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NOTES ON THE HISTORY OF COMMERCE AND COMMERCIAL LAW. 1. ANTIQUITY

Of the peoples of antiquity the Assyrians, Phoenicians, Egyptians, Greeks, Carthaginians and Romans played important roles in the history of commerce. The names of Babylon, Nineveh, Tyre, Alexandria, Corinth, Carthage and Rome come down to us as almost symbolic of wealth and luxury, and the aggregation of great wealth is of itself an index of commerce.

Of the commercial law of all save the Greeks and Romans little is known. No fragments have been preserved.

The Phoenicians, whose history as a nation closed with the conquests of Alexander the Great, were renowned as a race of navigators. They developed a maritime trade of such proportions as scarcely to be rivalled until the Middle Ages. They were a naturally peaceful and keen race. In this they were in contrast to their colony Carthage. The commerce of Carthage was imposed by force and was in its turn destroyed by Rome. Her walls were razed, her citizens killed and scattered and her fleet destroyed. No vestige of her law remains.¹

¹ Octave Noël, *Histoire du Commerce du Monde*, Vol. 1, Chap. IV. Pardessus, *Us et coutumes de la mer*, Vol. I.

The first commercial laws of which any knowledge exists are those of the Dorian island of Rhodes in the Mediterranean, and of these we have only indirect knowledge through the Roman law. Geographically Rhodes was so placed as to be an easy distributing center of Levantine and Phœnician goods. There is reason to believe that the Rhodian law was not simply a body of customary law, but that it was reduced to writing. A text of the Digests of Justinian treats "*De lege rhodia de jactu.*"² The use of the word *lex* in this connection here and elsewhere indicates that the Rhodian law had emerged from the customary state; the use of quotation points to a text. In the Digests is to be found the decree of Antoninus by which the Rhodian law was adopted into the Roman law insofar as it did not conflict with the latter.³

The Rhodian commercial law was a maritime law. It influenced the law of Athens, as is to be surmised by the strong likeness which the latter bears to it.⁴ In view of the influence and the authority which it enjoyed throughout the Mediterranean, it is not too much to say that the Rhodian law constituted the *jus gentium* of the seas until the Middle Ages. It is the first source of maritime law.

If the Rhodian commercial law was the first of which we have knowledge, the Athenian laws are the first of which we have texts.⁵ Those of Corinth, the most thriving commercially of all the Greek cities, have perished. But in Athens, in the liberty to traffic, in the guaranties of performance of contracts, in the regulation of the merchants' books and their probative value, in the importance of commercial associations, in the laws of surety, in a commercial jurisdiction, a peculiar characteristic of which was

² Digests of Justinian, XIV. 2. The "*De lege rhodia de jactu*" commences "*Lege rhodia, ut, si levandae navis . . . etc.*"

³ Digests, XIV. 2. §9. "*Ego quidem, mundi dominus, lex autem maris. Lege in rhodia, quae de rebus nauticis praescripta est, judicatur, quatenus nulla nostrarum legum adversatur. Hoc idem Divus quoque Augustus judicavit.*"

⁴ Blanco Constans, *Derecho Mercantil*, Vol. 1, p. 172. Alvarez de Manzano, *Curso de Derecho Mercantil*, Vol. 1, p. 176. Boulay-Paty, *Cours de Droit commercial maritime*. Hist. Introd., p. 7-9. Pardessus, *Us et coutumes de la mer*, contends that it was the Athenian law that influenced the Rhodian law.

⁵ Orations of Demosthenes; "*Lacritus*," p. 949-950; "*Aristogitonem*," p. 844-845. Boulay-Paty, p. 24. Caillemer, *Etudes sur les antiquités juridiques d'Athènes*. Beauchet, *Histoire du droit privé de la République Athénienne*.

the division of the year into the navigable season and the un-navigable season, during the latter of which the litigation was carried on of those questions which had arisen during the former season;⁶ in the penalties attaching to the failure to prove an accusation made against a merchant—in all this is evidence of an intent to encourage trade.⁷ The maritime law of Athens reached a high state of development, containing provisions relating to ship owners, captains, seamen, passengers, cargo, transport and general average, while those relating to bottomry have come down with remarkably little modification into modern law.⁸

The city of Marseilles in Gaul was a Greek colony, founded as early as the time of the Roman kings, by the city of Phocis in Asia Minor. From the mother city was brought a maritime law already developed, founded on the Rhodian law. None of it survives directly; Livy and Tacitus mention it and traces of it are found in the numerous municipal statutes of Marseilles of the thirteenth century.⁹

The Romans were not a commercial people, but their dominion exercised a great influence on commercial law. In their early history we know that they were an agricultural race. For the first two centuries they did not develop a trade either by land or sea. But the spirit of conquest and the ambition to dominate the world could not leave them insensible to the importance of commerce as a help to their ends. The rivalry of Carthage, whose navy controlled the Mediterranean, led Rome to build a fleet. After her rival had been destroyed her own importance as a sea power declined. The Mediterranean became infested with pirates and Pompey undertook a war of extermination. Only so could the seas be rendered safe for the merchants who centered their traffic on Rome, which was becoming yearly more dependent upon foreign supplies. The nation was a naval power from necessity rather than from choice.

⁶ The navigable period was from March 28 to Aug. 23. Boulay-Paty, p. 22, note 2.

⁷ Pardessus, *Us et coutumes de la mer*, p. 39. Desjardins, *Introduction historique a l'Etude du Droit commercial maritime*, p. 8. Alvarez de Manzano, Vol. I, p. 179.

⁸ Manzano, Vol. I, p. 179.

⁹ Boulay-Paty, *Introd.* § 3, p. 29.

As Rome became more and more the centre towards which flowed the wealth of the world, agriculture declined and Italy even during the later Republic could not provide her own subsistence. Sicily and Africa supplied the city with grain and the port of Ostium was built to give greater assurance to the safe arrival of the grain fleet.

The legions rolled the line of battle farther and farther from the capital city and within these limits reigned peace, or comparative peace, extending over centuries, such as had not been known before. This of itself was enough to cause commerce to spring up and flourish. But it was also in the interests of the dominant people, who enriched themselves by booty and tribute, to organize the subject peoples into provinces that should thrive economically. While the provinces produced, Rome consumed. Her commerce was one of importation.

It is not surprising that, disdaining trade himself, the Roman should have encouraged it in others. To the assurance of peace he added the dignity, science and unity of the Roman law. Highways were established and policed which put in communication the distant parts of the Empire. These, if built primarily for military purposes, gave a fresh impetus to commerce.

Accumulation of wealth through conquest and contact with Greece and the East created the love of luxury and idleness which led to the withdrawal of the Roman citizens more and more from public life, even from command in the great military machine, and to final national decay. In the activities of the city the non-Roman was conspicuous. In the provinces non-Romans were the producers and in the city itself theirs were the mercantile hands through which these products flowed.¹⁰

¹⁰ For the Roman History of commerce and commercial law see: Mommsen, *History of Rome*; Goldschmidt, *Handbuch des Handelsrechts*, 3rd Ed.; Pardessus, *Collection des lois maritimes antérieures au XVIII siècle*; Boulay-Paty, *Cours de Droit commercial maritime*, Introd. p. 33 et seq.; Molinier, *Traité de Droit commercial*, Vol. I; Lyon-Caen et Renault, *Traité de Droit commercial*, Vol. I, p. 11; Cossack, *Traité de Droit commercial* (translation from the German by Mis) p. 9; Vivanti, *Traité de Droit commercial* (translation from the Italian by Escarra) § 2, p. 1 of Introd.; Gustave Noël, *Histoire du Commerce du Monde*, Vol. I, Chap. IV.; Manzano, *Curso de Derecho Mercantil*, Vol. I, p. 181; Constans, *Derecho Mercantil*, Vol. I, p. 174.

In Roman law the non-Romans were known as *perigrini*. They played a highly important part in the development of Roman commerce, and the law which was applied to them played an equally important part in the development of the commercial side of Roman jurisprudence.

The free people of the Roman State, under private law, were divided into : 1. Roman citizens, 2. Latins, 3. *perigrini*.¹¹

The Roman citizen was he who by reason of his Roman parentage enjoyed the full rights of citizenship under the *jus civile*. This included the *conubium* or right to intermarry with a Roman and found a family under the *jus civile*; and the *commercium* or right to receive and transmit property according to the *jus civile*.

The term Latin was first applied to the inhabitants of Latium. Later it came to designate those upon whom limited rights of citizenship had been conferred, sometimes including both the *conubium* and *commercium*, but more often only the *commercium*.

The *perigrini* were at first pure foreigners. With time they became subjects without being Romans. Neither in private nor in public law did they enjoy any of the privileges of citizenship. Neither the *conubium* nor the *commercium* was theirs and they were unable to protect their rights through the legal actions offered by the *jus civile*.

This is not to say that they lived outside the pale of all law. They had their own law composed of: 1. Acts passed by the Romans applicable to them, 2. Their own national law, and 3. The *jus gentium*.

The *jus civile* is the law which a nation applies strictly to its own citizens; the *jus gentium* is the law which a nation applies to the foreigners within its territorial limits. The tendency is for these two bodies of law to approach each other. In the domain of private law today in most advanced countries the foreign resident enjoys almost every right that the national enjoys, while many instances could be cited of the spread of the tendency even to public law. But in antiquity the contrary was true. The *jus civile* was jealously limited to nationals.

¹¹ Girard, *Droit Romain*, p. 104, *et seq.*

The history of Roman law covers eleven centuries and during this period great organic changes took place. Of these none is more interesting than the influence of the *jus gentium* over the *jus civile*.

The *praetor* was the most important judicial officer of the Roman State¹² and in the 512th year after the founding of the City, a special *praetor* was named for the *perigrini*. At the hands of these officers the *jus gentium* received its development. Upon application of the litigant the *praetor* formulated the case and turned it over to the judge to establish the facts, directing what the judgment should be upon certain findings of fact. It is seen that the judge's functions were more nearly those of our jury.

This power¹³ of the *praetor* over procedure was negative in its character. He could not refuse to recognize already existing actions, nor grant new ones; but by creating defenses he accomplished the same end.

Upon entering office the *praetor* posted an edict in which he listed all the actions and defenses which he would grant during his term of office. Gradually a large part of this became permanent, each *praetor* adopting a part of the edict of his predecessor in office.

This became known as the Perpetual Edict and was a fruitful source of law. The *praetor* drew largely from the *jus gentium*, which in this way passed into the Roman law.

While the law regulating the family relations, marriage and inheritance, remained the special province of the *jus civile*, the law of contracts, of personal property and of the acquisition of property was profoundly affected by the praetorian law. Now, it is just this law of personal property and of contracts that is the domain of the commercial law.

Besides the *praetor* there existed the office of the *Aedile*,¹⁴ in

¹² The judicial power first resided in the kings, from whom it was passed on to the consuls on the establishment of the Republic. The consuls were gradually despoiled of many of their original powers. They were deprived of the judicial power by the creation of the office of the *praetor* in the 387th year of the city.

¹³ The added power was conferred by the *Lex Aebutia* in the first years of the seventh century of the city. Girard, p. 37.

¹⁴ Girard, p. 301, 562, 564. When a vendor did not reveal the defects in the goods the purchaser was protected by an action *redhibitoria*, granted by the *Aedile*.

whose charge was the policing of the markets. He, likewise, published an edict upon entering office, which was another source of Roman commercial law. The *praefectus annonae*¹⁵ was an administrative officer having under his charge ship owners and traders in grain. The judicial power which they acquired made of them to a limited degree, commercial judges.

There was, therefore, in Rome, no law special to commerce such as sprang up in Europe in the Middle Ages. In the English common law the refinements and exceptions to which the exigencies of commerce give rise have found their place in logical subordination to fundamental principles. So in Roman law, the peculiar genius of this people, working particularly through the *praetor*, succeeded in grafting to the fundamental principles of contracts as already worked out in the *jus civile* those practical reforms needed for commerce, and in welding the whole into one solid structure, cosmopolitan, simple and philosophic.

Roman law, and particularly the *jus gentium*, was not unfavorable to commerce.¹⁶ The law of contracts was founded on the principle of liberty; a maximum rate of interest was fixed; there were no restrictions as to the form of contracts of sale, of association, or of work and labor; to the creditor were given severe penalties against his debtor; contracts were liberally interpreted according to the intent of the parties, in the presence of good faith.

It remains to examine a few of the Roman laws applying to commerce. Those having exceptional application were few because of the law's unity. When there were any such they were generally maritime and the very special conditions of maritime trade have always given rise to special laws.

As might be expected, the laws having a bearing on commerce are found in great part in the Perpetual Edict.

Two laws¹⁷ of similar character were enforced: 1. By the action *de exercitoria*, and 2. *De institoria*. It was the principle of the *jus civile* that a debt could not be contracted through a representative, at least that a principal could not be made liable for more than the actual benefit which had accrued to him under the

¹⁵ Girard, p. 971, 1064, 1067.

¹⁶ Cossack, § 3.

¹⁷ Digests XIV. 1 and 3; Girard, p. 96, 662, 664, 668.

contract. The *praetor* held the principal liable, through the action *de exercitoria*, for the debts contracted by the captain of a ship to whom as his representative the principal had intrusted a commercial venture by sea. The action *de institoria* was a parallel action holding the principal liable for a debt contracted by an agent in a commercial venture on land.

An action was allowed holding the masters of ships, inns and stables responsible for injury to property intrusted to their guardianship even though the injury occurred through no fault of theirs, provided that it was not caused by an act of God.¹⁸

The action *de tributoria*¹⁹ was a supplementary action to the older action *de peculio*. The *peculium* was the property intrusted by a master to a slave to be administered by him. The old action *de peculio* made the property thus intrusted answerable for the contracts of the slave entered into in the course of his administration. When, however, the slave, with the knowledge of the master, ventured to use the *peculium* in commerce, the supplementary action *de tributoria* held the master liable personally, beyond the limits of the *peculium*.

The action *Pauliana*²⁰ was an action against fraudulent debtors. This action is interesting for, along with the *missio in possessionem* and the *venditio bonorum*, it is a precursor to the modern law of bankruptcy. By the law of the Twelve Tables the creditor might put his debtor to death or sell him into slavery. This was moderated to imprisonment and attachment of the debtor's property. The creditors were placed in possession (*missio in possessionem*) of the entire estate of the debtor which, after a certain period, was sold in a lump to the highest bidder (*venditio bonorum*). But up to the time when his creditors were placed in possession there was no restraint upon the debtor, who was left free to commit any fraud he pleased upon his creditors, increasing his insolvency by alienating his property and assuming new debts. The *praetor*, through the action *Pauliana*, corrected this by permitting the creditor to follow the property alienated in fraud through the hands of as many persons as it might have passed, provided that they had knowledge of the fraud.

¹⁸ Digests, IV. 9, *Actio de recepto nautarum, cautionum stabulariorum*.

¹⁹ Digests, XIV. 4; Girard, p. 665, 666; Cossack, § 3, p. 5.

²⁰ Digests, XLII. 8; Girard, p. 442.

The *receptum argentarii*²¹ was an act having a resemblance to the modern acceptance of a bill of exchange. A banker who promised to pay the debt of another was bound by his promise even though it turned out that the other owed no debt.

The main sources of the Roman commercial law are the Rhodian law, the Perpetual Edict, the Theodosian Code published in 438 A. D. by Theodosius II in the East and Valentine III in the West, the *Corpus Juris Civilis* of Justinian (529-534 A. D.), and the *Basilica*, a revision of the Justinian collection in Greek commenced by the Emperor Basil in Constantinople in 877. In the East the *Basilica* remained the law till the Turks took Constantinople in 1453.

In summarizing what is scarcely more than a summary itself, certain features of the commerce and the commercial law of antiquity stand out with prominence.

Before Rome the Mediterranean commerce had reached a high state of development, especially at the hands of the Phœnicians. However, no law has come down to us until the period of the Greeks. The Rhodians developed a maritime law of which we have indirect knowledge and which is the source of modern admiralty.

The Romans as a race were distinctly uncommercial, yet the effect of the peace which they promoted encouraged commerce in other peoples; the wealth which accumulated through conquest and tribute made them consumers rather than producers; their genius for law enabled them to develop a system of contract law favorable to commerce, based upon the classic *jus civile* and inspired by the equitable principles of the *jus gentium*. This law was characterized by the same scientific unity as the English common law. Its scientific development was in part due to the large powers of the *praetor* to mould procedure, amounting almost to legislative prerogatives.

With the fall of the Western Empire and the domination of Europe by invading barbarians there followed a period of anarchy when commerce almost disappeared. An immense amount of wealth was destroyed and real property became almost the only kind of wealth recognized. Centuries were required for Christ-

²¹ Girard, p. 604.

ianity and the germ of the ancient civilization to quicken society into self-consciousness. But while Christianity in so far as it liberated the individual and enobled labor was favorable to commerce, yet through the Canon law it fettered it and led the Roman law away from a true economic development. With the rise of the Third Estate came a new era for commerce.

Layton B. Register.

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