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THE LAW OF OUR NEW POSSESSIONS.

Two years ago, it might have been said in general terms that the comparatively small state of Louisiana was the only part of our country where the Roman Law, and its offspring the modern Civil Law, were considered as lying at the foundation of Jurisprudence. A Louisiana lawyer would often be asked: "You have the Code Napoleon down there?"—and then he would have to explain what we had that was like the French system of law and what we had that was very different.

But "we have changed all that," and have assumed the burden of what we call our new possessions; held by some kind of tenure, or in some sphere of influence, and inhabited by perhaps twelve millions of people, whose municipal law has been largely derived from Roman sources, and demands to be studied not only in the analytical but in the historical method.

In order to understand the present condition of law and jurisprudence in our new possessions, it is necessary to begin with the history of Spain. We need not dwell on the early career of the early Greek, Phœnician, and Carthagenian colonies in that peninsula. We may begin with the time of Augustus, and may find Spain highly organized under the Roman system of municipalities, and enjoying for a long time what was called the Roman Peace. The country became highly civilized, and distinguished men like Trajan and Martial were natives of the province. The law was that of the classical period of Rome, as modified by the local situation. It was the law of Gaius, of Ulpian, of Papinian, applied and extended by imperial constitutions.

In the 4th century of our era, a great change took place which has left its impress upon the juristic life and thought of both France and Spain, and has in that way influenced the legal history of both French and Spanish colonies. The Visigoths, or West-Goths, came after the fashion of the time, partly as invaders and partly as immigrants who owed in their rude way admiration and allegiance to the Roman Empire. They obtained possession of the southern part of Gaul and a large portion, at least, of the Spanish peninsula. In the 5th century, the Visigothic Kingdom became practically independent of Rome.

Under Euric and Alaric II, in the beginning of the 6th century, a codification was prepared, known sometimes as the Breviary of Alaric II, a compilation of much importance as a matter of fundamental legal history. It antedated by some years the Works of Justinian, and in this respect alone possesses considerable interest. But, furthermore, it was prepared in pursuance of the principle of "personal laws" for the use of Roman subjects of this West-Gothic Kingdom. It contained sixteen books of the Theodosian Code, a collection of Novells or new imperial constitutions of more recent date; the Institutes of Gaius, compressed into two books, and sometimes called the Gothic Epitome of Gaius; some Sententiae or opinions of Paul; some portions of the Gregorian and Hermogenian Codes, and finally one passage from the writings of Papinian. In this way, amid the many chances and changes of this turbulent epoch, many of the best portions of the classical law of Rome were preserved, and the Breviary of Alaric II became Roman Law for Western Europe, at least until the revival of legal studies in the 12th century, when, as Professor Sohm has remarked, "the Corpus Juris of the German King was destroyed by the Corpus Juris of the Emperor of Byzantium."

In the 7th century, the Spanish Code known as the Fuero Juzgo was promulgated. The name is significant as indicating, perhaps, the formation of the Spanish language. It is a contraction of Fuero do los Jueces, which in turn is a modification of the words Forum Judicum. We might translate Fuero Juzgo, therefore as a guide or code for the judges; or to use more general terms, as a system of jurisprudence. Opinions very widely differ as to the merits of this work, but it certainly presents an interesting amalgamation of Roman Law with Gothic or Teutonic customs.

Passing over some other compilations, we find it probable that the jurisconsults of Spain in the 12th and 13th centuries began to take part in the general revival of legal studies which

had become so extensive in Italy, France and England. In the year 1255, Alphonso the Learned, the king of Castile and Leon, promulgated the Fuero Real, a treatise upon law, which may be considered to bear the same relation to the legal system of Spain, at that time, that the Institutes of Justinian bear to the Digest of that Emperor. This work was really preparatory to the framing and promulgation of the Siete Partidas, one of the most important and interesting codes that has ever been published in the course of legal development. This was finally promulgated in the year 1348, in the reign of Alphonso II. It is divided into seven parts as its name implies, this division possibly being an intimation of the seven parts of the Digest of Justinian, and having, perhaps, some reference to the supposed sacred character of that number. The Partidas are still worthy of careful study, since they are fundamental in the law of Spain and her colonies. When the French colony known as Louisiana was ceded to Spain, in 1763, the code known as the Partidas was introduced and became really a large part of the fundamental law of that vast domain. Portions of it were translated into French for the benefit of the inhabitants. Some of its provisions remained as a part of the law of the state of Louisiana, and are referred to in the decisions of her Supreme Court. A translation of the principal portions of the work into English was made by Messrs. Moreau-Lislet and Carleton, and published in 1820, with an introduction giving an account of Spanish Law as then existing.

We may mention in passing a code called the Nueva Recopilacion promulgated in the time of Philip II, and the Novissima Recopilacion adopted in 1805, in the reign of Charles IV. Nor should the celebrated code of maritime laws called by the Spanish El Consulado, and generally referred to in our law books as the Consolato del Mare, be forgotten. This remarkable compilation, made by order of the magistrates of Barcelona in the 13th century, is really fundamental in commercial and nautical affairs and has obtained a great authority in the modern civilized world by its intrinsic merits.

We may merely notice in passing also the Code of Commerce adopted in Spain in 1829, and may then take up the much more recent codifications which are to-day the law of what we call our new possessions.

It is understood that as early as 1850, there were persistent efforts made in Spain to revise and codify her laws, but the final adoption of such codes was greatly delayed by the fact that in the various provinces the local fueros, charters, and

customs were highly esteemed and jealously guarded. There was not the opportunity to sweep them away that was found in France with her Revolution and her Consulate, and the new codes were only finally adopted after a long delay and with a large reservation of local rights and customs. These reservations, however, would not, I suppose, affect their force in the colonies, and so far as our new possessions are concerned, I assume that the provisions of these codes are generally obligatory.

Taking up these modern codes, their consideration may be arranged in chronological order as follows:—the Code of Procedure of 1881, the Code of Commerce of 1886, the Civil Code of Law of 1889, and the Hypothecary Code, concerning mortgages, privileges and their inscription, extended to the islands in 1893.

The Code of Procedure of 1881, which is in force in our new possessions, represents the Roman practice under the later empire, and is, in theory, the method of procedure which underlies Admiralty and Equity Practice and what we call the Reformed Code Procedure of the present day. It falls into two general divisions, the one concerning the "contentious jurisdiction", where parties are suing each other contradictorily, and the other concerning the "voluntary jurisdiction", where a party goes into court generally in an *ex parte* way, as for example, to open a succession, to probate a will, or to appoint a tutor. The pleadings follow the theory of the time of Justinian, and may be substantially stated as a petition by plaintiff and an exception or answer by defendant.

The Code of Commerce of 1886 which likewise prevails in our new possessions contains four books; the first treating of commerce and commercial people in general; the second concerning contracts which are especially commercial in their character, including mercantile companies, banks, and railways; the third treating of maritime commerce and the law of shipping; and the fourth making provisions in regard to respites and insolvencies, and prescription or limitations in commercial matters.

The Civil Code, of 1889, which is, of course, a code of private law, is an interesting and important work. It is understood that Mr. Alonzo Martinez, one of the most distinguished of Spanish jurists, was one of its compilers. Its general plan is not unlike that of the Code Napoleon and the other European codes of a similar character, as well as the civil codes of Lower Canada, Louisiana, and Mexico. It follows the division sug-

gested by Gaius, in the second century, when he declares that all jurisprudence concerns persons, things, and actions The subject of actions, or the remedies by which persons may vindicate their rights to things, is, of course, left to the Code of Procedure; and in general terms, the Civil Code, therefore, treats of persons who may acquire rights in things or property; of things or property in which such rights may be acquired, and finally of obligations by the effect of which the property in things is often gained or lost.

This Civil Code likewise contains four books. The preliminary title treats of laws and their effect and application. The first book contains twelve titles, treating of the law of persons, whether as citizens or foreigners, as natural or judicial, as present or absent, with detailed provisions in regard to the relation of husband and wife, parent and child, tutor and minor; and general rules in regard to civil status and its proof.

The second book is divided into eight titles, and treats of things; that is to say, of property, ownership and its modifications; and considers the subject of property as either immovable or movable; as public or private; as subject to ownership, either perfect or imperfect, and to the right of eminent domain; and lays down the rules in regard to its acquisition by accession, by possession, and by invention; and concludes with the statement of the law in regard to servitudes, whether personal in their character, as usufruct, use and habitation; or real servitudes, or easements, springing from the legal or conventional relation of different estates to each other. Rules are also given as to the recording of documents which concern immovable property and real rights.

The third book, containing three titles, embraces the different methods of acquiring property or ownership by occupation, donation and succession.

The fourth book, containing eighteen titles, treats of obligations, and is an interesting treatise upon that important subject, as it presents itself to the mind of the jurist in the latter part of the 19th century. It declares that every obligation consists in giving, doing, or not doing, something; and it recognizes that all legal obligations arise either from contract, from quasi contract, from offense or active tort, from quasi offense or negligence, and finally, in some cases, from an arbitrary provision of law. The different kinds of obligations are discussed, whether conditional or unconditional, divisible or indivisible, several, conjoint or solidary. It then takes up the subject of the extinction of obligations, and states that they may be extinguished

by payment or fulfilment, by the loss of the thing due in certain cases, by the voluntary remission of the debt, by confusion or merger of the rights of creditor and debtor, by compensation, or what we might call set off, and by novation. It then proceeds to take up the subject of contracts as one of the principal sources of obligations; the validity of contracts, the consent of contracting parties, the object of contracts and their cause, their interpretation, recission and nullity. The writers then proceed to discuss specific contracts, as those of marriage, dowry, and the community of goods existing between husband and wife; and then the contracts of sale, exchange, letting and hiring; rent and emphyteusis, partnership, mandate, loan, deposit, aleatory contracts, such as insurance, compromise or transaction, suretyship, pledge and hypothecation.

They then proceed to lay down the rules in regard to obligations arising in the absence of agreement; firstly, from quasi contracts, in which obligations arise from certain lawful acts in the absence of an agreement, and secondly, from offenses or quasi offenses where obligations arise from unlawful acts, whether from active tort or passive negligence.

The remainder of the work is devoted to dispositions in regard to insolvency and the classification of debtors and creditors as concerns their rights, privileges and preferences; and finally to the subject of prescription or limitations, considered firstly with reference to the prescription or lapse of time by which property and rights may be acquired, and secondly the lapse of time by which rights of action are barred or prescribed.

The style of the work is very concise and accurate. M. Levé, a French judge, writing in 1890, declares it to be a more scientific book than the Code Napoleon. Of course, its compilers had the advantage of about a hundred years of discussion and commentary in continental Europe on these subjects, to say nothing of similar work that had been done in the two Americas.

There is a supplemental provision of this Spanish Code of 1889 which appears to be interesting and important, and which reads as follows:

"1. The president of the Supreme Court, and the presidents of the tribunals of appeal, will send to the Minister of Justice at the end of each year a report of the matters which have been submitted to them in civil cases; and they will point out the defects and difficulties which the application of this Code may have revealed to them. They will indicate with detail the con-

troverted questions and points of law as well as the articles or omissions of this Code which have caused doubt to spring up in the courts.

"2. The Minister of Justice will transmit these reports and a copy of the civil statistics of the same year to the general commission of codification.

"3. After having taken cognizance of these documents, and of the progress realized in other countries which may be taken advantage of in our own, and of the jurisprudence of the Supreme Court, the commission of codification will formulate and address to the Government every ten years a plan of such reforms as it may think proper to propose."

We need not dwell upon the Code of Hypothecary Law which appears to have been enacted in Spain in 1871 and extended to the Islands in 1893. It contains an elaborate codification of the law in regard to mortgages of different kinds, whether conventional or legal, and the method of recording them in such a way as to notify third persons of their existence.

After this somewhat dry statement in regard to the history of Spanish Law and its extension to the Islands which we now possess as objects either of our ownership or protection, it may seem useful to inquire, in the interest of social science, as to the future of jurisprudence in Porto Rico, Cuba and the Philippines. It may be that the example of the Louisiana Purchase of 1803 may throw some light upon this interesting subject. For more than thirty years before that purchase, the vast domain called Louisiana had been a Spanish colony. It is true that in the early history of the French settlement, the laws and ordinances of France and the "Custom of Paris" had been extended to it; but the difference between the law of France and the law of Spain, when applied to colonial conditions, was not great enough to make any especial solution of continuity. When the Spanish took actual possession in 1769, Governor O'Reilly published some rules of practice and some elementary dispositions in regard to crimes and testaments; but, as Judge Martin remarks in his history, the transition from the jurisprudence of France to that of Spain was not perceived before it became complete, and little inconvenience resulted from it because the Spanish and the French laws came, to a large degree, from the same sources.

The net result was that when we acquired the Louisiana Purchase in 1803, its laws and jurisprudence were quite similar to those that now prevail in Porto Rico, Cuba and the Philip-

pines; and the question naturally arose as to what should be done. It was considered that no state carved out of this purchase should ever be admitted to the Union with a Spanish system of jurisprudence in criminal matters. The newly acquired territory was divided into two parts by act of Congress, the one, called the Territory of Orleans, embracing nearly the same area as the present State of Louisiana, and the rest of the purchase being erected into the District of Louisiana. The latter having few inhabitants, and being settled by emigrants from the common law states, adopted the Common Law in the natural and normal way. But the Territory of Orleans had a considerable population who had been living for nearly a century under a system of private law in civil matters derived from France and Spain. The Government of the United States acted very wisely in not undertaking to change the system in civil matters which had thus become interwoven with the social life of the people. It was only in criminal matters that, by the legislation of 1805, the Common Law of England was adopted as a basis of definition and practice in criminal cases. The law in civil matters remained unchanged, and was left to its natural development.

It is submitted that a similar course should be followed with reference to Porto Rico and the Philippines as well as with reference to Cuba, if we are to have anything to say in regard to that Pearl of the Antilles. It is quite likely that some modification ought to be made in regard to the definition of crimes and offenses and the methods of criminal procedure; but so far as private law in civil matters is concerned, there is no better system than that represented by the Spanish codes which I have attempted to describe.

No doubt, in past years, in the administration of justice in these islands, there has been a good deal of malfeasance. But such malfeasance should not distract our attention from the scientific value of these codes. The best law may be badly administered and may thus become an engine of abuse; but when we have good laws, honestly and intelligently administered, then we have an ideal condition of jurisprudence. Let us hope, then, that no effort will be made to disturb the general system of law in our new possessions so far as it concerns civil matters.

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