

part of the 19th century reflected the relatively secure establishment of the bourgeois nation-state. Equally clearly, the social and political order which that state embodied has been under continuing, fundamental challenge since World War I—under a challenge which has inexorably “politicized” an ever-widening range of human endeavor, including not only science and literature, but also the judicial processes through which men seek justice. Professor Kirchheimer dedicates his book to “the past, present and future victims of political justice.” Victims there are. But in a deeper sense, they are victims not simply of subversion control laws and drum courts, but of an as yet undetermined sea-change transformation in the structure of nations and societies.

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ANCIENT ROMAN STATUTES. A translation with Introduction, Commentary, Glossary and Index. By Allan Chester Johnson,¹ Paul Robinson Coleman-Norton,² Frank Card Bourne.³ General Editor, Clyde Pharr.⁴ Austin: University of Texas Press, 1961. Pp. xxxi, 290. \$15.00.

THIS volume contains translations of 332 chronologically arranged texts prepared by a team of classical scholars and forms the second step in the ambitious project of publishing a translation of all the source material of Roman Law. The first volume is Professor Pharr’s translation of the Theodosian Code.⁵ The editors report progress with Justinian’s *Corpus Juris Civilis*. It should be said at the outset that the physical form of this volume is of a very high order and most creditable to a University press.

The title is somewhat misleading. Many of the texts are *leges* in the strict legal sense of comitial legislation and a great many more are within the extended (and perfectly justified) definition of *lex* in the Glossary.⁶ But likewise there are many documents of a judicial and administrative nature which are very far from legislative in character.⁷ In this connection it is important to notice the criteria of selection which the editors have adopted. These are set out in their Introduction and expressly exclude, *inter alia*, illustrations of applied law or *negotia*, and texts quoted in imperial codifications. Though neither exclusion is in fact complete, this last self-denying restriction has entailed the exclusion of much that one would otherwise expect to see—the *lex*

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5. THEODOSIAN CODE (Pharr ed. 1952).

6. P. 267.

7. *E.g.*, p. 124, Doc. 147 is a *cognitio* of Augustus on a homicide appeal where the issue concerned the criminal liability of the owner of a slave who dropped a chamber pot on the head of the deceased when the latter was attempting to break into the defendant’s dwelling.

Aquila and other fundamental legislative texts. To this last exclusion and to the additional exclusion of documents "merely reported or reproduced in indirect discourse" the editors have felt impelled to make a few exceptions—the Laws of the Kings,⁸ the Twelve Tables,⁹ and Julian's consolidation of the praetorian and aedilician Edicts.¹⁰ The general scheme of publication no doubt warrants the editors' method, but it must be said that the effect for this volume is that texts preserved through legal sources (apart from inscriptions and papyri) appear less well represented than those preserved through lay literature.

The bulk of the texts are taken from the three great source books: Bruns' *Fontes*,¹¹ Girard's *Textes*,¹² and Riccobono's *FIRA*.¹³ These collections were compiled very much "in usum scholarum," without translation,¹⁴ the texts themselves laden with the apparatus of textual criticism, and all comment in Latin. The present translation therefore is much to be welcomed, for there are many lawyers, historians and others, who, without being specialists in this field, may expect to find great value in the collection. The responsibility of the translators is in consequence considerable and generally they have discharged their duty admirably.

But a preliminary word of warning is required. Throughout, the translators have followed implicitly the views of Professor Daube in his *Forms of Roman Legislation*¹⁵ and this has resulted in disagreement with Professor Pharr, the General Editor. Thus, in note 36a to Doc. 45 (to which note there are numerous cross references) a collision occurs over the correct translation of *oportere*. The matter is important because on it turns the question whether a particular enactment may be read in a mandatory or permissive sense. All common lawyers are familiar with these questions of construction regarding the difference between duties and powers as they arise in English texts and tenses. The translators on every occasion follow Professor Daube literally and render *oportet* as "it is proper, correct," and the General Editor on every occasion takes issue on the ground that the natural and ordinary sense is imperative.

At the risk of treading on disputed ground the opinion may be ventured that the criticism of the General Editor does not sufficiently take into account Professor Daube's statement, "That *oportet* far more often denotes what is necessary than what is permitted is indisputable."¹⁶ One may agree with Professor

8. P. 3, Doc. 1. More legend than legislation. The only authentic text of the pre-republican era, the Black Stone of the Roman Forum, is unintelligible.

9. P. 18, Doc. 8. The typography does not follow the standard editions which attempt to distinguish by capital and lower case type direct quotation and paraphrase. The editors deliberately but prudently decline trial by typographical ordeal.

10. P. 182, Doc. 244, p. 204, Doc. 245. From a strictly legal point of view these are the most important texts in the volume.

11. FONTES IURIS ROMANI ANTIQUI (7th ed. Bruns 1909-1912).

12. TEXTES DE DROIT ROMAIN (6th ed. Girard 1937).

13. FONTES IURIS ROMANI ANTEJUSTINIANI (2d ed. Riccobono 1940-1943).

14. Except for the rendering of Greek texts into Latin.

15. DAUBE, FORMS OF ROMAN LEGISLATION (1956).

16. *Id.* at 13.

Daube's convincing analysis, and at the same time offer the hard counsel that each case must be considered on its merits to discover whether we should say, "The correct thing is to wear evening dress" (mandatory) or "It is perfectly correct to wear lounge suit" (permissive).

Another division of opinion between the General Editor and Professor Daube occurs over the curious form "*Ne quis fecisse velit*."¹⁷ This at first sight appears to express a polite regret, "no one should wish to have done so and so," not even a pious hope, "*Ne quis facere velit*," but indeed the contexts show that it was a very nasty legislative threat. The General Editor launches a vigorous philological attack on Professor Daube's translation as given above and proposes for every case the translation that "no one should try" or "attempt" or "endeavour." For the lawyer the attack seems to be pressed too far when Professor Pharr writes that "it is fundamental principle of most legal systems, including our own, that the attempt or intent to commit a crime is punishable."¹⁸ It must be carefully noted that Professor Daube's interpretation of the form is that it "is used solely for the prohibition of acts, never for the prohibition of qualities."¹⁹ It is impossible to suppose a legislative form dealt solely with a quality of mind, and moreover "it is *a priori* incredible that an ancient legislative form concentrated on attempt."²⁰ On the other hand, there is nothing intrinsically improbable in a prohibition designed to cover conduct which does not completely achieve intended results as well as conduct which does. Further, the perfect infinitive is apt to include retroactive effect and it is worth noticing that this form is found in the field of police measures, public order, and dictates to defeated enemies. But in this review too much space must not be devoted to a philological puzzle, despite the legal implications. The translators have used for this form the future tense imperatively; the difficulty is relegated to the notes.

The translations are generally sound. In most instances, the translators have stuck closely to the received text, though the result as a consequence sometimes looks queer.²¹ In some few instances they have taken a freer hand where a text

17. P. 27, Doc. 28, nn.1, 1a. Incidentally not appropriate to statutes properly so called and appearing only in senatorial decrees and edictal provisions.

18. Possibly the reference to *intent* is meant as synonymous with *attempt* but even so it is open to criticism as susceptible to misunderstanding. Common law does not attach criminal liability to criminal intent *per se*. Even conspiracy, purely a mental state, requires communication between conspirators. True, in English law, a treasonable intent "compassing the King's death" is itself criminal, but overt acts evidencing that intent have always been necessary for conviction. The Federal law of the United States neatly illustrates the principle. *Republic v. Malin*, 1 U.S. (1 Dall.) 33 (1778) held that a citizen who meant to join hostile British forces but found that he had by mistake attached himself to a party of United States troops, could not be convicted of treason. For Roman Law, *DIGEST* 50. 16. 225 is quite explicit that criminal intent is not of itself punishable.

19. DAUBE, *op. cit. supra* note 15, at 45.

20. *Id.* at 39.

21. *E.g.*, p. 204, Doc. 245, § 6, the list of prohibited animals under the highway and market regulations of the Aediles runs, *inter alia*, "a dog, a boar or a young boar." *Vel*

is manifestly faulty and have restored it to good sense.²² The terminology of the law can raise difficulty for the translator and in certain places the wise decision has been taken to leave a term of art (e.g., *actio in rem*) untranslated but with an explanatory note. In some other places where an English equivalent is attempted the result is not wholly satisfactory. Thus, in the examples of certificates of discharge from the armed forces,²³ *comubium* is rendered as "lawful marriage." The translators of course know (and in notes explain) that this means "civil law marriage," but the reader who knows little of the law of personal status can easily overlook the legal significance unless he keeps his eye on the notes. In a few places it is possible to detect a misunderstanding of the terminology by the translators themselves.²⁴ On a point of high technicality, as *coemptio* of a woman *sui iuris*, one finds editorial treatment that is open to question.²⁵ On the legal disabilities of women, the statement in the Glossary

minorem can hardly be right. Is *verrem vel minacem aprum* a possible reading? Perhaps the words are best deleted altogether, as in Institutes 4. 9. 1. In this part of the Edict the translators also follow Riccobono in inserting marks of omission for the general words of Digest, 21. 1. 41, but "*et generaliter aliudve quod noceret animal*" etc. can hardly be read except as a quotation if the third word is correctly written.

22. A good example is their handling of Doc. 285, at p. 229, a rescript on illegal exactions of soldiers and officials, a theme significantly prominent in texts of the later Empire, and not absent in earlier times.

23. P. 150, Doc. 184; p. 151, Doc. 186; p. 152, Doc. 189; p. 215, Doc. 260; p. 228, Doc. 283.

24. In note 2 to Doc. 181, p. 148, the principle of *res iudicata* (a clear application in the text) is confused with that of *stare decisis*. (The rhetoricians certainly spoke of precedent as *res iudicata*, but this usage is not calculated to lead to legal clarity.) In Doc. 269, p. 221 and Doc. 305, p. 241, *usucapion* appears as a term applicable to prescription both *iure civile* and *iure gentium*. The translators know that civil law prescription was applicable only to citizens, but do not make explicit the legal distinction between *solum italicum* and *solum provinciale* which existed until Justinian's time. Civil law prescription (*usucapio*) conferring civil law title could apply only to the former. *Longi temporis praescriptio* for provincial land was not originally acquisitive prescription but rather operated on the principle of a statute of limitations. *Praescriptio* signified the *praescripta verba* in the formula clause *praescriptio pro reo*. Starting as an adjectival principle, it became an extinctive prescription in substantive law. In Justinian's time it had become acquisitive or vesting of title.

25. Thus a comment on *coemptio matrimonii causa* (p. 5, Doc. 1, note 3) speaks of a wife *in manu* as her husband's chattel, an unfortunate expression especially in a legal system which included slavery, for the slave is a person truly within the description of human chattels. *Capitis deminutio minima* is thus superficially confused with *c. d. maxima*. Again, at p. 211, Doc. 256, § 33, the text (trans. Lenel & Partsch) runs: *Mulieri Romanae praeterquam coemptione facta testari non licet*. The translation "beyond the so-called *coemptio*," and the reference in n.9 to fictitious marriage followed by immediate divorce, cannot but puzzle the lay reader. In *coemptio fiducia causa* the non-matrimonial purpose is better indicated by speaking of mancipation and manumission. A comment on GAIUS I. 115a, would have been helpful. A generation before this document was published in Egypt, Hadrian had abolished the testamentary incapacity of a woman *sui iuris* and therefore the need for the *coemptio* device. No doubt Egypt was an anomaly in the field of public or constitutional law, but this appears to be an interesting discrepancy in the field of purely private law.

that "guardianship over women beyond the age of twelve years disappeared in the late Republic"²⁶ must be an oversight, for *tutela mulierum* survived throughout the classical period.²⁷ And in several comments one comes across statements that are open to argument in terms of law.²⁸

Nevertheless in a work of substantial achievement it may seem ungracious and ungrateful to pick out minor flaws. Some of the notes on difficult texts are admirable. For example, there is an excellent discussion²⁹ of Caracalla's grant of citizenship and the baffling clause of exclusion of the *dediticii*.³⁰ The whole matter has been recently reviewed by Professor A. H. M. Jones in his *Studies in Roman Government and Administration* (1960).³¹ A possible explanation of the exclusion clause, Professor Jones suggests, is that it excluded not from the general grant of citizenship³² but from a subsidiary provision of the grant, dealing with the local citizenship of the new citizens.³³ *Peregrini dediticii* (that is, all provincials not organized into *civitates* but direct subjects of Rome) became citizens of the Empire but were excluded from the requirement of affiliation into local citizenship, at least where they were not residents in a particular city or its territory. While no certain conclusion is possible, the view expressed in the present volume also has much to recommend it, namely, that more probably "the *dediticii* formed a very small group, being perhaps those persons whose status was defined by the Aelio-Sentian Law of 4 A.D. (Justinian, Inst. 1. 5. 3), who were excluded from the grant."³⁴

The reasons for the grant have been similarly canvassed. The suggestion is now made that "Caracalla, an ardent admirer of Alexander the Great, and one

26. P. 264.

27. Indeed one of the notes to which cross reference is made makes this very point. See p. 14, Doc. 8, n.32. (XII Tables, V. 1, is taken straight from GAIUS I, 144-5). The reason for survival is obvious, when it is appreciated that the basis of guardianship in the form of *tutela legitima* was the right of intestate succession and a woman *sui iuris* had no direct testamentary capacity before Hadrian changed the law. See note 25 *supra*. By classical times the whole institution of the guardianship of adult women was certainly irrational, even allowing for its restricted scope, *e.g.*, it never included *administratio*.

28. *E.g.*, in the praetorial Edict, p. 199, Doc. 244, n.93, *aestimatum* is discussed in terms of sale, whereas it was just the difficulty of contractual classification that impelled the lawyers to develop a special action *praescriptis verbis*. Probably the editors have taken this debatable clause in the Edict of the urban Praetor as referring to the *actio aestimatoria* or *quanti minoris* in fact given by the Edict of the curule Aediles.

29. Contributed by Professor Donald Mackenzie of Princeton University.

30. P. 225, Doc. 277, *Constitutio Antoniniana*.

31. 127. This is a radical revision of 26 JOURNAL OF ROMAN STUDIES 223-35 (1936).

32. The view that it did is only tenable if *dediticii* is a term descriptive alone of surrendered barbarians and freedmen with criminal records.

33. *Origo*, to use the technical expression of the jurists. See Glossary, p. 268, s.v. In Egypt, where this text was discovered, there were no *civitates* except the few Greek cities. Doc. 270 at p. 221 illustrates this organization of Roman provincial administration.

34. The *lex Junia* (on freedmen with Latin status) and the *lex Aelia Sentia* (on freedmen with criminal records) remained in force till Justinian's abolition of inferior grades of free status. The principal disability of freedmen with criminal records had always been incapacity to become Roman citizens.

who had dreams of uniting the empires of Persia and Rome, took this step of uniting all his subjects in a common bond of Roman citizenship in preparation for the proposed union." From earliest times, however, the Emperor has been accused of more mundane motives, primarily of increasing the revenue from fiscal liabilities attaching to citizenship. The safest view seems to be that this was only the culmination of a policy extending citizen status which had been pursued by earlier Emperors. Moreover, the grant had little significance in the field of public law by that time (212 A.D. or a little later) ; in the field of private law it had the merit of introducing a high degree of simplification.

It is not possible in the compass of a review to indicate fully the vast range of these documents. Political, social, and economic historians will find this volume a mine of varied and valuable information. It may be considered a remarkable feat for a small body of editors to have handled so ably such a variety of materials. They have also placed Roman lawyers in their debt. The current work in this series on Justinian's *Corpus Juris Civilis* is a formidable undertaking and those engaged in it will be wished well in their exacting task.

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AN INTRODUCTION TO THE HISTORY OF THE LAND LAW. By A. W. B. Simpson.¹ Oxford University Press, 1961. Pp. xx, 276. \$4.00.

THIS book contrives to be both learned and readable, a joinder of qualities more often a matter of aspiration than attainment. It is designed to replace Holdsworth's *Historical Introduction to the Land Law*, written in 1927 and now out of print. But Mr. Simpson's book is not a revised version of Holdsworth's; it is in form and substance a new book and it departs in a decided manner from the underlying assumption and purpose of the older work. Holdsworth wrote for the beginner who requires some historical information in his approach to the modern law. One cannot recommend this book to such a reader. It is essentially a book which ought to be read by the man who has already gone some distance in his study of the modern law and now requires an explanation of how basic principles and concepts came into existence and were shaped in development. That such an explanation ought to be sought by any serious student in the field of Real Property is not a self-evident proposition, but it is nevertheless a very important one. Experience in teaching in an English University suggests that the student finds greater difficulty in acquiring a comprehensive view of fundamental principles in this branch of the law than in many others, not because it is so much "lawyers' law" but because its different parts are so far interdependent that the average student finds

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