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COMMON LAW METHODS OF CONSTRUING A CIVIL LAW STATUTE

At 6:30 P. M. on April 27, 1942, the first torpedo struck the Argentine merchantman *Victoria* as she plowed through the night 360 miles from her destination, New York harbor. At about 8:00 P.M. a second torpedo tore a twenty-five foot rent in her stern. The Captain, believing the ship doomed, ordered the crew to take to the life boats. During the night they lost sight of the vessel. A little after 2:00 A.M. on the 18th, the American destroyer *Owl* sighted the derelict Argentine ship, and boarded her. Later on that day the Argentine crew was rescued by the *Owl*. They returned voluntarily to the *Victoria*. Despite the severe damage which the two torpedos had caused, the original crew of the *Victoria* with substantial assistance from the United States Navy, was able to bring the battered vessel into New York harbor. Having brought the ship safely to port her crew filed a salvage claim against her. The trial court granted the claim on the following grounds: salvage claims are governed by the *jus gentium*; under the *jus gentium* when the crew is ordered to abandon ship, their contract of service with the ship is terminated; the voyage ends when the captain orders the crew to the life boats; at this time their duty to the ship is voided; consequently, the crew having no obligation toward the vessel, may return to her as strangers, and recover as salvors for the part they have played in the rescue.

The United States Court of Appeals for the Second Circuit in an opinion by Judge Frank reversed the lower court.¹ The *jus gentium*, according to the view taken by the upper court, did not apply to the duty of the Argentine sailors to their ship flying the Argentine flag. This relationship between vessel and crew, and the resulting ability of the crew to qualify as salvors, was governed by "the internal economy of the ship, by the Argentine law, the law of the flag."² "For us," Judge Frank

1. *Usatorre v. The Victoria*, 172 F.2d 434 (2nd Cir. 1949). A discussion of the maritime questions involved is found in 28 CORNELL L. Q. 69 (1942).

2. BOUVIER, LAW DICTIONARY defines "*jus gentium*": "The law of nations." It is not within the scope of this paper to discuss exactly where the law of nations ends and the law of the flag begins. See: *The Superior*, 270 Fed. 283 (D.C. Cir. 1920); *The City of Norwich*, 279 Fed. 687, 691 (2nd Cir. 1922).

continues "Argentine law is a fact. With respect to that fact defendant had introduced the testimony of an expert witness." This witness said that the Argentine Code created an objective standard by which the termination of the contract between the ship and the crew was governed. Before the crew was relieved of its obligation to its ship a "shipwreck" was required. The *Victoria* had actually to sink. The Captain's belief that she was certain to go to the bottom was not sufficient to vitiate the duty of the seamen to their craft. Consequently it could not be said that they returned voluntarily from the life boats. The witness concluded that the sailors could not be considered salvors, and had no claim against the *Victoria* or her owners.

The upper court refused to accept the testimony of this witness, reversed the decision of the lower court and remanded the case for a determination of Argentine law as to the contractual duty of the crew to the ship. In refusing the testimony of the witness the court was on sound ground. The witness had never practiced in Argentina. To substantiate his opinion the witness said he had searched the French Commentators on the French Code, but he did not give specific references to enable the court to search this source of information. In addition the trial court expressed in the record its belief that the witness was not reliable. After stating these valid reasons for its refusal to accept the expert's opinion, the appellate court indulged at some length in two generalizations concerning the nature of the civil law and its canons of interpretation. The court assumed (1) that civil law methods of interpretation govern the approach to be followed by a common law court in interpreting a civil statute (2) that the Argentine Code is based upon the French Code. Both of these propositions are sound, although the latter requires qualification.

First, the court reprimanded the witness for his failure to cite Argentine cases. This omission, in the eyes of the court showed that the witness had not searched the law on the statute before with care, and was therefore not qualified to give an opinion since, "despite conventional protestations to the contrary, much law is judge made [in Civil Countries] and the courts are by no means unaffected by judicial precedents or 'case law.'"³

3. 172 F.2d 434, 439 (2nd Cir. 1949).

Much has been written on the force of the case in Continental law. The degree of importance given the case is directly related to the writer's approach. From a theoretical standpoint the case has little if any importance;⁴ when measured on a practical scale the case has greater weight.⁵ The question is: in analyzing a legal system should we look to what the courts do; or to what they say they do? On the theoretical level the place of the case can be checked with accuracy. Its matrix was the Napoleonic Code. Napoleon drove the case from France.⁶ In an attempt to relegate judges to a simple, mechanical role, Napoleon forbade them to look beyond the words of the statute. The statute was the sole evidence of the intent of the legislature. It was the source of all law. Once created by the law makers the statute was omnipotent and self-explanatory. Judicial discretion was abrogated. The Judge had blinkers and he could neither look to what previous judges had said, in like instances, nor lay down a rule to bind future judges in similar cases. The case was a nullity under the original code. However, under the pressure of day to day litigation cracks appeared in Napoleon's scheme. Judges began to look to outside sources, commentaries by eminent jurists, and history, both of the times and of the particular statute, to aid them in their task of interpretation. Nevertheless, during the 19th century, the force of the basic idea behind the code prevented courts, with one exception, from referring to previous decisions. This rule finds expression in the French Code, as amended in 1906 under Section 5 of the Preliminary title: "Judges are forbidden, when giving judgment in the cases which are brought before them, to lay down general rules of conduct or decide a case by holding it was governed by a previous decision C. 1351; F. 127)." The above Article has been briefly modified by the law of the 1st of April, 1837, which provides that if a case is twice brought to the Court of Cassation on a particular point, and the decision of the lower court quashed in both appeals, then all the chambers of the Court of Cassation shall sit together and their decision

4. Ireland, *Precedent's Place in Latin Law*, 40 W. VA. L. Q. 115 (1934).

5. Déak, *The Place of the Case in Common and Civil Law*, 8 TULANE L. REV. 337 (1934).

6. FRENCH JUDICIAL CODE, Art. 5.

7. ALLEN, *LAW IN THE MAKING*, 125 (2nd ed. 1930); Henry *Jurisprudence Constante and Stare Decisis Contrasted*, 15 A.B.A.J. 12 (1929).

on the specific point before the joint body shall bind the inferior courts in like subsequent cases. The need for this article arose when an inferior court refused three times to accept the ruling of the Court of Cassation on a particular point of law. The Article represents nothing more than a slight practical modification. The one major exception is termed "jurisprudence fixée" or "constante." The law becomes fixed or constant when a number of separate tribunals independently reach the same result when presented with the same set of facts. After this has occurred a sufficient number of times, later courts may pay deference to their predecessors by reference to the series of decisions. It must be remembered, however, that these later courts are in no way bound by the prior holdings. Thus, until the beginning of the 20th century the case was relatively powerless in France. In contemporary times French Courts have been forced away from their theoretical concepts. Floundering in the complexities of modern civilization the courts have grasped at any source which might enable them to reach wiser results. Under the exigencies of the situation they have referred to previous cases.⁸ This reference however is an aid. French courts are still under no duty to give force to previous decisions. Despite the breakdown of pristine Napoleonic theory, the case remains a minor and relatively unimportant source of statutory interpretation. In no sense is the modern French view to be compared with *stare decisis*, or even the modern diluted form of that concept. The terms "judge made" and "case law" suggest such an analogy. In requiring the expert to cite Argentine cases the court requires him to follow a procedure which, although perfectly correct at common law where a prior judicial determination has authoritative force, is nevertheless completely foreign to the basic tenets of the civil law.

The final blow levied upon the expert witness by the court is founded upon what the lower court may have thought. Judge Frank says that the lower court probably knew that

the civilians influenced by an interpretive theory which derives from Aristotle, are accustomed to interpret their statutes equitably, *i.e.*, to fill in gaps arising necessarily from the generalized terms of many statutes, by asking how the legislature would have dealt with the unprovided

8. WRIGHT, *THE FRENCH CIVIL CODE ANNOTATED*, 2 (1908).

case. . . . This attitude finds expression in Art. I of the Swiss Code [of 1907] which directs the judge to decide as if he were a legislator, when he finds himself faced with a definite gap in the statute.⁹

The equity of the statute of which the court speaks finds its roots in Aristotle and its fruit in such modern Americans as L. Hand and Cardozo.¹⁰ It comes to us through the Roman law and its virtue is reflected in Plowden's instructions on interpretation.¹¹ It did not, however, take root in Continental law until most recent times. The concept is opposed to traditional continental jurisprudence. The latter, as heretofore mentioned, is grounded upon the Napoleonic belief in a sharply limited judiciary. This Code postulate has as its corollary an assumption that the legislature is capable of creating a code, the provisions of which will be self-explanatory. The need for judicial interpretation is non-existent. Judicial discretion from Napoleon's viewpoint was dangerous due to the casuistry of individual judges, and superfluous due to the ability of law makers to embody their intent in the words of a statute. Aristotle on the other hand postulated legislative inability to frame its intent in bare words.¹² The law makers could never predict the myriad of determinants which might arise under a given statute. And no matter how great their powers as careful draftsmen, they could not foresee all the possible permutations which the practical application of the law would create. Therefore successful administration of the law required original judicial placement of the unforeseen determinate within the determinable created by the legislator. Aristotle had faith in the judiciary, Napoleon distrusted it. Aristotle gave it power, Napoleon made it an automaton. The Swiss code does not epitomize the practice of the civilians.¹³ It represents a radical departure from the traditional codes of civilian countries. In placing such a high degree of power in the judiciary it stands as high-water mark in the

9. 172 F.2d 434, 441 (2nd Cir. 1949).

10. ARISTOTLE, NICOMACHEAN ETHICS Bk. V, Ch. X, 1137b; ARISTOTLE, RHETORIC, Bk. I, Ch. XIII; L. Hand, *How Far is a Judge Free in Rendering a Decision?* I LAW SERIES, Lect. No. 14, National Advisory Council on Radio in Education. (U. of Chi. Press, 1933); CARDOZO, NATURE OF THE JUDICIAL PROCESS (1921).

11. *Eyston v. Studd*, 2 Plowden 450, 465-467, 75 Eng. Rep. 688, 695-699 (1574).

12. See note 10 *supra*.

13. SCHLESINGER, COMPARATIVE LAW, CASES AND MATERIALS, 276.

continental trend toward increased judicial authority. This attitude, however, had not gained acceptance in France. It would be safe to assume that the judicial climate in the Argentine, especially when the latter's political atmosphere is taken into account, is less liberal than that of France. The reference, by the court, to the Swiss Code is unfortunate.

The common law puts former decisions in a position of highest authority; the civil law grants the case, at best, a weak place among the factors from which a judicial determination is reached. Judge Frank has failed to recognize the relative emphasis placed by the two systems upon the case. Moreover, the civil law itself is in a state of flux. The development of continental jurisprudence has reached different levels in different states. As the evolutionary process has unfolded, the judiciary has been allotted different degrees of importance; the value of the case in separate countries has varied accordingly. The court has failed to appreciate that the weight of a legal decision is not the same in all continental legal systems.

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