*Current Legal Periodicals**

The Reform of the French Civil Code. By LÉON JULLIOT DE LA MORANDIÈRE. 97 University of Pennsylvania Law Review: 1-21.

This "incomparable monument", the Code Napoleon, is to be "rebuilt". Napoleon himself felt it would have to be revised. In the Netherlands and in Italy where it was adopted, some revision has already taken place. In France the subject has been discussed seriously since 1837 and every decade or so efforts were made in that direction until finally a commission was created for the reform of the Code Civil on June 7th, 1945. The author of this article, Dean of the Faculty of Laws in the University of Paris, is the President of the Commission.

All the members are lawyers: three counsellors of state, three members of the highest court, three professors of law, one attorney at law, one attorney of the highest court and one notary. To achieve better drafting it was planned to have technicians — not too many, in order to preserve unity, but yet a fair number so that the problems would not be envisaged unilaterally. For convenience sake the work has been split under four headings, each of which is assigned to a sub-commission: General Part, Persons and Family, Obligations, and Property.

* * *

Why a revision? In the *Livre du Centenaire* (1900), Larnaude and Pilon said a revision was necessary and useful; Planiol and Gaudemet argued against it. There are arguments of a technical order and arguments of a social order.

There have been so many changes, additions, new structures, contrary judicial interpretations, graftings of customary law, which is full of obscurity and lacks precision, that citizens no longer know where they stand. Simplicity, clarity, harmony is disappearing. But is it possible to make a worthwhile reform? Will not simplification be in appearance only? What about renewed and eternal controversies over interpretation?

* Prepared by final-year students at the Manitoba Law School under the general supervision of the faculty.

The social concepts upon which the Code rests are obsolete. French society has undergone tremendous changes during the last one hundred and fifty years. In the economic and political fields the individual is more and more restrained by the state in the general interest of society. Yet because of the conditions of modern life, the emancipation of married women and the protection of children have become necessary. "Generally speaking, the law 'socializes' itself", and this new Law needs a new Code. But are the old traditional social concepts obsolete? Are they not the Gibraltar safeguarding us in this age of uncertainty? Others say: "Is this the right time? The evolution is not complete yet. Let us wait for a more stable period."

* * *

The French Government has decided that now is the right time. Out of the chaos of war France seeks solid and modern bases. All legal fields are undergoing a thorough reform.

Though the Government and, more particularly, the Minister of Justice will have to present the revision before Parliament and defend it, and must therefore approve the Commission's work and the concepts on which it is based, yet the Commission, whose experience and knowledge have been sought, is not the slave of the Government. So far its independence has been complete. No doubt some socialization of the law will be taken into account. But how far will it go? In the absence of Government intervention the Commission has decided to wait. There is no hurry. Time, the great healer, should mould the future way of life in a more definite and fixed form. Therefore, efforts have been directed mostly to problems of order and technique. Some success has been achieved in a rather "fragmentary and incoherent" way, but it was not without a great amount of work and conflict since there are great divergencies of opinions and inclinations among the members of the Commission.

The sub-commission dealing with Persons and Family has made most progress. Marriage, parental authority and guardianship are institutions to be maintained. The texts concerning family law have been simplified. The protection of the minor rests with the family but control of the judge is increased for greater efficacy. The texts on adoption and marriage have been revised. There was dispute about illegitimate children and it was decided to postpone the solution until the problem of filiation in its entirety was taken up. On the question of divorce, there was great difference of opinion, although all agreed that divorce is

an evil. The court was given "more extended powers in the investigation of proof".

After much argument it has been decided that there will be no "developed" General Part in the Code. No considerable and detailed work will be produced in that Part. "But a book or chapter will be devoted to the legal act and to its regulation." A common guide is thought necessary for public and private law.

The Commission faces many problems to which no solutions have been found as yet. What should be the status of married women? Should the old community property concept and the almost absolute power of control of the husband be left or should the trend of recent years be followed and a married woman be treated as "feme sole"?

What is property? Should not private property be abolished since there no longer exists a monopoly of exploitation? What are rights? Are they not merely "social functions"? Has the individual any rights, except in so far as they are the exercise of functions that are conferred on him by society? But is not this concept dangerous? Would it not make of the individual a machine? The answer lies probably in the proverb, *In medio stat virtus.*

What about freedom of contracting? Is there such a thing when the whole economy of the country is directed and controlled by the State? The Government issues regulations every day that set out in advance the conditions of a great number of contracts: leases, rent, labour-management relations, etc. What position must be taken? Should these relatively new ideas become part of the Code? Should the Code sanction their existence or are they ephemeral? Could these problems not be left to other commissions on a Labour Code, an Agricultural Code, a Commercial Code?

If such Codes were independent there would be no Code Civil. All general principles must be governed by the Code Civil. There are many difficulties ahead, but the Commission is confident that eventual success will crown its efforts. (LOUIS DENISET)

* * *

Equity and Quasi-Contract. By PROFESSOR P. H. WINFIELD. 2 The Indian Law Review: 69 (reprinted from the Law Quarterly Review).

Sometimes circumstances occur in which under our law of quasi-contract it becomes necessary to hold one person to be accountable to another, without any agreement to that effect.

Quasi-contract is: "liability, not exclusively referable to any other head of the law, imposed upon a particular person to pay money to another particular person on the ground of unjust benefit". Things easily turned into money have been treated as its equivalent for that purpose. Though quasi-contract is a branch of the Common Law, in certain cases Equity will order payment of money on grounds similar to those at common law and may also give such forms of relief as cancellation or rectification of an instrument.

Briefly the circumstances in which equity will give relief in cases of quasi-contract are those of Account, Contribution, Indemnity, Subrogation, Mistake, Illegal, Void or Voidable contracts, Voluntary payment, Loans to a married woman separated from her husband, and in the case of a Tracing Order or what is commonly called following trust property.

The section of the article dealing with relief in cases of contribution is subdivided into five subheadings. In every case of contribution, however, the party claiming and the party against whom it is claimed must be subject to a common demand for payment to the third party if the claim for contribution is to be maintained.

One of the cases in which equity is concerned is the doctrine of the tracing order. "The doctrine is that the owner of property, which has been transferred either by himself or by another party to an alienee in circumstances which prima facie do not confer on the alienee a valid title to the property, can reclaim the property from the alienee unless he took it in good faith and for value." In equity this rule is applicable not only to trust property, but also to property subject to any equitable objective.

In conclusion it is necessary to remember that the Court of Chancery applies common-law rules as to quasi-contract where a claim under them arises incidentally to a claim before the court relating to some other matter; and, conversely, it will not imply a trust to pay money where, on the same facts, no action for money had and received would be maintainable at common law.

Professor Winfield has compressed into a short space a wealth of material. Since no comprehensive treatment of the subject of quasi-contract yet exists, his article will have to be read with the writings of others by anyone wishing an up-to-date picture of the law on the subject. (MIKE BARYLUK)

* * *

Progress of the Law in China. By ROSCOE POUND. 23 Washington Law Review and State Bar Journal: 345-362.

War and hostile occupation have strewn many difficulties in the path of the administration of justice in China. After the Japanese evacuation the country was in disorder and there was a tremendous growth in the number of prosecutions, due mainly to the use of opium, arrests of collaborators and activities of Communists. The original staffs of judges and court officials, which were scattered at the invasion, could not be readily reassembled and those appointed under the Japanese puppet regime could not be kept in the administration. It was not until the latter part of 1946 that a full staff of court officials was available to cope with the situation. The whole or partial destruction in many cities of courthouses, prisons, court records and equipment of the courts added greatly to the difficulties.

The difficulties are aggravated by a lack of money for the reconstruction of the administration of justice. Another problem has been the want of unified teaching, interpretation and application of the different codes, ideas, systems and modes of juristic thought. The need of a balance between comparative law and historical Chinese traditions and modes of thought in both the constitution and the codes, together with the need of profound consideration of the effect of the importation of rigid provisions on the system in which they are to operate, also present difficulties. Another difficulty is the lack of a fully developed Chinese juristic and legal terminology, which is particularly evident in legal education.

The administration of justice requires immediate improvement in many ways. Suitable courthouses, furnishings, furniture and equipment are sorely needed. There is great need for adequate court libraries, law libraries and law school libraries. Adequate salaries in every part of the administration are desired. Overworked judges have need of properly trained secretaries. There is much need of Chinese doctrinal treatises for the assistance of courts and legal advisers as well as for the teaching of law. There is need of a better system of reporting judicial decisions because the published reports of the points of law are inadequate. An urgent need is the development of a true constitutional law to go along with the interpretation and application of the constitution. Improvement in public esteem with respect to the position of the bar in the administration of justice and the legal profession as a whole is very much desired.

The Chinese legal system has many outstanding features. Court organization is largely modelled on the French system. The Judicial Yuan is the head of the court organization and has general jurisdiction over the administration of justice and disciplinary punishment of public functionaries. The Grand Justices have the duty of interpreting the Constitution and unifying the interpretation of laws and ordinances. The Supreme Court sits at the capital and its jurisdiction is appellate from the High Court. In each province there is a High Court which is primarily a court of appeal from the District Courts. In the districts of each province there is a District Court which has general jurisdiction. There are no separate courts for small causes. The Ministry of Justice is part of the executive Yuan and has general powers with respect to the administration of the courts. Excellent features of the system are its exceptionally well-framed codes, competent examination systems and dependable record and statistical systems in all the courts. Legal education has had little time or chance to develop although great strides are being made towards a generally high level of legal education.

There are some special problems and questions to be considered in regard to the administration of justice in China.

Juvenile delinquency has increased in a menacing manner as an aftermath of conflict. War orphans are well provided for but, as for other juveniles, conditions vary in different parts of the country. In Shanghai the treatment of juvenile delinquents is well handled. In other cities however there are insufficient funds properly to maintain juvenile establishments and social service organizations.

The Chinese procurator system, which has no equivalent in Anglo-American legal terminology, is subject to criticism by many foreign observers. The procurator is a judge, criminal investigator and public prosecutor all in one.

In China there is a very advanced type of procedure in judicial matters. However, there have been many criticisms as to slowness of dispatch of business in the courts. Delays are mainly due to: the abnormal volume of prosecutions and civil litigation arising out of the war and hostile occupation; the appointment of new and inexperienced judges and procurators; the failure of the Chinese people to make use of lawyers; the lack of experienced clerical help.

In spite of the difficulties and problems confronting the Chinese great progress has been made in the administration of

justice and this progress is continuing at an ever-increasing pace. (THOMAS DOUGALL)

* * *

Trials of War Criminals (Non-Nuremberg). By WILLARD B. COWLES. 42 The American Journal of International Law: 299-319.

This article by Willard B. Cowles, Professor of Law at the University of Nebraska, is a digest of war crime cases published in Volume I, Law Reports of Trials of War Criminals, issued early in 1947 by the United Nations War Crimes Commission.

The writer justifies the action of the Allies, after World War II, in trying war criminals for atrocities committed by them during the war and states that, contrary to widespread belief, "all the offenses of any importance which the term war crime properly denotes are old and well known in the law of war". He summarizes the nine selected cases published in Volume I, all of which were trials of non-major defendants. The original Allied declaration of war crimes, made public in Moscow by Churchill, Roosevelt and Stalin in 1943, stated that trials of non-major defendants would be tried in the vicinity of the alleged crimes, and trials of major defendants "whose offenses had no particular geographical location would be tried at Nuremberg".

The former were tried by British and United States military tribunals sitting in the continental locale of the crime. The cases involved such offences as attacks by a German submarine on the survivors of a vessel it had torpedoed; reprisals by German and Italian soldiers on American saboteurs; slaughter by Nazi S.S. men of a member of the Dutch underground; wholesale murder by German doctors and attendants in an insane asylum; scuttling German submarines after the cease fire order had been given in Europe; the shooting of United States flyers, who baled out over enemy territory, by the Japanese; selling poison gas to concentration camps to be used to kill its inmates. The defendants included civilians and military personnel. It is interesting to note that the main defence resorted to was that of "acting under the orders of a superior officer". Sentences imposed ranged from five-years imprisonment to the death penalty.

The article concludes by making it very clear that precedents of war crimes, such as those summarized, have been reported and are available from the time of ancient Greece and Rome. The Nuremberg trials, in contrast to the trials reported in this volume, involved overwhelming matters such as "planning,

preparation, initiation, or waging of a war of aggression", but nevertheless the defendants are war criminals and precedent for the trials of war criminals is present.

The people of all nations, both victor and vanquished, have watched the progress of the various war trials with interest. Many are of the opinion, as Professor Cowles points out, that there is no precedent for the trials held by the Allied Nations—that the defendants are being unjustly treated simply because they lost the war. This view has been shared by eminent journalists and lawyers as well as persons not schooled in law. The reading of the writer's summary of these nine selected cases is an education in the brutality and arrogance of the enemy we fought in World War II. The writer's comments on the history of similar trials is most enlightening and will aid to dispel the misconceptions that have caused the war trials to be viewed with a great deal of disfavour. (J. M. RUSSELL)

* * *

Family Life Conference Suggests New Judicial Procedures and Attitudes Toward Marriage and Divorce. By PAUL W. ALEXANDER. 32 Journal of the American Judicature Society: 38-47.

This article, written by Judge Paul W. Alexander of the Court of Common Pleas, Domestic Division, of Toledo, Ohio, is a summary of the report issued by the Legal Section of the National Conference on Family Life held at Washington D.C. in May of last year. The fact that the President of the United States called the conference and that over 900 experts attended from every state and 33 foreign countries (including Canada) is enough to indicate how important such matters are coming to be regarded.

The committee expresses a few elementary truths which are of such importance that they should be outlined in some detail. The committee decided:

(1) "The broken family is not the result of divorce, divorce is the result of the broken family."

(2) The spouses are not divorced by the court, they divorce themselves before they even get into a divorce court —"Divorce is a result, rather than the cause of marriage failure".

(3) "The real cause of broken families is not divorce but drunkenness, cruelty, neglect, infidelity, etc., of one or both spouses."

(4) "The marriage fails because of the failure of the

individuals who marry." Therefore, it would appear that greater cause for concern lies, not in the fact that so many spouses are seeking divorce, but that the "national tragedy of divorce is but a symptom of greater national tragedy, to wit, the increasing disintegration and disorganization of family life".

However, the committee agreed that divorce would always be with us, and therefore should be improved, and that no one is better equipped to begin improving it than the legal profession, because "no one is more painfully conscious than the legal profession of the utter imbecility of our present divorce procedure and the pernicious and almost wicked philosophy upon which it is based. Every honest lawyer is ashamed of the atmosphere of hypocrisy and lies in which he usually must handle a divorce case; every conscientious judge is bitter about his impotence under existing limitations and restrictions."

The committee suggests that our archaic legal philosophy on marriage and divorce, for example our ideas on the guilt and punishment of the spouse charged with violating his marriage contract, should be abrogated and in their place substituted the modern philosophy of diagnosis and therapy. This modern philosophy would involve an expensive and intricate system of Family Courts patterned after the somewhat new Juvenile Courts, designed to go to the root of all marriage troubles, to advise and give counsel on all marital matters. It would entail necessarily a staff of doctors, psychiatrists, preachers and lawyers and be presided over by a judge especially chosen for the work he would have to do.

The committee specifically recommends: (1) that a broader construction be given to "residence", which as universally construed means "legal domicile", domicile being a state of mind and difficult to determine whereas residence is a fact; (2) abolishing the doctrine of collusion because everyone knows that practically all divorces are uncontested and are agreed-to cases (the Lord Chancellor's Committee in England agree with this suggestion); (3) abolishing the defence of condonation, which is recognized as a hindrance to reconciliation; (4) that the filing of a petition be permissive rather than as of right; (5) that jurisdiction over all family problems be in one comprehensive court, which is in keeping with the modern diagnosis and therapy philosophy; (6) changing the grounds for divorce; (7) making marriage for a certain length of time a pre-requisite to divorce; (8) considering carefully the advisability of requiring compulsory

education before marriage; (9) setting up a Uniform Divorce Law.

The committee concludes by suggesting that unless "the parties to a marriage are inspired with an imperishable desire — a perennial urge — to make a go of it" the marriage will fail. The home and Church should provide this inspiration but unfortunately they fail and "many prospective brides and grooms never go near a church". It would seem therefore that it is up to the State to remedy the situation by various statutes setting up organizations to educate and inspire our young people. (LORNE P. FERG)

Lawyers in the United States Senate

Another lawyer-predominated Senate marched up Capitol Hill early last month [January] as Washington greeted the fifty-four Democrats and forty-two Republicans who comprise the upper chamber of the nation's 81st Congress. For once again the American electorate has shown its confidence in its legal representatives, and the path to the Senate is still marked by the milestones of law school, legal practice and governmental service as public attorney or judge.

No less than two-thirds of the new Senators are members of the Bars of their respective states, and three additional Senators have had extensive legal training. Also numbered among the country's ninety-six top lawmakers (including Vice-President Alben W. Barkley, the Senate's presiding officer, whose own senatorial post has not as yet been filled) are fifteen ex-judges, thirty-one former federal, state, county and city attorneys, and five law professors.

Twenty-one of the states have elected two attorneys to serve in the Senate; twenty-two states will be represented by one attorney and one layman; and only five states (Delaware, Minnesota, New Hampshire, South Dakota and Vermont) will be without a lawyer delegate.

The percentage of lawyers among the Democratic representatives far exceeds that in the Republican bloc. Forty-two of the fifty-four Democrats in the Senate are members of the Bar, while only twenty-two of the forty-two GOP Senators have been practising attorneys.

But neither sectional characteristics nor the type of commercial activity within the various states has had any effect upon this election of Democratic lawyers to the Senate. Such essentially agricultural states as Iowa and Kansas have selected two attorney representatives, and such heavily industrialized urban states as Connecticut and New Jersey have followed suit. On the other hand the farming state of South Dakota and the "corporation-lawyer" state of Delaware find themselves without attorney representatives in the 81st Senate. Making the national picture all the more confused, South Dakota and Arkansas have two Democrats each in the Senate; New Jersey has two Republican Senators; and Iowa, Connecticut and Delaware are each represented by one Democrat and one Republican. (Albert P. Blaustein, Lawyers in the Senate: They Predominate in 81st Congress, 35 A.B.A.J. 108)