

tract and equity courses—and quickly. The graduate then out on his own would at least have a running start toward mastery of his client's problems in the property area. The further advantage of this approach lies in the cross fertilization of several areas of law in the process of studying a common business practice. For full effectiveness in a reasonably limited time such a course should be located in the latter part of the curriculum. This does not propose a trade school approach or a disregard of theoretical fundamentals, but it does propose a purposeful attention to the practical application and organization of the training and *knowledge* made available and acquired in the law school. In addition this pattern can provide ample opportunity to consider the adequacy of contemporary practices.

The editors in this second edition make occasional reference to inadequacies of the present procedures and current attempts to solve the problems. As valuable as any are the references to curative acts, title standards, and marketable title acts (chapter 9 of part 4). Additional suggestions by the editors of possible solutions, tried and untried, might well result in more ultimate progress in property law.

And now for some odds and ends: The chapter on Nuisance is expanded—this seems to meet a need if the topic is avoided in Torts or Equity; depending on other courses in the curriculum its omission could be perfectly feasible. The loss of *Pickering v. Moore*⁴ and its confusion of manure will be noticed. It was usually interesting to observe whether students could handle the case in a lawyer-like manner. Burial of *Jasperson v. Scharnikow*⁵ in a footnote gains this reviewer's complete approval because the appealing quality of the judge's naïve statement that the idea of "acquiring title by larceny does not go in this country" has caused too much misunderstanding already. That some jurisdictions are still burdened with the Rule in Shelley's Case could stand a bit of emphasis.

Belief that the different approach suggested above could be more profitable does not imply a belief of lack of quality in this book; on the contrary, this reviewer believes this to be a *good* book, following predecessors of high quality.

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Classical Roman Law. By Fritz Schulz. Oxford: The Clarendon Press, 1951. Pp. xii, 650. \$8.50.

The "classical" period, as Romanists call it, of Roman jurisprudence was the time of the great lawyers who produced that unique treasure of legal literature on which, in the sixth century A.D., Justinian's compilers drew for the purpose of putting together the Digest, i.e., the central part of the great codification known as the *Corpus Iuris Civilis*. Chronologically, it coincided with the principate or

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⁴ 67 N.H. 533, 32 Atl. 328 (1893).

⁵ 150 Fed. 571 (1907).

earlier imperial period (first through third centuries A.D.). The outlook and method of the classical lawyers were practical. Both in their work as advisers to parties, officials and judges and in their literary productions, they analyzed fact situations in the light of the forms of action which characterized the modes of procedure which they had inherited from the republican era and which still prevailed in the city of Rome. Their substantive law was a combination of a set of traditional institutions and principles, supplemented and partly modified by statutory law, and of remedies introduced by the jurisdictional magistrates, chiefly by the *praetor*, by virtue of their *imperium*. This dualism is somewhat comparable to that of English law and equity. In accordance with their background, the classical lawyers were interested chiefly in civil procedure and private law and concentrated upon the law of the city. Neither the legal systems of other nations living in the Empire nor Roman law as applied in the provinces (which differed in many respects from that of the city) were heeded by them.

The classical jurists did not create the Roman law. Although the "Edict," a comprehensive official statement of the actions and other remedies which the *praetor* was prepared to grant, did not receive its final shape until the time of Hadrian (A.D. 117-138), the formative period of Roman law lay almost entirely before the beginning of its classical era. Nor is the legal system emerging from Justinian's codification identical with that of the classical epoch. In spite of the classicist tendencies of the Byzantine emperor and his compilers, the tremendous changes which occurred during the intervening three centuries as to political, social, economic, religious and intellectual conditions, as well as the introduction of new modes of judicial procedure, had resulted in altering many maxims and—more important—the spirit of the law. Nevertheless, it was the classical lawyers whose practical and literary activities gave the Roman legal system those qualities of clarity, cohesion, richness and flexibility which both secured and justified its lasting importance, even though it was received by medieval Europe only through the medium of Justinian's restatement.

To present Roman classical law as it was at the time of those classical lawyers—that is to say, as a system of fully developed doctrines not yet corrupted by the decadence of subsequent times—was the task Professor Robert Schulz (now of the University of Oxford) set for himself.

After a brief introduction explaining the scope of the work and the method employed, the book begins with a survey of the types of actions and other procedural remedies through which this law was realized. In view of the strictly actional character of classical Roman law, the author's decision to include this material and to have it precede rather than follow the description of the substantive law can only meet with approval. The substantive law is dealt with under four main headings. The succession of three of them, namely, Part II: persons and family, Part IV: property, and Part V: obligations, corresponds roughly to the system used by Gaius, although much that was omitted by Gaius is of course included by Schulz, and his arrangement of matter within each of

the main divisions is by no means identical with that of the Roman writer. The most important deviation from the Gaian scheme is the placement of the law of succession and wills in Part III, in other words, between family and property. This may be defensible in view of the intimate link which historically tied the law of both testate and intestate succession to the structure of the Roman family. In classical times, however, this close connection had long ceased to be true, and the author, in accordance with the classical approach, conceives the heir merely as a personal successor to the decedent. One might therefore wonder if it would not have been more consistent to follow Gaius in treating the law of succession as an annex to the law of property.

The presentation is brief, restricted to essentials, and straightforward, without, as a whole, indulging in polemics or discussion of minute details which would not interest the nonspecialist. Just the same, the reader receives an abundance of information. A particularly valuable feature of the book is an insistence on correct classical terminology. Clear-cut terms, technical and yet concrete and close to the facts of life, were a characteristic of classical Roman jurisprudence. The author's conscious effort to point out these expressions has contributed much to his success in drawing a lucid picture of the logical structure of the Roman legal system. The whole is written in a simple but pleasant and extremely readable style and is admirable for its clarity of thought and expression. Further study is stimulated by a judicious selection, attached to each subdivision of the text, of sources and literature. The bibliography is not complete but sufficient to enable the student to get fully acquainted with current opinions and controversies on every problem.

It need not be pointed out that many of the views expressed by Professor Schulz are controversial, and it is to be expected that some of his theories will be challenged. We actually possess only a small fraction of what was written on law in classical times, and our sources are not pure. They were tampered with in post-classical times, as well as by Justinian's compilers. Therefore what was law in the classical era cannot be simply derived from the sources as they stand. It has to be reconstructed, and reconstruction depends on what degree of reliability as testimonies of classical institutions and modes of thinking we are willing to accord the sources. Schulz adheres to the more "radical" school of thought in admitting the presence of spurious elements in extant excerpts from classical literature, an inclination not fully shared by many scholars.

From this point of view, however, no critical review of the book can and will be undertaken here. Rather, the reviewer will confine himself to pointing out some limitations which he feels should be realized in order to gain a proper perspective of Professor Schulz's book as a whole.

The book describes and explains a historical legal system, but, strictly speaking, it is not a history book. It presupposes the reader's familiarity with the facts of general and constitutional history, as well as with the history of sources and

civil procedure, which form the background of the institutions discussed.¹ Nor are these institutions themselves shown in their historical growth. Almost without exception, they are given in the form in which they appeared in classical times, without any discussion as to how they came to appear so. Short hints at differences between the classical law and the law of Justinian are frequent, but the historical processes by which these changes came about are not explained.

For the most part, this characteristic of the book gives no cause for criticism, because the proper understanding of the classical law is not impeded by it. Occasionally, however, the author's explanations of classical phenomena are unsatisfactory, in the reviewer's opinion, on account of insufficient attention paid to the historical situations that produced them.

Thus, Schulz explains the strict formalism for which the Roman law of wills was notorious on the theory that the *pontifices*,² fearing the practical difficulties arising from an ill-drafted will, wished to compel testators to seek legal advice; soldiers were, in classical times, relieved of some of the required formalities, but this is credited to the circumstance that expert advice was often unavailable to them (p. 249). This utilitarian interpretation conflicts with the fact that the rigidity of the law of wills was not confined to rules pertaining to the outward form of wills or to the wording of certain testamentary provisions. For instance, the rule that a valid will had to begin with the designation of an heir or heirs³ ties in with the rule that the effectiveness of the whole will—that is to say, of legacies and other provisions—depended on the acceptance of the succession by the designated heir. The latter principle is certainly not covered by Schulz's suggestion. Another example, likewise from the law of wills, is the reason given by the author for the rule which forbade the designation of a secondary heir to replace the first-called after his death or after a term for years (*semel heres semper heres*). This, it is said (p. 262), reflects the liberalism of the Roman jurists

¹ A detailed account of the historical growth of Roman constitutional and legal institutions to the time of Justinian may be found in Jolowicz, *Historical Introduction to the Study of Roman Law*, the third edition of which is about to appear (Cambridge University Press). A shorter survey, but including medieval and modern developments, is found in the reviewer's *Roman Law, An Historical Introduction* (1951). The forms of Roman litigation are the subject of Wenger, *Institutes of the Roman Law of Civil Procedure* (1940), and the history of the sources is that of Schulz, *History of Roman Legal Science* (1946). For a discussion of some underlying attitudes and general aims of the classical jurists, see Schulz, *Principles of Roman Law* (1936).

² They were priests who in early republican times monopolized the giving of legal advice and were thereby in a position to control the development of the *ius civile*.

³ The *heres* was, to use the expression adopted by Romanist doctrine, a "universal successor" who entered into the whole legal position of the decedent, limited only insofar as two or more *heredes* had to share the succession. In contradistinction, a legatee was a person who, under the terms of a will, received a specific piece of property out of the estate or was entitled to raise a personal claim against the *heres*. Legacies could be ordered only after the designation of a *heres* or *heredes*; legacies preceding the *institutio heredis* were ignored, and a will lacking the designation of an heir was totally void.

which made them abhor the idea of depriving the *heres* of his freedom of disposal; the admission, from the time of Augustus, of the *fideicommissum hereditatis*, which practically obliterated the rule, is credited to the realization that "in this respect Roman liberalism was too radical." If this was so, however, it may be asked why the effect was not achieved directly by a mere relaxation of the rigid rule; for throughout the classical period the *fideicommissum* remained an alien element, as far as the Roman law of wills was concerned. It might, on the one hand, be ordered outside of the will proper, while, on the other, it could not be claimed, like the succession itself, by an ordinary action but only through a special procedure. The question asked is the more legitimate, since military wills were indeed not subject to the maxim: *semel heres semper heres*.

It must, therefore, be true, in spite of Schulz's denial, that the origin of the rules observed, which go back to old times, should be sought in prehistoric conditions when the principles of succession were still determined entirely by those governing the structure of the Roman family. Neither the ancient *pontifices*, with whom these rules originated, nor the republican or classical lawyers, who clung to them, were motivated by reasons of practical expediency or individualistic liberalism. For the purposes of this review, we may content ourselves with this negative statement.

These two instances may suffice to illustrate the critical observation made above. The argument could easily be enlarged by further examples. Speaking in general terms, it seems to the reviewer that Professor Schulz's approach keeps hidden from the reader an important aspect of classical Roman jurisprudence. It is certainly correct that the Roman jurists looked upon life with the eyes of an economic individualist. It is also true that, as a whole, they possessed a remarkable genius for producing solutions that were desirable from the standpoint of the type of society in which and for which they worked, while yet occasionally displaying a stubborn traditionalism regardless of unfair decisions resulting from it. Nevertheless, the author oversimplifies the historical situation by crediting, in exaggerated fashion, the bulk of classical institutions to the humanism, liberalism and sense for practical expediency of the classical lawyers and their republican predecessors, while at the same time chiding these jurists for their doctrinaire conservatism. Such attitudes did play a part. But the Romans were not pragmatists who felt free simply to put into effect policies conceived in accordance with their general social philosophy, only now and then hampered by an inexplicable inhibition about discarding inherited but obsolete concepts. They looked upon their law as the old way of life of the Roman people, embodied in original institutions, in statutes and in inherited forms of action and transaction. As long as the *ius honorarium* was still growing, the *praetor* might add to this body of law, even to the point of crowding out, for all practical purposes, the traditional *ius civile*. The *praetor* was aided in this activity by the jurists, to be sure. But the main task of the jurists was to apply the law as they found it in traditional institutions and recognized forms of action and transaction. This

task offered them great opportunities to display their practical ingenuity, which they often exercised. But it often set limits for them which they could not exceed.

This relationship to the materials with which they worked is the clue to both the progressiveness and the conservatism of the classical lawyers. Much of it was deeply rooted in the Roman past. In view of the conjectural nature which (because of the almost complete absence of direct sources) attaches to every statement concerning early Roman legal history, Professor Schulz's reluctance to delve into prehistoric law is understandable. But this situation should not have induced him simply to deny those roots.

The reviewer has dwelt on these matters at some length because they have a bearing on the practical use that can be made of Schulz's book in the teaching of Roman law. The method of the classical jurists, their skill in discovering the hidden implications of time-honored institutions and a fixed set of forms of action and transaction, is, more than anything else, what gives the Roman law its lasting didactic value. The somewhat unhistoric character of Professor Schulz's conception of the classical law has caused parts of his book to fall short of the goal of providing a guide to students of the Roman method. For the same reason certain omissions regarding the classical law itself are regrettable. It would have been desirable, for instance, to have a discussion of the elaborate and highly interesting case law of the Romans concerning negligence in the confines of the *actio legis Aquiliae* (a tort action lying for the killing or maiming of slaves and animals), or of a group of actions (the so-called *actiones adiecticiae qualitatis*) created by the *praetor* in order to overcome the harmful effects of the never-discarded principle of the *ius civile* denying the possibility of direct agency.

It was the reviewer's duty to point out what he felt was a certain one-sidedness in the author's approach. All the more does he wish to emphasize the general usefulness of Professor Schulz's work both as a basis for further research and as a text for classroom use. The value of the book lies in its perspicuous presentation of the positive institutions of classical Roman law as a system. In this it often excels. For special praise, the reviewer would like to single out the admirable chapter on real securities. He would also like to call attention to the splendid analysis of the social and economic background of the classical law of hire (p. 544 f.). Frequent comparison of Roman and English law will prove helpful and interesting to readers trained in common law.

For the specialist the book is a comprehensive statement of the views formed in nearly a half-century of fruitful research by one of the most distinguished representatives of his field. For the nonspecialist it is a clear and readable introduction to the institutions of Roman law at the time of its highest perfection.

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