THE GERMAN LAW-SUIT WITHOUT LAWYERS.

AS in the Roman practice, during the formulary period, there were two judicial stages to every law-suit, one in which the issue was determined and the mode of trial directed, and another for the trial itself, so there are two judicial stages to every German law-suit. In the first, the court finds out what is really in controversy; in the second is the trial.

In most cases there must be written pleadings drawn by lawyers, and a trial conducted by lawyers. A plaintiff is not allowed to conduct his own cause in any of the higher courts. But the plaintiff has his option of suing by a lawyer, or not, in petty causes, involving not over three hundred marks, or a greater sum when arising from certain kinds of controversies, as between landlord and tenant, master and servant, travellers and inn-keepers, or seamen and ship. Should he elect not to have a lawyer to try his case, the defendant cannot have one either.

Such proceedings are within the exclusive jurisdiction of the court of first instance (*Amtsgericht*).

Dr. Hermann Meyer, a Prussian judge of large experience, has written a law book for German lawyers and judges, which he calls a Guide to Civil Practice by Examples of Cases (*Anleitung zur Prozesspraxis in Bespielen an Rechtsfallen*). This gives a very clear notion of German suits, both plenary and summary, and may serve the purpose for us of a shorthand report of what might be the proceedings in an actual legal controversy.

The first step in a summary suit to be disposed of without lawyers is for the plaintiff to go to the clerk of the court of the first instance having jurisdiction over the matter and tell him his story. The clerk makes a brief minute or protocol of this.

Let us suppose that the controversy has arisen over goods in the possession of one man which are claimed by another. The protocol might read thus:

"Uelzen, March 23, 1900.
Clerk's office
of the Royal Court of First Instance.[1]

There appeared Major von Kladny of this place and made the following complaint against the master-mason Franz Beck also of this place.

[1] The several states of the Empire supply the courts, but the practice is uniform by virtue of imperial laws.

I was in possession until the year 1882 of an oil-painting, a copy of the Sistine Madonna of Raphael. This was then stolen from me. (Evidence: Testimony of Felix Braun, M.D. of Uelzen). It is now in the possession of Franz Beck. Dr. Braun can also identify it. As Beck will not give up this painting to me, I claim

That the defendant be adjudged to deliver up the copy of the Sistine Madonna of Raphael found in his hands.

For the oral hearing of the case I cite the defendant before the court of first instance of Uelzen, at a time by it to be set.

Read. Assented to.

VON KLADNY.

Subscribed.

FEDER, Clerk.

This original minute the clerk hands to the judge of the court named, who sets a day for the hearing, and indorses a note of this on the minute.

Of this the plaintiff is bound to take notice. To the defendant notice must be given, either by the plaintiff, or by order of the clerk. In the latter case, the notice may be given by a court officer by mail.

The parties may, if they choose, exchange written statements of their respective claims.

While neither can employ a lawyer, each can appoint an attorney in fact to try his case, in which case the power of attorney is mentioned in the protocol.

Let us suppose that in the case of *von Kladny* v. *Beck,* both parties appear in person, at the day set.

Such a colloquy as the following might result, and is given as one of his examples by Dr. Meyer.

"The Judge, to the plaintiff: What is your claim?

The plaintiff: I have given it fully in the protocol.

The Judge: That is not enough. You must state it by word of mouth.[2]

The plaintiff: I want the surrender of a copy of the Sistine Madonna.

The Judge to the defendant: And what do you say?

The defendant: The picture is mine.

The Judge: I don't ask that. I ask what are the claims you wish to make? Shall the action be dismissed?

The defendant: Yes.

The Judge to the plaintiff: What is the copy worth?"

[2] This is by an express provision of the statute.

This is important as bearing on the jurisdiction of the court, and the allowance of costs.

"The plaintiff: That is hard to say. It may be worth 200 marks.

The Judge: Do you wish now to put this in your complaint?

The plaintiff: I have nothing to add to the protocol.

The Judge: I must insist on it that you bring the value into the record. The statute requires it.

The plaintiff: The defendant has the picture in his possession which belongs to me, and I demand that he give it up.

The Judge: You say it is yours. You desire, very likely, to assert that you have had it in your possession, and it was stolen from you.

The plaintiff: Yes.

The Judge, to the defendant: What have you to say to the complaint?

The defendant: Whether the plaintiff was once in possession of the picture, and it was stolen from him I do not know. I bought it from an art dealer for 100 marks. His name I do not know. He conducted his business here, on Welfen street.

The Judge: When did you buy it?

The defendant: Over ten years ago.

The Judge: And since that have you been in possession of it?

The defendant: Yes.

The Judge: How do you propose to prove this?

The defendant: I can call on the broker Rudolph Thiele here as a witness to testify that I bought it on Welfen street and immediately took it away with me.

The Judge, to the plaintiff: Do you admit this?

The plaintiff: No. I would also suggest that the defendant cannot have acted in good faith if he bought such a picture for 100 marks.

The defendant: It was in very bad condition. I sent it to Berlin and it was restored there. This, with the transportation cost me 110 marks.

The Judge, to the plaintiff: Can you say anything as to this?

The plaintiff: No. I must first inform myself in regard to it.

The Judge, to the defendant: But if now you should have to give up the picture, how will it be then as to the money you have laid out?

The defendant: Of course I must get it back.

The Judge: Then you decline to surrender the picture till you are made good for the 110 marks.

The defendant: Yes.

The Judge: As the plaintiff cannot now declare his position as to the assertions of the defendant, I set as the trial-day for proceeding with the oral hearing April 16, 1900, at ten o'clock in the morning. Take note of this. You will receive no citation.

The protocol is now extended to include the demand of the defendant, to whom this is read and by whom it is assented to.

The Judge may also make a statement as to the taking or declining the decisory oath by either of the parties on the day set. In general, it is to be his care that all the material facts are brought out, and the proper claims made. If, when the day arrives, he has forgotten material facts brought out on the preliminary hearing, or another Judge sits in his place, it may be necessary to have the parties repeat their story. Otherwise, the trial goes on in the same colloquial fashion, from the point where the proceeding stopped before.

Dr. Meyer gives us this graphic sketch of the progress of the hearing of *von Kladny* v. *Beck,* on the day to which the adjournment was taken:

The Judge, to the defendant: If you are not willing to give up the picture, because you have had it for ten years in your possession, you must meet the plaintiff's contestation by showing when you first got possession.

The defendant: In October, 1888.

The Judge, to the plaintiff: Will you admit that?

The plaintiff: No.

The Judge, to the defendant: Can you prove it?

The defendant: The barber, Müller, in Celle has seen the picture since 1888 hanging on the wall.

The Judge: But it is necessary that you had possession of it as your own, that is, not merely borrowed or hired it.

The defendant: I had bought it.

The Judge: I have noted the name of Rudolph Thiele. He should testify to this.

The defendant: Yes.

The Judge, to the plaintiff: Do you concede that the defendant has been at the expense he claims?

The plaintiff: No.

The Judge, to the defendant: How then will you prove the expense?

The defendant: I have here the two bills of lading and the bill of the artist Bianconi of Berlin.

The plaintiff: May I look at them a moment? (Examines them). I will concede that the defendant expended, including freight, 110 marks. But I deny that any restoration was necessary.

The defendant: As to that, I propose the artist Bianconi of Berlin both as witness and expert.

The Judge, to the plaintiff: Then as to your possession of the picture, that it was stolen from you, and that it is the same identically

which is now in possession of the defendant, do you rely on the witnesses named in the protocol?

The plaintiff: I do.

The Judge (after directing any entries which he thinks proper in the protocol): Then I announce, to close the evidence, that these witnesses, Müller as to the possession of the defendant, and Thiele as to his purchase, and the artist Bianconi of Berlin, as witness and expert that the restoration made by him was necessary, shall be examined. Bianconi shall be examined on application to the court of first instance at Berlin; the others before this court. I assign as the next trial-day, June 1, 1900, at ten o'clock in the forenoon.

The plaintiff: Will the witnesses only be examined then?

The Judge: No. That is the day to go on with the trial.

The plaintiff: Shall we have any citation to appear then?

The Judge: No. You must take notice of the day. Don't forget to appear then.

The Judge then sends on a request to the Berlin court to examine Bianconi, and issues a summons to the other witnesses.

The Berlin court promptly complies with the request, and the sum of Bianconi's testimony is entered in the protocol which is remitted to the Uelzen court. It may read thus:

He recollects that he once, and about 1895, received from the defendant a copy of the Sistine Madonna, sent on for restoration. The picture had a bad spot at the top, which completely defaced it, and if not remedied would have grown steadily worse. He considered its restoration absolutely necessary, and what he did enhanced its value more than 110 marks.

On the day assigned, the Uelzen Judge examines the witnesses, and their testimony is thus entered in the protocol; that of each, as thus summarized, being read aloud to him and assented to by him:

1. Dr. Braun. In 1880, I was frequently at the plaintiff's house, as his family physician. I saw on the wall there a very good copy of the Sistine Madonna. I went there again a year or two later. He complained to me then that the picture had been stolen. I only know that it hung there no longer. About a year before, I was at the defendant's house, and found there a picture that looked exactly like that which I had before seen at the plaintiff's. I remarked at the bottom the same inscription which I had observed on that, namely, A. v. L. p.; denoting the name of the artist.

2. Police Magistrate Meineke. It was on October 18, 1882, as I have found by reference to an old calendar, that I found, in the forenoon, a crowd gathered in front of the plaintiff's house. I learned that, in the night, thieves had been there, and observed that the ground floor window had been broken open. I thereupon ascer-

tained from the plaintiff what things he missed, and know that among them was a Sistine Madonna, an oil painting, in a gilt bronze frame.

3. The broker Thiele deposes thus: Some years since—but I cannot fix the time—I met the defendant on Welfen street coming out of a house in which at that time a picture dealer lived. He showed me an oil-painting, which he was carrying, and told me he had bought it. I have recently seen the Madonna picture at the defendant's house. Whether it is the same I do not know. It looked before in a much worse condition. A bad spot in it struck me, then. Defendant told me he had had it restored in Berlin.

4. The barber Müller deposes thus: I have seen for many years, when I was shaving him, a picture hanging in the defendant's room, representing a Madonna. I believe I recollect it there for as many as eleven years, but I may be mistaken.

At the close of the evidence, the testimony certified from Berlin is read, and the parties have an opportunity to re-state their claims. A day is then set for judgment. That, when rendered, may be in such a form as this:

"In the name of the King!

In the matter of Major Adolph von Kladny of Uelzen, plaintiff against The master-mason Franz Beck of Uelzen, defendant, for the recovery of an oil painting,

Pronounced

June 8, 1900,
Kurtze,
clerk.

Has the royal Court of the First Instance, Section II, of Uelzen, upon the oral hearing of June 1, 1900, through the Judge Lange adjudged:

The defendant is to take this oath:

I swear by God the Almighty and Omniscient that I bought before March 27, 1890,[3] the picture now in my living room, a copy of the Sistine Madonna, and have since had it there. So help me God.

If the defendant so swears, the complaint shall be dismissed and the plaintiff be condemned to pay the costs of suit.

If the defendant does not so swear, he shall be adjudged to give up the copy of the Sistine Madonna to the plaintiff on receipt of 110 marks, and the costs of suit shall fall one-third on the plaintiff and two-thirds on the defendant.

[3] Possession in good faith under claim of title for ten years gives title to goods under § 937 of the Imperial Civil Code.

Statement of Facts.

The defendant is in possession of a copy of Raphael's picture. 'The Sistine Madonna.' The plaintiff asserts he had it in his possession till 1882, when it was stolen from him.

The defendant contests these assertions, and declares that he bought the picture about 1888, for 100 marks, from an art dealer on Welfen street, took it away with him at once, and since then for over 10 years has had it in his possession. Moreover he sets up a right to keep it, till paid 110 marks for necessary expenses; asserting that he paid that sum for a restoration of the picture at Berlin and transportation charges.

The plaintiff contests these assertions; conceding only the payment of 110 marks, but contesting the necessity of the restoration.

The plaintiff claims also that if the defendant bought the picture for 100 marks, it was not done in good faith, since it was worth 300 marks; to which the defendant responds that when bought, it was in very bad condition.

There have been examined on oath as to the possession of the plaintiff and the theft, the witnesses Dr. Braun and Police Magistrate Meineke; as to the purchase and possession of the defendant the broker Theile and the barber Müller. Their testimony is given in the protocol of the session of June 1, 1900. As to the necessity of the restoration, the artist Bianconi has been examined as witness and expert. His testimony is in the protocol of May 20, 1900.

Grounds of decision.

The suit for the recovery of the picture is brought under §1007 of the Imperial Civil Code. The plaintiff has however to prove the material facts and that he was the possessor of the picture. The proof of that is made out by the positive testimony of Dr. Braun, which leaves no doubt as to its identity. As the proof under his claim that the defendant in his acquisition of possession did not act in good faith, comes to nothing more than that the defendant bought the picture cheap, but the lack of good faith is not shown by this: and also as §1007, paragraph 1, of the Imperial Civil Code, does not apply; the plaintiff must further prove his assertion that the picture was stolen from him (§1007, paragraph 2, Imperial Civil Code). But this proof he has also supplied, for by the testimony of Police Magistrate Meineke there is no doubt that the picture was actually stolen from the plaintiff. Thereupon the defendant bought it and immediately took it away with him. This involves the proposition that the prescriptions of §929, Imperial Civil Code[4] should be considered, but they alone would not make the defendant the owner

[4] This requires delivery of moveables to effect a transfer of title.

(see §§932, 933, par. 1, Imp. Civ. Code). On the other hand, the defendant has become the owner by possession, if he carries his possession back for ten years before the service of the process, and also had the picture in his own possession before March 27, 1890 (§937, Imp. Civ. Code), and if he has become the owner, the plaintiff, under §1007 Im. Civ. Code, cannot require it to be given up to him. The barber Müller saw the picture during many years (he thinks eleven) hanging in the defendant's house. It does not indeed follow from this, without more, that the defendant had possession of the picture as belonging to him (§872, Im. Civ. Code); but since there is nothing to show that he had it only in behalf of another, his ownership has become so probable that the decisory oath was imposed upon him, and certainly the oath should settle the facts from which the conclusion as to ownership was to be derived. Through the testimony of the witness Müller it is also probable, that the possession began before March 27, 1890, and also as to this it was for the decisory oath to determine. If it be so sworn that the defendant got possession as proprietor before March 27, 1890, it is to be taken that the present possession of the defendant has been his possession as proprietor, and the duration of such possession for the intermediate time will, under §938,[5] Imp. Civ. Code, be presumed. Hence it follows that the suit is to be dismissed if the defendant takes the decisory oath.

If he does not take it, he must give up the picture to the plaintiff, yet the defendant has a right of lien for his necessary expenses, under §§ 1007, 1000, Imp. Civ. Code, (compare § 994, Imp. Civ. Code).

In the former case it is proved by the testimony and expert opinion of the artist Bianconi that the restoration was necessary; the amount that it cost is undisputed. Under § 274, Imp. Civ. Code, therefore, the defendant can only be adjudged to give up the picture on payment to him of 110 marks, if he does not take the above mentioned oath, which (if taken) destroys the right of the plaintiff to demand the surrender of the picture. §§ 91, 92, Civil Procedure Act, govern the matter of costs.

LANGE."

It will be observed that this form of judgment varies from that common in the United States in four points:

1. It is absolutely conditioned on the happening of a future event, *i. e.,* the making or not making a particular statement under oath. If wholly for the defendant, it is rested on a new proof, to be thereafter given. If for the plaintiff (in part), it rests on a future refusal of the defendant to do a certain act.

[5] This provides that if one has had a thing in his possession as proprietor at the beginning and also at the end of a certain period, it is presumed (prima facie) that the same kind of possession was continuous during the whole period.

This differs radically from what perhaps most resembles it, our decree of injunction, with a penalty for its violation; for there the judgment for the plaintiff is absolute, in any event.

2. The "statement of facts" is little but a record of the main steps in the pleadings and procedure.

3. The "grounds of decision" combine conclusions of fact and conclusions of law. They also refer specifically to the particular statutes which are held to govern, and are largely of the nature of an argument.

4. The real judgment comes first, and afterwards what is held to support it.

The term "decisory oath" has been used to describe one of the kind mentioned in the judgment, because it is a term ready at hand, and familiar to English students of Roman law or chancery practice. It is, however, inadequate, as thus employed, because such an oath may be ordered in the course of a trial, as a mere step in the taking of evidence, and if so taken is, under the German code (§ 453), not necessarily decisive.

To conduct a suit in the way that has been indicated to a fair result obviously requires great care and skill on the part of the Judge. He is, to a certain extent, in the position of a lawyer for both parties, and must see that neither fails because his case has not been properly stated.

In practice, it is a form of remedy seldom invoked. The plaintiff feels surer of justice if he retains counsel, and leans on him rather than on the Judge.

SIMEON E. BALDWIN.

NEW HAVEN, CONN.