

MELIUS EST PETERE FONTES QUAM SECTARI RIVULOS

This maxim means that it is better to begin at the fountain than to wander down the rivulets. It was approved by Coke and is cited by Missouri authors. It is worthy of consideration in all relations and especially in construction. To illustrate our views of its universal importance we call attention to the Code of Civil procedure, a statute, that came in 1848 and of course has been widely construed.

For a starting point the first two paragraphs of the preface of Pomeroy's *Code Remedies* are selected. Here more than a page is given to the statement that the heart and vitals of the Code have been taken from the Roman law and that beyond this the differences of legislation are in matters of regulation only. And the author also states, the generalities, prolixities and absurdities of the common law procedure have caused a general revolt, and return to the old law. The claim of the author that England has borrowed anything from the American antinomies is not justified, for here let us ask what comes from England that can be likened to *Gulling v. Bank*, 28 Nev. 257-280; or L. R. A. 1916 E., 298-326, where Federal, New York, Illinois, and other cases are reviewed. To see the differences look at *Lester v. Foxcroft*, White and Tudors *Leading Equity Cases* on the one hand and *Kirk v. Hamilton*, 102 U. S. 68-79, on the other hand. Where in England has it been written that a "cause" arises from the evidence and not from the pleading? (See *Gulling*, above cited, and cases cited with it in Hughes and Stafford's *Law Restated*). Said author's claim that American and English law are alike is a serious mistake, for the fact is they are widely apart. England does go to the Roman fountains for direction while in America the "letter of the act" is sought in opposition to well stated principles of construction. In America the legislature is the fountain, while in England the law of Rome, referred to by Professor Pomeroy, is sought. Of course, when we go to the Roman law we go to the maxims, and these lead. It was these that Hamilton commended in the *Federalist*; and so did Professor Pomeroy in his *Municipal Law* and his *Equity*, but did he in his *Code Remedies*? Did he cite one? On the contrary, did he not send us to the statute? Did he not speak for the Roman, and then send us to the statutes? Was this not inconsistent? And do not his editors in their prefaces to this volume charge him with incompetency? Do they not sustain what is observed of him under the title "Pomeroy" in the *Law Re-*

stated? In the same work criticism is made on Chitty and Stephen, and we submit that it is questionable whether Pomeroy understood the subject any better than did the followers of Tidd.

To come to a point, let us say that Pomeroy named the Roman as a fountain and plainly stated that the Code was taken from it by a reaffirmation of its organic principles through legislation. This is most important for it fixes with certainty the origin of the Code. It is a reaffirmation of Roman principles. And so it appears that the fountain of procedure is Roman. And this brings us to the rule that when a law is borrowed from another country or system the construction of this law by that country or system is also borrowed. There being a court, the Roman law required a record and that the "cause" be written upon this record, to satisfy the requirements of the state, *Res Adjudicata*, and according to the maxim; (*De non apparentibus et non existentibus eadem est ratio*), what is not alleged cannot be considered or decided. This maxim carries with it *Frustra probatur quod probatum non relevat*, (It is vain to prove what is not alleged); also this one, *Verba fortius accipiuntur contra proferentem*, (Every presumption is against a pleader). And so it is we can pick from Pomeroy's preface the fact that these cardinal rules are from the Roman. Let us add that these maxims are interactions; one calls for the other; and further they have interactions with the rules of *Res Adjudicata*, estoppel, and the rule of certainty, (See the title "certainty" in Hughes *Gr. & Rud.*, Sec. 240 Story's *Equity*). Through the above maxims and subjects the nerve center of procedure is touched and involved, and all of this is Roman. Here is a fountain which we must seek instead of "wandering down," and this is the command of the maxim *Melius est petore*. We wonder why Professor Pomeroy did not have some use for those maxims and at least quote them at the head of his sections 506-608. See what a difference it would have made with these sections. Certainly it would have relieved them of the charge that they are jejune.

It should have been plainly stated in 1776 that constitutional procedure was founded on the maxims and that they must be cited, at least the few organic, fundamental ones, such as we have above cited. Look into the Federalist, the letters of Hamilton (1778), and see what he said for the maxims, and that the division of state power is a maxim. Mansfield had given *Bristow v. Wright*, 2 Doug. 665, which is reprinted in cases like *Bartlett v. Crozier*, 17 Johns. 439 (Kent); *Slacum v. Pomeroy*, 6 Cranch, 221, (Marshall); Story had given his Secs. 10, 25-28, *Equity Pleading*; Smith's *Leading Cases*, Broom's *Maxims* and Greenleaf's *Evidence* all had been published, reaffirming

the Roman. The above *Maxims*, and the Code came in 1848, also reaffirming the above maxims, laying it down that there must be a "cause of action" tested by the general demurrer which is never waived and also emphasizing that fundamental defects cannot be aided, *Verba fortius*, and a judgment must be within the facts stated, where the pleadings end the judgment ends, (*Vicksburg v. Henson*, 231 U. S. 259; *Walrath v. Ins. Co.*, 216 N. Y. 220, pleadings are jurisdictional). Look at these matters and see history and a fountain. Of what use were any of these matters to the author; he never cited one of them, not one of the organic maxims or great Code cases before him. He did cite Story in a local way. Instead of the Roman maxims, he chose for authority chiefly New York, Abbott, Barber, Duer, Howard, Lansing reports, the statutes and cases that look to statutes, local and fiat law. Now see what we have come to; look at *Gulling v. Bank*, above cited, L. R. A. 1916 E., 298-326; can learned courts and annotators tell what the law of the states is? Look at the pages we cite and see what has happened to the Federal, New York, Illinois, Missouri, California and other cases. See what soon followed, *Kirk v. Hamilton*, 102 U. S. 68-79, which denied all the learning of *Lester v. Foxcroft*, in White and Tudor's *Leading Equity Cases*, which the professor never cites. And what was more worthy? In 1878 came Thompson's *Trials* which flatly denies all of the above maxims, Mansfield's cases and their cognates. *Kirk v. Hamilton* denied the pleadings, and the principles of *Lester v. Foxcroft*, that pleadings are to limit issues and to narrow proofs. (*Bliss Code Pleading*, Secs. 138, 141). Generally American courts have denied the latter proposition and they have rapidly drifted into the saturnalia of judicial anarchy. To prove this let us take the *Walrath case*, above cited, and then prove its accuracy by Pomeroy and his followers; see if cases like *Gulling* and its cognates are not generally supposed to be in accord with Pomeroy.

American literature and procedure have departed from the maxims we have cited and from cases reaffirming them and have become a mass of conflicting statutes and cases. It is conceded that the law is Roman but the few maxims that underlie and bottom the law of procedure are never set out, translated and explained and the result is what has come to be called the "legal jungle," wherein variances and departures are recognized and tolerated, as are also such discussions as Secs. 506-608, Pomeroy's *Procedure*. Vainly we turn for any principle of the Roman Law in Pomeroy's work, other than *Actio personalis moritur cum persona*, he cited no maxims as he did in his *Equity* and his *Municipal Law* where he commended

them. No theory or system of procedure has a greater principle and one more worthy of respect than the maxims above set out, nor any cases more worthy of respect than those reaffirming these maxims. We have mentioned some of these cases, now why did not Professor Pomeroy cite some of these fundamental matters? Why have he and his followers omitted these and showed such a preference for statutes and cases, local and fiat law? It is manifest that they believed local and fiat law to be the fountain of procedure, and their view has been followed to the exclusion of the maxims and their supporting cases which are the fountain. Have not statutes and cases been followed until the law has been lost in bewilderment and mire? Is not the call for revolution and a restatement of the law timely? We are compelled to look either to the one fountain or the other.

There are two fountains of law, the Roman and the Feudal, *i. e.* the maxims or the cases. Bacon and his school follow one and Coke represented the other. The former believed that there was high and immutable law and the latter believed that the law was local and fiat, and that "Parliament was omnipotent"; Blackstone believed the latter proposition. To this day we allow authors to ride astraddle of the above paradoxes, write a "deadly parallel", and certainly Professor Pomeroy did. A thread of the Roman, the higher law, is perceivable in *Clark v. Dillon*, (1884), 97 N. Y. 370, *Andrews v. Lynch*, (1858), 27 Mo. 167, 169, 170, which cited Virginia cases of 1796, 1797, denying that "Parliament is omnipotent." Illinois has some very excellent cases for him who reads principles in cases, *C. & A. R. R. v. Clausen*, 173 Ill. 100, 105 S. P. as *Andrews*. Very plainly this law appears in *Oakley v. Aspinwall*, (1850), 3 N. Y. 547, 554-556 (*Nemo debet esse iudex*) which was instructively set out in *State ex rel Henson v. Sheppard*, 192 Mo. 497-517, by Judge Lamm. This principle governed in *Lester v. Foxcroft*, White and Tutor's *Leading Equity Cases* (L. C. 341, 3 *Gr. & Rud.*), reaffirmed in 49 L. R. A. (N. S.), 112-122, with notes citing *Lester* but overlooking *Kirk vs. Hamilton*, (1880), which denies the *Lester* case. Look at *Andrews* and *Oakley* cases and get a glimpse of the Prescriptive Constitution, the fundamental law of which Professor Pomeroy constantly made mention but never cited *In praesentia majoris cessat potentia minoris* (In the presence of the major power of the minor ceases). Look at the cases we cite and see if Blackstone and Professor Pomeroy and their followers did not omit something. The above cases were on fundamentals and can we learn one of those from the instruction they gave us? How could one not conversant with the prescriptive constitution ever write for the Bacon school? See how Hamilton spoke for

the maxims in the *Federalist*; see how Story and Kent viewed them; how Professor Pomeroy praised them but omitted everyone even the greatest of administrative law, in his Code. How can we believe that he understood them? Could he understand them and still be waiting for cases?

Professor Pomeroy proclaims that he is Roman and assumes that he knows what the old law was; if so then he knew that the maxims above cited are Roman and that they are fundamental in every system that can serve the state, *Res Adjudicata*. Systems that serve *Res Adjudicata* and its maxims are the same in substance, and are not the maxims we cite, principles of *Res Adjudicata* which underlie all law? (*U. S. v. Oppenheimer*, 242 U. S. 85, 88, Secs. 35-37, 3 Gr. Ev.). The maxims above cited are a part of the common law of Mansfield, of Kent and of Story and can legislatures abolish this law as is assumed? It has not been done and it cannot be done. If it has been swept away then what new thing has come? Let this new thing be pointed out. If these maxims have been abolished then let it be so stated so we can understand the instructor. We think he is one that must see the word Code in a case before he will classify it as Code. Let us see: In Sec. 533 of his *Procedure*, Pomeroy cites *Antisdel v. R. R.* 27 Wis. 145, which he can see arose in a Code state, and is therefore a Code case; and he approves this case although it reaffirms *Verba fortuis*; it involved horses, and is exactly like *Dovaston v. Payne*. (Smith's *Lead. Cas.* L. C. 217, 3 Gr. & Rud.), but the latter is a cow case. In his Sec. 546, he denounces *Verba fortuis* and against it quotes the Code which he thinks sweeps away the views of Judge Napton in the *Andrews case*, above cited. The *Dovaston* and *Antisdel* cases are exactly alike and he approves one and denounces the other in the actions cited. Here is an illustration of the "deadly parallel." Along with the contradictions we point out we are giving study to Professor Thompson's *Cases on Equity Pleading and Practice* (Mich. Univ. 1903), 118-123, which reprints *Dovaston* (a law case), to illustrate *Verba fortuis* in equity. Other Professors instruct us of *Dovaston* and tell us that it is obsolete. In New York it is reaffirmed in *Clark v. Dillon* above cited. In England it is adhered to. *Hyams v. Stuart King*, (1908) 2 K. B. 696, 717-724, 6 Brit. Rul. Cases 983-989 (a judgment must rest on a pleading); (this cannot be supplied by liberal construction and presumptions), *Gilman v. R. R.*, 268 Ill. 305, with dissenting opinion.

Whoever will study the necessities of *Res Adjudicata* will see that *Verba fortius* is a principle and while expressed in *Dovaston* it is not dependent on cases or any authority; it is founded in sense and rea-

son and cannot be swept away as supposed by Professor Pomeroy, nor lost in doubt as supposed by Professor Thompson. Had they gone to the fountain *Res Adjudicata*, they could have been more positive and instructive. When *Res Adjudicata* is taught as the "king pin" of procedure then the fountain will appear and cases like *Richards v. R. R.* 124 Ill., 516, and the *Walrath case* can be seen and understood from principle, that they are alike. Compare these with the cases cited in L. R. A. 1916 E. 298-326. Why certainty is essential will appear from these cases. *Melius est petere fontes quam sectari rivulos.*

The claims that old systems are swept away and that England has adopted the American Code is a mistake. The old law is still with us and England has not been attracted to "American Law." England ceased to cite American cases in 1874, at the time that the Tweed litigation had such wide attention in the public press. (See Bryce's *American Commonwealth*). On the other hand English courts respect and follow the maxims we have cited.

No rounded work on procedure, the Code, can omit the doctrine of "Aider" of which the Feudal follower now gives us a multitude of kinds (See 102 U. S. 79). The principle of Aider in the Roman law is important and so is *Consensus tollit errorem*. The Code coming from the Roman has to do with this maxim. Now what have Code authors done for it? Mention of the principle can be made in a few lines and it includes discussions in the Feudal law that will fill rows of Digests, Cycs, and notes to reports and of the books that commercialism has given the profession. As there are innumerable rivulets from *Res Adjudicata*, so there are from *Consensus*. A view from the fountain gives a grasp that cannot be gained by wandering in the jungle and gathering details. It is from the Roman, its *Res Adjudicata*, and its *Consensus* as fountains that begin and flow on down innumerable rivulets, rules of pleading, evidence, practice and of jurisdiction. The maxims of procedure are its fountains.

Res Adjudicata and its necessities bring with them the state's attitude in procedure, the record of substance, the mandatory record, and the record of formal matter, called the statutory record, which are so important and so little understood. These matters we are now told have been lost and left behind. This information is shocking and plainly informs us that we must restate our law. (Elihu Root, 41 Am. Bar Assn. Report, 364, 365). We most readily concede that Senator Root's charge is fully justified and it is in order to ask who is to blame for this most serious neglect of the great conserving principle, the fountain from which so much issues and flows? To this

leading principle, Story and Greenleaf give attention, but do the Feudal authors and Pomeroy? *Res Adjudicata* is an idea flowing from the maxim *Interest reipublicae ut sit finis litium*, a Roman maxim which has many cognates; we have mentioned some of them. The Feudal lawyer did not develop this subject and can we say that he understood it? What has he done for the record upon which it depends? What has been his treatment of these vital matters, these nerve centers of procedure? Now when one tells us that something new has come and is from the Roman, do we not look for and expect something else than a Feudal treatment of the greatest matters of the Roman law, its greatest maxims of administrative law? Must not these be mentioned and explained? Must we not look away from the Feudal, its statutes and cases and look for principles? The Roman law is built out of principles and the Feudal out of local and fiat statutes and cases. Professor Pomeroy calls for more statutes and cases, and Senator Root says that these must be swept away. And so the student finds himself without rudder, swirling between Scylla and Charybdis. Addled by advertisements of audacity and mendacity he may find the orations of a few leading lawyers—whose voices are like “one crying in the wilderness”—in their addresses before the bar associations detailing the condition of the laggard outcast profession that its “ignorance is appalling,” that a cataclysm is near, and that the “crisis of law and the incompetency of the legal profession,” is here. (Frederick R. Coudert in the 36 Am. Bar. Assn. Report, 676, 688, A. D. 1911).

The pageant of 2,000 years ago was observed by Caesar and Cicero who saw the Constitution passing and the Republic drifting into the Empire; in St. Matthew the Saviour spoke no better for the stability of government and of the lawyer and his establishments as a fountain which he likened to “a whited sepulchre.” The lawyer and his contributions to government was understood by the Roman when in his comprehensive language he said *Multitudo imperitorem perdit curiam*. All persons know that legal ligature is a “legal jungle,” and that the lawyer has looked on for two generations and seen the discussions become a “deadly parallel,” a gathering of cases and statutes from which able annotators cannot pick out the law of courts, (L. R. A. 1916 E. 298-326). A Babel has come and the lawyer has looked on in calm serenity and has seen the fountains of his professional learning gathered and flowing through the states a veritable River Styx. This river, an Amazon, flowing through many tribes, each having for it a local name and each a council which is supposed to regulate its course and flow; the collections of all these

tribes, so to speak, is the "legal jungle" referred to. And such is the goft of commercialism and its empiricists along the stream who have mesmerized the chiefs of the tribes referred to. Of this dreadful condition a great lawyer spoke, Joel P. Bishop, who in the preface to his *New Criminal Law* comments upon the peculiarities of the lawyer, his indifference, blindness and gullibility, voracious appetite for the effusions of something new, fresh from the slums of quackery. Both Bacon and Bishop foretold what would come to the profession by teaching local and fiat law. And today do we not see a profession, storm-swept by false and deceitful advertising, by clamor and hurrah, hawking off on the student and professor nothing more than a catalogue of commercialism's output, for a worthy exposition of fundamentals? What book in fifty years has commercialism given, to teach the logic and the philosophy of the law better than the *Code Remedies* referred to? And what has happened to the Code? This may be gathered from the addresses we refer to. The logic and the philosophy of the law can be written in a few pages, and instead of this, see the overtopping gatherings of Digests, Cycs, annotations and notes to reports, form books, and gatherings of chaff-pads and bound by office hands, labelled as text books. Look at this gathering, the "legal jungle." What success can we have teaching it to our Insular Lawyer? Look at our home product? And what can we do for the foreign lawyer? In a general way the orations referred to tell us plainly enough; they tell us in plain language that our books are worthless. (41 Am. Bar Assn. Report 365, Elihu Root).

And what greater wrong is there than writing antinomies for the profession? Of perceiving that the logic and philosophy of the law is Roman and professing to write from this fountain and instead write from Feudal ideas, its cases and statutes? Too long we have assumed that the fundamentals are of Feudal origin. Do we learn principles when all we know are cases and statutes? Are not maxims constitutional law as claimed by Hamilton? By departing from them have we not "disintegrated and undermined fundamental law?" Now it is asked "what of the Constitution is left?" (41 Am. Bar Assn. Report 376).

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