Current Legal Periodicals

International Extradition: Implications of the Eisler Case. By P. E. JACOB. 59 Yale Law Journal: 622-634.

The Eisler case arose out of an application by the United States to the British authorities for the extradition of a Communist alien. The extradition proceedings were based on a charge of having made false statements in his application to leave the country. The case was decided solely on the test of double criminality, the first critical issue. Under the British-United States Extradition Treaty, 1931, extradition can only be effected where the act charged constitutes an extraditable offence under the law of the country where the fugitive is found. Perjury is an offence named in the treaty. But the British court held that Eisler's offence, although perjury in the United States, did not constitute such an offence as was contemplated by the treaty. The U. S. Department of State were confident that Britain would broadly interpret the double criminality test as the American courts had done earlier in the *Factor* v. *Laubenheimer* case. Here, although the law of Illinois, where Factor was found, did not recognize the offence named in the British request, the American court held that he was extraditable because the offence was named in the treaty. The fact that Eisler had not been lawfully sworn, the administrative officer having only taken and recorded his statements, was sufficient for the court to rule that there was no perjury, although there was an offence "akin to perjury". But the treaty lists perjury as an indictable offence and the British Perjury Act, 1911, and British judicial practice have established specific criteria for the determination of perjury which make it different from kindred offences. British courts in the past had strictly followed the doctrine of double criminality and accordingly Eisler was released from custody. It seems evident that Britain will strictly observe the provisions of the treaty but will hesitate to go beyond.

The second issue the case revealed is the uncertainty of legal practice where extradition proceedings are challenged as being politically inspired. It is a widely recognized rule that persons ac-

cused of political crimes are exempt from extradition, that they may not be punished for an offence other than that for which they are extradited, and that those whose surrender is sought with a view to punishing them for a political offence will also be exempt. Eisler contended that the prosecutions were of a political character. Had the decisions not gone off on the issue of double criminality, careful consideration would have been warranted of the applicability of these provisions. Eisler had been proclaimed the leading communist in the country by the house committee on un-American activities. The prosecution had been commenced after he had been granted leave for departure. But past decisions show that the courts decline to hear evidence that the government requesting extradition is politically motivated. Both British and American courts have hesitated to question the good faith of the requesting state. Thus the law in this regard remains unsettled.

By and large the British decision requiring the cautious and strict interpretation of the double criminality rule may be justified, for it provides a safeguard for political dissidents fleeing from state prosecution and may benefit others who are on the opposite side of the ideological conflict, assuring them of a safe and ready refuge. (M. H. STANBRIDGE)

Psychic Interest in Continuation of One's Own Life: Legal Recognition and Protection. By HUBERT WINSTON SMITH. 98 University of Pennsylvania Law Review: 781-825.

May the victim of personal injuries wrongfully inflicted recover damages for consequent shortening of his life expectancy? Nowhere in American jurisprudence can a decision be found that penetratingly probes this problem. The prevailing practice in American law is to compensate for a person's economic loss, and ignore the concurrent psychic loss based upon the individual's anticipation of a life worth living. Indeed, some American decisions have denied all damages for shortening of life expectancy on the common law basis that the death of a human being could not be complained of as a legal wrong in a civil action (see *Baker* v. *Bolton* (1808), 1 Camp. 493). The fact is that no case at common law can be found depriving a *living* person of the right to recover damages for wrongful shortening of his life expectancy.

The notion that a claim for shortening of life expectancy is actually one for wrongful death is false. It is settled in American law that the victim has a single cause for action, which vests in him at the moment the wrong is committed. What happens after-

wards is mere evidence of the extent of the original wrong. If the victim is alive at the time of the trial, the extent to which his life has been shortened rests in the realm of probability, but if he dies before the trial, the probability is converted into a certainty.

Since every man has a redressible interest in the integrity of his personality, it is only commonsense that he should have an equally redressible interest in the length of his personality. An injury that cuts life short involves an amputation of all interests of personality; the victim suffers as real a loss in such a case as another who sustains a crippling injury that narrows without shortening the scope of his personality.

Virtually every individual has reasonably founded expectations that depend on his continued life; the frustration of these expectations should merit the awarding of damages. *Flint* v. *Lovell*, [1935] 1 K.B. 354 (C.A.) and *Murphy* v. *New York and New Havan R.R. Co.* (1861), 30 Conn. 184, are instances where courts have awarded damages for the hastening of a person's death. It is to be noted that the award was made to the victim himself in the English case.

Psychic as well as pecuniary effects of personal injury must be recognized if the law of damages is to attain a philosophy as broad as the values that men everywhere impute to personality and life. The elderly pensioner may suffer no economic loss when his health or happiness is shattered, but would anyone say that his psychic loss is to go uncompensated? There is no reason why investigation should not reveal the previous habits and pursuits of the plaintiff and the extent to which these have been rendered impossible by his injuries.

In cases of severe and permanent injuries to people (especially children) American courts are prone to grant large sums in damages, thus showing the courts' awareness of the value of the plaintiff's personality. This willingness of the courts to compensate where personality is narrowed is a persuasive argument for extending compensation for the shortening of one's personality. In each instance the loss is the same — extinction of personality.

It is true that it is difficult to calculate the psychic loss in terms of money, but this is not sufficient reason to deprive the plaintiff of compensation for an absolute loss (see *Rose* v. *Ford*, [1937] A.C. 826, at p. 859, *per* Lord Roche). The problem is to fix a reasonable figure to be paid by way of damages for the loss of a measure of happiness, and this is to be determined from the circumstances of the victim's life rather than by any presumption "that life is, on the whole, good".

Our courts should recognize the right to damages for wrongful shortening of life expectancy. In this direction lies the proper course of legal evolution. (J. M. SIMPSON)

Restitution Under the Statute of Frauds: What Constitutes an Unjust Retention. By LINDSEY R. JEANBLANC. 48 Michigan Law Review: 923-960.

The stated purpose of this article is to "determine what does or does not constitute an unjust retention". Unjust retention is one of the essential elements in restitution, the other being the existence of a legal benefit. Generally speaking, determination of whether a legal benefit is unjustly retained involves an examination of the conduct of each party. The plaintiff's conduct should be particularly stressed.

In cases brought under unenforceable oral agreements, the terms of the agreement are generally admissible to show:

(1) that plaintiff was not an officious intermeddler;

(2) that plaintiff did not intend to tender his performance as a gift;

(3) the expectation of defendant that he would render his own performance as compensation.

The majority view is that the defendant's repudiation of an unenforceable agreement, together with his acceptance, retention or consumption of the plaintiff's performance, constitutes an unjust retention. It is also the general rule that the plaintiff's repudiation is sufficiently inequitable so as to be, in effect, set off against that of the defendant — and defendant's acceptance, consumption or retention of the benefit is not regarded as unjust.

Other jurisdictions, however, attribute much less unjustness to the repudiating party. In such jurisdictions, the character of inequitable conduct, as between the parties, varies considerably depending on the following factors, which influence the determination of what constitutes an unjust retention:

(1) The effect of the repudiation of the oral agreement, since it is often difficult to determine who repudiated.

(2) The wilful or inadvertent character of the plaintiff's repudiation.

(3) The effect of the Statute of Frauds upon the oral agreement. According to the author, the terms of the agreement *must* be considered to understand the acts of the parties and to make material the character of the repudiation. Generally speaking, however,

the legal effect of such an agreement is governed by how the particular Statute of Frauds is interpreted.

(4) The extent of performance rendered before repudiation. Partial performance would place a plaintiff who repudiated in a more favorable position with regard to restitution.

(5) The failure to make restoration. The plaintiff sometimes recovers in restitution notwithstanding his failure to restore the benefit he received from the defendant. Here, it is a problem to determine the net legal benefit unjustly retained by the defendant — a question that affords wide scope for the exercise of judicial discretion.

(6) The willingness of the defendant to be bound by the terms of the oral argeement. The equitable conduct of defendant is often stressed to reach the same result as would follow from the equitable character of the conduct of the plaintiff.

In the words of the author, "the above list includes most of the factors which may be of importance in the determination of what constitutes an unjust retention". But, and the author quotes from the Restitution Restatement, "No definite rule can be stated which will determine in all cases whether restitution will or will not be granted since the Courts consider all the circumstances involved in the particular case". (J. M. KILLEY)

Studies on the Testimony of Time Intervals. By ELON H. MOORE. 29 Oregon Law Review: 161-174.

In many court cases right or liability is decided by the court's evaluation of testimony involving the passing of time in minutes, months or years and, in some instances, on testimony involving only seconds or a fraction of a second of time. Frequently this testimony is faulty and inaccurate, not perjuriously so but simply because of man's excusable fallibility.

A series of experiments were carried out on a controlled group of subjects with the object of measuring the degree of accuracy in testimony on time intervals. The experiments, although each of them differed in method, were all similar in object. All of them required the subjects to recall intervals of definite periods of time ranging from seconds to years. Observations were made and data recorded through each experiment, and with the aid of these it was possible to deduce some interesting conclusions.

Witnesses who are successful in estimating time intervals are aided by recollection of the experience content of those intervals. If we associate one event with that of another occurring at the same

time, the recall of either one brings the other to mind. Intervals seem long or short according to the amount of activity that accompanies them. It was found that it is nearly four times as difficult to recall accurately events occurring during a period of idleness as during a period of physical activity. The errors in this respect tended towards overestimation.

Estimates of time intervals of but a few seconds are little better than guesses. The recall of periods of time involving minutes or hours is aided by the use of time posts in one's experience. The person whose activity is regulated by schedules or routines, the student, soldier or watchman, has many points of time reference not available to the average person. The estimates for periods of time running into days are even more dependent upon time posts for their accuracy. People, generally, tend to underestimate the dates of events or incidents occurring years earlier. The longer the period that is being recalled the lower is the subject's degree of accuracy.

In order properly to assess a witness's testimony on time intervals it would be advisable first to measure his capacity for attention and memory by means of similar tests and make these ratings available to the court. In this way more weight could be given to the testimony of a witness who approximates accuracy in three-fourths of the tests than to that of a witness whose rating of accuracy is but one-fifth. The court should also have a knowledge of the conditions under which the witness's observation occurred. (C. C. HENDERSON)

Soviet Socialism and Due Process of Law. By JOHN N. HAZARD. 48 Michigan Law Review: 1061-1078.

To what extent will the common law lawyer find, in Soviet law and practice, those measures of protection he is accustomed to see accorded to the individual accused of crime? Punitive jurisdiction over offenders is exercised both by the courts and by administrative tribunals in Russia, and each must be examined in the light of common law criteria to enable a true comparison to be made and opinions formed.

Even before the Russian revolution "persons dangerous to the peace of the community" were subjected to police supervision, police proposals with regard to them being submitted to a special board, which was of a purely administrative character but which nevertheless had the power to exile the subject, restrict his personal liberty and even, for a short time after the revolution, to execute

him. Since 1934 these special boards, reconstituted under what is now the Ministry of Internal Affairs, have had jurisdiction over "persons who are recognized as socially dangerous" and may impose exile or internment for periods up to five years and expulsion from the U. S. S. R. A representative of the Prosecutor General is present at meetings of the board and he may protest its decisions to the Presidium of the Supreme Soviet of the U. S. S. R.

The boards are not required by any published order to follow a set procedure; no reports are available to outsiders; hearings are in secret and the accused has no right of counsel — indeed, it sometimes not present. Thus a defendant cannot properly help himself, since he can neither cross-examine witnesses nor present his own evidence as of right.

But the special boards, operating as they must in the field of suspicion, appear to have no place in any trial involving an allegation of actual crime, jurisdiction in this case being vested either in the regular provincial courts, the Supreme Court of the U.S.S.R. or its subordinate federal courts. Exceptions are found in cases of treason, arson, terror and allied offences, which are subject to the jurisdiction of military courts notwithstanding the civilian status of the accused. All courts, be they military or civil, must follow the Code of Criminal Procedure.

Trial by jury is unknown, but in its place is provided a court composed of a professional judge and two lay assessors, all three of whom decide questions of fact and law; the lay members have less authority, in fact, then the Anglo-American jury. Any member of the court may be challenged on the ground of prejudice.

As to the presumption of innocence, Russian jurists contend strongly — as do their French counterparts — that it is fallacious to assume that, because neither system has any express edict laying down such a protection, the presumption must be one of guilt. It is claimed that their procedure of preliminary examination reflects a presumption of innocence, since the preliminary examiner decides merely whether the case should go on for trial and the evidence taken before him, although filed in the trial court, must be presented anew and substantiated at the ultimate hearing, thus giving a further, full opportunity for defence. Further, although there is no right to counsel at the preliminary hearing, the constitutional guarantee does exist of the right of counsel at any trial, unless the charge is one of terrorism or the defendant waives the right, or unless there is to be no official prosecutor present, and this guarantee, it is contended, of itself imports a presumption of innocence.

The Code of Criminal Procedure does contain the additional guarantee, so long cherished by the common law subject and practitioner, that an accused must be served with a comprehensive indictment within a minimum period before trial, and that he must be present at his trial should substantiation of the charge involve possible loss of freedom. The accused may waive his right to be present or may be tried in absentia if he avoids service or evades discovery.

An accused may call witnesses by permission of the court, which may only withhold its consent on the grounds of the irrelevancy of the proposed testimony: the "ratio" of the refusal must be given in writing, and is subject to review. The defendant may also make one final speech, unlimited as to length and relevancy.

Again, all trials must be public, unless publicity is denied in the interest of national security, state secrecy or public morals. Even in these exceptional cases, the reasons for a trial being held in camera must be given in writing, and on appeal a new trial may be ordered or the initial judgment reversed.

From the co-existence of special boards, lacking nearly all the elements of "due process of law", and a regular hierarchy of courts of criminal jurisdiction, a dualism becomes apparent in the Soviet's attitude toward law. This may be explained, from one aspect, by the fact that Soviet leadership is aiming at two publics — one at home and the other abroad; to gain friends from among those living in a setting of justice, an example must be shown that will command their respect and strike an answering chord. Again, even the peoples within Russia's borders, though humbled, will not suffer indefinitely an unpredictable legal system designed, in the first instance, to meet an emergency. To keep their own subjects docile and more nearly happy — thus preserving power at minimum cost — rulers will more readily make the gesture towards stability.

Yet are these the only considerations? If so, why preserve the special boards under the Ministry of Internal Affairs? The answer appears to lie in Engel's enunciation of the theory that every revolution must face efforts to restore the old order it has ousted. This theory, the adherence to which is amply borne out by the actions of Soviet leadership even in recent years, has engendered a lasting fear of the future, of the unknown enemy within and of the continued possibility of uprising before the new, good social order has been firmly established and stabilized. Support for the existing government must be maintained and increased, while potentially mortal dangers to it are eradicated. The seeming dualism may thus be designed to achieve the one end. (J. F. R. TAYLOR)

Comparative Law's Proper Task for the International Court. By LOUIS B. WEHLE. 99 University of Pennsylvania Law Review: 13-24.

Both modern experiments at establishing an effective World Court have failed to make full use of the general principles, other than those of Roman origin, that have emerged from the study of comparative law.

In the last century of the Roman Republic extensive trade with the known world resulted in the absorption of Roman law and influence by areas that were, or have since become, civilized European states. In 1495 the Germanic Roman Empire formally accepted Justinian's Corpus Juris. At the termination of the Thirty Years War in 1648 the Church had lost much of its political power in central and northern Europe but canon law was merged into the Roman civil law administered by the political units or states. The emergence of national sovereignty had resulted in differences in the various civil codes, but the predominant and basic influence remained Roman. This influence has reached beyond the confines of the European continent and Scotland; Quebec, Louisiana and to a lesser degree French, Belgian and even some British colonial areas have adopted Roman law.

It is, therefore, not surprising that the code civil should have played such an eminent rôle in the growth of international law. The primary factor in the growth of the "law of nations" during the Middle Ages was the Church. "Churchmen formulated such modern doctrines as the freedom of the seas, the guilt of aggression and the inherent necessity for a secular or political jus gentium." The expansion of commercial intercourse caused a revival and adoption of the ancient Roman Mediterranean maritime law. English admiralty courts were recognizing the law merchant (essentially the jus gentium) while on the Continent similar legal responses indicated an expansion of international life. Sir Henry Maine in his *Ancient Law* states that aside from the conventional or treaty law of nations a large part of the system is made up of pure Roman law. International arbitrations and conciliation agreements in the 13th, 14th and 15th centuries concerning territorial boundaries and jurisdiction were modelled on Roman private law.

This trend was continued and the predominance of civil law states was reflected in the Covenant of the League and in the United Nations Charter. The doctrine of stare decisis, so familiar to common law countries, was rejected. Adherence of states to the Statute of the Court, separate formal declarations of acceptance

of the Court's jurisdiction (optional compulsory theory) and voluntary joint submission by the disputing states in any particular case are reflections of Roman civil law methods. The absence both of special forms of pleading and standards for admissibility of evidence also reflect the Roman influence.

However, article 38 of the Statute of the International Court provides that in determining disputes submitted to it the general principles of law accepted by civilized nations and judicial decisions of the *various* nations' courts may be investigated and used as guides. The interpretive tendency has been to isolate these two sources and to require a rather extended acceptance by the various sovereign units before a common principle will be recognized to have emerged. The author submits that the meaning of "various" in the context should be interpreted as "different", that is, the Court is empowered to apply judicial decisions of different nations — those of any distinct or separate nation.

The common law countries have much to offer. Though the European codes vary, by and large a bilateral contract is completed when the offeree's acceptance is brought to the knowledge of the offeror. Under Anglo-American law the declaration of acceptance by the offeree is more germane than the actual receipt of knowledge by the offeror. In the latter case the offeror has less opportunity to revoke after tempting the offeree to act on a proposal. In American law the degree of unforseeability and the defence of act of God are more stringently restricted than under French or German law. Under Continental civil law a mistake of essential fact by one party generally makes the contract voidable, while under Anglo-American law the mistake of fact must be mutual, the mistake of one party known to the other or, in the case of a mistake of fact by one party caused by the negligence or omission of the other party, estoppel prevents the avoidance of liability. In the field of damages loss of prospective profits is more liberally considered than under continental systems. These principles could be applied to the violation of treaties and questions of reparation with beneficial results in the field of international law. The stricter enforceability of contracts under the English influence would do much for the sanctity of international treaty obligations. By such an exercise of authority the Court would create an inspiring task for comparative law. (G. E. PILKEY)