International Legal Practice

Fritz Moses

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The present crisis has not caught the lawyers napping as it has so many other professions. Due to the labors of the great torchbearers, Holmes, Brandeis, Cardozo, Pound and others, and their introduction of the sociological approach to legal questions, our tools—I venture to say—are better prepared than ever to cope with the avalanche of new problems. Yet there is a weak spot in our armor, one phase in the process of our adaptation to the times where conditions are outrunning our equipment. I refer to the technique of handling the legal side of private international relations.

The problem is pressing. In miles the distances to foreign countries have remained the same; in time they are a fraction of what they were not long ago. There may at present be more friction between nations than there was before and immediately after the World War; but the tremendous technical progress in our means of communication and transportation cannot but result in a steady increase and intensification in personal relations between nationals of different countries.

What does that mean to the lawyer? His function is to help regulate human relations. If those relations burst more and more the national confines, it means that he is apt in his practice to be concerned to an ever-widening extent with foreign interests of his clients. Today any lawyer may be called upon—to mention only a few examples—to advise his clients on the drafting of a sales contract, an agency contract with a foreign merchant; to draw up a will with foreign beneficiaries and foreign property to dispose of; to settle a dispute with a foreign party or simply to collect a claim from a foreign debtor. Has the lawyer done his duty if he prepares—as happens in the American export trade—an ‘ironclad’ contract in the form used in his jurisdiction with the clause that his law shall apply? Has he done his duty if he writes letters, translated into Spanish, to the Latin-American lawyer, selected at random, and prepares the case without knowledge of the law, procedure

†Former Judge at the Landgericht, Berlin.

The following subjects are considered in this paper:
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and general customs prevailing in the country where the lawsuit is to take place?

Here is a challenge to the profession. The existence of the problem at least must be fully recognized by the bar lest the handling of such cases be attempted with wholly inadequate means.

In recent years some interest for foreign law has sprung up anew in this country. A few American law schools have during the last decade done excellent work in comparative law studies. The interest has spread to the bar itself. Evidence is the revivification or new organization of committees on foreign laws in various bar associations. Their approach to matters of foreign law is influenced by two different purposes: one to win a better understanding of our own law according to the word of the poet: "If you would know yourself, know how the others act"; and the other, to use the legislative experience of other countries for the improvement of our laws.

1. See the recent organization of the Committee on Foreign Law as a Standing Committee of the Association of the Bar of the City of N. Y. [Year Book (1934) 251] of the Section of International and Comparative Law of the American Bar Association, and the contemplated organization of the Committee on Foreign Laws and Comparative Legislation of the N. Y. County Lawyers' Association.

2. As it has been forcefully expressed: "Just as a deep sea fish may find it difficult to appreciate the taste of salt water, so a lawyer may find it difficult to appraise objectively the legal system in which he grew up", Deák, "Place of the 'Case in the Common and the Civil Law", (1934) 8 Tulane L. Rev. 334.

3. A striking application of the comparative method, seemingly the first work in American legal literature since the period of Kent and Story, in which this method has been used to a large extent, is Prof. Edwin Borchard's recent work on "Declaratory Judgments". To me it seems to prove abundantly the value of this method for interpretation of as well as for legislative purposes with regard to a purely domestic legal subject.

4. The use of the comparative method for legislative purposes seems recently to have found favor in the United States, though in comparison with the European Continent, Latin-America and England this development is still in its infancy. (See as to England, ILERT, THE MECHANICS OF LAW MAKING 41 and particularly 51-52). Disappointing with respect to its attitude towards the value of comparative studies, however, is the otherwise most thorough governmental study for the reform of the Bankruptcy Act in "Report to the President on the Bankruptcy Act and its Administration in the Courts of the United States," dated December 5, 1931, with the Appendix, published in "Message from the President of the United States Recommending the Strengthening of Procedure in the Judicial System", Sess. Res. No. 65, 72d. Cong., 1st Sess. containing a chapter on "History of the Bankruptcy Act and Comparative Legislation", pp. 49-68, the last paragraph of which starts as follows: "We have gone at some length into the record of bankruptcy legislation in England and Canada because of the close historical association of our laws with theirs. We have also made a somewhat limited study of the Continental bankruptcy systems. These systems are so foreign to our traditions and laws that little, we think, is to be gained through their study." And yet the European countries introduced—some of them several decades ago—laws for "the relief for debtors without adjudication in bankruptcy" along the lines of the new section 74 of the Bankruptcy Act. For a good, though not up-to-date collection of these laws in Europe, all in German, see HARRER, DER GERICHTLICHE AUSLESEN (1928). A voluminous literature exists on their economic and social effect and a consideration of these laws might well have given some valuable suggestions.
But little, if any, thought has been given to the eminently practical, eminently pressing problem of how to handle cases of foreign law or—rather—cases with a foreign aspect: cases which may be pending in our courts, but where one or the other party is a foreigner or where the transaction or part of it took place abroad or where actual questions of foreign law arise; cases which may be pending in foreign courts, but where proper preparation must be made in this country and correspondence carried on with foreign attorneys; cases where disputes with foreigners are to be settled without litigation or—prophylactic work—where a contract is to be drawn adapted to all the laws which may govern part or all of it and providing for the peculiar contingencies which may arise due to its international character. The nature of the general problems arising in these and similar cases is discussed in this paper, but no specific questions treated, such as the peculiar technique of drafting contracts to be used in foreign countries; the selection of foreign attorneys and the arrangements and correspondence with them; the preparation of a case and documents for court proceedings abroad, etc. The purpose of this paper is to point out fundamental difficulties, easily overlooked, and to warn of pitfalls that beset the inexperienced.

**Difficulties Due to Differences in Cultural Background**

Ulpian says "jurisprudence is the knowledge of things human and divine . . ." The reason for the frequent quotation of this famous saying may be that it flatters the vanity of the disciples of this science. But it surely contains a deep truth, a truth, which—overlooked in various periods of legal history—is recognized more and more in our times, namely that knowledge of the rules of law is only a small part of the lawyer's equipment, and that we cannot perform our function without a knowledge of life itself, of the human relations and of the ideas and ideals which move our clients and those with whom we deal. Growing up in a certain environment we become acquainted with its social currents and crosscurrents and the sentiments and business methods of those with whom we are usually concerned in our legal practice. No brilliancy of mind, no learnedness in the law could balance lack of such experience.

In international legal matters we are concerned with parties who belong to two or more different countries, or transactions which have their situs wholly or partly abroad. Thus, international legal practice requires a duplication of the lawyer's ordinary range of experience, if it is to be executed adequately and at a standard of efficiency equal to that generally insisted on in our domestic legal work.

Here is danger. Experience with life comes without effort and is applied without realization. Thus, where in legal matters experience with

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5. D.1.1.10.2: "jurisprudentia est divinarum atque humanarum rerum notitia . . ."
the life of foreign peoples is required, the lack of proper equipment is not easily recognized and the effectiveness of the legal work is in double jeopardy, not only because the necessary experience with foreign life may be missing, but—worse—because automatically unsuitable experience derived from home environment may be applied and actions based on false premises.

Nor is this difficulty overcome by retaining a lawyer in the country of the foreign party. Even if the situation is such as to make it possible to introduce a resident lawyer into the picture—generally only in cases of serious disputes or important contracts necessitating long negotiations—not much is won unless that lawyer is familiar with both his own and our customs, institutions, ways of thinking, business methods, etc. To exemplify: By the last will of an American resident his widow had become the beneficiary for life and certain relatives living in Germany remaindermen. Practically all assets of the estate were in Germany. The widow as administratrix c.t.a. wanted to have them transferred to New York for safety's sake, although they would have produced less income here. The German beneficiaries objected strenuously, not because they did not realize that the money could be invested in the United States much more safely, but because they were afraid they would never see one cent of the money once it had left Germany. American counsel finally engaged counsel of high standing in Germany to continue the negotiations. But he received little help, and for a year or more no progress was made until finally the German attorney advised that only litigation might bring results. But litigation would have required an advance of money far in excess of what the administratrix had at her disposal. Why should it have been impossible to arrange for the investment of the money in the United States if the German beneficiaries, who were interested in safety before income even more than the American widow, were convinced that investments here were safer? The reason is that, if all parties involved had been in Germany, the remaindermen would have been almost at the mercy of the widow. For in Germany the widow could have managed the estate practically without control; no security would have been required from her, and bonds and bonding companies are practically unknown. No wonder that the German remaindermen, who hardly knew the widow, feared that, if the money was once in the United States, it would be lost to them forever, no matter how well it might be invested. All that was required in this case to satisfy all parties was to explain to them the different situation in the United States, particularly the functions of an American administratrix, trustee and bonding company, in terms of comparison with corresponding German institutions, and in spite of the bitterness that had meanwhile been created the money was permitted to be transferred with the consent of all.
Difficulties Due to Differences in Language

"Words are very rascals," says Shakespeare's Clown in "Twelfth Night." Many poets and thinkers have since complained about the inaccuracy of words in expressing thoughts. Clearly, this danger of inaccuracy is multiplied if thought is first expressed in one language and then translated into another. The flavor of a sentence is apt to change or disappear in a translation; and just this flavor may change the aspect of the case; for—to use the words of Holmes' Autocrat at the Breakfast Table—"it is the imponderables that move the world". But even if it is sufficient to convey in the translation the exact meaning of the original without its atmosphere, we sometimes will encounter insurmountable difficulties. Nothing seems to prove this more convincingly than the forlorn resignation Dean Wigmore, master of his own and other languages, expressed in his "Addendum" to the English translation of a French report on the International Congress of Comparative Law: "It has been virtually impossible to translate literally the above report sent out by the Academy, because not only the words, but the forms of expression of Continental jurists, often have no corresponding words or ideas among English-speaking peoples, and the above language attributed to the learned author is in part a paraphrase only of the original words of the report."

If the translation of a report presents such difficulties, one will the better understand the obstacles in drafting legal documents which must be used in two or more languages, be they contracts between private parties or treaties between nations. Such an experienced law comparer as Professor Rabel says with regard to treaties in two languages: "Here are multiplied the difficulties which every good translator of a legal text is always aware of. To find the equation between the products of different realms of thought is often impossible. Even where concepts correspond wholly or partly, all too often the unequivocal linguistic means of expression are missing. We well know that even the same words in a uniform text, if introduced as law into different legal systems, change their color within their environment."

6. I am not referring here to the controversy now raging between the "Realists" and others about the "verbalism" in the law, because we are here concerned with the accuracy of expressing established law through words, while the "Realists" are interested mainly in the influence of words on the thought process, i.e., on the development of legal thought.

Concerning the difficulties with regard to English legal terminology, see WILLISTON, THE WORK OF TEACHERS OF LAW, SOME MODERN TENDENCIES IN THE LAW (1929) 131-139.

7. 24 ILL. L. REV. 665.

8. When the American Arbitration Association published its American edition of the International Yearbook for Arbitration, originally containing articles, decisions, etc., in German and French, in addition to English, it was considered necessary to annotate the English translations in order to exclude the danger of misunderstanding.

9. Ernst Rabel, Director of the Institut fuer Auslandisches und Internationales Privatrecht at the University of Berlin, in RECHTSVERGLEICHUNG UND INTERNATIONALE RECHTSPRECHUNG in 1 ZEITSCHRIFT FUR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT 15.
The consequences of these difficulties can be seen in many instances. The three Hague Conventions of June 12, 1902 became law in Italy through Royal Decree of September 18, 1905. But on January 18, 1906 there was published:

"Royal Decree No. 37 which authorizes the re-publication of the Italian text of the three international conventions signed June 12, 1902 at the Hague for the correction of some mistakes in the previous publication."

The first official translation of the three conventions in Sweden also had to be corrected.

The German, French and Italian texts of the most carefully prepared Swiss Civil Code are equally authoritative. Yet various discrepancies between the three texts have crept in and the courts have had to decide for the one or the other version.

The Peace Treaties after the World War are a particularly fertile source of difficulties arising out of their bi-lingual nature.

In one of the cases arising therefrom there was among the judges of the Permanent Court of International Justice not only disagreement as to how the alleged difference in the English and French texts should be harmonized, but whether there actually was any difference between the two texts. The majority opinion of the court considered the French version to have a more restricted meaning than the English; Lord Finlay in a dissenting opinion thought the two texts were in agreement; and Judge John Basset Moore in a dissenting opinion made these illuminating remarks on the linguistic problem involved:

"I strongly incline to the belief that the French text, in the present instance, is a so-called 'literal' translation of the English text and was intended to mean the same thing. A 'literal' translation, however, if taken alone, may be so interpreted as to prevent or even destroy the meaning of the other text."

11. See e.g. Haupt v. Dame Haupt—Huguenin, Feb. 13, 1913, Journal des Tribunaux, Droit Fédéral (1913) 536, 538, where one of the issues was whether the German text, calling for an "opinion of experts" (Gutachten von Sachverständern) or the French text, calling for an "expert opinion" ("rapport d'expertise"), of art. 374 Swiss Civil Code was applicable, and where the court decided in favor of the French text in view of the legislative history of the article, namely that the opinion of one expert was sufficient.

12. Mavrommatis Palestine Concessions Case, Permanent Court of International Justice, Collection of Judgments, Series A, No. 2. The pertinent part of the text that was to be interpreted reads in English: "... shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein." The French text reads: "... aura pleins pouvoirs pour décider quant à la propriété ou au contrôle public de toutes les ressources naturelles du pays ou des travaux et services d'utilité publiqué déjà établis ou à y établir." (Art. 11 of the Mandate for Palestine of July 24, 1922.)

13. Id. at 18.
14. Id. at 44.
15. Id. at 69.
The discrepancies between the English and French texts of the Treaty of Versailles, both "authentic" according to a provision of the Treaty, have become the subject of numerous court decisions. I shall mention here only one that is particularly interesting, because it indicates a tendency on the part of courts in case of discrepancies to base their decision on that text which is written in their own language.

Art. 296 subd. 1 provides in its English text that "debts payable before the war" and due by a national of one of the Contracting Powers to a national of an Opposing Power shall be settled through the intervention of certain Clearing Offices. The French text reads "dettes exigibles avant la guerre". While debt means a claim for money due as well as liquidated, the French term "dette" does not imply liquidated. The result is: the Tribunal Arbitral Mixte Germano-Belge, basing its decision on the French text, decides that non-liquidity of a claim does not prevent it from being settled through the Clearing Office; and likewise the French Commercial Court of Anvers declares itself without jurisdiction in the case of an unliquidated claim, because it should have been filed with the Clearing Office and the dispute then settled by the Arbitral Tribunal.

On the other hand, the Anglo-German Arbitral Tribunal, apparently only considering the English text, decides with the same lack of hesitancy as is noticeable in the decisions of the French-speaking courts exactly contrariwise, namely, that to be settled through the Clearing Office the claim must be for a sum certain.

The French and Belgian as well as the English tribunals disregard the text which is written in the language not their own, although both texts have equal force.

While the limelight of international court proceedings brings into strong relief the linguistic mistakes in international treaties, the errors made and misunderstandings arising in the daily intercourse of citizens of different nations are, of course, much more frequent.

There are treacherous words which sound almost alike in two different languages, but have a different meaning. The German word eventuell, for instance, does not mean eventually, but perhaps. The French transactio generally means compromise, while the French compromis means arbitration clause. Interesting are the terms for divorce and separation in the various languages. The Romans used the term divorcium in the

16. Decision of March 24, 1922, Recueil des Décisions des Tribunaux Arbitraux Mixtes II 5: "It is very well understood that the art. 296 of the Treaty of Versailles did not at all demand the liquidity of the claims notified to the Offices."

17. Tribunal de Commerce d'Anvers, Cap. Polemis et al. v. Cap. Karl Bath, Recueil I 141: "In short the plaintiffs confuse the dette exigible with the dette liquide. . . . art. 296 does not demand as does art. 1291 of the Code Crav. that the dette be at the same time liquidated and actionable, but only that it be actionable."

18. Decision of March 9, 1926, Recueil VI 34: "No claim for unliquidated damages for breach of this later contract can under art. 296 of the Treaty of Versailles be set off against the creditors' claim."
sense of the American term *divorce*, but in Spain and the Latin-American countries the canonical law, opposed to a dissolution of the marriage bond, was applied directly or indirectly to matters relating to marriages, and therefore the word *divorcio* was used in the sense of separation. However, reforms of the family laws have been widespread, and the meaning of the word *divorcio* now differs among these countries, in some cases even within the countries before and after the reform.

In some countries it means both divorce and separation. In others it has only the meaning of either separation or divorce. In Germany divorce is *Scheidung* and separation *Trennung*, but in Austria these same German words have just the contrary meaning: *Trennung* corresponds to divorce or *Scheidung* in Germany, and *Scheidung* to separation or *Trennung* in Germany; and recently it happened here that, due to the translation of an Austrian decree as if it had been a German decree, an Austrian, although only separated from his wife, received a marriage license in New York.

An illustration of the tendency to read one's own preconceived ideas into a foreign word is the decision of the Court of Douai. It was an action of an illegitimate child against his alleged father for support. Under the French law no proof whatsoever could have been admitted before 1912 that the defendant was the father, unless in a case of abduction. In 1912 the French law was changed and it would have been possible to prove the case by showing that the father and the mother had lived together "en état de concubinage notoire". But in this case

20. In Ecuador the word *divorcio* in the Civil Code before the enactment of the laws of Oct. 3, 1902, and Sept. 20, 1910, abolishing the application of the *Codex juris canonici*, meant separation. It now means divorce, and the word *separation* means separation.
23. Uruguay: Civil Code, art. 186. (See also note 20, supra.) Spain: Law of March 2, 1932, art. 1 (see also note 20, supra.) Ecuador: see note 20, supra. Venezuela: Civil Code, art. 188. Nicaragua: Civil Code, art. 160.
24. Germany: Civil Code, par. 1575. In the code itself the term "Aufhebung der ehelichen Gemeinschaft" is used for "Trennung" (separation).
25. Austria: Civil Code, par. 103, 105.
26. See SPEAK AND SWEVASON, METHODS AND STATUS OF SCIENTIFIC RESEARCH (1930) 94.
28. Former art. 340 Code civil ("La recherche de la paternité est interdite.").
German law was applicable, and under German law it would only have been necessary to prove that the defendant during a certain time had "beigewohnt," the mother, i.e. had had intercourse with her. Nevertheless, the French court demanded proof similar to that demanded by French law, interpreting without any justification the German word "beiwohnen" in the sense of repeatedly having intercourse, because they could not imagine that under German law the proof should have been still more simple than under the amended French law.

Technical commercial terms used in the same language all over the world in international trade lead to difficulties because of different meanings. The term "free on board" means in the whole world outside of the United States "free on board vessel," never "free on board railroad." In 1919 disputes creating much bad feeling arose between American and Australian firms on contracts calling for delivery "f.o.b. New York." The Australians understood the term to mean "free on board vessel New York" and demanded damages when the American firms delivered free on board railroad New York.

In order to clear up misunderstandings the International Chamber of Commerce sent to its various national branches questionnaires about the meaning of the terms most common in international trade, such as c.i.f., c. & f., f.o.b., f.a.s., f.o.r. The answers show so few differences that one may wonder why all this work was necessary. But these answers are deceptive. The cases reported, particularly in the European countries, but often with an American firm involved, show the trouble caused international trade by differences in the meaning of these terms. Unless there is assurance that both parties interpret them in the same manner, it is preferable to refer to rules which give an interpretation of the terms or to embody the interpretation directly in the contract.

Of course, a great part of international trade, practically all trade in raw products, uses standard contract forms drafted by the respective trade associations. But where individual contracts are used, par-

30. German Civil Code par. 1717.
31. A court in Grenoble in a decision of Dec. 25, 1924, understood the German word "beiwohnen" correctly (1925 JOURNAL DU DROIT INTERNATIONAL PRIVÉ 979).
32. See International Chamber of Commerce, Publication § 68, Commercial Terms, 2d ed.
33. See about the ambiguity of the term "f.o.b." WILLISTON, SALES, (2d ed. 1924) 598.
34. See note 32, supra.
36. It is surprising to note that American trade associations have shown far less interest and initiative in the drafting of standard contract forms than English and even German associations. This has peculiar practical consequences. In the international raw products trade the parties almost always agree to arbitrate their disputes. The standard contract forms, therefore, contain arbitration clauses and these clauses generally call for arbitration by the machinery which the particular trade association sponsoring the standard
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particularly in the finished goods trade, the linguistic problem requires attention. A contract to be used in foreign countries should be written with a view to its translation; otherwise the foreign text may, without the fault of the translator, sound stilted or, if the English text is written in legalistic phraseology, even nonsensical. Such text not only jeopardizes the development of business, but, if signed by the foreign customer, is apt to lead to disputes, so that the very thing sought to be avoided by the draftsman will happen—the contract will have to be interpreted on the basis of the translation in a foreign court by judges as—to use Lord Mansfield's words—"the only authorized interpreters of nonsense".

Difficulties Due to Differences in Law

To ascertain the law of one or more foreign countries is another difficulty inherent in international legal practice. This at least—unlike many difficulties caused by differences in life and language—is an obstacle that lies open to the eyes of even the inexperienced. Yet this hurdle causes many casualties.

Modern Civil Law = Roman Law? The Myth of the Uniformity of Foreign Law

There appears to be a widespread belief among American lawyers that the law systems of all non-Anglo-American countries are fundamentally the same as Roman law and, therefore, more or less alike. Neither premise nor conclusion is correct.

Whatever may have been the influence of the Roman lawyer's art, his way of thinking, his method of approach to legal questions, nowhere is Roman law directly applicable today with the exception of Greece, and reference to Roman law is made no more often in Continental than in Anglo-American court decisions. Whether the rules of law now in contract has established, and in the place where that association has its seat. As a result England is almost always the arbiter of the international raw products trade, even in disputes between parties of whom none is English.

37. Maine in Ancient Law, explaining why he allotted to certain philosophical theories of the Roman Jurisconsults so much space, says: "... those theories appear to the author to have had a much wider and more permanent influence on the thought and action of the world then is usually supposed" (Preface to the First Edition), and his book shows that he has particularly the influence on England in mind. On the other hand, for differences of the modern Continental and the Roman method see e.g. Ginny, Méthode d'Interprétation et Sources en Droit Privé Postérieur, (2d ed. 1919) Chapter: Des Conceptions et Constructions en Droit Romain 171, particularly 184 et seq.

38. According to a decree of Feb. 22, 1835 the Civil Laws of the Byzantine Emperors were to remain in force; and, as these laws were very incomplete, their sources, and among them Justinian's Corpus Juris, were also considered law. But most legal subjects are now regulated specially by statutes. See Konst. Ant. Papanos in I Rechtsvergleichendes Handwörterbuch, Greece 74.

39. C. K. Allan, Law in the Making (1927), says referring to English law: "Some departments of our law have been settled almost entirely on the authority of the Digests.
force in the "civil law countries" are more in harmony with Roman law than the rules of law in "common law countries" is open to question. Of course, the Roman law was considered in the drafting of all the modern European and Latin-American codes, but it was only one of many sources from which the legislatures sought inspiration. Dean Pound's statement: "History of a system of law is in large part a history of borrowings of legal materials from other legal systems" applies with particular force to Continental European and Latin-American countries, whose modern legislators have always prepared themselves for their task through a careful comparative study of the various foreign laws. But, on the whole, the Roman law has fared in this process of selection rather badly. The large and important field of commercial law is practically free from Roman influence; and as to the civil law proper the Continental writers—even Romanists—agree that Roman law is far from being the main source of their modern codifications.

On the other hand, it must not be forgotten that the triumphal procession of the Roman law in the Middle Ages did not stop at the English Channel, but pressed its everlasting mark on equity and common law itself. Today there is only in few cases a definite demarcation line

The most conspicuous example is the right of flowing or percolating water" (p. 153) and then cites decisions where the Digests, but no English decisions were quoted. Reference to the Roman law as basis for the decision would hardly be possible in any non-Anglo-American country since 1900 (Greece excepted).


42. As to English law see the dramatic story that MAITLAND tells in his Rede Lecture of 1901 ENGLISH LAW AND THE RENAISSANCE about the invasion of the Roman law in the beginning of the seventeenth century into England. Furthermore, 4 HOLDSWORTH, HISTORY OF ENGLISH LAW, particularly p. 293: "We have received Roman law, but we have received it in small homeopathic doses at different periods and as and when required". See also Allen, op. cit. supra note 39 at 153: "Some departments of our law have been settled almost entirely on the authority of the Digests."

As to American law see 1 KENT, COMMENTARIES ON AMERICAN LAW, (1889) 516: "It (the Roman law) exerts a very considerable influence upon our own municipal law and particularly on those branches of it which are of equity and admiralty jurisdiction, or fall
between fundamental principles of the common law and the other laws, and in some of these principles it is the common law, and not the "civil law," that bears Roman features.

Surely the identification of "Roman law" with "civil law," frequently encountered in this country, has no justification, and Maitland's words remain true: "From the time of Bracton to the present day Englishmen have often allowed themselves phrases which exaggerate the practical prevalence of Roman law on the Continent of Europe."

From this erroneous idea about the influence of Roman law on the non-Anglo-American legal systems seems to have developed the just as
incorrect and more dangerous idea of their uniformity. Such uniformity—it cannot be stated too emphatically—does not exist; and, if in American decisions reference is made to a rule of the "civil law," more often than not that statement is correct only if by civil law is meant Roman law or the law of one or more Continental countries during a certain limited period of its history. 46a True it is that the non-Anglo-American countries form a closed phalanx on a few general doctrines, such as that of stare decisis, consideration, ultra vires; on certain principles of procedure; and on certain phases of their general approach to the solution of legal questions. But what uniformity there is lies, with few exceptions, in the negative; on the positive side there is generally a wide divergence; and only between the laws of certain groups of countries 46 do we find a similarity which sometimes approaches, rarely equals that between the laws of the states of this Union. 47

45a. The United States Supreme Court in Townsend v. Jemison, 50 U. S. 406 (1850) quotes with strong approval, but immediately disregarding its own advice, Lord Stair’s Institutes (p. 852): “There is in Abbott’s Law of Shipping (5th ed. p. 365) a singular mistake; and, considering the justly eminent character of the learned author for extensive, sound and practical knowledge of the English law, one which ought to operate as a lesson on this side of the Tweed, as well as on the other, to be a little cautious in citing the works and publications of foreign Jurists, since, to comprehend their bearings, such a knowledge of the foreign law as is scarcely attainable is absolutely requisite. It is magnificent to array authorities, but somewhat humiliating to be detected in errors concerning them . . .” (Italics by author).

46. See with regard to the grouping of Continental civil—in contradistinction to commercial-laws, Chas. S. Lobinger in 40 C. J. 1252-5, § 8 under title Modern Civil Law. A grouping of the commercial laws would bring together other countries, as many are influenced with regard to their civil codes by countries other than those which influenced their commercial codes.

47. Rabel, Director of the Institute for Foreign and International Private Law at the University of Berlin, writes in 1 Zeitschrift fuer Auslaendisches und Internationales Privatrecht 21: “It is not generally true that the European Continental lawyers understand each other more quickly than a German or French lawyer understands an English.”

Dear, The Place of the “Case” in the Common and the Civil Law, 8 Tulane L. Rev. 337 at 342 note 9: “The term ‘civil law’ is used for the sake of convenience only, the author being fully aware of the lack of precision inherent in the generalization. . . . There may be less difference between the approach of a common law lawyer and a French lawyer than between the approach of a French and a Spanish jurist.”

In the General Introduction to the Continental Legal History Series it is said: “Speaking of Western Continental Law . . . A thousand detailed combinations of varied types are developed, and a dozen distinct systems now survive in independence.”

Of different opinion is EDMUND MUNROE SMITH, “A General View of European Legal History” in Acta Academae Universales Jurisprudentiae Comparativae Vol. I 228: “At present there are but two groups of European civil codes, the Latin and the German-Swiss, and in comparing the codes of these two groups we find a substantial accord which far outweighs their material and formal differences.”

As to the divergence of American state laws even with regard to the so-called “Uniform Laws”, see KENNEDY, A Plea for Uniformity in New York Commercial Law (1933) 8 St. John’s L. Rev. 12 ff; also see the comment of Dean Pound on the American Ideal of the local law after the era of the ideal of the universal law in the first half of the 19th century, A Comparison of the Ideals of Law (1933) 47 Harv. L. Rev. 1, 11.
Technique of Finding the Law of Foreign Countries

The method of "civil law" lawyers to "look up the law" is not to delve right away into the decisions with the help of elaborate digests and tables, subject indexes and citation books, extra-annotations and whatever other guides there are. In fact such auxiliaries hardly exist in foreign countries. What the foreign lawyer generally does to ascertain the law is, first of all, to find the statutory provisions which apply. While they are usually published in the official journals, bar and bench, as a rule, use the editions of private publishers, generally reliable, though not certified by a government official. The texts of the codes—sometimes with just a few notes—are kept on the lawyer's desk for ready reference, and in the majority of cases they suffice. If the matter is questionable, one or more commentaries or textbooks are looked up; and, if the points involved are particularly "nice," the lawyer will read the court decisions and special literature on the question, all of which are ordinarily found by reference to them in the commentaries.

How far a lawyer will go in taking these steps depends not only on the question or the importance of the case involved, but also on the usage in his country. The systems of the "civil law countries" are in this respect as in most others in no way the same. I think it is possible to say—though this statement is based not on systematic research, but only on the writer's limited experience—that in lawyers' briefs resort to decisions is had the least in Latin-American, the most in German-speaking countries, but in either group far less than in Anglo-American countries.48

Finding the Statutory Provisions

The laws of almost all non-Anglo-American countries are codified.49

While in the United States the statutes are hardly studied in the law schools and generally treated with something akin to indifference,50 the codes form the backbone of legal education in non-Anglo-American

48. On the frequency of citation of decisions in the court decisions of various countries see note 75 infra.

49. In some countries, particularly Hungary and the Scandinavian countries, though most subjects are regulated by statutes, the law cannot be considered codified, if we use the term "code" as "the written expression in concise and logical form of the entire body of law." (11 C. J. 940).

50. Pound, Common Law and Legislation (1903) 21 Harv. L. Rev. 383 et seq.; Cardozo, The Paradoxes of Legal Science (1927) 9, 10. Allen, Law in the Making (1927) 103: "When the English judge has to apply a statute—and this nowadays is a great part of his task—he is, it would seem, in exactly the same position as the Continental judge who has to apply a code. But here too—so deeply rooted is our principle of judicial analogy—our judges are governed by precedents of interpretation. An English statute is not very old before it ceases to be a dry generalization and is seen through the medium of a number of concrete examples. The result is often startlingly different from what the enactment would seem to have intended."
countries. The lawyers there are supposed to be fully familiar with all the more important statutes, to know the numbers of their most important sections and to find the others with rapidity and ordinarily without reference to the alphabetical index. Such familiarity can be more easily attained because the statutory provisions are arranged in a more systematic order than is generally found in the "Revised," "Consolidated" or "Compiled Laws" or "Codes" or "General Statutes" of the various American states; because they do not contain that maze of detail which seems to be characteristic of American statutes; and because they are not written in a jargon understandable only to the initiated, but in relatively simple language, some of them—especially the French and Swiss Codes—even in a masterly literary style. On the other hand, American lawyers, when confronted with a question of foreign law, sometimes seem to be inclined to overestimate the ease with which the answer may be found in the foreign code. Whatever may be the advantages of codes, the answer to every legal problem is not stowed away in their cubbyholes. Codes are still a tool for lawyers.

A simple example will illustrate this: We want to find whether an oral guaranty of a merchant is valid under French or German law.

The answer as to the French law can be found only by a circuitous route. There is in the Code Civil a chapter entitled "On the Proof of Obligations and that of Payments" and therein a section "On Proof by Witnesses." Art. 1341 I of that section provides that no agreements involving more than 500 Francs can be proven unless in writing. But the second paragraph of Art. 1341 states that its first paragraph does not apply if something different is provided in the laws referring to commerce. Thus we examine the Code de Commerce. There we find under the title "Purchases and Sales" an article (109) stating that sales contracts can be proven, in addition to various other means, by witnesses, providing the court deems such evidence admissible. Nothing is said about guaranties. Nevertheless, this article is generally interpreted to apply to all commercial transactions. And thus the final answer to our question as to French law is: An oral guaranty is valid, but enforcible only if involving not more than 500 Francs, or—regardless of the amount—if given by a merchant in the course of his business.

The German codes have a different structure. In the section of the German Civil Code, dealing with guaranties, it is expressly provided that the promise to answer for the debt of another must be in writing

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51. LYON-CAEN & RENAULT, MANUEL DE DROIT COMMERCIAL (14th ed. 1924) § 385: "The Code of Commerce (art. 109) refers expressly to the most usual commercial contract, the sale: but it follows from the Civil Code that the same rule applies in a general manner in matters of commerce."

52. PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS, Vol. XI, CONTRATS CIVILS (1932) § 1528.
in order to be valid, and this is so regardless of the amount involved. As to the guaranty of a merchant no reference such as in Art. 1341 of the French Civil Code is made in the German Civil Code to the Code of Commerce. No chapter in the German Commercial Code deals with guaranties. But among the “General Provisions” of the book “Commercial Transactions” in the Code of Commerce we find a provision according to which the Civil Code provision dealing with the written form does not apply to a guaranty, provided it is given as a commercial transaction. Thus, under German law the oral guaranty of a merchant is valid.

The difficulties for the foreign lawyer of finding the law, the dangers of being misled are apparent. The official titles of the statute of frauds in the American states vary, and so do their classifications—substantive or procedural. The lawyer of an American state in which the statute is considered as procedural may well expect to find the corresponding provision in the French or German codes of procedure and assume, in case there is none, that no special form requirement exists as to guaranties. For in the “civil law” countries the line between substantive and procedural law is more clearly drawn than in the Anglo-American countries and almost all procedural provisions—may be found in the Codes of Procedure. But have we not just seen that the French consider the provision as to form requirements as of an evidentiary nature and yet have inserted them in their Civil Code? The answer is that, while it is true that to the French these rules are rules of evidence, evidence to them is—contrary to the American as well as to the German conception—a matter of substantive law.

53. Par. 766 German Civil Code.
54. Par. 350 German Commercial Code.
56. As to the nature of the Statute of Frauds see the searching study of Lorenzen, The Statute of Frauds and the Conflict of Laws (1923) 32 Yale L. J. 311 (Also very interesting from a comparative viewpoint).
57. For the Statute of Frauds as a rule of evidence see Iowa Code (1931) Title XXXI, General Provisions Relating to Civil Practice and Procedure, Chapter 494, Evidence, Sec. 11285, Statute of Frauds: “Except when otherwise specially provided, no evidence of the following enumerated contracts is competent, unless it be in writing . . . ”. For the same conception as to the English statute see Lord Blackburn's opinion in Maddison v. Alderson, 8 App. Cas. 467 (1883).
58. This difference in the qualification of the provisions concerning form requirements raises most intricate questions in the field of Conflict of Laws. See Lorenzen, supra (note 56). Should German or American courts apply the French evidentiary rule as to form requirements (Art. 1341) in a case where the French substantive law is applicable or should its application be denied because of its procedural character from the American and German viewpoints? Since Lorenzen's article was written the opinion of German writers and
Many more examples could be given to show how different the solutions in various Continental codes may be or—if the same—how different the ways in which they are arrived at. Without a good working knowledge of all the codes of a particular country, one cannot be sure whether all the pertinent statutory provisions have been considered, and the lawyer looking up foreign codes must be careful lest he be misled by a difference in the structure of his own and the foreign code.

Interpretation of Statutory Provisions. The Authority of Precedent and Legal Literature

But having found the pertinent statutory provisions we are faced with another more formidable difficulty. The words of a statute have a technical meaning which sometimes differs from that applied to the words in every day use. To know the statutes is not knowing their words, but their meaning and their effect. These words, now eighteen hundred years old, are as true today as ever. It is the application of the statute in practice that breathes life into its dead words; therefore, differences in the method of application will create differences in the law itself out of identical statutes. Spengler in his book "The Decline of the West," though not a lawyer, states it clearly thus: "One must know in what relation the text [of the statute] stands to legal thought and to decisions. It may be that in the conception of two different peoples one and the same book possesses the meaning of two fundamentally different works." Or as a French jurist puts it pointedly: "The similarity [of the codes of two countries] may be due to the purest coincidence—no more significant than the double meaning of a pun." courts has changed. German courts would now apply Art. 1341 if French substantive law governs (Kammergericht-Decision of Oct. 25, 1927 concerning the similar Par. 136 SovieT CIVIL CODE; NUSSBAUM, DEUTSCHES INTERNATIONALES PRIVATRECHT (1932) 90; LEWALD, DAS DEUTSCHE INTERNATIONALE PRIVATRECHT, 66, § 86a). The Restatement of the Conflict of Laws (1934) says in § 334, Comment b: "If the statute of frauds of the place of contracting is procedural only and that of the forum goes to substance only, an oral contract will be enforced though it does not conform to either statute." That result may be logical, but is hardly satisfactory.

59. See Ex Parte Grossman, 267 U. S. 87 (1925) Taft, C. J. writing: "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention—were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary."

60. Digesta 1. 3. 17 (Cesus): Scire leges non hoc est: verba earum tenere, sed vim ac potestatem.

61. 2 SPENGLER, DER UNTERTANG DES ABENDLANDES (1922), 84. Whether his interpretation of the effect of different "Kulturen" on the law is correct does not concern us here. See, concerning the small influence of ethnological factors on the law, Pound, Interpretations of Legal History (1923) 80 et seq.

All this applies with particular force to the statutes of non-Anglo-American countries. Their drafting technique differs from ours. They indulge in broader generalizations,63 give the judges more leeway to adapt the law to changes in legal thought and social conditions and do not bind the courts to precedents by the *stare decisis* rule.64

A striking example for such change in statutory interpretation due to a change in legal thought is the development of the German trademark law during the first two decades of this century. The Trademark Act of 1894 made the ownership of a trademark dependent upon registration. Unlike in the United States, use of the trademark was neither necessary nor did it create any right without registration. The act was interpreted strictly and in a most formalistic manner. In 1907 a change became noticeable and, without any change in the Trademark Act itself, the courts under the stimulus of the legal literature generally applied an interpretation which approximates the American rule, thus discarding the advantage of greater certainty under the former interpretation for more substantial justice in the particular case. A fundamental principle of statutory law was converted into its opposite without legislative action.65

63. See *Freund, Legislative Regulation* (1932) particularly p. 5, where he compares the number of sections on the law of torts: European Codes, French, 5; German, 31; Swiss, 21; Official and unofficial Anglo-American Codifications: Ga. Code 119; *Jenks' Digest of English Civil Law*, 315; *Restatement, Torts*, 503.

64. Gutteridge in an interesting article, *A Comparative View of the Interpretation of Statute Law* (1933) 8 Tulane L. Rev. 19, points out as what he believes to be the main difference in interpretative technique that “the continental judges are empowered to examine into the reports of parliamentary proceedings and other historical material for the purpose of ascertaining the intention of the legislator, whereas this right is almost wholly denied to the English speaking judges.”

65. Here are a few landmarks in this development:

(a) From the report of the Reichstag-Committee concerning the Trademark Act (p. 6): “He who does not register a valuable mark should bear the consequences of this omission, and one cannot call it inequitable, if, in case the mark should be registered for another party, the first user will not be allowed to continue its use.” And the Reichsgericht, the highest court: “The principles of good faith and those concerning fraud are not applicable against the formalistic principle of the Trademark Act.” (Decision of March 2, 1900, in Blatt fuer Patent-, Muster-und Markenwesen, 1900, p. 216).

(b) In 1907 the Reichsgericht: “The Trademark Act, although it codifies its subject matter completely, is, after all, a special statute and does not intend to exclude the principles of the Civil Code, which purport to give protection against unfair transactions in commerce.” (Decision of June 21, 1907, vol. 65, p. 240).

(c) In 1928 the Reichsgericht: “That it would mean an increase in the certainty of law, if the first user would have to recognize the effect of the registration of the mark against himself, may be admitted. This viewpoint, however, cannot be decisive as against the necessary consideration of fairness of competition. . . . For the same reason one must reject the consideration that the first user who has neglected to secure himself through registration is himself at fault if another gets ahead of him.” (Decision of April 30, 1928, vol. 120, p. 329).
Other striking examples of the adaptability of statutes to changes in the economic structure in a civil law country, and at the same time examples of the danger of applying such statutes without knowledge of the economical and legal background, are the development of the German corporation law from 1918 to the first important amendment thereafter in 1931, and the astonishing change of fundamental principles in contract law wrought without change in the statute law by the disastrous inflation of the German currency.

There is hardly any similar example of changing interpretations of statutes in the United States. True, the interpretation of the Uniform Negotiable Instrument Law is far from uniform. But, first of all, the divergence is mostly between and not within the various American jurisdictions. Furthermore, these differences are not caused by differences in the method of interpretation or in economic conditions, but because American judges, by training and tradition shy about the use of statutes, continue with or without a courtesy bow to the Act to base their decisions on precedent on the ground that the Act was only a re-statement of the then existing common law.

Thus, it will be seen that statutory law, contrary to frequent statements of American lawyers, is not necessarily rigid; it all depends on

66. In 1928 a German lawyer wrote rightly with respect to the Corporation Law, originally of 1861 with major amendments not later than 1884: “The façade has remained unchanged; but within many things have become different from what one should have expected in view of the original intent of the legislature.” (WERTHEIMER, ENTWICKLUNGS-TENDENZEN IM DEUTSCHEN PRIVATRECHTE (1928) 34 et seq.) The European literature on the subject of corporation law reform since 1918 is enormous. For a short report with stress on the value of comparative studies see Feller, The Movement for Corporate Reform: A Worldwide Phenomenon (1934) 20 A. B. A. J. 347.

67. In 1925 certain phases of the problem were settled by statutory enactment (See Moses, Final Solution of Germany’s Revaluation Problem (1931) 17 A. B. A. J. 57). But a large part of the problem was left for solution entirely to the courts, who worked out some kind of relief for creditors with Mark-claims, shrunk to nothing, by an unprecedented use of par. 242 Civil Code, which expresses the equitable doctrine of performance ex aequo et bono in law (“The debtor is obliged to perform as good faith with consideration of custom requires”).

68. See Beutel, Necessity of a New Technique of Interpreting the N. I. L. 6 Tulane Law Rev., 1 et seq.

69. See note 38 supra.

70. Beutel, supra note 68 at 5, 6: “After mentioning the Act, it turns immediately to the case and goes about the business of writing its opinion as if the Act had never existed.” And as to the general tendency, Kennedy, Garnishment of Intangible Debts in New York (1925) 35 Yale L. J. 689: “Even after they (reforms) are accomplished there is a tendency to look back with longing glances and in some instances to revive the abandoned principles by artificial and forced construction of statutory changes.” According to Herold: The French Language and the Louisiana Lawyer 5 Tulane L. Rev. 172, a tendency to disregard statutory law generally in favor of precedents is noticeable in American code-states, such as Louisiana, California, etc.

71. That the code system should be considered rigid by lawyers who work with judge-made law is surprising, as the “granite fixity” (1 WIGMORE, EVIDENCE (2d ed. 1923) p. 117)
the form in which it is drafted and the manner in which it is applied. In fact, in view of the methods of drafting and interpreting statutes in civil law countries one might well ask: Where is the anchor by which the law in these countries is kept stable; where the guideposts by which it becomes predictable, if statutes only state broad principles and judges are not bound by precedents?

There are several factors which narrow down the path of the “civil law” and make its road visible to the eye of the lawyer trained therein. And these factors must be considered by the American lawyer whenever questions of foreign law arise in his practice.

Some landmarks are given by the statutes themselves. They may be set at wider distances than precedents. But they have this advantage: they are not only far more easily ascertainable but also more rockbound than precedents under the modern interpretation of the stare decisis rule.

Furthermore, the absence of the stare decisis doctrine in the “civil law” does not give the judges in practice an unlimited license. In no country would it be considered proper, though it may not be illegal, for a lower court to deviate from the interpretation of the law, definitely established by a series of decisions of the higher court, at least not without new and weighty reasons. Thus, the longer a code or statute exists and the less change there is in the social and economic structure of the country, the more questions of interpretation will be settled. As Edouard Lambert, the eminent French jurist, puts it: “Judicial practice is fixed only by the repetition of judicial decisions after a period of groping, during which the legal writers can present their objections to the solution given by the judges on each point of law.”

Of course, just as the strictness of the stare decisis doctrine vacillates, so does the persuasive power of court decisions in civil law countries. In recent times a development can perhaps be discerned in some non-Anglo-American countries to consider and quote decisions more frequently than

of the precedents has long been the subject of complaints (see Spencer’s characterization of the law as “government of the living by the dead”) as well as the subject of praise (see the attack of “Junius” on Lord Mansfield—letter of November 14, 1770—ed. 1805, Vol. II, p. 41): “Even in matters of private property we see the same bias and inclination to depart from the decisions of your predecessors, which you certainly ought to receive as evidence of the common law. Instead of those certain positive rules, by which the judgment of a court of law should invariably be determined, you have fondly introduced your own unsettled notions of equity and substantial justice”).

Prof. Williston in his lecture, Written and Unwritten Law, published in Some Modern Tendencies in the Law (1929) seems to concede to judge-made law in principle greater elasticity: “In spite of the importance of the rule of stare decisis, it should be recognized that the common law cannot attain the elasticity which is its greatest claim to superiority over codes without on occasion departing from rules established by earlier precedents” (pp. 85, 86). But this statement is made after a series of examples showing to what injustice a strict interpretation of the stare decisis rule has sometimes led, examples which I hardly believe could be matched by examples from civil law court decisions.

72. L’ENSEIGNEMENT DU DROIT COMPARÉ, p. 67.
formerly. Eminent Anglo-American writers have commented on this practice as a rapprochement between the precedent and the code systems\(^\text{73}\) and in the German literature similar remarks may be found.\(^\text{74}\) But so far as the “civil law” systems are concerned, the change is not one of principle.\(^\text{76}\) It is the *stare decisis* rule which undergoes fundamental changes.\(^\text{76}\) And if the development continues and the two systems ever


74. Garland, *Probleme des englischen Rechtslebens* (1929) who even goes so far as to call the German system a “crypto-precedent system” (p. 28). The presiding judge of the highest German taxation court, Dorn, *Rechtssicherheit und Richterspruch im Steuerrecht* in *Juristische Wochenchrift* (1933) 294, particularly with regard to the German taxation laws and emergency legislation since 1931.

75. Pound, *loc. cit. supra* note 73: “But if the results are coming in their broader features to be much alike, the modes of thought are wholly unlike, and these modes of thought have decisive effect upon the administration of justice.”

A survey of the use of decisions in American states and in certain “civil law” countries with statistical tables has been made by Ireland in *The Use of Decisions by United States Students of Civil Law* (1933) 8 Tulane L. Rev. 358 et seq. It shows a considerably greater number of case citations in American decisions than in civil law countries, and I believe that the difference would be still far more pronounced if a comparison between decisions of lower courts were made. Moreover, Ireland describes excellently the structure of a civilian decision and points out what seems to me to be the most striking difference in the use of case citations regardless of their frequency in court decisions: “The way in which the civil law judge handles the citation he does use is significantly different from the common law usage. Instead of progressive reasoning step by step from case to case passed in review, limitations marked off and exceptions noted, the civilian judge, as we have seen for the juristconsult, states a series of propositions of general but successively narrowing content, devotes a little explanation to cases, quotes a code section or a doctrinal paragraph, refers to a few standard text books or commentaries in support and, if he refers to any case, embodies the citation physically in the text but grammatically wholly aloof from the context, as a book or page reference when something in agreement with what has just been stated may be found, without comment to show its bearing or to weigh the extent of its pertinency.” (p. 364) Similarly as to Swiss law in an excellent study Williams, *The Sources of Law in the Swiss Civil Code* (1923) 184.

Llewellyn in *Praejudizienrecht und Rechtsprechung in Amerika* (1933) prophesies that the precedent system in Germany is bound to expand in some form. I believe this will be so only if the intrinsic value of the German legal literature decreases, and in no event will decisions of the German courts be given the force of law unless present political thought in Germany finds such method more in harmony with the “authoritative principle,” now one of the guiding rules of German life. Prophecies are, of course, always dangerous. But Llewellyn shows in his book so much insight in the German law and method that his opinion as to the development of the German law must be considered very seriously, even if he tries to belittle its value by terming it “the kinky opinion of a lawyer trained in the precedent system” (a weak translation of his forceful German).

76. This statement hardly requires support through reference to cases or writers. It may suffice to quote two striking utterances from Cardozo: “An avalanche of decisions by tribunals great and small is producing a situation where citation of precedent is tending to
meet, the common law system will have made most of the concessions. 77

Finally, the influence of the legal literature must be mentioned. Although the role of the legal writers is becoming more and more important in the United States, 78 the legal literature on the Continent is by far a greater factor in the development of the law. This literature differs from the American with respect to technique as well as media of publication.

The generally adopted technique of legal writers in most non-Anglo-American countries is to develop a legal subject systematically and within this system to bring the arguments pro and contra the various points with reference to other writers and court decisions, but not to start with the court decisions, to quote them copiously and then to analyze them. 79 Whatever the value of their writings may be, they are quite prone to weigh critically the opinions given by the courts 80 as well as other writers on a particular subject, to advance new arguments and to discuss new and undecided questions of law. They are not restricted in their discussions by the facts of a particular case, but may deal with the legal question from all angles, bring all the arguments advanced to trial and arrive at opinions uninfluenced by the peculiarities of a special case. Thus, soon a trend of opinion on a legal question becomes visible and exercises its influence on the courts.

count for less, and appeal to an informing principle is tending to count for more." [GROWTH OF THE LAW (1924) 5] and "I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed." [Nature of Judicial Process (1921) 150]. American development does not seem to bear out the statement made by Edward Jenks that the doctrine of judicial precedent may be destined to acquire an important influence on the evolution of world law. [See The Japanese Commercial Code (1932) J. Comp. Lgs. And Int. Law, 3d series, Vol. XIV, Part 1, p. 64].

77. Beale, A TREATISE ON THE CONFLICT OF LAWS, (1916) 147: "We in the United States have almost reached the condition of affairs which prevails in France, Germany and Italy, where rules of law are accepted as fixed by precedent only where there is a great and practically unanimous body of decisions behind them."


79. Cf. Wigmore concerning American legal literature in 1 Wigmore, EVIDENCE (2d ed. 1923), 116: "This respect (of the American profession for the latest decisions) is, in turn, served by the authors. What ought to be a genuine juristic treatise is degraded to a mere collection of precedents." Of course, Wigmore himself and a number of other authors of textbooks are proof that there are at least some rays of very bright light in that dark picture.

80. Cf. Cardozo, The Comradeship of the Bar in LAW AND LITERATURE AND OTHER ESSAYS, 178: "The Mansfields of the present, if there are any, will know that they can get from students as good as they can give, at least if the goodness of the counsel can be measured by its vigor." But written if not oral criticism of court decisions in the United States is exceedingly mild in substance and in form compared with Continental criticisms. Moreover, the published criticisms of Continental writers, particularly the notes on the decisions, usually come from authorities and not from students and thus carry more weight through the prestige of the writers, if not through the intrinsic value of their arguments.
While in the United States writers as a rule have an opportunity to state their opinions on legal questions only in voluminous textbooks or in articles of law school periodicals, the editorial policies of which are all about alike, the forms in which legal writers of the larger Continental countries may express themselves and the media at their disposal are considerably more varied and adapted to the particular requirements of the class of readers whom the authors wish to reach. The result is that the average practitioner can follow the periodical literature more easily. And he can quickly obtain information in a systematic form on any subject of the law through monographs and commentaries, large or little; and this refers also to new important statutes, on which commentaries appear often immediately after their enactment and before the courts have had occasion to interpret them.

With this literature the lawyer must be familiar. For lawyers, when working on a case, first reach for the commentaries, not for the reports; and in briefs the literature is quoted at least as often as court decisions. When a lawyer in a "civil law" country has a legal problem which is not definitely settled by statute he may be satisfied to solve it without reference to decisions, but never without the literature.

Thus, the work of the legal writers not only greatly alleviates the labor of the courts, but the practitioner can with relatively little effort—much less effort than in the United States—ascertain the present status of and gauge the trend of opinion on a given point. Legal literature in the "civil law" countries acts as a stabilizer and a means of predicting the decision, a very useful and important function which does not seem to have been fully recognized and made use of in the United States.

I venture to say that through these factors—codifications in broad principles; independence of the courts from precedents, but traditional restraint in using this privilege; a critical literature which influences the court decisions not less than it is influenced by them—the "civil law" countries have not only simplified the work of the lawyers, but come closer than we to a solution of the eternal problem how to make the law predictable and at the same time adaptable to unforeseen contingencies.

81. It may be mentioned that France, Germany, England, Italy and Belgium each have one or several periodicals dedicated exclusively to matters of foreign law and conflict of law, while in the United States there is only one law review (Tulane) which regularly, but not exclusively publishes articles on comparative law.

82. See supra page 257.

83. Thus, the influence of the literature on bench and bar is much stronger than here, but so is the influence of the bench and bar on the literature. More practitioners contribute to the literature and some of the most important works are written by them. Not applicable to the Continental situation is what Prof. Williston says with regard to the American literature: "Even in the past, and most certainly to a greater degree in the future, teachers ... are likely to be the authors of most important law books that are not merely digests of past decisions" (The Work of Teachers of Law in Lectures, 109).

84. Cf. Pound, Interpretations of Legal History (1923); 1 Cardozo, The Para-
Sooner or later our law is bound to be codified. Precedents become unmanageable through their numbers. Only uniform statutory enactments in the States can lead us towards the desired uniformity of law in the Union. Smaller legal subjects have already been codified and the Restatement lays the groundwork for the codification of the entire field. If codification does not come our legal history would become anomalous. In all other countries the last phase of their legal system has always been codification. When the Romans approached the millennium of their legal history, Justinian’s code “restated” the law with legal force; history seems to be bound to repeat itself in our case. Those who today look askance at this development, thinking of the manner in which our present statutes work, may find solace in the code experience of other countries.


85. See Williston, Written and Unwritten Law (1931) 17 A. B. A. J., pp. 39, 41. For the English law Salmond, Jurisprudence, (7th ed.) 180. It might not be amiss to call attention to the famous Savigny-Thibaut controversy in 1814 in Germany, which parallels that between Carter and Field in New York. Savigny won the argument against a code for the German Reich, just as Carter did in New York, and for a long time no attempts at codification were made. But in the end the cause for codification was victorious. In 1848 a Uniform Negotiable Instrument Law was drafted and quickly adopted by the various German states. Various other codifications followed until in 1874 the work of codifying the “civil law” was started and completed in 1896.

86. Uniformity was one of the strongest incentives for the creation of the Code Napoleon in France and the Civil Code in Germany.

87. Maine in Ancient Law develops the thesis that the stages of legal growth in general are: legal fiction, equity, legislation. Salmond, Jurisprudence (7th ed.) p. 177: “As it (legislation) is the most powerful, so it is the latest of the instruments of legal growth.”

88. It is surprising to find in how many respects the development of the common law parallels that of the Roman law, contrary to the development of the systems of the civil law countries which started where the Roman law had finished. Some indications of this parallel development may be found supra note 43. Another particularly striking parallel is the assignment of choses in action: In Rome at first an assignment was impossible; then a makeshift was invented, the mandatum actionis in rem suam, which is exactly the English “power to sue coupled with an interest”; still later the assignee obtained the right to sue in his own name and right in the case of an assignment of a beneficiary interest in an estate; this right was slowly extended to other choses in action until even the equitable assignment without consideration was recognized around 500 A.D. Yet, it seems that in those days the old idea of the mandatum in rem suam was still kept alive in the fictitious form of the complaint, just as today in the forms of assignments “full power and authority to do and perform...” is given and granted “unto said attorney” (the assignee).

89. See Salmond, Jurisprudence (7th ed.) 176 ff. for a detailed enumeration of the advantages and disadvantages of codification. To the advantages enumerated by Salmond I would like to add that, as a system of codified law throws the burden of legislating more squarely on the legislature the standard of statutory drafting should improve under a code system. Salmond draws the balance thus: “The advantage of enacted law so greatly outweighs its defects that there can be no doubt as to the ultimate issue of its rivalry with the other forms of legal development and expression. The whole tendency in modern times is towards the process which, since the days of Bentham, has been known as codification.” (p. 180).
Of course, predictability together with elasticity can only be approached, but never attained under any system. In the civil law systems to obtain the best results a lawyer must be able to weigh the authority of the writers, the strength of their arguments and the significance of the decisions rendered by the courts on the same or similar questions. Therefore, the more we imbibe of the spirit in which the law is applied in a particular country, the nearer we shall come to the ideal. No rule, only experience, can help. Knowledge is a prerequisite, but the most essential is juridical tact.

Opinions and Testimony on Foreign Law—The Foreign Lawyer

Our previous discussions admit of several conclusions with respect to the technique of giving opinions or testimony on one's own law to foreign lawyers or before foreign courts.

Most important is that the expert know, in addition to his own law, at least the principles of the law in which the lawyer who consults him is trained. Only if the consulting lawyer himself has a fair knowledge of the expert's law, this requisite might possibly be waived. Otherwise there is danger of misunderstandings in every but the simplest matter.

Foreign law should be explained in the form of comparison with the law of the court in which the testimony is given. Not that it is always necessary to state in so many words that the foreign law is like or unlike. But the expert should always keep in mind the law of the court or counsel and call particular attention to those points in which the foreign law deviates.

Furthermore, the use of the simplest technical terms sets automatically in motion certain definite chains of thoughts. In some cases they may be the same with respect to both laws, in others they may differ. Then it is the expert's duty to point out such differences.

To mention a few simple examples: A judgment creates in the United States the judgment lien; that is not so in many other countries. The American lawyer, when reading about a judgment in an opinion on foreign law, may easily take it for granted that there is also a lien on real property, just as the foreign expert, who is not familiar with American law, takes it for granted that there is none. Particularly if the matter of the lien is only a side issue the misunderstanding may never be cleared up and may lead to serious mistakes.

In Germany and other countries a corporation acts through bodies similar to those of an American corporation, but their functions and powers are distributed differently. A German corporation is represented by its combined officers (“Vorstand”); and this is so by law,90 and not by delegation of power from the shareholders or directors. Thus, a third party dealing with a corporation need not inquire into the powers of the

90. Par. 231 GERMAN COMMERCIAL CODE.
officers. Although they are bound to keep within the limitations imposed upon them by charter or resolutions of the shareholders' meetings, such limitations are ineffective as to third parties. The body that corresponds to the American Board of Directors, the "Aufsichtsrat," is limited almost exclusively to a function of supervision and control. It will readily be seen how easily an American and German lawyer, discussing matters of corporate law, may talk around each other if neither knows the other's law. The danger of confusion is increased because of the fact that an officer of a German corporation is often called a "Direktor." Therefore, it would be quite natural for a German lawyer, not acquainted with American law, to call the "Vorstand," the combined officers of a corporation, the "Board of Directors." Of course, if the point discussed deals with the powers of representation, both errors may counterbalance each other. The German, referring to the "Vorstand" as the body with power to represent and terming it wrongly in English "Board of Directors," will actually convey to the American lawyer the proper meaning.

Another difficulty is the choice of authorities to be referred to in the opinion on the foreign law. It was shown above how different the degree of authority of decisions, textbooks and commentaries in the various countries is. An expert on foreign law must consider the viewpoint of the court on this matter. The foreign lawyer may in his own country never think of quoting a court decision on a certain point, but only refer to a commentary as authority. Or, if he refers to a decision, he may not be accustomed to state the facts of the precedent, as an American lawyer would possibly do in that case to show that it is "on all fours." The court will naturally apply its own measure in weighing the authority of the references adduced by the expert, and, not being bound by the expert's conclusions, may as a result not become convinced. It is often better, as expert before an American court, to cite in support of an opinion on foreign law the decision of a court than that of a text-writer, though his writings may enjoy higher authority in his own country than an occasional decision of a court. But if it is not possible to cite a decision on a point—and this may often happen because in many

91. Par 235 German Commercial Code.
92. See supra pp. 260-268.
93. See supra note 75.
94. See the amendment to section 391 New York Civil Practice Act, in force since Sept. 1, 1933: "... The law of such foreign country is to be determined by the court... In determining such law, neither the trial court nor any appellate court shall be limited to the evidence produced in the trial by the parties, but may consult any of the written authorities above named in this section, with the same force and effect as if the same had been admitted in evidence," a provision, recommended originally by the Committee on Practice and Procedure in the Supreme Court of the New York County Lawyers' Assn. [Year Book (1931) 330 et seq.] which, as pointed out in their report (p. 335 et seq.), restated the heretofore prevailing law.
countries only the decisions of the highest court, and of these only a relatively small selection, are published—it is often advisable to point out the degree of persuasive force the text-writer has in his own country.

Not infrequently the opinion of a foreign expert in affidavit form lacks persuasiveness because certain points of law are not discussed or no authority for the stated opinion is given. The reason is not necessarily negligence. Often the point is considered by the expert so elementary as to deserve no discussion or at least no reference to authorities in support thereof. But what may be a matter of course abroad, may not be so here. In fact, sometimes it is much more difficult to find the statute or decisions to prove such points than others less undisputed, because due to their general acceptance in the foreign country their source has fallen into oblivion.

Finally, to properly bring out the foreign law through questions and answers requires a particular technique which is strange to a foreign lawyer not acquainted with the characteristically Anglo-American method of examining witnesses. Cross-examination is used to test the witness’ credibility; it is sometimes misused to weaken the effect of the testimony under direct examination by asking questions, the answers to which call only for part explanations, and by insinuating seemingly common-sense conclusions from such answers which are contrary to the witness’ previous statements. If the issue is an involved point of foreign law it is not difficult to ask questions of a general nature which will becloud the real argument, unless the expert witness has sufficient experience to insist on full explanations and to qualify his answers so that they do real justice to the situation of the particular case. Otherwise a perfectly correct opinion may lose much of its force and even redirect examination may fail to clarify the matter and rehabilitate the expert. 95

In those cases where only one party has consulted an expert and where opposing counsel cross-examines without any knowledge of the foreign law, the expert must be particularly alert. Would it not be rather difficult for an American lawyer to explain the law concerning transfer of title to a layman? Would it not be still more difficult for him if he is limited in his explanations to answering the layman’s questions? This is precisely the situation of an expert when cross-examined by counsel unfamiliar with the foreign law, with the added difficulty that the cross-examiner is interested only in obtaining from the expert explanations favorable to his side.

95. Whether the method of examination and cross-examination is productive of the best results in the case of testimony on foreign law and whether in case there are experts who contradict each other it would not be preferable to allow them, after the indisputable points of foreign law have been ascertained in the usual manner, to argue just as counsel are allowed to argue on their own law, seems to be worth consideration with a view to a further amendment of section 391 N. Y. Civ. Prac. Act. (See note 94.)
Questioning a foreign lawyer so that the foreign law will be brought out correctly and clearly is not easy. It requires that the questioner have at least a superficial knowledge of the foreign law. In support I cannot do better than quote from the speech which Sir Frederick Pollock, that great authority on comparative law, made in 1930 at a meeting of the American Foreign Law Association:

"People when they are venturing on great problems for the first time always think them far simpler than they are. As a matter of fact you cannot begin by asking questions of a foreign lawyer in the right way until you already know something about the general ideas and methods of his system. It is quite probable that if you address him in the language of your own law he will not know what you are talking about. But if he is a very wise man it may occur to him that he does not know and there will have to be further explanations. But if he is an ordinary learned man he will just interpret your customs in the way of his own way of thinking, and he will give you an answer which probably will be quite misleading. And the more correct it is in the terms of his own system, the less likely it is to have any bearing on yours."

96. PROCEEDINGS, AMERICAN FOREIGN LAW ASSOCIATION No. 9, pp. 7-8.
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CONTRIBUTORS TO THIS ISSUE


JAMES A. DELEHANTY, LL.B., 1898, LL.M., 1899, New York Law School. Judge of the Court of General Sessions, New York County, 1916; Surrogate of New York County, 1935-

IGNATIUS M. WILKINSON, A.B., 1908, College of St. Francis Xavier, New York; LL.B., 1911, Fordham University, School of Law; A.M., 1913, LL.D., 1924, Fordham University. Lecturer in Law, 1912-1916, Associate Professor of Law, 1916-1919, Professor of Law, 1919 to date, Fordham University, School of Law. Dean, 1923 to date, Fordham University, School of Law.


JOHN F. X. FINN, A.B., 1920, College of the City of New York; LL.B., 1923, Fordham University, School of Law. Member of the New York and Federal Bars. Associate Professor of Law, Fordham University, School of Law. Co-author CARMODY'S NEW YORK PRACTICE, COMPACT EDITION, 1935; KEENER'S CASES ON CONTRACTS (3d ed. 1934); COMPACT MANUAL OF NEW YORK CIVIL PRACTICE STATUTES (1933). Author of The Forging of Good Unilaterals Out of Bad Bilaterals (1933) 3 Brooklyn L. Rev. 6, and other articles.

FRITZ MOSES, 1920, University of Berlin; Dr. juris, 1922, University of Halle-Wittenberg. Judge at the Landgericht Berlin, 1923. Author of GERMAN BUSINESS LAW: Final Solution of Germany's Revaluation Problem (1931) 17 A. B. A. J. 57; Protection of Trade with Soviet Russia by Treaty (1934) 20 A. B. A. J. 207, and other articles.