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THE MAXIMS OF EQUITY—I

OF MAXIMS GENERALLY

1. PROVERBS AND MAXIMS [1]

MAXIMS in modern law are either inherited or borrowed from the Roman law or framed in the formative period of modern law "*juxta exemplum Romanorum.*" But the maxims of Roman law had their model, in large part at least, in the proverbs and maxims which are to be found among all peoples in a certain stage of culture. A distinction is made between popular proverbial sayings and literary proverbs or gnomes. According to the accepted theory the former were originally uttered spontaneously; they were spontaneous utterances called forth by unusual and stirring incidents and experiences. They were not made deliberately but sprang up out of the soil of national character. This orthodox doctrine as to proverbs savors of the romantic explanation of all social phenomena which came into vogue in the fore part of the last century, of which Savigny's theory of law as a spontaneous product of the *Volksgeist* is another example. In the light of recent philosophy and folk-psychology we may suspect that proverbial sayings are rather traditional versions of the orally expressed reflections of individuals gifted with more than ordinary power of observation, homely wit, and a trenchant tongue. Aristotle suggested some-

[1] Reference may be made to TRENCH, PROVERBS AND THEIR LESSONS (1905); GERBER, DIE SPRACHE ALS KUNST (1885), II, 397–442; BOIS, LA POÉSIE GNOMIQUE (1886).

thing of this sort, saying that proverbs were remnants which because of their brevity and accuracy had been preserved out of the ruins of ancient philosophy.[2] Moreover, many of the earliest proverbs were responses of oracles. Our chief concern with these proverbial sayings is that they sometimes have to do with matters of law and are one of the forms of expression of customary law. As will be seen presently, legal proverbs attained some importance in Germanic law. For the rest, popular proverbial sayings furnished the model for the literary proverb or gnome and so ultimately for the legal maxim. By all accounts the literary proverb is a product of conscious reflection. Originally it may but cast a popular saying into literary or perhaps poetical form.[3] Presently it may express the first stirrings of philosophical reflection upon life and conduct. The fusion of advice about practical life, rules of agriculture, moral precepts, and political advice to rulers which we find in Hesiod is the beginning of the reflection on life that was to lead to ethical and political philosophy. Down to Socrates we find nothing but isolated maxims.[4] But Greek moral and political philosophy had its roots in the maxims and gnomes of Theognis and Phocylides and the gnomic poetry attributed to the Seven Sages. Thus maxims "stand on the threshold of philosophy"[5] and "form the transition to philosophy proper."[6] When conscious reflection begins, they bridge the gap between customary moral rules and ethical principles. The later throwing of ideals, not reflections on customary conduct, into the form of ethical maxims is quite another matter. Such maxims may eliminate all the limitations and obstacles that are encountered in practice and put practically unattainable standards in order to fire the imagination or excite moral enthusiasm.[7] They are related to the maxims of the beginning of ethical philosophy only in that in form they follow the model of the proverb.

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[2] Quoted by Synesius, Bekker, ARISTOTELIS OPERA, V, 1474.

[3] "The sayings attributed to the mythical or semi-mythical Seven Sages are crystallizations of popular morality which cannot be treated as the beginnings of a science." WUNDT, ETHICS (transl. by Titchener and others), II, 3.

[4] *Ibid.*

[5] ZELLER, PRESOCRATIC PHILOSOPHY (transl. by Alleyne), 121.

[6] ERDMANN, HISTORY OF PHILOSOPHY (transl. by Hough), I, § 18.

[7] FOWLER AND WILSON, PRINCIPLES OF MORALS (1894), II, 293–294.

2. Maxims in Roman Law[8]

Dirksen[9] and Sanio[10] pointed out long ago that the maxims of which Roman juristic writing is full belong to the older legal science of the Republic and not to the classical period. Some of them are referred to the *auctoritas* of named jurists of the older period.[11] Others are expressly attributed to the *ueteres*.[12] Moreover the way in which these maxims are treated by the later jurists shows that they came from an earlier time and had traditional authority. They are cited as generally recognized truths or are even applied and interpreted as actual rules of law much as if they were statutory provisions.[13] If, with Girard,[14] we recognize three phases of legal development in republican Rome, namely, the esoteric phase in which the interpretation and application of the enacted and of the customary law were a monopoly of the pontifices, the phase of secularization and popularization, and the phase of systematization, Cato the Younger, with whom the practice of framing maxims is held to begin,[15] belongs in the second stage. Thus we see that the jurisprudence of maxims comes in at the very threshold of Roman legal science.

In the older practice, the case in hand was decided by a simple method of distinctions and analogies.[16] Also the older juristic

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[8] Reference may be made to Jörs, Römische Rechtswissenschaft zur Zeit der Republik (1888), 282–313; Jhering, Geist des römischen Rechts, I, § 3, II, § 40; Rabel, Origine de la règle Impossibilium nulla obligatio (1907); Bruns-Lenel, Geschichte und Quellen des römischen Rechts (Holtzendorff, Enzyklopädie der Rechtswissenschaft, 7 ed., I, 1915), § 30. I have relied largely on Jörs and on the texts he has collected.

[9] "Ueber den Zusammenhang der einzelnen Organe des positiven Rechts der Römer mit der gleichzeitigen juristischen Doctrin," 3 Rheinisches Museum für Jurisprudenz, 85, 106–109 (1829).

[10] De antiquis regulis iuris (1833).

[11] *E. g.*, many are attributed by name to Q. Mucius Scaevola. See references in Jörs, Römische Rechtswissenschaft zur Zeit der Republik, 291, n. 2.

[12] Dirksen cites Gaius, III, § 180, as an example. The title of the Digest, De diuersis regulis iuris antiqui (50, 17), tells the same story.

[13] *E. g.*, compare the maxim attributed to Cassius — *non possit causam possessionis sibi ipsa mutare* (Dig. XLI, 6, 1, 2)— with the interpretation by Iulianus: *quod uulgo respondetur causam possessionis neminem sibi mutare posse, sic accipiendum est, ut possessio non solum ciuilis sed etiam naturalis intellegatur*. Dig. XLI, 5, 2, 1.

[14] Manuel élémentaire du droit romain, 6 ed., 43–46.

[15] Jörs, Römische Rechtswissenschaft zur zeit der Republik, 289 ff.

[16] Jhering, Geist des römischen Rechts, III, § 49.

writing was no more than a heaping together of legal materials in collections of actions and of *responsa*. The *Tripertita* of Sex. Aelius Catus, a work of this type although it essayed to be something more, marks the end of this method. On the basis of these collections which handed down the results of juristic craftsmanship, jurists began to think of the substance of the law, as distinguished from laws and as distinguished from method of decision. Accordingly they sought to find common points of view in the mass of collected or traditional *responsa*, formulae of actions and forms for legal transactions and sought to express these points of view concisely in maxims. But, says Jörs, these maxims at first are not addressed to the judge but to the jurist.[17] The *responsa* remained expert opinions as to the application of the law to particular cases. They did not seek to impart general legal information. Yet in view of the bulk and the diversity of the recorded *responsa* and the conflict of juristic opinion, it became important for the individual jurisconsult to state precisely and in terse language the point of view which he sought to express in a rule of law. The analogy of a statutory provision was obvious and naturally enough was made use of. "As the *lex* declared what should be law for the future, so the jurists, through their maxims, established what was rightful and legal for the present, and, as in the case of *leges*, their phrases were as sharp and concise as possible, sometimes in imperative form, sometimes in proverbial form." [18] It is likely that the model of proverbial sayings was before the minds of the jurists quite as much as the model of the terse and oracular phrases of the old statutes.

Another factor in the development of legal maxims is to be found in the *disputationes fori*, or public disputations upon questions of law. The very name (*regula*) indicates a measure which the teacher gives to the pupil for the decision of legal controversies. Every teacher has had experience of the desire of students for a crisp phrase which they may put down in their notebooks. Evidently many of the maxims were first framed for the use of students.[19]

[17] RÖMISCHE RECHTSWISSENSCHAFT ZUR ZEIT DER REPUBLIK, 293.

[18] *Ibid.* Examples of the statutory form are: *a ueteris praeceptum est* (DIG. XLI, 2, 3, 19); *ciuilis constitutio est* (DIG. XLVII, 1, 1, pr.); *ueteres decreuerunt* (DIG. XXVIII, 5, 32, pr.). Of the proverbial form: *quod uolgo dicitur* (GAIUS, II, § 49); *solemus etiam dicere* (DIG. II, 14, 7, 5).

[19] JÖRS, 294. As to the tendency of teachers to frame maxims or aphorisms, compare the maxim-like sayings of Zeno. BEVEN, STOICS AND SCEPTICS 18, 33.

It is noteworthy that in Roman law, as later in the common law, a great number of maxims have to do with principles of interpretation of statutes and of legal transactions. This is parallel development, not borrowing. But it is significant of the stage of development at which maxims arise. The strict law takes no account of will or intention as such. The words operate quite independent of the thought behind them.[20] At the end of a period of strict law, as lawyers begin to reflect and to teach something more than a tradition, as they begin to be influenced by philosophy to give over purely mechanical methods and to measure things by reason rather than by arbitrary will, a chief effect is to change the emphasis from form to substance, from the letter to the spirit and intent. When statutes and legal transactions were looked at in this way, maxims grew up announcing policies to be followed in interpretation in doubtful cases. Thus there were maxims to the effect that certain relations or certain situations were to be favored,[21] that words were to be interpreted in favor of promissors and against those from whom the transaction proceeds,[22] that the milder interpretation was to be preferred in certain cases,[23] and generally that as between different possible interpretations the more intrinsically meritorious was to be adopted.[24] The transition to the natural law of the classical jurists was easy. "From recognition that certain *regulae*, to be discovered and established by juristic research, lay at the foundation of application of law, it was a short

[20] JHERING, GEIST DES RÖMISCHEN RECHTS, III, § 49; DANZ, GESCHICHTE DES RÖMISCHEN RECHTS, I, § 142.

[21] *E. g.*, — "Where the will of the manumitter is doubtful, freedom is to be favored" (DIG. L, 17, 179). — *Cf.* DIG. L, 17, 20, to like effect. "In case of doubt it is better to decide in favor of dower" (DIG. L, 17, 85). *Cf.* DIG. XXIII, 3, 70, to the same effect. "In testaments we interpret the will of the testators liberally" (DIG. L, 17, 12).

[22] It should be remembered that in Roman law the promisee or creditor speaks, not the promisor or debtor, as in our law. These maxims appear in two forms, which suggest much as to the development of a jurisprudence of maxims into a jurisprudence of principles. In an older form we have special maxims as to particular transactions, *e. g.*, stipulations, DIG. XXXIV, 5, 26, XLV, 1, 99, pr., XLV, 1, 38, 18; sales, — "that is taken which is to the disadvantage of the seller" (DIG. XVII, 1, 33), "the agreement is to be interpreted against the seller" (DIG. L, 17, 172); letting and hiring, DIG. II, 14, 39. In a later form these are generalized. DIG. L, 17, 96.

[23] Here again the earlier form applies to penalties. "In penal causes the milder interpretation is to be made." DIG. L, 17, 155, 2. Later it is generalized. DIG. I, 3, 18, L, 17, 56, L, 17, 192, 1.

[24] DIG. I, 3, 19, XXXIV, 5, 24, L, 17, 67.

step to the wider thought that a *lex* also need not be regarded as a mere aggregate of precepts but that these precepts themselves are but forms or derivatives of ideas of right which should be formulated theoretically as *regulae*." [25] This leads to the philosophical view of the *ratio iuris* [26] and of all legal rules, whether statutory or traditional or doctrinal, as but expressions of or attempts to formulate principles of natural law.

Application of maxims merely as solving phrases is a later abuse. The jurisprudence of maxims was a theoretical working over of the law for practical purposes. Roman legal science was never purely theoretical. Application to concrete causes was the end of theory and the end was kept constantly in view. But that end might be sought in two ways. One way was to begin with the cases which occurred in practice. The other way was to begin with the ideas which were taken to be behind the law and to treat the phenomena of practice as realizations of these ideas.[27] The older jurisprudence took the first course and the method of collecting *responsa* and *formulae* remained an important form of legal writing. Next came commentaries in which there is a transition from the method of beginning with cases to that of beginning with ideas, in that more and more the commentaries take account of general ideas of which the statutes are regarded as expressions and of spheres of interest and jural relations which the *formulae* are regarded as seeking to secure. The jurisprudence of maxims carries this still further and enters definitely on the method of beginning with ideas. It is "the first attempt at a theoretical formulation of law." [28]

Certain defects, characteristic of the period of legal history in which maxims arise, abide with the jurisprudence of maxims to the end. When the right line of evolution is followed, which leads through natural law to the maturity of law, the maxim develops into a fruitful legal principle and is merged therein.[29] But Roman

[25] JÖRS, RÖMISCHE RECHTSWISSENSCHAFT ZUR ZEIT DER REPUBLIK, 295.

[26] DIG. I, 3, 15.

[27] JÖRS, RÖMISCHE RECHTSWISSENSCHAFT ZUR ZEIT DER REPUBLIK, 300.

[28] *Ibid.*

[29] Jörs gives the following example: When the burden of proof was first considered theoretically, a *regula* was framed to the effect that the plaintiff had the burden of proving his assertion. DIG. XXII, 3, 21. This continued to be used and the question as to proof of exceptions (equitable defenses) was met by another *regula* that "in an exception the defendant is a plaintiff." DIG. XLIV, 1, 1. But this did not suffice

maxims develop in two other ways. Some become fixed in form from the beginning, retain their form throughout the subsequent history of the law, and become encrusted with exceptions and limitations or are turned into arbitrary special rules.[30] In such cases there is a survival of the methods and modes of thought of the strict law in situations where the maxim was too narrowly conceived at too early a stage of the jurisprudence of maxims and acquired an authoritative stamp before it was critically examined and restated. Others are diverted from their original function of standards for the decision of controversies or from the outset are theoretical and become vague high-sounding generalities, of no practical import, and may even serve to darken counsel and to retard the working out of a sound principle.[31] In these cases we have a phenomenon of the beginnings of legal philosophy in the period of natural law or of the decadence of legal philosophy at the end of that period — of the time when juristic philosophy was finding itself and had not learned to make a proper use of concrete legal materials or of the time when it had exhausted itself for the time being and was unfruitful. In short, we have a characteristic phenomenon respectively of the transition from the strict law to natural law and of the transition from natural law to the maturity of law.

Writers on jurisprudence commonly speak of law as an aggregate of rules. But a legal system of any degree of development is more complex than this formula would indicate. Rules, that is, definite detailed provisions for definite detailed states of fact, are the staple of the beginnings of law and continue to be employed in the maturity of law in situations where there is exceptional need for certainty to maintain the economic order.[32] In a later stage

to meet cases where the defendant contended that he had paid or where the exception was met by a replication. After further *regulae* for these cases (DIG. XXII, 3, 25, 2), the jurists came ultimately to the general proposition that "the burden of proof lies on one who asserts not on one who denies." DIG. XXII, 3, 2.

[30] *E. g.*, DIG. XLI, 3, 33, 1, XLV, 1, 91, 3, L, 16, 231.

[31] "One who remains silent certainly does not speak; but nevertheless it is true that he does not deny." DIG. L, 17, 142. "Ignorance of law will not help those seeking to acquire, but will not be prejudicial to those who are seeking their own." DIG. XXII, 6, 6. "No one is held to act wrongfully who makes use of his own right." DIG. L, 17, 55.

[32] As to rules, principles, conceptions, and standards, see my papers, "Juristic Science and Law," 31 HARV. L. REV. 1047, 1060–1062, and "Administrative Application of Legal Standards," 44 REP. AMERICAN BAR ASSN., 445, 454–458.