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# INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE. Revised Edition, by Leopold Wenger, translated by Otis Harrison Fisk, with an introduction by Roscoe Pound. Veritas Press, New York, 1940. Pp. xxx, 440. $6.00.

Hans Julius Wolff

by amendment. In these senses, this included material may be deemed far from superfluous.

The Louisiana State Law Institute must justify itself, and has justified itself, by its work and by its publications, which are of course a most important element and a concrete proof of its work. This particular publication is indeed a concrete proof of the high quality and character of the work of the Institute, as well as of the utility of that work to the profession. The Reporter, the Advisers, and those lesser lights who have assisted them here, are all entitled to congratulations upon a difficult and important task well done.

WALTER J. SUTHON, JR.*

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INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE. Revised Edition, by Leopold Wenger, translated by Otis Harrison Fisk, with an introduction by Roscoe Pound. Veritas Press, New York, 1940. Pp. xxx, 440. $6.00.

The Roman law of civil procedure, in spite of its fundamental influence on the development and structure of the Roman system of private law, is usually confined to a more or less brief chapter in textbooks on Roman law. Such a chapter conveys to the reader only the outlines, but little or nothing of the numerous legal problems arising from the procedure and sometimes intermingled with highly interesting and important questions of substantive law. Therefore, a warm and well deserved welcome greeted Professor Wenger when in 1925 he first published his *Institutionen des römischen zivilprozessrechts.* Thus at last the long obsolete manuals of Keller and Bethmann-Hollweg were replaced with a detailed exposition, even more elaborate than Emilio Costa's excellent *Profilo storico del processo civile romano,* published a few years before.[1] A new view of the history and system of Roman procedure was presented as a result of the research conducted by a number of scholars during the past few decades. Now the English-speaking public interested in the history of legal institutions is enjoying the privilege of using a new English edition of this valuable book,[2] brought up to the status

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1. Rome 1918, Athenaeum.

2. An Italian translation, prepared by R. Orestano, was published in 1938 (Milan, Giuffré).

of our knowledge and theory as developed just before the outbreak of the present war.

The chief purpose of Professor Wenger's work is to provide the student with a textbook which enables him to integrate and deepen the instruction received in the classroom. Accordingly the author has followed the plan of giving a broad survey of the system of the law of procedure and of its evolution from the regal and early republican period down to Justinian. He depicts this survey against the background of general historical conditions and puts due emphasis on the dependence of the procedural law upon the constitutional institutions of each period. Indeed, a good deal of familiarity with Roman constitutional history is required of the reader. If the student possesses this knowledge, he will acquire a clear idea of the historical growth and doctrinal foundation of the system. However, it seems to the reviewer that in some passages, particularly the opening chapter entitled "Generalities," a strictly historical arrangement of material might have served the purpose better than the method employed by the author. The framework of the book is filled throughout with a large but not fatiguing mass of detail, presented in the lucid and pleasant style for which all of Wenger's writings are noted. The author's interest is chiefly centered in contrasting the republican and classical system of lawsuits (*ordo iudiciorum*), the private law character of which is justly stressed, with the purely public administration of justice as exercised in the *cognitio extraordinaria* of republican and imperial officers and later generally under the absolute monarchy of the post-Diocletian (post-classical) period. The classical formulary procedure with its written program (*formula*) for the trial to be held by a private judge, as agreed upon by the parties in the *litis contestatio* and authorized by the *praetor,* the structure of the *formula,* the nature and effect of the *litis contestatio* are thoroughly discussed, though a more detailed exposition of the earliest form of procedure as represented by the oral *legis actiones* might have been desirable. In accordance with the didactic purpose of the book, the text is restricted, as far as possible, to what is firmly established, but in the notes many controversial issues are discussed or at least referred to, and full attention is paid to the immense literature. It is therefore chiefly in the notes that the new edition differs from the original work, and these notes give the book an importance which far exceeds its primary purpose of serving as a

textbook for students. They make it a convenient starting point for any new research to be conducted in the field.

It is inevitable that the critical reader of a book which deals comprehensively with so large a subject should find a number of passages which he is inclined to question. While it would be tedious to enter into a discussion of every doubt that arose in the reviewer's mind, a few suggestions may not be amiss.

The current theory of Roman civil procedure approved by most modern Romanists has been laid down by Moriz Wlassak in a long series of books and articles. At its core lies the doctrine that the *litis contestatio,* in which under the *ordo iudiciorum* with its bipartite procedure the preparatory stage of the suit before the magistrate (proceedings *in iure*) culminated, was a covenant between the parties who by drafting the *formula* made up the issue to be submitted to a judge of their choice. Accordingly, the latter, a private citizen, is considered an arbitrator, whose decision, however, was authorized by the magistrate and vested with public authority and enforceability. On the basis of this conception, Wenger, a faithful adherent to Wlassak's theory, draws the historical lines, characterizing the reservation of the final decision for a private citizen selected by the parties as an expression of the democratic spirit of the republican period. As regards the provinces, and as regards the whole empire after the establishment of the absolute monarchy, this spirit had to yield to the idea of unlimited state authority which vested "full jurisdiction" in the official before whom the suit was filed. While no objection should be raised against the conception of the *litis contestatio* on which this view is founded, the latter itself is open to doubt, as becomes apparent from the difficulty which it faces when confronted with the problem of the origin of the bi-partite procedure. Here Wlassak and Wenger disagree. Wlassak assumes that after the consolidation of the Roman state the supervision of the magistrate was imposed on a previous habit of settling disputes by resorting to the good offices of a third man. Wenger suggests a fusion, after the establishment of the republic, of such mere arbitration and an originally full jurisdiction of the king, which he believes were in use side by side under the despotic régime of the Etruscan dynasty. Either theory, however, seems to find little support in such actual conditions as we should suppose to have existed in the early days.[3]

3. Why should the need of state intervention have made itself felt, if there was already a smoothly working system of private arbitration? As to

A more satisfactory result seems possible, if we discard the notion of a "full" and a "divided" jurisdiction. The evidence of the historical structure of the procedure, from the XII Tables down, suggests that the judicial decision of disputes was never among the functions legally vested in the magistrate, whether the king or the annual official with *imperium* who took his place under the republican constitution. Only gradually did the magistrate assume the tasks and powers of administration. In the early days his competence, apart from war and religion, was obviously restricted to the maintenance of peaceful and orderly conditions within the community, involving, with regard to private relations between its members, the prevention of unwarranted self-help, but also the granting of the permission to use self-help when it appeared justifiable,[4] since execution was in the primitive period carried out by self-help. The normal way to find out whether the desire for such an act was justified was to submit the issue to an authorized representative of the community. But if the plaintiff was unwilling to do so, the magistrate would deny the "action," that is, the seizure of the thing claimed or of the person liable, while against a passive defendant he would allow it immediately; this is what even in the classical procedure the coercive measures applied by the *praetor* in such a case essentially were. However, the magistrate acted in doing so, not as a judge, but within his competence just outlined. Comparative legal history provides us with parallels supporting this view. The principle of referring the decision to the people or their representatives is met with in the participation of the people in the administration of justice in what we may call the Homeric "city" (Iliad 18.497-508), and still in the popular courts of the classical Greek city, as well as in the ancient Germanic custom of having the judgment approved by the surrounding crowd. The original idea that the judgment merely decided on the admissibility of self-help is, as late as the second century B. C., reflected by the fact that the Greek courts of the Ptolemaic monarchy in Egypt rendered judgment by formally pronouncing that an execution should take place.[5]

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Wenger's theory, see Levy's objections (1926) 46 Zeitschrift der Savigny Stiftung, Romanistrische Abteilung 370f.

4. Cf. Koschaker, 37 Zeitschr.d.Savigny Stiftg., Rom. Abt. (1916) 356.

5. Wolff, 72 Transactions Amer. Philol. Assoc. (1941) 423ff. For ancient Greek law, see, for the time being, Steinwenter, Die Streitbeendigung durch Urtel, Schiedsspruch und Vergleich nach griechischem Rechte (Munich 1925) 45. I expect elsewhere to discuss extensively the beginnings of civil procedure in the Greek sphere.

Thus we need not assume either an unnecessary intrusion of state power on a generally accepted habit of settling disputes by peaceful arbitration or a curtailment of powers previously allowed to the highest official, which it would be hard to reconcile with the fact that the republican magistrate enjoyed full *imperium*. We only need to understand the function in fulfilment of which he availed himself of his *imperium* when dealing with private controversies, and to realize that popular participation in the dispensation of justice seems to have been frequent among Indo-European peoples. Against this background the bipartition of the lawsuit, the contract-like nature of the *litis contestatio*, and the whole system of the *ordo iudiciorum*, as it took shape in the time of the *legis actiones* and grew into the period of the formulary procedure, are easily intelligible. The provincial and post-classical procedures, which made the summoning of the defendant a semi-official and later an official business and vested full power of decision in a state-appointed judge, are well explained by Wenger as expressions of authoritarian government by officials appointed from above. But we should not consider this as a restoration of conditions similar to those which had prevailed in the regal period. The function of the magistrate had assumed a character entirely different from what it had been in the primitive epoch.

Dr. Fisk, confronted with the difficult task of translating a German legal book into technical English, has as a whole acquitted himself satisfactorily. In some cases doubts may exist as to his choice of words; the use, without an explanation and even without putting the term in italics, of "common law," for the Roman-German *Gemeinrecht* is apt to mislead readers not familiar with continental legal history. Doubts may also be voiced as to the wisdom of his insistence on literally translating involved German sentences and even typically German expressions which have no exact English equivalent (such as *gegenüber*, which he translates *over against*). A few mistranslations occur.[6] Useful additions are some explanatory notes: the text and translation of the passages dealing with procedural matters in the fragment of Gaius' *Institutes* found several years ago in Egypt (now in Florence), translations of Greek and Latin passages quoted in the book, and

6. For instance, page 366, where the German: *"wenn dies so kirchlich gesinnte Kaiser tun, wie Justinian* [when such ecclesiastically minded emperors as Justinian do this]" is rendered: "when *thus* church-minded emperors do this, like Justinian."

a two-way glossary of German and English legal terms. Mr. Fisk's preface, in which he explains some Latin terms, is unfortunately not free of mistakes.[7] Some misprints were found, mostly in foreign language quotations.

We appreciate the courage shown by the publishing house in bringing out this book. Let us hope that its pioneering enterprise will be rewarded by an increase of public interest in legal history. Roscoe Pound in his introduction stresses the need of a revival of historical jurisprudence. Modern historical jurisprudence is no longer merely the history of isolated institutions, but a comparative analysis of the growth of legal thought. It helps us to understand the background of present trends and to appraise the psychological factors working in them. Note, for instance, the striking parallel between the early history of civil procedure and modern attempts to establish an organization for the peaceful settlement of international disputes. The study of Roman law as the greatest of the legal systems of the past, and a system, like the English, whose unbroken evolution from modest beginnings to highest perfection can be followed, is bound to play a leading part in this effort.

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COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA. LOUISIANA LEGAL ARCHIVES, Volume 3. Prepared by The Louisiana State Law Institute. Joseph Dainow, Reporter. Baton Rouge. Pp. Part I, 1940: xxxii, 968; Part II, 1942: iv, 1192.

The Louisiana State Law Institute and its reporter for the present volumes should be congratulated on the completion of a monumental undertaking.

The texts of the Louisiana Civil Codes of 1808 and 1825 are bibliographical rarities. Even in the very State of Louisiana itself they can be found in but few libraries. Yet, they are needed by lawyers and judges not only in the comparatively rare cases which turn around a transaction executed under the regime of one of the older codes, but in the everyday case where the

7. Namely, the explanation of *ius dicere,* also, in the opinion of the reviewer, the definition of *arbiter.*

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