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THE "SOURCE OF LAW" IN THE PANAMA CANAL ZONE.—A case just decided in the Supreme Court of the United States, coming to that court from the Canal Zone, shows the great difficulties under which our courts labor when they are called on to interpret and administer the law in our extra-continental possessions. The courts have apparently had the most difficulty in amalgamating the Roman law and the common law in cases involving questions of delictual liability. In the case of *Fernandez* v. *Perez* (1906), 202 U. S. 80, the procedural question was presented as to the validity of an action on the case for the wrongful levy of an attachment brought in the United States District Court for the District of Porto Rico. A decision of the point involved a discussion of the relation of torts to crimes in the Spanish law. Such a discussion was presented in 6 MICH. L. REV. 136, 149, (1907).

In *Panama Railroad Company, Plaintiff in Error* v. *Theodore Bosse,* U. S. Sup. Ct. March 3, 1919, the plaintiff in the lower court had been injured by a motor omnibus, negligently driven by a chauffeur of the Panama Railroad Company at an excessive rate of speed through a crowded street in the

Canal Zone. Suit was brought in the District Court of the Canal Zone. The defendant argued, (1) that the common law liability of the master for his servant could not be applied to this accident in the Canal Zone, (2) that there can be no recovery for physical pain. The lower court decided for the plaintiff on both these points, and this decision was affirmed by the United States Supreme Court.

Using "source" in the sense of the instrumentality through which or the persons by whom the rule of law is formulated, there are several questions that naturally arise as to the "source of the law" of this case; namely, is it found in the law of the old jurisdiction of Columbia or Panama, in the common law, in an amalgamation of the two, or, finally, may the law have come from some other source? If the lower court had requested a brief from counsel as to what the Panama law was on the doctrine of *respondeat superior,* that question might have been settled at the beginning of the litigation, and, at the final hearing, the Supreme Court would not have been reduced to clever guessing as to the meaning of the several articles of the Civil Code which deal with compensation for losses by illegal act.

An executive order of the President of the United States, issued on March 8, 1904, had said, "The law of the land, with which the inhabitants are familiar, * * * will continue in force in the Canal Zone." This was construed to keep in force the Civil Code of the Republic of Panama, and it was argued that the Civil Code as construed in civil law countries "does not sanction the application of the rule of *respondeat superior* to the present case". It would seem that the phrase "with which the inhabitants are familiar" ought to apply to those who inhabited the Panama Zone at the time of the issuance of the President's order: *i. e.,* in March, 1904, and not, as the Supreme Court suggests, to the inhabitants at the present time who are "only * * * the employees of the Canal, the Panama Railroad, and the steamship lines and oil companies permitted to do business in the Zone under license." The *present* inhabitants are, as the court says, familiar with the common law rule, but the suggestion that the President's order applies to such inhabitants and not to those natives dwelling there in 1904, when the Zone was first taken over, adds to rather than decreases our bewilderment as to the relation of the common law rule to the civil law provisions.

In the absence of any enlightenment from counsel in the case as to the actual character of the civil law on the point, the Supreme Court attempts to show that Articles 2341, 2347 and 2349 of the Panama Civil Code are, at least, not necessarily out of harmony with the common law doctrine of *respondeat superior,* and concludes that, "it would be a sacrifice of substance to form if we should reverse the decision." And further, "we are by no means sure that they (the native Courts) would not have decided as we decide." But, *"at all events"* (italics not the Court's) "we are of the opinion that the ruling was correct." In regard to the second point the opinion concludes with the statement that, "it cannot be said with certainty that the Supreme Court of the Zone was wrong in holding that under the Civil Code damages ought to be allowed for physical pain. *Fitzpatrick* v. *Panama Railroad Co.,* 2 Canal Zone Sup. Ct. Rep. 111, 129, 130."

The decision is certainly a wise one and it commends itself as in accordance with the well-established principles of the common law, but it leaves us just where the District Court of the Canal Zone started so far as concerns a definite answer to the questions above suggested. As a decision of our court of last resort it makes perfectly good law and the decision in the Court of the Canal Zone has already been followed as a useful precedent in the United States Circuit Court of Appeals. Cf. *Panama Railroad Co.* v. *Toppin*, 250 Fed. Rep. 989, but it is submitted that if the Courts of the Canal Zone could have determined at the beginning under what law they were acting, not every case varying in some details from the instant case on its facts would have to be carried to the Supreme Court of the United States for determination, and incidentally the perfectly innocent desire of the theorists might be gratified by the determination of whether the "source of the law" is the Modern Roman Law of Columbia or Panama, the Common Law of England or the good old doctrine of Cicero that *"lex nihil aliud nisi recta et a numine deorum tracta ratio, jubens honesta prohibens contraria"*.

It would seem that in this instance also the rule of the survival of the fittest in law is operating. Where the common law has come into conflict with the Spanish-Roman or Dutch-Roman law in the English or American dependencies the principles of the former have generally supplanted that of the latter. The English doctrine of "consideration" has proved superior to the modern Roman law doctrine of "cause" in Louisiana and Cape Colony, South Africa. 4 MICH. L. REV. 19, Cf. 20 LAW QUART. REV. 349. In the instant case also the common law principle is victorious, although we are not quite certain whether it has won because it was identical with the civil law principle or because the case was finally determined by our Supreme Court. It should be noted also that this victory of the common law is in the field of private law, not of public law, and thus seems out of harmony with Taylor's generalization (Cf. "THE SCIENCE OF JURISPRUDENCE", p. XV), according to which there is arising a composite law in these localities of mixed jurisdiction "whose outer shell is English public law, * * * and whose interior code is Roman private law."

J. H. D.