, when other matters had pressed themselves upon the attention of the court. Moreover the jurisconsulti were not trammeled by the requirements of the doctrine of *stare decisis* in rendering their opinions as are the Anglo-American courts.

It is almost pitiable to note the dilemma in which our courts sometimes find themselves when they are forced to acknowledge that the law as it exists, does not meet the ends of justice, but having been previously decided in a particular way they do not feel at liberty to adopt the better rule.

The jurisconsulti do not correspond exactly to our

[39]History of the D evelopment of Law, Morris, pp. 298-299.

judges nor yet precisely to our lawyers. Probably the functions of our lawyers are more nearly like those of the jurisconsulti than are the duties of our judges. Can we adopt the Responsa Prudentum into our system of law? Probably not in the form it existed in the Roman law. We have noted certain methods in the Anglo-American law that are in a slight degree similar to the Responsa Prudentum, at least, one reminds us of the other and we find these methods in the most useful and progressive parts of our law. We refer to the recently adopted process of confirming land titles, the equitable procedure of banishing a cloud on a title to real estate, our probate practice and other similar matters. Are there not other ways in which we may advantageously employ the methods of the Roman jurisconsulti?

May not our judges on being retired on account of length of services be employed, at least a part of their time, in a manner similar to the way in which the jurisconsulti rendered service? Of course it would not be possible for retired judges to give opinions in individual cases but in nearly every state there are institutions for the training and education of persons who *aim* to become lawyers. Would it be unreasonable, or impracticable to require our judges who are retired on pay to give one or two, or more courses of instruction in the State law schools each year? The valuable work of Chancellor Kent as a law instructor and in writing his commentaries after his retirement from the bench suggests the feasibility of such a plan. This might tend to the production of better equipped and more useful lawyers and thus to the diminution of litigation, which for many reasons is an object desirable of being attained. If we had better lawyers, then in time better judges and in the end better case law.

It may not be practicable that our people should have the advantage of the best attainable legal advise free of charge, but that is what the people of Rome had

in the early days of the Responsa Prudentum. Every man is bound to know the law, and yet at the present time it is in many cases very expensive knowledge for the layman to acquire when he is in need of it for a particular case; more than that a legal opinion that is bought and paid for is not apt to be an unbiased opinion. If there were some way whereby our citizens could secure reliable, unprejudiced and unbiased legal opinions from able counsellors without an extra charge in each particular case, that would seem to be desirable and we should be just in the position Roman citizens were in the early days of the Responsa Prudentum.[40]

ROBT. WORTH LYMAN.

[40]Sohm's Institutes of Roman Law, p. 96.

MOOT COURT

ARRISON v. BRITAIN

Real Estate—Lateral Support—Rights of Adjoining Owners—When Negligence Must Be Proved—Damages

STATEMENT OF FACTS

Plaintiff and defendant owned adjoining tracts of land. On Arrison's land was a dwelling house, 20 feet from the division line. Britain was extracting coal from his land, a result of which was a sliding over of a portion of Arrison's land, a cracking of it and an injury to the house. He sues for damages but gives no evidence of negligence in Britain. He claims for injury to the house, and also for injury to his land.

Cohen, for plaintiff.

Farrell, for defendant.

OPINION OF THE LOWER COURT

CHYLAK, J. Two questions for consideration present themselves to this court. I. Whether the defendant in operating his own mine is liable to an adjoining surface owner for injuries resulting from his excavations. 2. Whether the defendant under the same circumstances, is liable to the adjoining owner for injuries to buildings located on the land which has subsided without proof of any negligence on part of the person making excavations.

Taking the first question. Under the C. L. rule, the owner of minerals is bound to so conduct his operations in the removal of them as not to disturb the adjacent surface and do injury to the owner hereof. This is the settled law in England, followed in this country and well settled in the law of Penna. In McGettigan v. Potts, 149 Pa. 155, and Matulop v. Coal & Iron Co., 201 Pa. 70, it was held that the plaintiff was entitled to the natural lateral support of her land or ground, and if the same were withdrawn by her neighbor in mining operations on its own land, for an injury to her lots resulting from withdrawal of such support or from excavations, compensations must be made. The right to such lateral support is an absolute one and the adjoining owner who withdraws it or excavates, whether negligent or not, is liable for injuries resulting to his neighbors land. In the first case cited, Justice Green citing, Gilmore v. Driscoll, 122 Mass. 199 and

McGuire v. Grant, 1 N. J., 356, with approval says: "But in the case of land, which is fixed in its place, each owner has the absolute right to have his land remain in its natural condition unnecessary consequence from this principle that for any injury to his soil resulting from removal of natural support to which it is entitled, the owner has a legal remedy in an action at law against the party by whom the work was done. This does not depend on negligence, but upon violation of a right of property which has been invaded. This unqualified rule is limited to injuries caused to land itself and does not afford relief for damages by the same means to artificial structures or buildings. For an injury to buildings, which is unavoidable, incident to the depresson or affected by any act of his neighbor, and if the neighbor digs upon or improves his land so as to injure this right, an action may be maintained against him for damages without proof of any negligence." There is no doubt whatever as to the soundness of this view and further discussion of the first question is unnecessary, and therefore must be answered in the affirmative.

Now we proceed to the second question. This question can be answered by referring to cases cited above. It has been held that the lateral support of land to which the owner thereof has an absolute right and for the deprivation of which by his neighbor he can maintain an action without proof of negligence, extends only to the land itself in its natural condition and does not include support for protection of buildings upon it. This is well settled in England and also with us. Since this absolute right is limited to the land itself in its natural condition, there can be no recovery for injuries to buildings, or improvements resulting from withdrawal of such support in the absence of proof of negligence or carelessness in excavating adjoining land. This is equally well settled and the rule is no where more distinctly announced than in Doley v. Wyeth, 2 Mass. 131, where the court after referring to absolute rights of an adjoining owner of land to lateral support for it in its natural condition said: "It is a slide of the soil, on which they stand, caused by the excavation of a pit on adjoining land, an action can only be maintained when a want of due care or skill or positive negligence has contributed to produce it." In Alexander v. Colon, 72 Superior 1, the court expressly ruled upon this point as follows: Negligence or want of due care in excavating or mining adjoining lands for which there is liability for injury to a neighbor's building means positive negligence or manifest want of due care in the mining operations, so far as they affect adjoining properties. In the absence of any evidence of such negligence there can be no recovery. Hence

the second question presented must be answered in the negative.

Judgment accordingly.

OPINION OF SUPREME COURT

The carefully written opinion of the trial court makes extended discussion by us of the questions involved, superfluous.

For disturbance of plaintiff's land, as distinguished from the building, by defendant's excavations, the latter is liable, whether they were made with care or not. 12 Forum (Dickinson Law Review) p. 101. The case recognizing this principle is Alexander v. Conlon, 72 Superior 1.

It is equally well settled that there is no liability for injury to a house, fence, a chicken house, a building, a wall, unless there has been negligence. 12 Forum, p. 102.

No evidence of the negligence of the defendant was given. Negligence is not presumed. It must be proved. We must assume that whatever would have been reasonably expected of the defendant, to avert a possible injury to the house, he did.

The trial court has allowed a recovery of damages for the caving in of plaintiff's land, but has denied damages for the injury to the house. The judgment therefore must be affirmed.

CLARK v. COMSTOCK

Party Wall Legislation—Constitutionality—Act of June 7, 1895, P. L. 135.

STATEMENT OF FACTS

In a city in which there is the usual party wall legislation, Clark and Comstock owned adjacent lots. On Clark's lot was a house, the outer surface of whose wall was exactly coincident with the division line. The house is three stories in height. Comstock's house was vacant. In 1918 he decided to erect a seven story building and to avail himself of the right to make a party wall. This would entail the necessity of taking down the wall of Clark's house. Comstock asked the building inspector to authorize the act. He did so and the taking down of the wall was about to begin when Clark applied for an injunction denying the legal right to take down the wall.

Bashore for Plaintiff.

Unger for Defendant.

OPINION OF THE LOWER COURT

SHARMAN, J. In a city of the first class, authority to erect a party wall is given by the Act of Feb. 24, 1721; in the cities of the second class by the Acts of June 7, 1895, and May 5, 1899. Since this was a city "in which there is the usual party wall legislation" it is of no consequence under which of the above acts Comstock claimed his rights, so far as the decision of this case is concerned. The municipal inspector duly authorized the removal of the plaintiff's wall and his decision in each particular case in final. Evans & Watson, v. Jayne, 23 Pa. 34; Childs v. Napheys, 112 Pa. 504; Godshall v. Miriam, 1 Binney 352.

In the case at bar, we can assume, the contrary not appearing, that the proceedings were in accord with the provisions of one of the acts of assembly. The plaintiff neither alleged nor endeavored to prove the defendant had not strictly complied with the law; but claimed to restrain the defendant upon the theory that the legislation authorizing the proceedings is unconstitutional.

The efficacy of these contentions can best be waived by quoting part of Mr. Justice Stewart's opinion delivered in 1907 in the case of Heron v. Houston, 217 Pa. 1. "It is too late at this day to question abstractly the right of the legislature to confer upon municipalities the power of regulating party walls. Never since we have been a state have we been without legislation of this kind; and every enactment on the subject has contained the fundamental feature here challenged—constitutional warrant for the appropriation, under municipal regulation, by one of two adjoining lot owners of a certain portion of the others land, for the construction of a party wall for their common enjoyment and use. This legislation has not only been acquiesced in and acted upon until it has become a settled rule of property, which it would be most dangerous to public interest to disturb, but its constitutionality has been recognized by judicial authority in unmistakable terms. * * * The principle upon which these enactments rest is the general police power of the state. While it must be admitted that they are to a certain extent an interference with that exclusive enjoyment ordinarily incident to ownership of land, and are therefore to be strictly construed; Hoffstat v. Voight, 146 Pa. 632; yet our adjudications under them are but so many repeated recognitions of their correspondence with constitutional limitations."

The fact that the outer surface of Clark's house was exactly coincident with the division line will in no way militate against Comstock's right to tear it down for as was brought out in the appeal of the Western National bank, 102 Pa. 171, "this right cannot be taken away from him by the adjoining owner building exclusively upon his own land, either to the line or a short distance therefrom."

An apt conclusion to such a state of facts is drawn by Mr. Justice Stewart in 217 Pa. 1, supra, in these words: "The fact that the erection of the party wall here complained of will involve the appropriation and possible removal of appellant's (plaintiff's) eastern wall, built wholly within his own line, and so contract the dimensions of his present hall or entry to his building, only furnishes another illustration of how general laws in their application may in individual cases result in apparent severity and injustice. Such apparent inequality necessarily results; but all are alike exposed to the chance, and the risk is part of the price which each pays for equal participation in all that is provided for the general safety and the common good."

No better exposition of the law at present in regard to party walls can be found than in the able and exhaustive opinion of Mr. Justice Moschzisker, delivered Jan. 7, 1919, in Jackmon v. Rosenbaum Co., 263 Pa. 158, in which the constitutionality of such legislation is upheld.

By section 9 of the act of June 7, 1895, P. L. 135, the court of common pleas is empowered to enjoin a subsequent builder from cutting into or using a wall, as in this case, until the cost of the same, i. e., the original wall, is paid. It does not appear from the facts that the plaintiff did not receive compensation in compliance with this section of the act.

We fail to see that the plaintiff has made out a case and the bill is therefore DISMISSED.

OPINION OF SUPREME COURT

The constitutionality of party wall legislation has been too often recognized in this state, to make discussion of it advisable.

Each of two owners of contiguous lots in a city or borough, has the right, when he builds on his lot, to project the wall next to his neighbor, across the mathematical boundary, and plant one-half of its thickness on his neighbor's land. Of this right he cannot be deprived by the fact that his neighbor has already built a wall up to the division line. "When either lot holder," says Moschzisker, J., "builds on his own property up to the division line he doets so with the knowledge that, in case of the erection of a party wall, that part of his building which encroaches upon the portion of the land subject to the easement will have to come down, if not suitable for incorporation into the new wall." Jackman v. Rosenbaum Co., 263 Pa. 158, 171.

Clark's house was of three stories, and stood wholly on his lot. That the wall toward Comstock's lot was strong enough to sustain the weight of four additional stories is quite unlikely. The build-

ing inspector was satisfied that the demolition of the wall was unavoidable. We see no reason for the court's interfering with the process.

The conclusion reached by the lucid opinion of the learned court below must be accepted, and the appeal from the decree refusing the injunction, must be DISMISSED.

BOOK REVIEW

Federal Criminal Law and Procedure by Elijah N. Zoline, of the New York Bar, with an introduction by Hon. Henry Wade Rogers, Judge of the U. S. Circuit Court of Appeals, Second Circuit. Publishers, Little, Brown & Co., Boston, 1921.

This important work is in three volumes. The first, contains Judge Rodgers' Introduction, the Table of Cases, and 45 chapters on various procedural topics. A few of their titles are: Jurisdiction of the Federal Courts; Due Process of Law, Arrest without Warrant; Venue Right to Counsel, Confrontative of Witnesses; Self-incrimination, Indictments, Ex post facto laws, Limitations, Former Jeopardy, Pardon, Jury Trial, etc. Chapter 33, contains a valuable and interesting treatise on the subject of Evidence. The first volume concludes with a discussion of international extradition, and inter-state rendition.

The second volume containing 730 pages, deals with the various crimes that have been defined by federal legislation. It would serve no useful purpose to enumerate them.

The third volume, of 783 pages, contains a collection of Forms. Crimes are divided into 17 groups, and illustrative forms pertaining to each, are presented.

These three volumes may be cordially recommended to the attention of students and practitioners in the Federal Courts. The style is simple, clear, and terse. The pertinent statutes and decisions may be quickly found. Familiarity with the constitutional principles underlying the criminal law, is everywhere manifest. The books are well printed, and are as attractive in appearance, as their contents are interesting and important.