A REVIEW OF THE
UNIVERSITY STUDENTS'
LAW SOCIETY

THE LAW JOURNAL

"Legum servi sumus ut liberi esse possimus"

Vol. III, No. 2.

February, 1952.

Price: 2s. 6d.

UNIVERSITY STUDENTS LAW SOCIETY

THE COMMITTEE — 1951-52

Hon. President : THE HON. THE RECTOR.

President : S. BORG CARDONA, B.A.

Hon. Secretary : R. CONTI, L.P.

Hon. Treasurer : A. FARRUGIA, L.P.

Editor : J. FENECH ADAMI, L.P.

Member : A. MANCHE'.

CONTENTS

Correspondence on editorial matter should be addressed to the Editor, The Law Journal, c/o Royal University of Malta Union, St. Paul's Street, Valletta.

Letters, articles and book-reviews will be considered for publication, but these should be confined to comments on topics of legal interest.

Printed at St. Joseph's Institute—Hamrun.

LAW JOURNAL

Vol. III. No. 2.

EDITORIAL

A WELCOME TO NEW STUDENTS:

THE Law Society welcomes all the new students who intend to take up law as a career and we assure them that "their society" is always ready to help with their difficulties and to encourage that "earnestness and assiduity" which are the basis upon which the legal prestige and the social advancement of a country are based.

Very unfortunately indeed we are still at a loss as to what will finally be endorsed in, the now notorious Chapter XIII of the New Statute. All responsible opinion is agreed that the degree of Bachelor of Laws after a comprehensive and detailed study of the various branches of law extending over a period of five years, not to mention the two-year preparatory course belongs to-day to the realm of absurdities.

The position now stands thus. Ordinance No. XXXII of 1947 was a year later published as the New Statute of the Royal University of Malta. As soon as this Society learned of the new commitments our predecessors resorted to the polite way of sending a letter of protest and justifying their reasons. This was in 1948 other letters, protests and reminders were sent periodically and at last a sub-committee was appointed to study the question. We were never told who were the members of this sub-committee, when and how often did it meet, by whom was it appointed or whether a representative of the students was to be heard. Then some time ago it was rumoured that this sub-committee had reported to the Faculty Board but apparently the Faculty did not agree to the sub-committee's proposals whatever they might have been and a new sub-committee has been newly appointed. Again nothing substantial was communicated to the Law Society or to the students themselves although this matter does concern their interests. In November, 1951, the Society again wrote to the authorities asking for a statement on the position but so far no new developments have materialised.

Some of our fellow-students will look back we know, to th ty years ago, when a similar attempt was made and when t innovation which so relegates the position of the Faculty to su an inferior status was readily altered by the effective but ce surable means then adopted and they would be tempted perha to ask and favour a similar procedure. Our answer to that is the negative. It is true that the procedure so far followed this Society has had no very promising results but then must remember that the recently acquired University Autonor is still passing through one of those early and critical peric aptly likened by St Paul to the pangs of childbirth and cc sequently some patience and goodwill is required for in the ve near future we hope and pray that justice and reason will pr vail.

TWO AMENDMENTS TO THE CRIMINAL CODE:

Two amendments to the Criminal Code, one of which h been gone through because of a recent case have become t topic of conversation and debate. In the first case which dea with Section 661 of the Criminal Code, the Courts of Judic Police found A.B. guilty of having through negligence or no observance of regulations whilst driving a truck, caused t death of a child five years old. The Court sentenced accused imprisonment for six months. A.B. appealed but H.M. Cou in its Appellate Jurisdiction upheld the previous sentence. soon as this sentence was given Dr. A. Magri, Counsel for A pellant, filed a note invoking the provisions of Section 661 the Criminal Code which laid down that ".....every decisi shall be enforcible as soon as delivered provided that the judg ments of the Criminal Court shall be enforced two days aft their delivery....." Crown Counsel held that the interpretati of the clause was to be in the sense that sentences of the Crimin Court should be enforcible *not later than two days* after the delivery or that *they shall have been enforced* two days after d livery. The learned Judge however declared that in section 6(the wording of which was sufficiently clear, only one interpr tation was possible, moreover, there was no doubt that H.M Criminal Court in its Appellate Jurisdiction was a crimin court within the meaning of the section quoted. The Cou therefore upheld Defendant's plea and ordered that the senten just delivered should be enforced after two days. The amen

ment to this section which does away with this forty eight hours grace, the need for which is no longer felt, was introduced in the Legislative Assembly on Thursday, July 5, 1951.

It was pointed out that this provision existed in the draft Code of 1850, it was repeated in the project of 1844 and enshrined in the draft of 1854. But its existence is probably due to the fact that in these projects provision was made for an appeal from sentences given upon indictment to the superior court of penal justice on conditions that it be lodged within two days. Hence the necessity that the execution of such sentences should be stayed for two days in order to enable the person convicted to make such appeal if he desired. So much so that it was likewise provided that, if the person convicted declared, upon delivery of the sentence that he did not intend to appeal, the sentence then was executed on the same day. Had this been otherwise the consequence would be that persons sentenced to punishment restrictive of personal liberty by a sentence which is not subject to appeal would be set free for two days and would begin to undergo the sentence only thereafter. And even in the case of a person sentenced to death, he would be entitled to be at large pending the issue by the Governor of the necessary warrant for the execution of the sentence. When appeals from sentences of the criminal court were dropped, the provision for staying the execution of such sentences became meaningless and in fact since 1854 the principle recognised has always been the general one in the first part of section 661 viz that every decision apart from payment of pecuniary penalties is enforced as soon as delivered.

Another section which needs amendment is section 95 which deals with the punishments awarded for attacking or resisting with violence or active force a person charged with a public duty (96). The text says that "if any of the offenders..... shall use a regular weapon in the act of attacking or resisting, or shall have previously provided himself with such a weapon with the design of aiding such attack or resistance **or** shall be apprehended with the same in his possession, he shall be punished....." We are not here concerned with the anomalous departures from the general rules as to the communicability of material circumstances laid down in section 46 of our Criminal Code. It must be noted that in the case in which the offender is taken with the weapon (as distinct from

the case in which he actually made use thereof) he is an able for the aggravated form of the crime only if it is to appear that he had previously provided himself with weapon with the design of aiding the attack or resistance Art. 179 of the Neapolitan Code, on which the provision o Code was framed it was sufficient if the offender "nel stesso dell'attacco o della resistenza fosse preso con un' propria anche nascosta". It appeared to Jameson that phraseology might lead to injustice. The fact that the offe is taken on the spot and weapons found on him might in instances be altogether accidental, and if no bad use were of the weapons being so accidentally in the possession of offender this would be a circumstance of extenuation rather aggravation. Such a provision is both arbitrary in character contrary to, the just principles of a penal code which ougl reject all arbitrary presumptions of guilt or aggravation an low every circumstance of suspicion to be sifted at the tria cording to the evidence. It ought to appear that the wea were provided beforehand with the intent to make such a tempt or resistance (Report viii).

Jameson therefore recommended that the Article of draft should be amended, which it was. However in the te Section 96 of our Code, there is an *or* instead of an *and* and *or* it must be submitted must have crept in by mistake instea an *and*, if the idea was, as it was, to give effect to Jameson's commendation. That *or* instead of removing the defect anir verted on by Jameson, adds another defect to the section, f makes a separate case of aggravation of the condition whicl suggested should be fulfilled in order that the mere possessio the offender on the spot of the crime should constitute an ag vation. In other words if one were to accept that *or* instead o *and*, not only the mere accidental possession of the weapo the time of the attack or resistance would be an aggravatio spite of the objection pointed out by Jameson—but there w also be the aggravation if the offender had *previously* to the tack or resistance provided himself with the weapon to aid attack or resistance, although he may have subsequently thou better and dispossessed himself of such weapon *before* the ac attack or resistance. *

---

* Cfr. "Notes on Criminal Law" by Prof. A. Mamo, pp. 41 to 46.

THE RE-INTRODUCTION OF ITALIAN AS A COMPULSORY SUBJECT IN THE CURRICULUM OF THE PREPARATORY COURSE OF LAWS

This is indeed a crucial subject which demands the most urgent attention. For some we know, it may seem an attempt to revive a question of political character and in the excess of their misdirected zeal, they may smell a rat in our attitude. We do not refer to these people, though it would be interesting to see their, re-action when we refer to the fact, that decisions of our tribunals up to the last two decades or so have been published in Italian, not to mention that for the last five or six centuries all acts of civil life were drawn up in the same language. Surely not even these good people do consider that our notarial Archives and our Case Law are but the trappings of a lawyer's profession; that in other words a lawyer may well proceed without understanding anything about his own country's past legal records.

As the position now stands such exactly is the situation. Students in the 1948-55 Course of Laws were expressly debarred from taking up Italian in their Matriculation by having Latin held at one and the same time as Italian (Latin, quite justly, being compulsory). It is true that the new students who have joined the Course were less harshly dealt with but then Italian being optional there is a minority who have never done the language in their lives and so through sheer force of circumstances they were obliged to take up another modern language; these same people to whom the whole of Maltese Jurisprudence is a closed book are now expected to write a thesis. Here it may not be out of place to quote two short passages from the impartial enquiry of the Royal Commission of 1931. On page 128 we have it laid down that "a reason for maintaining Italian in the secondary schools and the university..... is that it is required in the profession of the Law. With few exceptions, the existing records, deeds, wills etc. from the time Latin gradually merged into Italian are in the latter language. "And on page 15 "Maltese Laws particularly civil and commercial, are based almost entirely on Italian legislative types and Maltese Jurisprudence is wholly founded on Italian or, more widely, Latin precedent". These quotations are as true to-day as they were then.

It is because of these reasons that we whole-heartedly concur with what was stated in an appendix on the LL.B. question

sent by the Students' Representative Council to the Governm
The "Times of Malta" commenting on a similar Editorial
Volume I No. 2 of the Law Journal, while not concurring v
our views that Italian should be compulsory admitted in
issue of the 22nd March, 1945 that it should be the "choic
all those students who desire *to become more proficient lawy*
Conscious of this desire that animates the whole student bo
sentiment of the good will, the liberal education and backgro
of the Senatorial Body and especially of the Faculty Bo
percipient of our obligation to promote and advance
interests of the members of this Society independently of pa
politics and partisanship we make our plea cognizant that wl
it shall be weighed objectively and conscientiously a ratio
and sensible basis will not be found wanting.

CARLYLE ON AN "ADVOCATE'S TRADE"

Strange trade that of advocacy. Your intellect, your highest hea
ly gift, hung up in the shop window like a loaded pistol for sale,
either blow out a pestilent scoundrel's brains, or the scoundrel's salut
sheriff's officer's (in a sense) as you please to choose, for your guir

CUSTOM.

Mudar costumbre a par de muerte. — To change a custom is nex
death. — SP. PROVERE

Consuetudo est secunda Natura.—ST. AUGUSTINE.
Nil consuetudine majus.—OVID.

Man yields to Custom as he bows to fate
In all things ruled—mind, body and estate;
In pain, in sickness, we for cure apply,
To them we know not, and we know not why.

— CRABBE

Security has only one law and that is Custom.—HAMMERTON.

The way of the world is to make laws but to follow Customs.
— MONTAIGNE

NEWS AND VIEWS

The Law Society welcomes the item in the recent speech from the throne whereby a new court of criminal appeal is to be instituted. Thus a long felt need will be satisfied and an inconsistency in our law will belong to the domain of the past.

* * *

Our hearthy congratulations go to the Hon. Mr. Justice Prof. E. Ganado, LL.D., C.B.E., whose name appeared on the Honours list. Very nearly the biblical three score years and ten have passed since the last similar honour had been confirmed on one of H.M. Judges. Prof. E .Ganado's career of 40 fruitful years has now been publicly appreciated by King, Government and Country.

* * *

The Law Society thanks Chev. G. Ransley, our energetic Prisons Director, for the courtesy and attention shown to its members when they had occasion to visit H.M. Prisons on Tuesday, April 24th in the company of Prof. A .Mamo, B.A., LL.D., to whom the Society's thanks are also due.

* * *

Our congratulations likewise go to Dr. J.J. Cremona, B.A., LL.D., D.Litt. (Rome), Ph.D., B.A. Hons. (Lond.), for his learned oration on the subject of "Legal Publications by former Professors of Law in the Royal University of Malta", delivered on Tuesday, 22nd November at the Foundation Day ceremony. Dr. Cremona also deserves the Society's thanks for his lecture on "Habeas Corpus and the Maltese Law" delivered on Tuesday, 29th January, 1952.

* * *

The Law Society also congratulates the following gentlemen for obtaining Diplomas. The Diploma of Notary Public

and the relative warrant were awarded to : Mr. S. Abela; M. Gambin, B.A.; Mr. H. Borg; Mr. S. Borg Cardona, B.

The following obtained their Legal Procurator's Diplo Messrs A. Abela, G. Borg, J. Busuttil, J.F. Cachia, V. Ca na Colombo, R. Conti, G. DeMarco, B.H. Dingli, J. Fe Adami, J. Fenech, A. Farrugia, U. Mifsud Bonnici, J. O'Shea, F. Portanier, G.A. Scicluna, J. Martinelli, J. Zar Tabona. Our special congratulations go to Mr. Ivo Galea was first in order of merit and won the University Prize of .

* * *

The Law Society thanks Dr. J.M. Ganado, B.A., LL Ph.D. (Lond.) for his very interesting lecture on Filiatio the Maltese Law. The whole of Maltese Jurisprudence was through in what must have been one of the most exhaustive tures on the subject.

* * *

As we go to press we hear with deep regret of the deat Professor Owen Fogarty, B.A., (N.U.I.), M.R.S.T. Profe Fogarty, who was born in 1894, had been holder of the Ch of English Literature and General History at the Unive since April, 1924. Professor Fogarty during all these years e ed the respect and affection of his colleagues and of all un graduates. He is survived by a brother who is a priest in Aus lia and a sister who is a nun in Ireland, to whom we offer sincerest condolences.

* * *

The student members of the Law Society thank Mr. E. Soler for supplying them with copies of his "The Maltese tion"; Mr. G. Vigo for his patriotic exposition on "The Bri Title to the Sovereignty of Malta" and the Directors of the M tese Review"—a quarterly of culture and politics.

We also acknoledge with thanks "Il Politico"—Rivista Scienze Politiche diretta da Bruno Leoni, Università degli st di Pavia; "The Law Quarterly" A.L. Goodhart; The Jou of Comparative Legislation and International Law; and Report on Legal Studies of London University.

Some Thoughts on the Pre-eminence of Roman Law

By Dr. J. M. Ganado, B.A., LL.D. Ph.D. (Lond.)

MANY of you will have already heard the saying that if Greece has given us the statue, Rome has given us the obligation and I daresay that few of us have considered that these two great relics of the past share a particular quality in common : namely their solidity; for, while the Greek statue is in itself an expression of solidity, in matter and in design, the Roman *viculum iuris* is in itself a powerful tie, a *ligatio* of the very person, solid in content and in form. Of course, the Roman legal heritage does not consist only in the law of Obligations; however, in the general notion of the obligation, I am at present visualising the binding force of all law, since in all its manifestations,speaking generally, law does not do any more than create rights and correlative obligations. It is by means of the existence and enforcement of the obligation that we see law put into effect and it is exactly in that quarter that our greatest debt to the Romans lies. In point of fact, the obligation is the legal counterpart of the well-known *Romana fides* which was a solid rock on which Roman Republican civilization reclined.

Men have repeatedly asked the question : why is it that the Romans were able to develop a private law which has been held in great esteem for many centuries and which is still the prototype of countless systems of law? As a race, the Romans do not seem to have been great original thinkers. In philosophy and scientific method, they were followers of Greek learning and in vain do we try to find in their ranks, a Socrates, an Aristotle or a Plato. They never developed, or even attempted to develop a legal philosophy of their own. With a few exceptions, they held aloof from the legal history, were completely disinterested in comparative law and never treated law from a sociological point of view, although, as Schulz says, (R.L.S. p. 70) the Greek contribution in this direction was already worthy of attention. They do not seem to have ever cared to probe the intricacies of Roman Constitutional law. Nevertheless, with all these failings, chief of which was the narrowness of their outlook, the Roman jurists succeeded in developing a law which has justifiably been

held in veneration. Why should this have come about? Th the question which I am putting to myself to-day and I hope will bear with me, if I try to apply the lesson we infer from investigation to our modern condition. A lawyer is often inc to be somewhat positivist in outlook and turn his gaze tc past with an eye on the future.

Let me hasten to state that the fact that Roman private has been applied in many countries does not mean much; at rate, it must not be over-stressed. It is true that, as Disrael it: "A faked greatness does not last", but in legal matters, servatism is very often imperative, as even a reform, which be good in substance, might easily provoke wholesale confu Lt us imagine that the present system of real rights over here in Malta were to be supplanted by some other system, be more logical and more in conformity with present com cial requirements. The confusion which would arise can e be envisaged. Owing to this inevitable conservatism, system law are very rarely discarded *en block*, and you will no d agree that the fact that a bad law continues to be observed sh not be taken to confer upon it any particular merit. It is r the same with rogues: an old rogue cannot pretend to be pectable just because he is an old one.

Roman law was enforced in the whole of the Roman pire for no reason other than that it was introduced and imp by the Romans themselves. Nothing but Roman law could ply to *cives Romani* and after the 212 A.D. Constitution of tonius nicknamed Caracalla all the free inhabitants of the pire became citizens. The reason underlying such benevol was to make the inhabitants of the Empire share in the ho of paying taxation, but it also had the effect of imposing Ro law on the greater part of the known world. Then came the of Justinian which saved Roman law from the complete wrec which could have otherwise resulted; here again, we find a rect and rigorous imposition. The Code of Justinian, and notl but that Code, was supposed to be the law for the whole pire and no one was allowed to make comments on the C let alone to criticise it.

So far, it was perfectly natural that Roman law be follo by all—*nolentes volentes*—independently of its intrinsic m or demerits. But immediately circumstances arose in which man law was put to the test and had to rely on its merits a

for future recognition and application. I am referring to the so-called Barbaric Invasions. One might easily have expected that the ruins of the Roman Empire of the West included also the remains of classical jurisprudence, but the truth is, rather surprisingly, that the unrefined Northern Invaders regarded the law of Rome with the greatest respect. I have always felt some astonishment, not unmixed with admiration, in reading over the history of some of the Barbaric Codes. I need mention only one instance: the Edict of Theoderic the Great, the king of Ostrogoths. Despite the fact that he was a conqueror, Theodoric regarded himself as a sort of viceroy for the Roman Emperor of Constantinople and that was the reason why he called his law an Edict. In his legislation, he sought for inspiration in the works of Iulius Paulus and in Roman constitutions and he not only applied that law to his Roman subjects, as other Nordic kings had done, but also to the Ostrogoths themselves. This was indeed a case in which the law of the vanquished in its own turn vanquished the victor: "capta ferum victorem cepit".

Roman law then faced a protracted and insidious danger under the guise of the ignorance and indifference prevailing in the Middle Ages. The Roman tradition was of course carried by word of mouth as customary law but the legal science was almost extinct until it was revived by the Italian glossators and post-glossators, by the French and Dutch humanists and by the German Pandectists. But, even so, a great following was not secured, until after the Napoleonic Codification which succeeded in converting a very elusive legal system into a semi-standardised form, conveniently vague at times but nonetheless a suitable instrument by means of which the fundamentals of the Roman tradition could be imparted to the outside world. Those countries, such as Malta, in which Roman law had been followed for centuries, would have retained it, whether the Code Napoleon had seen the light of day or not; but it is quite safe to say that had it not been for the *Code Civil* Roman law would certainly not have attained its present position as a sort of a common denominator of all legal learning. It would similarly not have had such wide expansion It is not quite clear, for instance, that it would not have found its way into Russia or Japan?

I hope I have made my point clear. Unassisted, Roman law would not have received the widespread expansion which the world has had to behold during the last century and a half. For

that expansion a great deal is owed to the Germans and French, but in order to find out something about its intrir merits, we must of course turn to other quarters.

Every body of laws is the result of a vast number of fact and can hardly ever be the work of one single individual. T can be safely said of all systems of law but it applies in a higl degree to those laws, such as Roman or English law, which hi grown up on a casuistic basis. Further, a law is an organism, complex in structure and content, that it is often the product diverse preiods which, in succession one to the other, make th own particular contribution. So, indeed, it was with Roman la As we shall see, even those periods which have traditionally be held in contempt have rendered some good service in the mou ing of Roman jurisprudence, as it has been transmitted to us.

If I were forced to point out concisely the factors which my mind were mainly responsible for the evolution of Rom law as a highly logical system of law, I would point out the f lowing two factors :

Firstly, in the formative stages ample opportunity was giv to a very wide circle of persons to exert considerable influence law-making.

Secondly, the constitutional changes affecting law-maki were particularly well-timed.

The first factor was produced by the Romans with pure c liberation; on the contrary, we owe the second factor mainly chance.

I must now amplify these two elements which really can treated together, since the well-timed constitutional changes al marked stages in the formation and development of Roman jur prudence. In the development of the law, the Republic cons tutes one period, the Principate i.e. until the time of Diocletia another period and the Dominate a third period. With tl changes in the constitutional regime, the characteristics and te dencies of jurisprudence invariably took new turns.

In the middle of the sixth century before the Christian e Rome already possessed a Code of Law : the Code of the Twel Tables—a Code which standardised some rudimentary principl of legal responsibility and of procedural and sacral law. Tl forms of action by means of which law-suits were commence were at that time still kept secret by the College of Pontiffs, wl however, were always prepared to divulge them to those wl

wished to initiate proceedings. These Pontiffs or priestly officials were also the official interpreters of the law and their interpretation often amounted to the creation of new rules of law. In this connexion, it is customary to mention one particular example; I am going to conform to the practice lest I be taken to disapprove of the example. At the time of the XII Tables, adoption was unknown and it was not possible for a father to free his son from life-long paternal authority. Now, in the XII Tables one provision read as follows: "Si pater filium ter venumduit, filius a patre liber esto". The provision was intended to penalise a father who for some reason or other gave his son *in mancipii causa* to other persons for three times. The Pontiffs, wishing to redress the need of the institutions of adoption and emancipation, advised persons seeking their opinion to carry out three consecutive sales, by means of which the desired result could be achieved. In this way, the institution of adoption was created. The Pontiffs often delivered their interpretations of the law in public and a group of persons interested in public matters and avid of public approval made it a point to attend these meetings and in the course of time became well-acquainted with matters legal. From such small beginnings, a body of jurisconsults gradually grew up.

It may be pertinent to recall that at this stage the Roman Republic was at its height and the Romans, on the whole, did enjoy great liberty of speech, even in political affairs. You all know what safeguards of individual liberty there were in the Roman Republican Constitution. I shall mention only one. The magistrates in peacetime held office for a very short period of time, ranging from one year to five years and were personally responsible for any unjust deeds they may have committed during their tenure of office. In this way, the jurists were absolutely free to give their candid advice, be it *de lege condita* or *de lege condenda* not only to private persons, but also to magistrates and to Judges who constantly required good counsel, since they were mere private citizens and generally possessed no legal education.

These jurists were somewhat aristocratic in temperament. They could not receive payment for their services. Indeed, they are supposed to have shunned direct payment; whether they shunned the indirect form or not, I do not know. They refused to plead in Court; such work was left for the *oratores*, like Cicero, who knew little law but were well versed in rhetoric. They generally belonged to the higher and walthier classes and they

seem to have retained a certain dignified aloofness. Strangely enough, this attitude did have also its good results, since it left the jurists free of strong partisan spirit, which would have been inevitable had they made it a practice of pleading in Court; it also ensured them absolute independence of thought and action. Goethe has told us that to think is easy : to act is more difficult : but to act in accordance with one's thoughts is the most difficult thing in the world. Perhaps, these Republican jurists came very near this goal, since there was nothing to hamper their thoughts and actions as far as legal development was concerned.

The jurists could indirectly influence the course of litigation and above all, their opinions did affect the drafting of the magisterial edicts to a considerable degree.

We must here stop to say a word or two about the magisterial edict. You may be aware that to-day in order to initiate proceedings in Court a special form is bought from the Registry the barrister fills it up with a concise statement of the facts and claim and then the Judge signs it. A copy is sent to the defendant and the case starts. In this way, the issue of a writ of summons takes place. In Republican days, the summons to appear was made privately. The XII Tables had in fact provided : "Si in ius vocat, ito..." but, after the appearance of the parties, the position was not altogether different from the modern one. The parties appeared before the praetor, narrated to him the main points of the controversy and he had to decide not who was wrong or right, but whether the case was such as to warrant a reference to a private citizen—the *iudex*—for a decision on the merits. In this way, the keys of the administration of Justice were held by the praetor. He had to decide which cases deserved judicial protection and also what sort of judicial protection was to be meted out in every particular case. In the exercise of these functions the praetor knew no control, save public opinion and his future personal responsibility, if he acted in bad faith. In order to introduce some stability in the exercise of his discretion, the praetor issue edicts which were proclamations of his intentions during his tenure of office. If the praetor happened to be a jurist, he would draft the Edict himself, otherwise, he would consult his *consilium* which invariably contained one or more jurists.

At rock bottom, the Edict was the result of the jurists' private initiative. It was the joint effort of successive generations of jurists which was responsible for the working out of the so-

called *Edictum tralacticium* that is that *corpus edicti* which was handed over from praetor to praetor for many decades in semi-standardised form. It was not the work of one brain, but of hundreds. It was not formulated by a group of studious theoretical persons who would be inclined to forget practical necessities; rather it was formed gradually, as cases arose: every new case called for a new remedy and of course a new remedy in fact meant the creation of new law. A modern jurist often yearns for those good old days when one could plead in the name of Equity for Equity's sake. Equity in the administration of Justice to-day is often a word without meaning, a concept without practical application, and a modern Judge finds himself often bound to commit injustices, since it is his duty to apply the law, however it may work in particular cases. It is true that to apply a corrective to these injustices there are the legislative organs, but these are generally too slow, too intricate and often out of touch with daily occurrences in the Courts. If we only had something analogous to the praetor and his *consilium*, the law would never find itself lagging decades and centuries behind current events.

The individual jurist possessed also another instrument by means of which he could "make law"—namely the *responsum* which was a written opinion which he issued upon request. For some time after Augustus, the Emperor used to confer the so-called *ius publice respondendi* upon the jurists he fancied and, in this way, these jurists who gave advice with the Emperor's benediction possessed no doubt augmented authority. Originally, their opinions were not binding but from Hadrian's day a unanimous opinion made law. How this unanimity was taken is a moot point but it is a fact that under the conditions presumably specified in a Rescript of Hadrian's, the mere private opinions of the jurists formed law. This was even more so, in later law. In the fourth century A.D. it was established that the majority opinions of a set of jurists had also the force of law and in certain cases also opinions where there was no majority on either side were binding. I need not enter into details. I am mentioning these instances in order to show to what extent the legal profession *auctoritate propria* without anybody's sanction could make new law. The respect to the jurist's work was great during his life but it often turned into veneration after his death. Indeed, the most important part of Justinian's legislation is the Digest, which is no more than a collection of juristic writings. These

writings were cut short and partly modified but they becar law; so that, ultimately, what Salvius Julianus or Aemilius P pinianus wrote in their offices became law. I am sure that su instances are unparalleled in the history of any other law syste

It is important to appreciate that in the Republic and in t Principate—that is in the periods when legal doctrine was bu up and written down—the jurists were no mere theorists. Sor abstraction was no doubt inevitable but they were concern with practical cases and they built up their law on a purely c suistic basis. Schulz describes the process in a most attracti maner: "In the beginning was the case. But every decision a special case is given in the conviction and with the intenti that, should the case recur, it will be decided in the same wa Now it is impossible that the new case should coincide with t old in all its details, so that every decision implies that not on one case is decided, but also that an abstract principle is evolv from the case itself by a process of abstraction in which certa special circumstances of the case are ignored. A further ste often more than one, is needed before this abstract result can formulated in the words" (Principles—p. 40).

I am not suggesting that precisely the same system can introduced with safety to-day. Life has become so complicat and so speedy that it would be dangerous to allow anything interfere with the certainty of the law. But, if we were in t course of the developing and correcting some law, I can imagi no more efficient method than that employed by the Romans. has been well said that fortunately there is something in m which rejoices in escaping regimentation in thought and in actio The life of every lawyer is crowded with instances when the la falls short of real justice and he would certainly feel the weight l ing removed from over his conscience if means to redress the rem dy were put at his disposal. In this way, the most crying needs w quickly come to the limelight and the enactment of necessa legislation will not depend on any accidental brainwave of Mini ters or Law Officers. It is incredible, for instance, that in t year of Our Lord 1952, our fellow-citizens can be relegated idle away their time in a prison cell, just because they happ to be unable to meet their debts, even if their honesty is unta nished. When business is good, the Government shares in t good fortune, and when business is bad, of course, the Gover ment pays no part of the debt and besides, allows the poor fe

low to be sent to prison. And when these unfortunate people are locked in their prison cells, they are handed over some half a crown per day to live on. They have to live on it in the most literal sense of the word, since no prison warder is allowed to procure food for them nor are they allowed to fetch it themselves. Well, that is the law as practised. Should we ever repeat the experiment which the Romans used of giving the Bench and Bar direct control over law-making, one can feel quite sure that the cobwebs in the legal system will quickly disappear.

Let us now pass to the second factor: the timing of the constitutional changes. I must repeat that the timing of the constitutional changes was purely accidental and was certainly not connected with the course of legal development. However, it is fact that these changes were remarkably well-timed and exerted a decisive influence on the Roman jurisprudence. In England, for example, the law, in form, is in a stage similar to that of the Roman law prior to Justinian's Codification. English lawyers appreciate this point very well indeed; some of them are happy that their law has retained such flexibility, as, for instance, Sir Patrick Hastings who advises the future rulers of Britain to leave English law alone; others decry the hopelessness of making English law knowledgable to the general public and advocate a codification of the law evolved by generations and generations of Judges, for in England, you know, every judgment makes law for future similar cases. In English Constitutional history there was never any sudden break of any long duration, with the result that the continuity in the Constitution carried with it continuity in legal development. Had the Constitution of England suffered the cataclysmic changes which resulted in the course of Roman History, English law would certainly not have remained so elusive and so liable to constant change, so incomprehensible to the layman, as if it were still law in its early period of formation.

Every period of Roman history afforded the proper atmosphere for the law's formation, for its standardisation, for its codification, as the case may be.

In the early Republic, the Romans were mostly concerned with the abolition of class distinctions and the establishing of a legal process open to all. Hence we have the law of the XII Tables in 451 B.C. and the publication of the forms of action in 307 B.C.—after which the law was no secret of a class and all

those who felt inclined to contribute to legal development v free to do so with the methods which I have already descri At this stage, a litigant, whoever he might be, could at leas sure of receiving a fair deal within the narrow range of an e crude procedural system. But when trade relationships with reign countries began to be established, the need was felt of dulging in some form of abstraction for the co-ordination of rules still being evolved. For this purpose, what influence c there have been better than that of Greek philosophy which a dentally was exerting immense influence at this stage on the w of Roman life. "'The strivings of the last century of the Rep lic after an abstract and systematic statement of the law are tainly attributable to Greek influence" (Schulz, Principles 129). Roman law, before that time, could not claim to be organised Science, and the Greek dialectic method was emplc to put it on a proper foundation.

We must now pause to consider briefly the dialectic met which I have just mentioned. It was dialectic which turne mass of practical rules into a legal science worthy of the na It was dialectic which established the general structure of l institutions, by creating those categories and distinctions, wl characterise Roman Law and which have made it so understa able and attractive to the outside world.

The dialectical system was Platonic in origin and was w ly used in all fields of science. It aimed substantially at the duction, in Cicero's words of "quod est diffusum et dissipatun certa genera" (de orat. I. 142). Pomponius tels us that Quir Mucius, the pontifex, was the first jurist to classify the wl *ius civile* into *genera*. Servius Sulpicius Rufus continued extended the same system and we find in Cicero's works str laudations of the contributions of Servius in this direction, though perhaps it may be suspected that Cicero's praises of S vius formed part of the policy of running down Quintus Muc The scope of the dialectical method is the making of distincti and subdistinctions within the whole field of any partic science and the making of such classifications, which often volved a good deal of abstraction, can surely be regarded as important means which the Republican jurists adopted in t effort to put the law on a sound and rational basis for fur development. In La Pira's words · "La scienza, ars, si costru partendo dai principi deducendo da essi more sillogistico, o

nizzando ad unità, ad immagine del corpo, il sapere; divisio per genera, species, partes: sono queste le tre operazioni del metodo scientifico, e con esse che logici, geometri e giuristi hanno saputo creare sistemi scientifici di imperitura bellezza" (studia et Documenta (1935) p. 348).

The classifications drawn by the Republican jurists were followed by the lawyers of the early Empire, chief among whom were Antistius Labeo and Massurius Sabinus. At the same time with the growth of the Empire and consequent expansion of trade, the law had to be evolved in such a way as to make it applicable with fairness to foreigners and Romans alike and what instrument could have been more suitable for that purpose than the Greek notion of *ius naturale* which was transformed by the Romans into positive law under the guise of *ius gentium*.

It verily seems that in the Republic all the elements had conspired to create what I may call a good breeding ground of law.

After several centuries of development based on the private initiative of praetors and jurists, occasionally assisted by *leges* of one of the *Comitiae* or by *plebiscita*—it became necessary to curb the speedy course of legal development and, so to say, canalise it. For instance, some jurists thought that there were four types of theft, others said that there were three, others insisted that there were only two. This was no theoretical discussion, for it could easily produce substantial divergencies. The time had come when a strong hand was needed to restrict these wayward tendencies of legal discussion. And fate intervened by ushering the Augustan pseudo-Republican regime which, as you know, heralded the Principate.

From then onwards, authority gradually centred round the Senate. The Senate gave instructions to the magistrates and individual authority gradually declined. Even the jurists felt that it was advisable to gather in groups, so that their voice could better be heard and hence we have the Sabinian and the Proculian Schools of jurists. It is true, the jurists could only give individual *responsa* but we find that all through the Principate, especially during the earlier half, the jurists belonged to these two groups. And, it is by no means improbable that the clannish sentiment underlying the formation of these two groups under two recognised leaders who provoked by the more methodical outlook on legal development which prevailed in the Principate. The prin-

ceps and the Senate in fact were also distrustful of praetorian i tiative and in the 2nd Century A.D. the Emperor Hadrian dered the jurist Salvius Julianus to make a compilation of t Edict. From then onwards, the Edict became standardised a this most wealthy source of Republican jurisprudence was su stantially truncated. This was not a period of formation as t Republic had been. It was what we may call the period of r gistration. It was necessary to put down in writing the resul which had been attained, and work out practical rules to the n nutest detail. This task was undertaken by Domitius Ulpian and Julius Paulus whose voluminous works discussed a vast nur ber of practical cases. They treated no theories: their intere was solely in giving solutions to hard practical cases—solutio which had to pass the test of rigid logic.

With the end of the Principate and birth of the Dominat individual initiative in legal development came to an end. The was only one real source of law: the Emperor's will: "qu principi placuit, legis habet vigorem" and, of course, the will the Emperor had to be made clear. Constitutions were oft issued to deal with new contingencies but the general body of t law was still to be found in the standardised Edict and in t juristic commentaries on it. It became necessary to cut dow this vast bulk of legal material. Such was the task that nothir but the autocracy of Imperial Rome could cope with such d mand upon it. Theodosius II made a first unsuccessful attemp More than a century later, Justinians' compilers with the a sistance of revised editions and summaries of legal writings m naged to cut down the legal works to 1/15th of their origin length. This consummate piece of vandalism, produced the D gest or Pandectas which is the backbone of the Corpus Juris Justinian.

In the Corpus Juris of Justinian the Christian influence w extremely strong and a genuine attempt was made by the com pilers to temper the strict logicality of the rules bequeathed t them with ideas of Equity. The result stood in marked contra with the earlier rule. Let us take for instance the doctrine Liability. The earlier rule was that if an artificer happens to b cutting, say, a diamond and the diamond is accidentally broke well, he is liable for damages unless he proves that the diamon was defective in its structure. Justinian's compilers held this t be too severe. They said that the artificer will not be liable if h

succeeds in proving that he has taken all necessary precautions and exercised the degree of skill which could reasonably be expected of an artificer. Let us take the case of wills. The earlier jurists held that a will should speak for itself and no outside evidence should be taken to explain it. Justinian's compilers thought that a testament, as an act of volition, should be interpreted as much as possible in accordance with the testator's will and were quite prepared to allow any type of evidence which could throw light on what the testator might have intended by the wording of the will. This latter attitude opened the doors to prolonged litigation on the interpretation of wills, so much so that it became dangerous to make a will. After all, some witnesses are forgetful while others are deliberately untruthful and it is not very difficult for some people to cook up a story about a dead man's intentions. A detailed study of the Corpus Juris reveals the working of the two distinct attitudes the effects of which are laid bare before the eyes of modern legislators—who are thus literally spoon-fed about the more plausible choice.

Had it not been for the gradual transformation of Roman political life from Republicanism to Imperialism, Roman law would not have initially been developed so logically and so fairly, as it was, and in the end it would not have been codified. In England, for example, there were no such political transformations, with the result that the law has remained uncodified.

Without a Corpus Juris Roman Law would have undoubtedly perished. Indeed, despite the Codification, it almost succumbed to the ravages of time. One can very well imagine what would have happened without a Corpus Juris. May I repeat the fine words of Wharton : "Many programmes are born of enthusiasm, only to die later of neglect and usually this happens not because the programme isn't good but because it is too good, too big, too ambitious and too impractical".

If I said that Roman Law was not the work of one man, I would be repeating a platitude more than once. But I hope you will agree that Roman history itself helped in the construction of this work of genius.

What is the real lesson which is imparted to us by what we know of Roman legal development? Is it that individual initiative should be given a great say in legislation and judicial discretion in the decision of cases? My answer is certainly in the affirmative. However, the answer is not unqualified. Solutions of

practical difficulties were worked out so minutely by the jurist that within the orbit of those rules, the greatest certainly wa ensured and in this way discretion could only serve as a safety valve against injustice. Whether stress was laid on one side o on the other depended on the characteristics of the particula age. When law is inclined to become stereotyped, as it was a the time of the Twelve Tables—then it needs a Republic in whic individual opinion and initiative are given full play. When, o the other hand. legal development runs out of control, then th curbing hand of a centralised government becomes necessary fo certainty's sake.

Many a time to-day do we come across blatant injustice being committed beneath the shadow of the blind figure of lega Justice and in such cases we do feel like yearning for judicial di cretion, and for the initiative of the Bar in legislation. If we ac cept the Romans as our masters in the substantive rules of law why should we not also try to learn something from them fron the point of view of legal method, bestow upon the successors o the praetors and the jurisconsulti the Bench and the Bar—a defi nite role in the initiation of legislation and try to perfect th *magnum opus* bequeathed to us in the Roman way?

Owing to the fact that access to official documents is dif ficult (thanks mainly to superabundant red tape) Dr. Alber Ganado's fourth instalment on "The History of the Crimina Code" will appear in our next issue and not in this number a stated previously.

The province of the doctrine of Unjustifed Enrichment in Continental Law

By Dr. E. Busuttil, B.A., LL.D., B.A. (Hons.), B.Litt. (Oxon.)

ANYONE who attempts to speak on Unjustified Enrichment in these dynamic days is instantly haunted by the reflection that he is somehow embarking on a discussion of some new-fangled political creed. Certainly the familiar French axiom *nul ne doit s'enrichir injustement aux depens d'autrui* sounds attractive enough to be mistaken for a slogan, while its implications appear at first blush to be no less pregnant with political meaning. No one, it is said, must enrich himself unjustly at his neighbour's expense : and is not this a palatable way of saying that no one is permitted to acquire riches or to retain them? Beyond doubt, it is true to say that in an economic system where the means of production are State-owned and State-controlled, the acquisitive propensities of the individual are restricted to the wages he is capable of earning from the State, and nothing more besides. Accordingly, if a purely collectivist society is contemplated, it becomes fundamental to hold that to enrich one's self is necessarily to do so at the expense of one's neighbour; and further, if by injustice is meant "social injustice", as the French school of social solidarity would have the early twentieth centry jurists believe, then it soon begins to look obvious that any variety of enrichment is unconscionable.

But so much for what is ,at best, robot jurisprudence, and at worst, fanciful speculation. The fact of the matter is that Unjustifiable Enrichment has been accepted as a rule of law in countries with a political and economic outlook as widely different as that of the United States and Soviet Russia. What is more, the doctrine is formulated in almost identical terms in both countries. Thus Sec. I of the American Restatement on Restitution, published in 1937, says : "A person who has been unjustly enriched at the expense of another is required to make restitution to the other", while Art. 399 of the Soviet Civil Code of 1923 lays it down : "Alui qui s'est enrichi aux dépens d'autrui sans cause suffisamment fondée sur la loi ou un contrat est tenu de restituer ce qu'il a reçu indûment". This legal affinity is remarkable, and alone should go far to rid the principle of any alleged flirtation with current political ideologies.

Elsewhere on the Continent the principle has been gathered up and embodied in Art. 812 of the Grman Civil Code of 1900, Art. 62 of the Swiss Federal Code of Obligation of 1911, Art.s 1041-1043 of the Austrian Civil Code of 1811, Art. 2041 of the Italian Civil Code of 1942, Art. 904 of the Greek Civil Code of 1946 ,Art. 123 of the Polish Code of Obligations of 1934, Art. 1750 of the Hungarian Draft Civil Code of 1928, and Art. 73 of the Franco-Italian Draft Code of Obligations of 1927. A fair specimen is afforded by Art. 123 of the Polish Code of Obligations : "A person who has unjustly derived a benefit from the property of another is required to restore the benefit so obtained, or if that is no longer possible, to refund its value". Or again, let us take Art. 904 of the Greek Civil Code : "A person who has been enriched at the expense of another without legal ground is required to make restitution. In particular, this obligation exists where money has been paid over when it was not due or where it has been paid over for a lawful purpose which has failed of accomplishment, or has remained outstanding or has become unlawful or immoral".

In France. Belgium, Spain, Portugal, and Rumania, the prohibition against Unjustified Enrichment is not incorporated into a single text of law, but it is recognised in a number of Articles scattered throughout the length and breadth of the Civil Codes of these countries. Thus, for example, where money is paid without the payment being due, that money can be recovered back. A person devoid of capacity may avoid a contract into which he has entered, but he must restore any benefit which he has received under the contract. The owner must compensate a person who is in *bona fide* possession of immovable property for any expense necessarily incurred in connection with the preservation of the property or for any improvement which has increased its value. Even outside these special cases, however, the doctrine has long ago been established as a broad doctrine and a separate source of obligation by French, Belgian, Spanish, Portuguese, and Rumanian judges and textbook-writers.

On the other hand, there is no general theory of Unjustifiable Enrichment in Dutch Law. The reason is that when Dutch Law was codfied in the beginning of the 19th century, it was expressly provided that there could be no room for Private Law other than that laid down in statutes. Now the principles of Dutch Private Law are contained in the *Burgerlijk Wetboek* (Civil

Code) and the *Wetboek van Koophandel* (Code of Law Merchant), and neither of them makes any mention of Unjustified Enrichment. Consequently, an action grounded on the broad rule that no person must benefit himself unjustly at the next man's expense is inadmissible in modern Dutch Law, although of course relief can be obtained if the case happens to come under one of the numerous special applications of the principle included in the Civil Code.

Again, none of the Scandinavian countries has a wide all-embracing principle of Unjustified Enrichment. What they do have at the moment is a tidy row of pigeon-holes each containing a labelled head of Unjustified Enrichment (Vide Knopl, Björling, Much-Petersen, and Ussing). In theory, this means that if a plaintiff cannot fit his claim into one of the recognised heads of liability, he has no legal grievance. But it is almost certain that in practice the position is not as iron-bound as all that. For one thing, Law in these northern countries is a very malleable affair. It is, in the main, customary law created by the practice of the judges and the critical opinions of legal commentators, who are both in some sense regarded as the interpreters of the living spirit of the people—"*der Volksgeist*"; and the salient point is that neither judge nor jurist is bound to follow precedents or to adhere to previous doctrine. Secondly, the tendency in Scandinavia is for equity to become identified with law. This no doubt derives from the pre-eminent position occupied by custom, for it is evident that what the majority of the community considers just and equitable will sooner or later receive the imprint of legal recognition. In the result, therefore, there is, one would think, very little likelihood of genuine cases of Unjustified Enrichment being unrestored.

This prefaced, I propose to attempt a discussion of the problem along comparative lines. This method of approach will involve, in the first place and by way of general background, a brief exploration of the position under the Roman system. The next step will be to take account of the historical antecedents on the Continent, and more particularly, in France and Italy, and thereafter, to examine the operative limits and incidents—the reach and function—of the resulting modern rules in their proper setting.

I propose also to refer incidentally to American law, which should prove especially interesting in this connection, if only for

the curious fact that a system sprung from the same roots English law and with a similar technical structure, should h developed a general rule very similar to that prevailing on Continent.

English law, on the other hand, I do not propose to co der—for two reasons. In the first place, I am naturally desir of reducing this lecture to reasonable dimensions. And second I should doubt my own ability to render the English law on subject in legal terms which are at once intelligible to the M tese lawyer unacquainted with English Law and its history faithful to the spirit and tenor of the original.

ROMAN ORIGIN OF THE DOCTRINE

We begin then, as is proper in any discussion on the pe gree of a legal concept in Continental countries, with Rom Law.

That the principle was not unknown to the Romans, it certain; in fact, the Roman Law provided various remedies bringing to book anyone who sought to enrich himself unjus at another's expense. The Praetor could, for example, by vir of his *imperium*, place a party in the position he occupied bef a particular event took place, if an inquiry into the circumst ces of the case showed that it would be inequitable to allow m ters to take their course. This reinstatement, or *restitutio integrum*, as it was called, was normally granted *ob aetatem*, *absentiam*, *ob errorem*, *ob metum*, *ob dolum*, and *ob capitis minutionem*, and stemmed directly from the Praetor's anxi to do what was just and equitable. Equitable considerations, t played an important part in the formulation by the Praetor of t various *actiones in factum*, and the *actiones fictitiae et util* But the real roots of the doctrine of Unjustified Enrichment found embedded in the *condictio* and *the actio de in rem verso*

The historical evolution of the *condictio* makes an intrigui study, but is difficult to delineate with finality. Ulpian tells that, according to Sabinus, the *veteres* already had an action gu ranteeing the restitution of anything acquired *ex iniusta caus perpetuo Sabinus probavit veterum opinionem exsistimantium quod ex iniusta causa apud aliquem sit, posse condici, in q sententia etiam Celsus sit* (D. 12.5.6). On this authority, Gira has been quick to argue that there existed in Roman Law a wi general principle of unjust enrichment and that it was very a

cient. With more reason, Sobbé-Duval and Buckland have pointed out that these *veteres* need not have been very ancient and that, in any case, the passage merely referred to the particular cases for which the *condictio ob turpem causam* was the sanction.

At all events, it is probably true to say that at that period relief could only be obtained by the injured party through the complicated remedies of *sacramentum* and *judicis postulatio*. The *condictio* came later (probably towards the end of the 3rd century, B.C.) and, according to Gaius, caused no little speculation : *quare autem haec actio desiderata sit, cum de eo quo nobis dari oportet, potuerimus aut sacramento aut judicis postulatione agere, valde quaeritur* (Gaius, 4, 20).

In Classical Law, the *condictio* was a *stricti juris, in personam* action, so flexible that it could be used both as a contractual and an extra-contractual remedy. In the contractual field, it might be brought against the debtor *ex mutuo* for the recovery of a certain sum of money (*condictio certae pecuniae*) or some other certain thing (*condictio triticaria* or *certae rei*). The literal contracts relied on the *condictio* for the recovery of *certa pecunia*, while the verbal contracts could give rise to the action when they had as their object either a sum of money or some other certain thing. Outside of contract, the *condictio* was the remedy available to the impoverished party against any person who had enriched himself unjustly at the former's expense.

Gradually, however, the development of the *condictio* became marked by an attempt on the part of the jurists to extricate it so far as possible from the root idea of contract. The old *condictio* was parcelled out into a number of *conditiones*, each having its own peculiar features; and so there emerged the *condictio furtiva*, the *condictio indebiti*, and the *condictio ob rem* (*causam*) *dati*. On the whole, the result was to restrict the range and scope of the *condictio*.

Justinian established a new classification and modified to some extent the traditional terminology. He was particularly concerned with the *condictiones* which sanctioned cases of wrongful enrichment. The chief cases were the following. First, the *condictio indebiti* which was for the recovery of a sum not due and paid by mistake. Then, the *condictio causa data causa non secuta* for the recovery of anything surrendered to another in consideration of an advantage which had not materialized. In *condictio ob turpem* and *condictio ob injustam causam*, the prin-

ciple in either case was that where money was received for a immoral or illegal purpose, or by illegal or immoral means, th law imposed a duty of compensation upon the person receivin the benefit. Finally, there was the *condictio sine causa* whic covered a group of cases of unjustified enrichment which di not come under any of the foregoing heads. It is important t note, however, that the action did not apply indiscriminately t all those cases outside the ambit of the other *condictiones*.

Alongside these *condictiones*, Roman Law had a large num ber of relatively unimportant actions through which a perso could, in certain specified cases recover an unjust benefit. Onl one need detain us. This is the *actio de peculio et de in rem vers* which has achieved perpetuation by the merest juristic freak. I France, the traditional name for the broad general action agains Unjustified Enrichment is *actio de in rem verso*; and the term found convenient, has been retained. Its employment in curren legal language, however, is misleading for there is only a remot connection between the modern French action and the Roma one.

The Roman action was essentially narrower in scope. It wa the action brought against a *pater familias* by the creditors of hi *filius familias* or slave where the latter had acted without expres or implied authority. The liability of the *pater familias* was limit ed to the amount of the *peculium* unless it could be shown by the plaintiff that the *pater familias* had himself derived an advantage from the contract, in which case his liability would be co-extensive with the benefit gained. The amount by which the *pate familias* had profited was spoken of as having been *in rem versum*. Again, the old action "de in rem verso" never enjoyed a separate existence, but was just one head of a two-pronged condemnation contained in the *actio de peculio et de in rem verso*. In other words, there was just one action with two condemnations, the judge having the power to condemn either in the amount by which the master had profited or in the amount of the *peculium* : *licet enim una est actio qua de peculio deque eo quod in rem domini versum sit agitur, tamen duas habet condemnationes*. (Jus. IV, 7, 4).

Finally, the Roman action was an action *adjectitiae qualitatis*, that is to say, one of those actions that sought to remedy the unfairness of the rule that while all rights acquired under a contract by a subordinate member of the family, son or slave,

vested in the *pater familias*, the corresponding liabilities incurred were none of his affair. Consequently, the action does not find its justification in any principle of natural justice—despite the fact that it would have been inequitable to allow the *pater familias* to enrich himself at the expense of a third party—but rather in the realm of practical politics, it being in the interest of the *pater familias* to safeguard his credit vis-à-vis third parties.

It will be apparent, therefore, that no broad general principle that unjust enrichment must be refunded existed in Roman Law, but only a rather haphazard list of cases in which recovery was possible under certain conditions. It was not every enrichment at another's expense that called for restitution; it was important that there should exist special circumstances rendering the enrichment an unjust enrichment: *constat id demum posse condici alicui quod vel non ex iusta causa ad eum pervenit, vel redit ad non iustam causam* (D. 12. 7. 1. 3). Thus, although the purpose of each separate action is that of preventing an unjustified enrichment from going unrestored, the fact is that, in the words of Pacchioni, "ciascuna ha un fondamento e un oggetto suo proprio". And there were of course cases where a person could not obtain restitution from another who had been enriched at his expense; we know, for instance, that the *bona fide* possessor could not recoup the expenses made on another's property directly, however much he might be entitled to exercise a right of retention, the *jus retinendi*.

Pomponius' celebrated dictum *jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletatiorem*, purporting to enunciate a general principle, can be explained by the simple expedient of relating it to its context, the chapter in Digest XII on *condictio indebiti*, and is to-day no more than an interesting museum piece. The Romans were an intensely practical people, little addicted to theoretical generalisations. Singularly empirical in outlook, they were much more interested in in arriving at an equitable solution of the individual case than in fashioning general rules and principles. Moreover, it is hardly to be supposed that in Roman times social relations were sufficiently involved as to give rise to an appreciably large number of cases of unjust enrichment. It is only in a highly complex social milieu, with its varied play of circumstances, that instances of unjustified financial disparity are found to be at all numerous.

Summing up the Roman position, therefore, we may say this. The Romans never evolved a coherent theory of Unjustified Enrichment; the various *condictiones*, and in particular the *condictio sine causa*, covered part of the ground, but they did not go far enough. On the other hand, it is almost certain that having regard to the relatively straightforward character of everyday transactions in Roman times, the need for such a wide principle was never very pressing.

HISTORICAL ANTECEDENTS IN FRANCE AND ITALY

Turning to consider the historical antecedents of the doctrine on the Continent we find that little headway towards the establishment of a general theory of Unjustified Enrichment was made in the old French law. A careful study of the old French authorities reveals nothing more than infrequent and rather vague allusions to the French version of the old Roman principle : *nul ne doit s'enrichir injustement aux dépens d'autrui*. They were content to speak of it as a rule of natural equity which could somehow always be relied upon to do justice between the parties when the testing time arrived.

In Beaumanoir's *Coutume de Beauvoisis*, for instance, the principle of Unjust Enrichment is, without further explanation given as the basis for the rule that anyone who in good faith has put up houses upon the land of another is entitled to recoupment. Likewise, we find it stated in the *Grand Coutumier de France* : "Vous savez que le droit veult, et aussi raison et bonne foy s'y accordent, que nul oultre raison et sans cause ne tiengne à autru chastel". And again Boutellier, in his Somme Rural ,cites the maxim *locupletari non debet quis ex alterius jactura* as a "regle de droict'".

Dornat, though merely reproducing the Roman system of *condictiones* in his *Lois Civiles*, was the first writer to give prominence to the idea of unjust benefit, and one passage from his book is well worth quoting : "A person who finds himself in possession of another's thing without a just cause must restore it, as also must a person to whom a thing has been handed over on a legal ground which subsequently disappears or subject to a condition which has not verified itself, since he has no longer any ground for retaining it". Pothier, too, was alive to the importance of the principle, but his reflections on the subject took a wrong turning with the result that unjust benefit became firmly

identified in his mind with *negotiorum gestio*. Pothier realized that cases might arise in practice in which the pre-requisites of *negotiorum gestio* were lacking. It was obvious, for example, that if A had done something for B's benefit, but contrary to the express behest of B, A could not exercise the *actio negotiorum gestorum contraria*. What was the position in these circumstances? Pothier had no difficulty in ruling that A had an action for the reimbursement of the amount which had turned to B's profit; it was a case of abnormal *negotiorum gestio* grounded upon natural justice.

This theory is inviting in its simplicity, but it cannot bear close inspection. It is confronted with two unanswerable objections. In the first place, "abnormal negotiorum gestio" is not a precise juridical notion; and this is patently true. Secondly, the elements that go in the make-up of the two actions are vastly different. Thus *negotiorum gestio* is only operative within a restricted field; its essence is a spontaneous interference for another's advantage in urgent cases. In addition, unlike the *gestor* who, *inter alia*, is bound to render an account of his management, the impoverished party in cases of undue enrichment is never under any form of obligation to the person enriched. Furthermore, the person who has been enriched at another's expense is only liable up to the amount of the profit obtained, while the *maître* must reimburse the *gérant* for all useful or necessary expenses; the *gérant*, too, has the advantage over the impoverished party in that he is not required to prove that the benefit still exists at the date of the action. Finally, Unjustified Enrichment lacks the intention on the part of the *gestor* to manage the affairs of the principal, which is one of the very vital traits of *negotiorum gestio*.

The year 1804 heralded the promulgation of the Code of Napoleéon, and with it the dawn of a new era in the legal world. But there was still no sign of any general theory of Unjustifiable Enrichment. Far from formulating such a theory, the new Code did not so much as state the principle underlying it. All it contained were several special Articles spread throughout its length and breadth providing relief in odd cases of unjust enrichment. The immediate result was that the French courts, faced with the question whether or not they should argue the existence of an embracing principle of unjust enrichment, answered it in the negative. Thus in 1850 where a partner brough an action against

the partnership for the amount of the profit realized by the partnership out of the sale of certain goods originally purchased by him in his own name, the *Cour de Cassation* dismissed the claim.

During the latter part of the 19th century, however, the attitude of the Courts changed. Influenced not a little by the vast legal literature of the time, the judges were busy producing a "second edition" of the *negotiorum gestio*—revised and enlarged. The intention of the *dominus*, the *contemplatio domine*, was henceforth to be a merely casual element in its make-up. It was enough if the service performed by the *gestor* turned out to be at once beneficial to the *dominus* and detrimental to himself. In short, *negotiorum gestio* came to be looked upon as a strictly objective conception. And of course, the whole object of this judicial prostitution of *negotiorum gestio* was to widen the ambit of the action brought under *negotiorum gestio* so as to include the ever-increasing number of cases of unjust enrichment which came up before the courts and which were not provided for by special provisions of the Code Civil.

This state of things lasted until the opening years of the last decade of the 19th century. At about this period a small group of writers, led by Aubry et Rau and the *arrêtiste* Labbé, began to condemn this unseemly liaison with *gestion d'affaires* and to press for the recognition of unjust enrichment as an independent source of obligation. In 1892 their efforts met with success; in that year a famous decision of the *Chambres des Requêtes* established unjust enrichment as a separate right of action and released it from the shackles of *gestion d'affaires* in no uncertain manner. The judgment ran : "Seeing that this action is derived from the principle of equity which forbids a man to enrich himself at the expense of another, and that it has not been regulated by any text of our law, its exercise is not subject to any fixed conditions : it is sufficient to make the action competent that the plaintiff alleges, and offers to prove, the existence of a benefit which he has by a sacrifice or a personal act procured for the defendant".

It will be at once apparent that in its alacrity to do the right thing the *Cour de Cassation* went to the opposite extreme. It laid down the principle in far wider terms than its most fervent adherents had dared to hope. As the rule was actually stated, the mere fact of the plaintiff showing that his personal act or sacrifice had proved useful to the defendant was enough to sustain

the action. So applied, the rule would create utter confusion for, as Amos and Walton have pointed out, "every judge would be free to decide cases in accordance with his own ideas of equity". But although the danger inherent in this situation was apprehended, it was not until 1914 that the *Cour de Cassation* took it upon itself to formulate a comprehensive theory of wrongful enrichment with all the necessary qualifications and restrictions. The Court now reproduced the exact wording of the fourth edition of Aubry et Rau's commentary: "The action *de in rem verso* based on the principle of equity which forbids one man to enrich himself at the expense of another is to be admitted in all those cases in which the estate of one person being enriched without lawful cause at the expense of another person, the latter in order to obtain what is due to him does not enjoy the benefit of any action based upon contract, quasi-contract, delict or quasi-delict".

And so at the present time the veteran rule *nul ne doit s'enrichir injustement aux dépens d'autrui* is as much a part of French Law as any of the Articles of the Code Civil. Though theoretically always open to challenge, no lawyer who valued his reputation would question its existence at this time of day. Indeed, if the Code were to be revised to-morrow, that principle would beyond doubt figure among the new additions. Proof of this is Art. 73 of the Franco-Italian draft Code of Obligations published in 1937. It runs: "Chi si arricchisce senza causa a danno di un'altra persona è tenuto, nei limiti del proprio arricchimento, ad indennizzarla di ciò di cui si è impoverita".

Elsewhere on the Continent, too, the rule against unjust enrichment had a chequered history. This was particularly true of Italy where, throughout the last quarter of the 19th century, the various provincial courts kept contradicting themseves, and one another, with humdrum regularity. As in France, the absence in the Italian Code of a general provision against unjustified enrichment was materially the source of this unedifying confusion of thought.

Four main phases—all short-lived—may perhaps be detected amid this welter of opinion. In the first of these, the courts either denied the existence of the *actio de in rem verso* altogether or only admitted its application within a restricted field. Thus in May 1833, the Turin Court of Cassation doubted the existence of the action, while in July of the same year the corresponding

court in Florence acknowledged the action but limited its operation to cases where obligations were entered into by persons incapable of so doing. However, a new phase opened in 1890. In March of that year the Turin Appeal Court categorically laid it down that the action was to afford relief in all cases of unjust enrichment where the plaintiff had no other remedy. And this view seemed to predominate until 1895, when a reaction set in Two judgments delivered in 1895, one by the Turin Court of Cassation and the other by the Florence Court of Cassation, contain certain passages which unfortunately leave no room for doubt that the Judges were once more denying the existence of the action. But the curious feature was that the Turin and Florence Courts were now found pulling in the same direction, though which direction that was was a matter of arbitrary caprice. In all truth, there can be no other explanation for the remarkable *volte face* accomplished by both Courts within two years. Here is what the Turin Court said in 1897 : "l'obbligazione corrispondente all'azione di versione utile, non dipende da vincoli contrattuali o quasi-contrattuali, ma unicamente e direttamente dalla legge che non permette l'indebito arricchimento a danno altrui". And so the century closed with the bold assertion that the law then afforded a comprehensive remedy against unjustified enrichment.

The twentieth century brought no relapse into the old aggravating habit of the judges of blowing hot and cold every few years. Rather the principle proceeded to take firm root in the minds of Bench and Bar alike. It operated against a man and his wife who had derived an advantage from the grant of a gift subsequently declared void owing to defect of form. It could compel the father of an illegitimate child to pay a third party any expenses incurred by him in maintaining the time until such time as its paternity had been legally established. It did not permit a wife to benefit by any improvements made by the husband on property forming part of her marriage settlement; and it mattered not if the two spouses were already legally separated. It intervened to prevent the joint-owner of a publishing firm from making use of the firm's machinery in the publication of a new periodical on his own account.

These are a few random examples, but enough to demonstrate that the *actio de in rem verso had come* to stay as far as the Italian Courts were concerned. On the other hand, the battle among

the text-writers outside still raged with undiminished vigour. The field was a formidable one. On the side of the new action were ranged some of the keenest legal brains in the country, and in particular, Chironi, Pacchioni, Riccobono, De Ruggiero, Marioni, Scuto, Castion, Graziani, and Giorgi. Opposing the action were a team of jurists which, if slightly less illustrious than their rivals, were certainly no less opinionated, and among others, Scialoja, Bruno, Gabba, Buonamici, Palazzo, Nattini, Ascoli, Rotondi, and Ricca-Barberis. Even as late as 1924, in an article in the *Rivista del diritto commerciale*, Rotondi could roundly say: "It is certain that the action is far from being that panacea which certain judicial pronouncements and the fanfares of some of its adherents would lead one to believe".

Howver that may be, the former opinion prevailed at the Franco-Italian Conference on the Law of Obligations in 1927, though the controversy was not finally settled until the advent of the new Italian Civil Code of 1942. For the first time the Code now incorporates a new head under the title: "Dell'arricchimento senza causa", and Art. 2041 states: "Chi, senza giusta causa, s'è arricchito a danno di un'altra persona, è tenuto, nei limiti dell'arricchimento, a indennizzare quest'ultima della correlativa diminuzione patrimoniale".

THE DOCTRINE IN THE MODERN CIVIL LAW

Having traced the general history of the doctrine, it now lies upon us to determine the province of the doctrine in the modern Civil Law and to mark off its contours with some precision. Far from being the magic panacea it is sometimes taken for, there are on the contrary certain very exact conditions which must be satisfied before the doctrine can be brought into play and an action-at-law accrue on this score. They are:—

(1) An enrichment derived by the defendant.
(2) An impoverishment sustained by the plaintiff.
(3) A causal nexus between the enrichment of the one and the impoverishment of the other.
(4) Th enrichment of the defendant must be "*sine causa*".
(5) The absence of any other remedy at the disposal of the plaintiff.

We must consider these in detail.

for instance, if A, who is travelling on the Calais to Paris train with a Calais-Amiens ticket in his pocket, becomes so intrigued with a fellow-passenger's frock that he misses his Amiens stop and goes on to Paris, the Railway Company cannot bring an action *de in rem verso* against him for the fare from Amiens to Paris, because the loss sustained by the Company has not in fact resulted in a corresponding benefit to A.

So much is simple, but beyond this lies the question, what is meant by enrichment? This is the real core of the problem and, as may be expected, a wide divergence of opinion exists on the point. On one view, enrichment comprises any type of benefit, be it economic, intellectual or moral. In the illustration given, this means that the Railway Company would be able to recover the additional fare on the ground that the contemplative traveller must be presumed to have derived a certain amount of moral gratification from his meditations on the floral luxuriance of the frock on the Amiens-Paris lap. Now it will be observed at once that any such sweeping interpretation of enrichment tends to stultify the whole concept. Yet thus, or something perilously near it, appears to be the system adopted in the United States. According to Woodward, who as far back as 1913 had suggested that the word "benefit" should be substituted for "enrichment" in this context, the plaintiff is not required to point to an actual increase in the defendant's estate; it is enough if he can show that the defendant has received something desired by him or something advantageous to him. And the authors of the American Restatement on Restitution (1937) seem to confirm this view. "A person confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word "benefit", therefore, denotes any form of advantage. The advantage for which a person ordinarily must pay is pecuniary advantage; it is not, however, necessarily, so limited, as where a physician attends an insensible person who is saved subsequent pain or who receives thereby a greater chance of living"' (American Restatement, p. 12).

However that may be, American law is not alone in its preference for an elastic definition of enrichment. In Austrian law, too, enrichment has a very wide connotation. In fact, the actual word used is "profit", and it is common ground in the Courts as well as in the lecture-rooms that "profit" may be either a "profit patrimonial", an actual increase of the defendant's estate by

money or money's worth, or a "profit personnel", that is to say, an enrichment of the defendant which, although it cannot itself be expressed in terms of money, is yet capable of being measured by reference to the corresponding prejudice sustained by the plaintiff. The notion underlying "profit personnel" is a subtle one, and it is perhaps best to take a concrete case. B accepted A's invitation to stay at his house. While he was there, he somehow contracted small pox and A incurred a certain amount of expense in disinfecting the room and the furniture. Now it is clear that B did not obtain the pecuniary advantage from this precautionary measure. Nevertheless, it was held by the Austrian Supreme Court that he had derived a "profit personnel" corresponding to, and within the measure of, the expenditure laid out by the plaintiff.

It will be realized at once that, so stretched, the notion of enrichment is liable to wear thin under the strain. Accordingly, it is not surprising to find that the Austrian view has, on the whole, found scant support in other Continental countries. Both German and Swiss law have rejected the conception of "profit personnel" outright, while French law, if it can be said to have accepted it at all, has only done so with considerable reservations.

On the one hand, in Germany as in Switzerland, enrichment means an advantage acquired by the defendant which is of an economic or patrimonial character. Thus the *Reichsgericht* has held that "a benefit having no real economic value — the mere fact of procuring some purely moral satisfaction—will not ground an action for restitution unless such moral satisfaction has also had its effect upon the recipient's estate in the shape of a saving of some necessary expense". So, also, the Swiss Federal Court, only more succinctly: "la notion d'enrichissement est avant tout, économique". It must be noted, however, that a certain suppleness has been imparted to this restricted conception of enrichment by a rather wide interpretation of what constitutes economic advantage. A striking illustration is afforded by the following case. A wished to run a coffee-house in a town where the law was that there was to be no two coffee-houses in the same street. As there was already one coffee-house where his immovable was situated, he promised B, the coffee-house proprietor, that if B gave up his licence he, A, would purchase the whole place from him. B agreed and gave up his licence. A then obtained a new licence and rapidly abandoned the idea of buying

the place. It was held by the *Reichsgericht* that A had been u justifiably enriched, since B's act in giving up the old licence h held out to A the prospect of obtaining the new one.

Opinion in France, on the other hand, seems to have wav ed between two alternatives. Originally, it was believed th every enrichment, in addition to bearing an economic charact had to emanate from an actual transmission of value from t plaintiff to the defendant. It soon became apparent, howev that the very narrowness of the formula was apt to work inj tice in deserving cases. As a result, the law has now settled do to the view that any advantage the value of which can be esti ated in money is an actionable enrichment. The keynote here appraised in terms of cash; for the rest, enrichment comprehen in the words of Planiol, Ripert, et Esmain, "toute satisfacti pécuniaire, physique ou sentimentale, qu'elle soit ou non de n ture patrimoniale".

It remains to add that where the defendant has suffered loss at the same time as he has reaped an advantage, the rule all Continental legal systems is that the enrichment is here p presented by the subtraction of the quantum of the loss from t quantum of the advantage.

§2 IMPOVERISHMENT

The second requirement is that the plaintiff must have be impoverished, so that where no impoverishment is manifest, action is sustainable. What is frowned upon by equity is not much the fact that one person has been enriched as the fact th he has been enriched at someone else's expense. Thus, for exa ple, an engineer who hits upon an invention while doing wo for an employer, cannot maintain an action for the equivalent the enrichment thereby accruing to the latter, for the simple re son that he has not himself been impoverished in any way.

But even in those cases where a *prima facie* detriment e ists, it must still be determined whether the detriment suffered an impoverishment in the accepted legal sense. Speaking ger rally, the legal notion of impoverishment is the obverse of that enrichment. This is so in German and Swiss law, where it is i perative that the impoverishemnt, like the enrichment, should patrimonial in character, though here again a very large int pretation is put on patrimonial impoverishment. In Austri law, on the contrary, the all too liberal concept of enrichme

does not find its analogue in a like concept of impoverishment. One searches in vain for a doctrine of "prejudice personnel"; and in fact, all the reported Austrian decisions appear to insist that no prejudice sustained by the plaintiff which is not reducible to a money value will ground an action *de in rem verso*.

In French and Belgian law, it is commonly agreed that the impoverishment lends itself to the same reasonably wide interpretation attributed to enrichment. Therefore, a plaintiff is said to be impoverihed not only where he has suffered a money loss or the loss of an estate or of its enjoyment, but also where he has done work or rendered services for which payment is usual, or where he has refrained from exercising a right to which he is entitled. Thus if a female shop assistant agrees to serve without a salary in consideration of a promise on the part of her employer that he would marry her, and the latter then suddenly changes his mind, the girl is entitled to remuneration for the services which she has rendered gratuitously. Moreover ,it is not necessary that the nature or the value of the impoverishment should correspond exactly with that of the enrichment. So in the case where A renders services to B, A's impoverishment is his failure to gain by them, while B's enrichment consists in the expense which he has been spared. Similarly, A's services may possibly be worth more to B than they are worth to A himself in the open market.

On the other hand, two limiting conditions attach to impoverishment. In the first place, it is essential that the plaintiff himself, and none other, should have sustained the loss or detriment of which he complains. Thus if A's servant performs a piece of work for B, a stranger, in his spare time, the rightful plaintiff in any action for recovery is the servant and not A. Secondly, there are decisions of the Courts in support of the proposition that the impoverishment must not be attributable to the plaintiff's fault or negligence. One very recent judgment has gone further and refused to entertain the claim of a husbandman for certain works carried out by him on the land he was farming, on the ground that these had been undertaken "dans son intérêt et à ses risques et périls". It is not yet certain what construction the Courts will put upon this new formula, but it is clear that if it is interpreted too literally it would, as de la Morandière has pointed out, narraw very considerably the field of application of the whole doctrine of Unjustified Enrichment.

§3 CONNECTION BETWEEN ENRICHMENT AND IMPOVERISHMENT

A third essential of the action for Unjustified Enrichment is the existence of a causal link or nexus between the enrichment of the one party and the impovrishment of the other. It is not enough to prove that the defendant has been enriched and that the plaintiff has been impoverished; it must further appear that no enrichment would have accrued to the defendant if the plaintiff had not been impoverished. In a word, the enrichment of the defendant must proceed from the impoverishment of the plaintiff.

There is no question, then, that a causal connection is required; that is admitted on all sides. But there still remains the controversial point, what kind of causal connection? As far as Germany is concerned, the judges and text-writers give an unhesitating answer. The connection must be a direct one *eine direkte Bereicherung*), that is to say, no independent transaction should intervene between the plaintiff's loss and the recipient's gain. An example will make this clear. A bought a certain chattel from B, who employed a carrier to deliver it and paid the transport charges himself (which A later refunded). It so happened, however, that B had overpaid the carrier, so that the latter could properly be said to have been unjustly enriched. Accordingly, A sued for the overpayment. But the *Reichsgericht* would have none of it and firmly dismissed the claim. The reason for the decision was of course that the carrier's enrichment could not be said to proceed directly from A's impoverishment, B's intervention having snapped the link of causation.

If we turn to the French law, we are at once in the midst of doctrinal controversy. One school argue that the enrichment must arise directly from the impoverishment, while the opposite school insist that the acti on is also admissible where the enrichment of the defendant has been brought about indirectly and through the intervention of a third party. It would appear at first sight that the Courts favour the latter view, for there are many cases where an indirect causal link has been held sufficient to found an action *de in rem verso*. A typical case is the following: A tradesman had sold and delivered manure to a farmer on credit and the farmer had dug it into the land. The farmer became insolvent and his tenancy of the farm was determined. The seller of the manure brought an action *de in rem verso* against the landlord of the farmer and claimed the price of the manure

on the ground that the value of the soil had been increased. The landlord disputed the claim maintaining that the farmer had contracted to preserve and improve the quality of the land. The Court of Cassation, nevertheless, held that the seller was entitled to recover. Similarly, where a woman who owned a house jointly with her children contracted for certain improvements to be carried out in the house without consulting the children, it was held by the Court of Cassation that, if she later became insolvent, the contractor was entitled to bring an action against the children on the basis of Unjustified Enrichment. There are other cases, but it is extremely doubtful whether they ought to be regarded as conclusive on the point in issue. As will be seen presently, there are many decisions the other way, and it would perhaps be more consonant with modern trends to suggest that an enrichment of the defendant which results from a contract between himself and a third party is grounded on a "just cause", and is, therefore, unimpeachable.

In Austrian law, on the contrary, the action is maintainable despite the fact that the enrichment of the defendant may have been procured through the instrumentality of a third person.

§4 ABSENCE OF A "JUST CAUSE"

"Cause" is undoubtedly the crux of the problem under investigation, for it will be readily appreciated that some definite criterion is required which will enable us to determine the occasions (and they are many) in which the restitution is possible from a person who has been enriched at the cost of another. The concept is of the very essence of the obligation, and its purpose will become manifest when we consider for a moment the strange results which would follow if we ignored it. It would mean for one thing, the virtual disappearance of all commercial contracts, for the parties would soon be made aware of the sheer futility of doing business at all, if any economic advantage obtained by one of them was subsequently going to be challenged, and challenged effectively, by the other. The whole commercial way of life would be crippled and the circulation of economic wealth seriously hindered. Secondly, the principle as such would come into sharp conflict with other provisions of the law which, in given circumstances, authorized one person to retain certain benefits at the expense of another. And, of course, conflicting rules of law cannot be regarded with equanimity by any thinking lawyer, for it

is pretty evident that they tend to upset the whole balance of a legal system.

Having thus established the *raison d'être* of "cause", let us now in the first place attempt to define the notion and then proceed to dissect and examine it more closely. First, then, what is "cause"? Laying aside the conscious refinements of theory and elaborate academic jargon of Dernburg, Jung, Renard, Scuto and others, we may say quite simply that in this context "cause" signifies "l'acte juridique qui explique, qui justifie l'acquisition d'une valeur". Now obviously this is not "cause" in the sense used in the law of contract, where "cause" refers to the immediate end, as distinct from the motive, which the parties have in view. "Cause" here is a more tangible concept; it denotes an effective or operative "cause"— a *cause efficiente*, as the French would say. In practice, this means that the Courts will not extract from the defendant the benefit gained, if he is able to point to some legal ground or recognized title. What is more, and contrary to the impression created by the phrase *enricchissement sans cause*, such ground or title does not attach solely to the enrichment, but extends to the impoverishment as well. To bar restitution, it is sufficient if either the enrichment or the impoverishment is grounded on "cause"; and conversely, for the action *de in rem verso* to be entertained it is vital that both the one and the other element should be devoid of "cause". It will be understood, therefore, that "cause" falls naturally under two headings; the "cause" of the enrichment, and the "cause" of the impoverishment. The analysis which follows of this twofold aspect of the notion is substantially true of the French, Belgian, Italian, German and Swiss systems.

The enrichment is regarded as justified if it was obtained by the defendant either on the strength of some rule of law or in compliance with the terms of a contract. In regard to the first part of the proposition, there is no difficulty in perceiving that public policy will not, and cannot, permit a person to circumvent an embarrassing situation rooted in positive legality by an eventual recourse to the doctrine of Unjustified Enrichment. The following is a neat case in point. A vendor sold a piece of allotment land to several purchasers and later undertook certain repairs on it. No mention of these had been made in the deed of sale, but according to a *loi* of July 19, 1924, they were to be paid for by the vendor himself. This notwithstanding, the latter brought

an action against the purchasers alleging that they had been unjustly enriched at his expense. The Court of Rouen, however, was not impressed and speedily dismissed the claim. The rule contained in the second part of the proposition is equally well settled. It will not now be suggested that the *actio de in rem verso* can be brought to recover a benefit emanating from a contractual transaction between the parties. Accordingly, it is very seldom that a tenant will be able to recover any useful expenses incurred during the continuance of the lease, since a claim is usually inserted in the contract freely conferring their benefit on the landlord. So, too, if a policy of fire insurance gives the insurer the option either to pay the amount insured or to build new premises, and the insurer chooses the latter alternative, he will not afterwards be heard to say that the assured has been unjustly enriched thereby.

A much more difficult question, however, is this. Can the enrichment be still considered as justified where it results, not from a contract between the defendant and the plaintiff as in the foregoing cases, but from the existence of a legal relationship between the defendant and a third party? As we have already noticed when dealing with the problem of the kind of connexion required between the enrichment and the impoverishment, judicial opinion in France has not been laudably consistent on this point. According to one line of decisions ,including the famous *Arrêt Bondier* of 1892, the existence of a contract between the defendant and a third party is not a good defence to an action *de in rem verso*. The argument commonly adduced in support of this view is that the converse rule would go against the principle expressed in Art. 1165 of the Civil Code, namely, that a contract has effect only between the parties to it and can neither prejudice nor benefit third parties : *res inter alios acta, tertius neque nocere neque prodesse debet*. However, the difficulty here is more apparent than real, as Colin and Capitant have shown. "That rule", they write, "merely means that a contract can neither create a credit in favour of a third party nor impose any liability on him, but this in no way affects the principle that a contract constitutes a source of law between the parties, which third parties themselves are bound to acknowledge". This is sound legal logic, and the view now widely held by the Courts and academic writers is that some of the older decisions on this point are not good law at the present day and that an enrichment must

now be considered as justified where it proceeds from a contract between the defendant and a third party. The reports are replete with illustrative cases, but it is enough if we select one or two instances. A tenant-farmer became insolvent and quite incapable of paying the wages of a labourer who had done work for him on the farm. It was held that the latter had no remedy against the owner of the farm however much he might have benefited by the work done. Likewise, a contractor who has done work on leased premises at the bidding of the lessee cannot claim to be recouped from the landlord where the contract of lease contained a clause empowering the latter to retain any improvements made. It would appear, however, from a case of 1899, that collusion between the landlord and the tenant will vitiate the defence.

So much for justified enrichment; there remain to be considered justified impoverishment. An impoverishment is regarded as justified where it results either from the intention to make a gift or from the rendering of services under a contract or from the performance of a legal duty. The impoverishment is also justified where it proceeds from the miscarriage of some venture engaged in by the plaintiff in his own interest. A felicitous illustration of this latter proposition is afforded by a well-hypothetical case contained in a German collection for students. A rich Berlin landowner carried on an affair with a ballet-dancer. One day when they were walking down a luxury thoroughfare together, she took a fancy to a bracelet displayed in a jeweller's shop. The landowner expressed himself willing to pay 4,000 marks for it, but as the jeweller held to his price of 6,000 marks, no sale was effected. Next day, however, the girl called at the shop again and offered the jeweller 2,000 marks cash down if he promised to sell the bracelet to her lover for 4,000 marks and did not disclose their private transaction. The jeweller agreed and sold the bracelet to the landowner for 4,000 marks, whereupon the latter made a gift of it to his wife. The dancer sued the wife for the 2,000 marks on the ground that she had been unjustly enriched at her expense to that extent. It seems, however, that at German law the ballet-dancer's impoverishment would be held to be justified for the jeweller, by selling to the landowner as he had promised, had earned the 2,000 marks; and that in any case the enrichment was too indirect.

§5 THE SUBSIDIARY CHARACTER OF THE ACTION

There is no general agreement among the modern Civil Law systems on the question whether this element is in fact of the essence of the action of Unjust Enrichment. So far as Italy is concerned, the subsidiary nature of the action is now made statutory by Art. 2042 of the new Civil Code, which runs: "L'azione di arricchimento non è proponibile quando il danneggiato può esercitare una altra azione per farsi indennizzare del pregiudizio subìto". In Germany, opinion is sharply divided; on the whole, however, the Courts and the vast majority of text-writers, including Stammler, Cierke, Planck, Plessen, Cosack, Enneccarus, Dernburg and Standinger, incline to the view that the *Bereicherungsklage* is available concurrently with other remedies. And this view, if we are to believe Rutsaert, has also found favour with the Belgian Courts. On the other hand, de Page in his monumental treatise on Belgian law published in 1942 is vigorously insistent on the subsidiary character of the remedy.

Turning to French law, we find the rule as to the subsidiary character of the *actio de in rem verso* categorically laid down by the *Cour de Cassation* on several occasions. Subsidiary, however, does not mean that the plaintiff is at liberty to fall back on this remedy should he come to grief in some other form of action. For example, a plaintiff who has lost his action for the recovery of a loan owing to his failure to produce the written evidence required by law will not afterwards be heard to say that the defendant has been unjustly enriched at his expense. What subsidiary means in this context is that the action for Unjustified Enrichment is only available when the plaintiff has no other remedy open to him based upon contract, quasi-contract, delict, or quasi-delict. The formula, which can be traced to Aubry et Rau's commentary, is acquiesced in by the bulk of modern French writers. Some, it is true, have objected to what they regard as a belated attempt to revive the old forms of action, but the majority are firmly convinced that any other rule would only tend to undermine the stability of legal relations and to transform the action into a charitable institution.

§6 RESTITUTION

Finally, two additional points invite attention.

First, as to the measure of restitution. The general rule on

this subject in the French, Belgian, and Italian systems is that restitution is restricted within a twofold limit : it must never exceed (a) the quantum of the enrichment reaped by the defendant, and (b) the quantum of the impoverishment sustained by the plaintiff. That is to say, where the amount of the enrichment is less than the amount of the impoverishment, the plaintiff cannot recover more than the former amount; and conversely, where the amount of the impoverishment is less than the amount of the enrichment, the plaintiff cannot recover more than the actual amount of his own impoverishemnt. The reason for the rule is of course this, that the essential scope of the *actio de in rem verso* is to re-establish the economic equilibrium between two competing estates. It is instructive to note, however, that in Austrian law the measure of restitution is always co-extensive with the amount of the enrichment accruing to the defendant.

The second point is that the *punctum temporis* at which the enrichment and the impoverishment are to be estimated is that of the date of the action. In particular, a plaintiff is not permitted to recover a benefit which no longer exists at the time the action is brought. The rule appears to be general throughout the modern civil law systems—France, Italy, Germany, Hungary and Switzerland, to mention only a few. Russian and Austrian law, however, form an exception. Thus in Austrian law the relevant moment is fixed at the time of the acquisition of the enrichment (Art. 1041), and it matters not if it subsequently ceases to exist, while Art. 400 of the Soviet Civil Code has it that "a person who has enriched himself unjustly is bound to restore or refund the value of all the advantages which he has derived or ought to have derived from the thing thus acquired, from the moment he knew or ought to have known of the non-existence of a cause justifying the enrichment".

Such, then, is the architecture of the modern *actio de in rem verso* on the Continent; and it will be conceded by one and all, I think that it is a highly-developed remedy which appears to work substantial justice in the overwhelming majority of cases coming up for decision.

What made the eminent French authorities, Planiol et Ripert, therefore, point a warning forefinger at the doctrine of Unjustified Enrichment as being, "susceptible, si on lui laissait le champ libre, de bouleverser les institutions du droit positif et l'ordre social"?

Planiol et Ripert do not themselves offer any further explanation, but it is probable that they were uneasy about two things.

In the first place, it is conceivable that what purports to secure an equipoise between rights vested in different persons, may in effect provoke serious inroads on the liberty of the individual. Like all indefinite expressions of an ethical principle the doctrine is capable of being put to an infinite variety of uses, and it may be employed to invade almost any sphere of human activity for the purpose of subordinating the individual to the demands of the State. Above all, it can be an extremely dangerous instrument in the hands of the revolutionary, furnishing a convenient legal façade behind which he can put into operation his pet political theories.

Secondly, the *actio de in rem verso* being essentially an equitable remedy, there is always the danger that the judge might on occasion be tempted to depart from the strict letter of the law in order to achieve the intrinsically just solution in the particular case before him. In other words, there is always a very real element of vagueness and subjectivity.

On the other hand, it is obvious that the possibility of the doctrine being employed as a political weapon only exists in times of violent social upheaval; and even then the evidence of the last hundred years is all the other way. Accordingly, too much should not be made of this aspect of the problem.

The other argument is a more serious one from the legal standpoint It sees in the principle of Unjustified Enrichment an application of the relation between law and corrective equity, classically stated by Aristotle. By equity, it will be remembered, Aristotle meant justice, but not justice according to law. Law, in his view. professes to lay down general rules and principles and in so doing will inevitably ignore cases of particular hardship. Equity is "the correction of the law where it is defective on account of its universality". So understood, equity represents that discredited modern movement towards *Freirechtslehre* or "free law" which purports to individualize legal rules to near vanishing point by encouraging the judges to rely on their own subjective sense of justice.

What, then, is the defence advanced to this formidable count in the indictment?

It is vigorously urged in answer by Ripert in his excellent monograph : "La règle morale dans les obligations civiles", that

there is nothing particularly vague about the doctrine; once the distinction between "unjust" and "unjustified" is fully grasped, that is to say, once it is realized that the moral obligation not to enrich one's self *unjustly* has in process of time ripened into the legal obligation not to enrich one's self *unjustifiably*. Thus it is, if the argument may be paraphrased somewhat, that a core of very precise legal rules and principles have so far crystallized the doctrine that the equity known to underlie it has all but been transformed into a kind of "technical" equity, or equity in the sense used by English lawyers. In point of fact,, the modern doctrine is only operative under a system of strict rules and conditions which allows the individual judge very little latitude and, in the last analysis, tends towards restricting litigation. Evidence of this is found by the well-known Belgian *civiliste* Henri de Page in the significant "indigence de la jurisprudence belge au regard d'une théorie appareinment si prometteuse".

Finally—one last "finally"—it seems to me that any criticism of the doctrine of Unjustified Enrichment is to a large extent a criticism of Law in general where the difficulty of reconciling stability with flexibility, always present, is rendered particularly acute when there are implicated notions of morality and fair play. In the forceful language of Professor Winfield:

> "Like the observation balloon under experiment, the moral idea is continually being pulled earthwards until it is too low to see much, and is then continually released skywards where it may be too much in the clouds to see anything. So long as we have case law and so long as the judicial process is what it is, we shall never escape this oscillation between the extremes of useless freedom and mischievous technicality. If the happy mean is achieved it must be by accident as much as by anything else, for very few men have acute enough perception to see exactly where the mean lies, and the mean itself is often variable over a period of time".

Neutralised States

R. CONTI, P.L.

NEUTRALISATION "either of states, of parts of states, of particular bodies or streams of water is a limitation on national sovereignty which may be created by agreement". The essence of neutralisation is that it is a collective act i.e. all the Great Powers must expressly or impliedly assent to the status of neutrality permanently conferred. Another important element of neutralisation is that it is contractual.

Neutralisation may take place in the case of:

1. States that have been permanently neutralised by treaty;
2. Where persons, things or places though in fact belonging to a belligerent state are invested with immunities to which as so belonging they would not be entitled, they are said to be neutralised;
3. The term neutralisation was used in a very extended sense with reference to the Black Sea in the Treaty of Paris, 1856.

This threefold classification is made by Moore "International Law Digest" Vol. 2 para. 19.

Neutralisation is not to be confused with neutrality. "A state is neutral which chooses to take no part in a war, and persons and property are called neutral which belong to a state occupying this position. The term (neutrality) has in recent times received a larger application. A condition of neutrality or one resembling it, has been created, as it were artificially, and the process has been called neutralisation". (Moore op. cit. p. 19). A state may conclude a treaty with another state undertaking the obligation to remain neutral if such other state becomes a belligerent without thereby becoming a neutralised state. Neutralisation, therefore, differs fundamentally from neutrality which is "a voluntary policy assumed temporarily in regard to a state of war affecting other powers, and terminable at any time by the state declaring its neutrality. Neutralisation, on the other hand, is a permanent status conferred by agreement with the interested powers without whose concurrence it cannot be abandoned". (Starke, Introduction to International Law, p. 90). The act through which a state becomes permanently neutralised is always an international treaty between the powers,

the neutralising states on the one hand, and the neutralised state on the other. If not all the Great Powers take part in the treaty of neutralisation, those which do not take part must give at least their implied consent, by showing that they agree or are not averse to the neutralisation. Although any state may declare itself to be permanently neutral, such unilateral declaration does not have the effect of making the state which declares itself permanently neutral "a permanently neutralised state". Such 'autonomius neutralisation' has been claimed by Ireland and the Holy See, the latter state declaring itself to be invariably and in any event neutral and its territory inviolable.

The reasons which prompt the neutralisation of a state vary, of course, with each particular case, but it may be said that with regard to the neutralised state itself, it is invariably a weak state, which does not desire a prominent or active position in international politics, "being exclusively devoted to peaceable developments of welfare." (Oppenheim). As regards the neutralising states, it is generally the desirability of having a buffer state between the territories of the Great Powers which impels them to consent to the neutralisation.

Oppenheim's definition of neutralised states is fairly comprehensive. "A neutralised state", he says, "is a state whose independence and integrity are for all the future guaranteed by an international convention of the Powers, under the condition that such state binds itself never to take up arms against another state except for defence against attack, and never to enter into such international obligations as could indirectly drag it into war". In guaranteeing the permanent neutrality of a state, the contracting powers enter into an obligation not to violate or their part the independence of the neutralised state and to resist any violation by other states. "Not only it is preordained that such states are to abstain from taking part in a war into which their neighbours may enter, but it is also prearranged that such states are not to become principals in a war. By way of compensation for this restriction on their freedom of action, their immunity from attack is guaranteed by their neighbours for whose collective interests such an arrangement is perceived to be on the whole expedient". (Moore op. cit. p. 19). A neutralised state may not, therefore, enter into treaties of alliance which may prejudice its impartiality and complete neutrality, which might drag it even incidentally into hostilities with any other state

Thus in 1867, Belgium could not sign the Treaty of Guarantee in connection with the neutralisation of Luxembourg. In fact, Article 2 of the Treaty of London of May 11, 1867, said: "Sous la sanction de la garantie collective de puissances signataires à l'exception de la Belgique, qui est elle même un état neutre". For the same reason, it was only after considerable discussion and a referendum by the Swiss electorate that Switzerland joined the League of Nations, with the qualification that she was not to be forced to take part in any military measures whatsoever as any ordinary member of the League might be called upon to do. In 1936 when economic sanctions against Italy were ordered by the League, Switzerland considered that her participation might prejudice her impartiality.

The neutralised state, however, must be ready to defend itself against attack and to uphold its neutrality and integrity. At the same time, a neutralised state when attacked must call upon the guarantors for assistance. In 1938, when the Council of the League of Nations recognised Switzerland's full neutrality, it noted the fact that Switzerland could and would defend itself. Though usually neutralised states are not forbidden to own Armed Forces for their defence and are in fact required to defend themselves while calling for the assistance of the guarantors, there have been cases where the treaty of neutralisation forbids the possession of Armed Forces except for Police. Luxembourg and the Free City of Cracow were forbidden to own Armed Forces except for Police.

At the moment the only neutralised state in existence is Switzerland which has succeeded in preserving its neutrality intact since 1815. Examples of neutralised states in the past have been few and were certainly not lasting. Neutralised states were a product of the 19th century when a spirit of conciliation prevailed at the various conferences of the Powers which followed the end of the Napoleonic Wars. Belgium, Luxembourg, Cracow and the Congo Free State were at one time neutralised states.

1. SWITZERLAND. — Switzerland has pursued a traditional policy of neutrality since the Peace of Westphalia in 1648. Her neutrality, however, was violated during the Napoleonic Wars and French intervention in 1798 enacted a new constitution whereby the several cantons were deprived of their independence. The Confederation gave place to the "Helvetic Re-

public'' which was in effect a puppet state of France. In 181 the Confederation was restored and in 1815 its neutralisatic was guaranteed by Great Britain, Austria, France, Portuga Prussia, Russia. Spain and Sweden at the Congress of Vienn On May 27th, 1815 Switzerland gave her consent to the decla ation of the Powers. Art. 84 of the Vienna Congress confirme the declaration and Switzerland's neutralisation was again e pressly recognised by the Powers assembled at Paris on the 20 November 1815, after the final defeat of Napoleon. Since th time, for almost a century and a half, Switzerland has alwa succeeded in maintaining her neutrality despite the bloody wa that have raged over the whole of Europe.

Switzerland has no restrictions on her keeping Armed Forc and building fortresses provided these are for defence purpos only. As a matter of historical interest, it may be recalled th a French Army of about 80,000 men which entered Switzerla in 1871 during the Franco-Prussian War was disarmed a detained in Switzerland until the end of that war.

As has already been observed, Switzerland has been ve reluctant to join International Organisations, fearing that h neutrality might thereby be prejudiced. She joined the Leag of Nations as a qualified member on the understanding that s was not to take part in military operations, but she has not se fit to join the United Nations. On the other hand, Switzerla is very much in the picture where peaceable organisations a concerned and Geneva has long been a favoured seat of Inte national Organisations. Switzerland has often taken t initiative in organising International conferences of a peaceat character.

The neutralisation does not have any effect on the rank Switzerland as a state. She is a state with Royal honours, ful independent and sovereign, enjoying the same internatior position within the family of nations as the guarantors of h neutralisation.

2. BELGIUM. — The Treaty of London of he 15 November 1831 between Great Britain, Austria. Belgium, Fran and Russia stipulated in Article 7 the independence and p manent neutrality of Belgium. Art. 25 of the same Treaty co rained the guarantee of the Great Powers which was given aga in Art. 2 of the Treaty of London of April 19th, 1839 whi followed the final separation of Belgium from the Netherland

But Belgium, unlike Switzerland, has not been able to preserve her neutrality. Germany invaded Belgium in 1914 in order to get at France, and after the First Great War Belgium asked that her neutralisation should come to an end. The Powers acceded to her request and Germany and Austria both consented to the abrogation of the treaties neutralising Belgium and promised to observe the new arrangements which were to be made by the Allied Powers respecting Belgium. But apparently nothing was done after this and it might be argued that Belgium could still be considered legally, though not de facto a neutralised state. In 1936, Belgium followed a policy of non-involvement in world affairs and requested to be released from the provisions of the Treaty of Locarno which had redefined the frontiers laid down in the Peace Treaties of 1919. Moreover, Belgium obtained a restriction of her obligations under the Covenant of the League of Nations. But Germany again invaded Belgium in 1940 and after the Second World War, Belgium can no longer be considered as a neutralised state in view of her participation in various international military organisations, such as the Atlantic Pact. Belgium is also an unqualified member of the United Nations and has in fact taken part in the military operations undertaken by the United Nations in Korea.

3. LUXEMBOURG. — From 1815 to 1866 the Grand Duchy of Luxembourg was in personal union with the Netherlands, the King of the Netherlands being at the same time Grand Duke of Luxembourg. At the same time Luxembourg was a member of the Germanic Confederation and Prussia in 1856 actually acquired the right to keep troops in the fortress of Luxembourg. When the Germanic Confederation came to an end in 1866, Napoleon III tried to obtain Luxembourg by purchase from the King of Holland. Prussia was alarmed at this and in order to ease the tension that arose in consequence it was decided to neutralise Luxembourg. A Conference attended by Austria, Great Britain, Belgium, France, Holland and Luxembourg, Italy, Prussia and Russia took place in London and Luxembourg was neutralised by means of the Treaty of May 11th, 1867. Belgium, as has already been stated above, did not sign the guarantee. Luxembourg was prevented by the terms of the treaty from possessing any Armed Forces except for Police. The neutrality of Luxembourg was violated by Germany in 1914. After this Luxembourg like Belgium asked that her

neutrality should cease. Germany again invaded Luxembourg in 1940 and after the Post War period, Luxembourg certainly cannot be considered as a neutralised state having taken part in various military organisations for common defence.

4. THE CITY OF CRACOW. — The International status of the City of Cracow and its territory from 1815 to 1846 has caused much confusion of thought. The Convention of St. Petersburg of the 13th October 1795 assigned the City of Cracow and its territory to Austria, from which it was severed by Napoleon and attached to the Duchy of Warsaw in 1809. The Treaty of May 3rd, 1815 between Austria, Russia and Prussia stipulated that the City of Cracow and its territory "sera envisagée" for ever, as a free, independent and strictly neutral city, under the protection of the three High Contracting Powers, and the Three Courts by Art. 6 pledged themselves "to respect and cause to be respected on all occasions, the neutrality of the Free City of Cracow and its territory". An armed force was not to be introduced into it upon any pretext whatsoever at any time. But it was expressly provided that no protection or asylum to fugitives and deserters from the three countries (Austria, Russia and Prussia) should be granted and that such persons should be immediately surrendered upon a demand of extradition made by the competent authorities. Moreover, the city of Cracow had no right to levy custom duties but only pontage and road tolls upon the transit of goods and cattle, according to a tariff regulated by the Commissioners of the Three Powers. The other articles of the Treaty provided for the political constitution of the Free City, but no provision was made regarding consuls or commercial agents. The Peace of the City and the Police were to be in the hands of a Civic Militia. The European Powers who took part in the Congress of Vienna admitted this treaty between Austria, Russia and Prussia to be inserted in the principal act of the Congress. When Austria, Russia and Prussia declared their intention of suppressing the independence of Cracow in 1846, various Powers amongst them Great Britain and France protested on the ground that it was not competent for three of the countries who had been at the Vienna Congress to undo what was established by the common engagements of the whole. But the Republic of Cracow was extinguished and incorporated into Austria.

5. THE CONGO FREE STATE.—The Congo Free State was recognised as an independent Free State by the Berlin Congo Conference of 1884-5. It was a permanently neutralised state from 1885-1908, though its neutralisation lacked a guarantee of the Powers and was consequently imperfect. Art. 10 of the general act of the Berlin Congo Conference provided that the signatory powers should respect any territory within the Congo district provided the power who was in possession proclaimed its neutrality. The King of the Belgians as the sovereign of the Congo Free State declared it permanently neutral, which declaration was communicated to and recognised by the Powers. In 1908 the Congo Free State merged into Belgium.

6. MALTA. — It is of historical interest to recall that art. 10 of the Treaty of Amiens provided that the islands of Malta, Gozo and Comino should be restored to the Order of St. John of Jerusalem and their independence and perpetual neutrality recognised under the guarantee of Austria, France, Great Britain, Prussia, Russia and Spain. As is well known, the Maltese objected to the provision of this treaty which was never put into effect as war broke out again in 1803.

Since neutralised states in return for the guarantee of independence are subject to certain restrictions according to the terms of the treaty of neutralisation, the question arises whether these states enjoy the same international position within the family of nations as other states. A neutralised state cannot make war against another state except in face of an attack. In this case, the neutralised state is under the obligation to defend itself if it has the means to do so. It follows from the Treaty of neutralisation that a neutralised state cannot cede any part of its territory without the concurrence of the powers which signed the treaty of neutralisation. In this matter a neutralised state cannot go beyond mere frontier regulation. It must also abstain from entering into any obligations in time of peace which might involve it in hostilities with other states. This does not usually mean that the neutralised state cannot have Armed Forces provided these are used for defensive purposes only (v. case of Belgium and Switzerland). But here we must refer to the conditions of the neutralisation of Cracow and Luxembourg, both of which were forbidden by the treaty of neutralisation to have any armed forces (except for Police) and to possess any fortresses. These latter states, if they were invaded, had to depend

on the guarantors of their neutralisation for their defence and in this case their depedence would seem to be absolute.

Such limitations, infinitesimal though they might be must have some effect on the sovereignty of a state. For this reason some writers have classed these states among those which are part sovereign. Others, and among these Oppenheim, hold that the limitations imposed by the neutralisation do not have any effect on the sovereignty of a state. Lawrence comes to the conclusion that though the restrictions of the neutralisation admittedly are limitations on sovereignty yet they are so small and have so little effect in regard to rank, honour and influence of states, "that it might be accounted pedantry to insist on classing them along with part sovereign states" for the mere reason that they are deprived of exercising certain prerogatives which belong to sovereign states. Indeed, if they were to be so classed, they would form a class by themselves. But this in no way excludes the fact that the limitations imposed by the neutralisation are restrictions on sovereignty. As a rule these restrictions regard external sovereignty but we have come across instances of restrictions on internal sovereignty as well (v. Cracow and Luxembourg).

Those who deny that neutralisation affects the sovereignty of states argue that sovereign states often voluntarily impose limitations on their future action by treaties and that these limitations are no restriction on their sovereignty. However, we must not forget that the limitations resulting from neutralisation are a permanent and essential condition of the existence of a neutralised state. Other states can withdraw from their agreements without a change of status, but once a neutralised state goes back on any of the conditions of the neutralisation, it loses its status of neutralised state and moreover, such action gives a right of intervention to the guarantors of the neutralisation. So the contention that the restrictions placed on a neutralised state by the treaty of neutralisation are no different from the limitations into which ordinary states enter by agreement cannot be upheld. We must equally reject the contention that neutralised states come under the protection of their guarantors. The stray pieces of sovereignty of which neutralised states are deprived are not transferred to anybody else and remain, so to say, in abeyance.

Oppenheim, it must be admitted, takes rather an ex-

treme view of the matter when he says that a neutralised state is as fully sovereign as any not neutralised state. Such statement may perhaps be true in the case of Switzerland and Belgium, but the same cannot be said with regard to Luxembourg and Cracow. As regards Luxembourg, Oppenheim describes as "abnormal" the condition that she was not allowed to keep Armed Forces by the Treaty of 1867. The case of Cracow is even more complicated. The conditions of the neutralisation of the city were exceedingly severe and in spite of the solemn declaration of the powers that "the city of Cracow with its territory should be regarded for ever, as a free, independent and strictly neutral city", one is inclined to agree with Sir Travers Twiss, who says, comparing the Free City with the State of the United Ionian Islands (then under the protection of Great Britain) "if a careful comparison is made between the condition of these protected independent states, and the condition of the Free City of Cracow, it will be seen that the Ionian Islands enjoy far more of the rights which pertain to an independent state, than the Free City of Cracow". In fact the Free City was by the treaty of 1815 debarred from levying any custom duties; it had neither a commercial flag nor commercial agents in foreign countries, and as far as external sovereignty was concerned foreign powers could not have any relations with the Free City except through the medium of Austria, Russia or Prussia. The Free city was politically represented at the General Treaty of Vienna by these three powers, and it could only address itself to foreign governments through one of these three powers. From this we may conclude that the Free City was in fact a protectorate of Russia, Austria and Prussia and not an independent state in spite of the declaration. It is a fact that these three powers resented any interference from any other power with regard to Cracow and it was finally annexed by Austria in 1846 with the concurrence of Russia and Prussia without consultation with the other powers, which action aroused strong protest from Great Britain and France.

A lot depends on the provisions of the particular treaty creating the neutralised state and "from a political and legal point of view it is of great importance that the states imposing and those accepting restrictions upon independence should be clear upon their intentions. For the question may arise whether these restrictions make the state concerned a dependent one".

(Oppenheim). In other words, the question whether a neutr ised state has through the neutralisation forfeited its indepe dence or not can only be answered by reference to the particu treaty creating the neutralised state and the intentions of t parties to the treaty. Thus, while we may all agree about t complete independence of Switzerland, today the only existi example of a neutralised state, past examples of neutralisati may not provide such a clear cut answer. Cracow and to a les extent Luxembourg provide complexities which are not eas solved.

It may perhaps be wondered why the subject of the neutr isation of states, today a comparatively unimportant branch International law should come in for such minute attentic The institution seems to have been born and to have died w the 19th century and it cannot be said that the experiment w much of a success (with the exception of Switzerland); but had a beneficial effect, perhaps only temporary in the major of cases, in that peaceful settlements were arrived at on d puted pieces of territory which have been described as lying the "international borderline which represents the struggle power between the great states". It was instrumental in easi the tension that arose between the Great Powers over particu tracts of territory and notably so in the case of Luxembou which both France and Prussia coveted on account of its fo ress. By effecting its neutralisation neither state got the fo ress, but the fact that the other state did not get it either doubt proved a source of consolation to the two countries and situation which might easily have degenerated into a war w peacefully settled.

——00——