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Study in Comparative Civil Procedure*

PIERRE LE PAULLE†

Most of the value of the law comes from the fact that its precepts have sanctions back of them. Sanctions means nearly always judicial sanctions. Hence procedure is the cross-road of the law, and studies in comparative law should begin with comparative procedure.

Taking for granted that common law procedure is known to the reader, we have contrasted it with civil law procedure. But as civil law is more or less an abstraction, we have chosen a concrete example: French procedure as a most representative illustration, since French Law has been taken as a model in many other countries.

As law must always be looked at as a living thing, organisms and functions have to be considered. Indeed they should be studied at the same time. For the sake of exposition we will consider first, organisms, second, functions.¹

A. THE ORGANISMS

French territory is divided into a certain number of districts. The smallest unit is a "canton", determining the jurisdiction of the justice of the peace. A certain number of "cantons" form an "arrondissement", determining the jurisdiction of the lower civil court,² and of the commercial court, where it exists.³ A certain number of "arrondissements" form a "circonscription", determining the jurisdiction of the court of appeal. Above the court of appeal there is only the supreme court⁴ whose jurisdiction extends to all French territory. The tribunals of arbitration⁵ are created by a special decree and the scope of their territorial jurisdiction is determined by that decree.

The justices of the peace, the judges of the civil courts, of the supreme court, and of the divers administrative tribunals are appointed by the President of the Republic. Once appointed they cannot be divested of their office, except as a punishment pronounced by the

*Based essentially upon French procedure.

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¹We have left aside criminal procedure and all incidents that might be grafted on the normal civil procedure.

²Tribunal de première instance.

³Where it does not exist the civil court fulfills its function.

⁴Cour de cassation.

⁵Conseil des prud'hommes.

supreme court, sitting in full bench,⁶ or when they have reached the age limit, or when the court in which they sit is suppressed, or when they are transferred to another tribunal with the same position and the same dignity.⁷ The judges of the tribunals of commerce are elected by all the men of trade. They must be French citizens, and must have been themselves in trade for at least five years within the jurisdiction of the tribunal to which they are elected. They are elected for two years and are reeligible twice; afterwards, a period of one year must elapse before they can be elected again. The judges of the commercial courts can, while they exercise their functions, continue their trade, and they may be also senators or members of the Chamber of Deputies.⁸ They are not subjected to the authority of the Supreme Court, but only to that of the Secretary of Justice⁹ and of the Court of Appeal.¹⁰ Therefore one of the most important judicial functions is exercised by judges who are not trained in law. Is it the reason why the statistics show that they have less judgments reversed than their colleagues of the civil courts who are professional jurists?

The same is true of the judges who have to settle controversies arising out of the employment or out of the contract of employment: the "prud' hommes," who are elected, half by the employers, half by the employees.¹¹

The prosecuting officers, representing the State district-attorneys and attorneys-general are also appointed by the President of the Republic. They are under the authority of the Secretary of Justice who may order them to prosecute or enjoin them from prosecuting, and may request the President of the Republic to remove them if they do not comply. But at the trial the prosecuting officers are free to conduct the case according to their own discretion.¹² A great difference between civil and common law procedure is that, in the civil law system, there is always a representative of the State (district attorney) in all civil suits. In a case of breach of contract, for example, the district attorney may argue the case one way or the other, as he believes the law to be. In nine cases out of ten their presence is not necessary, but sometimes it is quite useful to have

⁶Law of August 30, 1883.

⁷Law of January 16, 1824.

⁸"Députés."

⁹"Garde des Sceaux."

¹⁰Law of August 30, 1883, art. 14 and 17.

¹¹Law of March 27, 1907.

¹²That is the significance of the well-known proverb: "la plume est serve et la parole est libre".

before the judges an important disinterested exposition of the facts and of the law.

Divers other auxiliaries are necessary to the proper working out of the technique of the French courts. They are:

(1) The clerks of the court,¹³ who do the clerical work of the court, registering the decisions, filing the minutes, delivering copies of them, etc.

(2) The solicitors,¹⁴ who must be employed to represent the parties in the civil tribunals. They draw up all necessary papers: summons, pleadings, etc., are in charge of all adjective law in a case, take charge of the enforcement of judgments, they can handle funds and act as agents or representatives of their clients. Their number is strictly limited, they hold a monopoly, have to buy their office from their predecessor in office, and must also be accepted by the chamber of solicitors.

(3) The barristers.¹⁵ Their number is unlimited. The only qualifications are that they be French citizens and have the degree equivalent to the American degree LL.B.¹⁶ Their functions are: (a) to give consultations to clients on questions of law; (b) to argue cases when they come in court and draw what corresponds to the pleadings (conclusions).

By opposition to the English barristers, they come in direct contact with their clients and can draw contracts for them. They cannot handle funds or form partnerships. They can appear before all courts beside the "State Council" (the highest administrative court) and the Court of Cassation.

(4) The "avocats" near the "State Council" and the Court of Cassation. They are the only ones allowed to appear before these law courts. Their number is limited to sixty. They buy their office from their predecessor, as the solicitors. They combine the work done by the solicitor and the barrister in the other courts.

(5) The "agrées" who combine the functions of a solicitor and a barrister in the Commercial Court. They constitute a special body, are in limited number, but are not appointed by the President of the Republic. They have no monopoly, as anybody can appear before these courts.

(6) The sheriffs,¹⁷ also limited in number, who serve writs and other documents, have charge of matters relating to execution of judg-

¹³"Greffiers".

¹⁴"Avoués".

¹⁵"Avocats".

¹⁶"Licencié en droit": this degree is given by the French Government.

¹⁷"Huissiers".

ments, and make attachments, garnishments, etc. They have offices and clerks, and are much more versed in legal matters than the American sheriffs.

B. THE FUNCTIONS

I. *Civil Tribunals*

The civil tribunals are the courts of ordinary jurisdiction and hear every case in which no reason is shown why it should be decided by another tribunal. When, in the cause of action, there is nothing to prevent a civil court acquiring jurisdiction over the case, the first question which has to be decided is this: among all the civil tribunals that exist in France, which is the one that has jurisdiction over this particular case? This question which has a peculiar importance from the point of view of the conflict of law, must be carefully discussed, especially since the rules of French procedure are widely different in this respect from those of American jurisdiction.

(1) *When both plaintiff and defendant are French citizens, domiciled in France.*

The rules which apply in such a case are principally determined by articles 59 and 60 of the Code of Civil Procedure. Looking at these articles in the light of the commentaries made by text-writers, and their development by the course of judicial decisions, we realize that the framework of the French law on this point is as follows:

(a) The general rule is that the defendant must be sued at his domicile.

This rule applies essentially to actions *in personam*. It is immaterial that the obligation of the defendant be to convey land or an object situated outside the jurisdiction: as soon as the defendant is under a personal obligation to do something, or to allow something to be done, the court of his domicile alone is competent. So, a corporation must be sued at its domicile.¹⁸ But a foreign corporation must be sued at the situs of its principal place of business in France.¹⁹ On this point the French courts go beyond the technical notion of domicile, since, while a foreign corporation can have only one domicile, it can nevertheless be sued in any place where it has a complete business organization.²⁰ The theoretical basis generally given by French writers for the rule (a) is that the burden of proof is on the plaintiff. "How could you oblige a defendant to disturb himself only to answer to a plaintiff, whose claim is perhaps ridiculous?"

¹⁸Art. 59, Code of Civil Procedure, sec. 5.

¹⁹Dalloz, 1885, part I, page 353.

²⁰Dalloz, 1887, part I, page 101.

Common sense, together with historical tradition, led the legislator to adopt the rule: *actor sequitur forum rei*.²¹ To an American lawyer it will probably seem that the historical reason has had more influence than common sense.

By analogy to the principal rule, suits against an estate must be brought at the last domicile of the deceased.²² The reason given in this case is the desirability of having the whole estate administered in the same place by the same court.²³

Actions *in rem* for movable property must also be brought at the domicile of the defendant, not because the defendant is there but because the situs of movables is there.²⁴

By consent the parties may elect a domicile, for purpose of suit, anywhere they wish.²⁵

(b) The law of the situs of the *res* determines the jurisdiction in two main cases: (1) action *in rem* relating to immovables,²⁶ (2) action relative to personal status, that sounds also like an action *in rem*. In this latter case, the action, in fact, will be brought at the domicile of the defendant, but for quite a different reason than in rule (a).

(c) The law of the place where the cause of action arose determines the jurisdiction, mainly in four cases: (1) In case of guaranty the suit must be brought where the suit against the principal debtor is pending;²⁷ (2) Fees of attorneys must be sued for in the tribunal in which the services have been rendered;²⁸ (3) In case of suit against an insurance company, for the recovery of the indemnity, suit must be at the place where the accident occurred;²⁹ (4) In case of suit under the equivalent of what would be called in this country "Workmen's Compensation Acts," the suit must be brought in the jurisdiction where the accident occurred.³⁰

(2) *When both plaintiff and defendant are French citizens, but the defendant is not domiciled in France.*

The only tribunal having jurisdiction is the tribunal of the domicile of the plaintiff.³¹

²¹R. Japiot: *Traité élémentaire de Procédure*, 232.

²²Art. 59, Code of Civil Procedure, secs. 6 and 7.

²³E. Garsonnet and Ch. Cézard-Bru. *Précis de Procédure Civile*, 7th Edit., sec. 230.

²⁴R. Japiot, *op. cit.*, *supra*, n. 21, sec. 313.

²⁵Art. 59, Code of Civil Procedure, sec. 9.

²⁶E. Glasson, *Précis théorique et pratique de Procédure Civile*, 2d Edit., sec. 275.

²⁷Art. 59, Code of Civil Procedure, sec. 8.

²⁸Art. 60, Code of Civil Procedure.

²⁹Law of January 2, 1902, art. 1, sec. 2 (not applicable to maritime insurance).

³⁰Law of April 9, 1898.

³¹Art. 14 and 15 of the Civil Code. Bourges, January 1899, D. P. 1902.2.57. E. Glasson, *op. cit. supra*, n. 26, sec. 273.

(3) *When both plaintiff and defendant are French citizens, but neither is domiciled in France.*

It seems probable that the French tribunals have no jurisdiction.³²

(4) *When the plaintiff is a French citizen, and the defendant is an alien.*

(a) If he is domiciled in a foreign country, the defendant can be sued in the foreign country where he is domiciled, according to the general rule: *actor sequitur forum rei*. But the French law allows the plaintiff to sue the defendant in a French tribunal, whether the cause of action arose in France or not.³³ The competent tribunal is held by the weight of authority to be the tribunal of the domicile of the plaintiff.³⁴ Such a rule seems to be contrary to sound principles of international law, and frequent derogations are made from it by diplomatic treaties. (b) If domiciled in France, the foreigner will be sued at his domicile.

(5) *When the plaintiff is an alien, and the defendant a Frenchman.*

(a) If the Frenchman is domiciled in France, the competent tribunal is the tribunal of the domicile of the defendant, according to the general rule. However, some discussions arise as to the interpretation of article 15 of the Civil Code.³⁵

(b) If the Frenchman is domiciled abroad, the French tribunals are probably not competent.

(6) *When both plaintiff and defendant are aliens.*

(a) If both or one are "authorized" to establish their domicile in France, the foregoing rules will be applied, since such formal "authorization" is considered as a preliminary step to naturalization, and assimilates foreigners to Frenchmen for the purpose of jurisdiction.³⁶

(b) When neither has an authorized domicile in France, and in the absence of protection coming from a diplomatic convention with his own country, the general rule is that the French tribunal is not bound to take jurisdiction. But such a rule becomes every day more and more obsolete, because of the increasing number of exceptions made to it. The most important of these exceptions are when the cause of action arose out of "commercial transactions",³⁷ or out of a crime or a tort,³⁸ committed in France, or when the action

³²E. Glasson, *op. cit. supra*, n. 26, sec. 273.

³³Art. 14 of the Civil Code.

³⁴R. Japiot, *op. cit. supra*, n. 21, sec. 325.

³⁵We cannot enter here into a discussion of this article; we can only refer to Weiss, *Traité de Droit International Privé*, 2d Ed., volume 5, p. 238 *et seq.*

³⁶Art. 13 of the Civil Code.

³⁷Art. 420, Code of Civil Procedure.

³⁸Art. 3, Civil Code.

is *in rem* and relates to an immovable situated in France.³⁹ Moreover, beside these cases, if the defendant does not object to the jurisdiction of the court, the latter can take jurisdiction at its discretion.⁴⁰ The last exception explains how French courts grant divorces to foreigners.

Granting now that the proper tribunal in which to bring the action has been determined, the regular steps of the procedure are as follows:

*Attempt at conciliation.*⁴¹ Before starting a regular action, the plaintiff must attempt a compromise, a judicial settlement being considered as an undesirable thing with the defendant. So, through a sheriff,⁴² the plaintiff notifies the defendant to appear before a justice of the peace.⁴³ Before the latter, the matter is discussed freely. The duty of the justice is to use all his efforts to reach a settlement. In a certain number of cases,⁴⁴ the attempt at conciliation is dispensed with. The main reasons for these exceptions are essentially necessity of speedy action, or impossibility or improbability of reaching an agreement. If there is no necessity of an attempt at conciliation, or if this attempt has failed, then the real procedure begins.

Getting jurisdiction over the defendant. (a) If the defendant is a Frenchman. It is not possible, under French law, to obtain jurisdiction over any defendant by proceedings of attachment, or garnishment, or over a French defendant by service of process on him personally outside of his domicile. Whether an action is *in personam* or *in rem*, if a person has to be made a defendant, he must be served at his domicile. That does not mean, according to French notions, that he has to be served personally or within the territory. The sheriff can serve a relative, a servant, or, in their absence, a neighbour of the defendant. If none of these forms of service is possible, service will be made on the Mayor of the town in which the defendant is domiciled.⁴⁵

(b) If the defendant is a foreigner. If he is found in France, he may be served.⁴⁶ If he is not within French territory, and if his foreign domicile is known, the writ⁴⁷ is sent to the Foreign Office in

³⁹Art. 59, sec. 3. Code of Civil Procedure.

⁴⁰R. Japiot, *op. cit. supra*, n. 21, sec. 327.

⁴¹Art. 48 to 59 of the Code of Civil Procedure.

⁴²"Huissier".

⁴³"Juge de paix". They are really quite different from the American Justices of the peace.

⁴⁴Art. 49 of the Code of Procedure.

⁴⁵Art. 68. Code of Civil Procedure.

⁴⁶Revue de Droit International Privé 1912, p. 87.

⁴⁷Called "ajournement".

Paris, which will have it sent to the defendant by its Consuls there.⁴⁸ Historically, the method of service consisted in having the sheriff go to the part of the French boundary line the least remote from the domicile of the defendant and in having him shout the writ! If the foreign domicile of the defendant is unknown, the writ will be mailed at the principal door of the court where the case will be tried.⁴⁹

The service of process made in the proper way interrupts the running of the statute of limitations,⁵⁰ and starts interests running.⁵¹

Granting that the defendant has been served, the procedure can follow one of three different courses: (1) The summary procedure, when the matter is very simple and the amounts involved small, or when there is an essential interest in having the case decided quickly; (2) The written procedure, for matters involving complicated accounts, or requiring careful comparison of documents; (3) The ordinary procedure, which is the normal form of procedure. As this latter is the most general, forms the back-bone of French procedure, and is the one which is applied in the absence of a specific rule to the contrary, even in tribunals other than the civil ones, it is the only one that we shall consider here. For the sake of simplicity, we will not speak of all the incidents which can super-add themselves to that procedure.

Under the ordinary American procedure, when the case has been put on the docket after the summons, or otherwise, there need to be no additional formalities to have the case heard when its turn will come, on a later date.

Under French procedure, there are a certain number of steps to be taken by the solicitors⁵² that are mostly remnants of formalism. It may briefly be said that solicitors in behalf of the parties must ask the Court to judge the case;⁵³ after admission the case is put on the docket.⁵⁴ At a given date, the solicitors for both sides appear again before the Court and state their contentions of law.⁵⁵ The case is then said to be in shape.⁵⁶ All these steps are of small interest and do not concern anybody but the solicitors.

But more instructive differences between French and American procedure may now be pointed out.

⁴⁸Ordinance of October 25, 1833, art. II.

⁴⁹Art. 69, sec. 8. French Code of Civil Procedure.

⁵⁰Art. 1153 and 2245 of the Civil Code.

⁵¹Sirey, 1912, Part I, p. 158.

⁵²"Avoués": "officials whose services must be employed and consist in representing parties before the Tribunaux Civils and the Courts of Appeal." (H. Goirand, and K. S. Thompson: *The French Judicial System*, London, 1919, p. 15.)

⁵³By a written act called "Placet".

⁵⁴This is termed "la mise au rôle" (decree of March 30, 1808, art. 80).

⁵⁵This is termed "poser les qualités", or "prendre ses conclusions".

⁵⁶"En état".

Under American law to call the defendant in court by summons is one thing; to serve notice on him of the grounds of the plaintiff's claim by a declaration or a bill in equity is another thing. In French procedure the "ajournement" or "assignation" fulfills both functions: it challenges the defendant in court and tells him why.

Then both parties must through their solicitors communicate to each other their "conclusions." By this last term is meant a short outline of the arguments that will be used by the plaintiff and the defendant.

Such "conclusions" are, in fact, drawn most often by the barristers. They do not correspond to the briefs (unknown in French procedure) since they are very sketchy, do not quote any authorities, and are always in typewritten form. There is no necessity of "conclusions" before "Commercial Courts."

These "assignation" and "conclusions" constitute the only legal fight on substantive law. There is no necessity to come formally to an issue before the trial. So that disposes of all the complicated rules relating to pleadings that one finds in the Common Law system: each party presents its arguments of law or of facts as it wants. Freedom, lack of formalism, brevity are the main features that oppose civil law "conclusions" to common law pleadings.

Before the case comes in court, the evidence in support of the contentions of the parties must be gathered.⁵⁷ It is indeed amazing for the civilian to see all the witnesses brought in the court room, and the tremendous waste of time it necessarily brings with it.

The general principle is that evidence produced must be written, and that when a writing is produced, witnesses must not be brought in to assert anything against or beyond what is stated in the writing.⁵⁸

It is only in exceptional cases, when it is clear that written evidence was impossible to obtain (as in cases of torts and of quasi-contracts, for instance), that oral evidence is admitted.⁵⁹

The practice still reinforces the theoretical principle and the constant tradition of lawyers is to avoid oral testimony as far as it may be done.

But, of course, in many cases there is no sufficient written evidence. Then, if the facts to be ascertained still continue to obtain, as in

⁵⁷Art. 1315 to 1636 of the Civil Code. Proof in the French system is a question of substantive law, not of adjective law. B. Garsonnet and Ch. C  zar-Bru, *Pr  cis de Proc  dure Civile*, pp. 289 *et seq.*

⁵⁸Art. 1341 of the Civil Code.

⁵⁹Civil Code, art. 46, 192, 197, 307, 322, 323, 341, 1341 to 1348, 1715, 2044, etc.; Commercial Code, art. 41, 42, 109, 332, etc.

suits relating to easements, and more generally to real property, the judges may decide to go on the spot and examine them themselves,⁶⁰ accompanied by the lawyers of the parties.

If the facts are very intricate, or require to be ascertained by one having special knowledge of certain categories of facts, an expert will be appointed who will see whom he wants, go where he wants, examine what he wants and establish the facts inductively in using all clues possible. Lawyers have free access to him to make all suggestions. Then the expert makes a report, and the case is argued on that report. Hence, a case that would require two weeks in court in America, may be decided in two hours in a civil law court.

When the appointment of an expert is not considered necessary, but when the solicitors and the barristers believe that oral evidence must be brought in, a request for inquiry⁶¹ is made to the courts. It sets forward the facts that should be ascertained by that inquiry.⁶² If the opponent admits these facts, or if the courts believe it is unnecessary to grant the inquiry (either because these facts are irrelevant or proved otherwise), the courts will not allow it.

If it is allowed, each party will give the name of its witnesses. It is highly unprofessional for a lawyer to come in direct touch with the witnesses before the time of their deposition.

In the ordinary procedure witnesses are heard by a special judge,⁶³ in a room where the public is not admitted. There is no stenographer. Parties may be present and assisted by the solicitor, but neither has a right to put questions to the witnesses directly.⁶⁴

The judge asks the witness to tell what he knows about the facts propounded in the inquiry; he lets him speak at random;⁶⁵ he afterwards puts him questions on points that seem obscure or untrue. Then he dictates to a clerk a résumé or memorandum of the testimony. That memorandum written in long-hand is read to the witness. The latter can add, cut out, or modify anything he wants in it. He can refuse to sign it; he may also refuse to testify at all.

Such are, practically, all the rules of evidence known to the civil law.

All the evidence gathered by each party must be communicated to the other party a reasonable time before the trial, so that the element of surprise so much relied upon by American lawyers is entirely eliminated. French barristers leave the most valuable piece of written

⁶⁰"Descente sur les lieux".

⁶¹"Demande d'enquête".

⁶²Art. 252, Code of Civil Procedure.

⁶³"Juge-Commissaire".

⁶⁴Art. 273 and 276, Code of Civil Procedure.

⁶⁵Art. 273, Code of Civil Procedure.

evidence to their colleague on the other side. They never ask any receipt for it, and never get into trouble for having such confidence in their brethren of the bar.

Then the case is ready to be heard. But since the evidence has already been entirely gathered, since there is no jury, the trial will be the most simple kind of proceeding: it will consist only in the two arguments made by the two barristers.⁶⁶ The court can, at its discretion, stop the arguments of the barristers.⁶⁷ As there is no jury, French law avoids putting the fate of individuals in the hands of one man by two methods:

First, by the presence in all civil cases as well as in criminal cases, of a representative of the State—a district attorney having a right and sometimes a duty⁶⁸ to tell to the court what he believes to be the law. That, evidently, amounts to arguing the case either on the plaintiff's or on the defendant's side. Such a conception is far remote from the Common Law point of view that is anxious to leave both fighters in the arena with equal chances;

Second, by the requirement of three judges to hear and decide any case in civil tribunals.⁶⁹ If one judge is absent, the Chief-Justice will ask a barrister having practiced for at least ten years, to sit on the Bench.

When the case has been heard, if the case is quite clear, the judges will confer together without leaving the Bench, and render the judgment immediately. If the case requires some discussion between the judges, they will retire from the court room, decide the case, and come back a little while afterwards to give their decision. If the case is more complicated, one of the three judges will make a report, which will constitute the basis of a discussion between the judges, and the judgment will be rendered at a later date.⁷⁰ The judgment must be announced publicly⁷¹ in the court room by one of the three judges, in the presence of the two others.⁷²

After a period of eight days, during which no steps to enforce the judgment can be taken,⁷³ the successful plaintiff can enforce the

⁶⁶"Avocats".

⁶⁷R. Japiot, *op. cit. supra*, n. 21, sec. 505.

⁶⁸Art. 83. Code of Civil Procedure. The principal instance is when one of the parties is under guardianship (minor, or insane). The names of these State attorneys are from the lower to the upper rank: "Substitut, Procureur de la République, Avocat Général, Procureur Général". All are officials appointed by the State.

⁶⁹Law of August 30, 1883, art. 4; and Law of December 10, 1883, art. 5.

⁷⁰Art. 116 of the Code of Civil Procedure.

⁷¹Law of April 20, 1810, art. 7.

⁷²E. Glasson, *op. cit. supra*, n. 26, sec. 491.

⁷³Art. 450, Code of Civil Procedure.

judgment, even before the expiration of the period during which appeal is allowed, so long as the defendant does not in fact appeal. The judgment is as a general rule final, until appealed from.⁷⁴ In some cases⁷⁵ indeed, execution can be had, although the defendant has appealed from the decision.

The effect of the judgment is not to work a novation so as to create new rights. As a general rule, French lawyers consider a judgment only as a declaration of the primary right.⁷⁶ Modern civil law goes much further along this line of thought than the classical Roman Law, since in cases of partition,⁷⁷ French law holds that the judgment does not create new rights, while Roman law held it did. From this theoretical idea follow a number of practical consequences which go deeply into substantive law, for example, that conception that on an action of contract, specific performance is the general rule, damages the exception. In the cases where facts compel the admission that the judges have created new rights, as in a judgment granting a divorce, for instance,⁷⁸ the practical consequences are different.

The judgment creates a general lien on all immovables that the defendant then possesses or thereafter may possess until the judgment is satisfied.⁷⁹ This lien does not arise automatically, the plaintiff has to register his lien at the proper office to make it effective.⁸⁰ This lien exists also as a result of a foreign judgment made executory in France.⁸¹

While in the United States the effect of a judgment is to create a debt, the copy of the French judgment delivered to the plaintiff has executory force by itself: the successful party can insure the execution of it by using the enforcement machinery of the State.⁸² When a judgment has been rendered, the judicial machinery is through; it then becomes a mere question of police.

The modes of staying or reviewing judicial proceedings under the civil law, are simpler than under the common law for two main

⁷⁴E. Glasson, *op. cit. supra*, n. 26, sec. 1004. By exception the judgment is not executory until time for appeal has elapsed in few cases: forgery (art. 241), divorce (Law of July 27, 1884). See also art. 457 of the Code of Civil Procedure.

⁷⁵E. Glasson, *op. cit. supra*, n. 26, sec. 1005. The principal case is when temporary execution has been granted: art. 457 *et seq.* Code of Civil Procedure. This temporary execution is granted in some cases of emergency, or when there are strong probabilities that the successful factor in the inferior court will also succeed on appeal (art. 135 to 138, Code of Civil Procedure). In such a case, the winner in the Lower Court must give a bond.

⁷⁶E. Glasson, *op. cit. supra*, n. 26, sec. 577.

⁷⁷Actio familiae erciscundae. Actio communi dividendo.

⁷⁸Art. 252 of the Civil Code.

⁷⁹Art. 2123, secs. 1 and 2 of the Civil Code.

⁸⁰Art. 2134 of the Civil Code.

⁸¹Art. 21, sec. 4 of the Civil Code.

⁸²R. Japiot, *op. cit. supra*, n. 26, sec. 621.

technical reasons: one is the absence of "equity" as distinguished from Law, the other is the absence of trial by jury in civil cases.

Therefore one cannot find in the civil law any proceedings similar to injunctions, motions for judgment *non obstante veredicto*, motions in arrest of judgment, bills of review and many cases when a motion for a new trial could be possible in an Anglo-Saxon court.

Practically the only mode of reviewing judicial proceedings under the civil law, is by an appeal.

If the amount of the claim of the plaintiff is less than Frcs 1,500 in all actions *in personam* and in all actions *in rem* relative to movables, or less than Frcs 60. of annual income in actions *in rem* relative to immovables, there is no right of appeal at all.⁸³ As a general rule, the unsuccessful party cannot appeal before the expiration of a period of eight days after the judgment in the lower court,⁸⁴ in order to avoid the appeal "*ab irato*." The right of appeal is forfeited after two months after the unsuccessful party has notice of the judgment.⁸⁵ The appellant must serve on the appellee⁸⁶ a writ, in the same manner as the original writ.⁸⁷ An appeal is really a second chance given to the loser to have his case tried *de novo*, all the questions of fact and of law decided in the lower court being tried again in the upper court, which does *not* decide whether the former judgment was right or wrong, but decides the whole case anew and substitutes its decision for that of the lower court.⁸⁸ The practical consequence of this principle is that the procedure followed in the upper court is very similar to the procedure followed in the lower court.⁸⁹ Of course, if the upper court agrees entirely with the decision formerly rendered, it can purely and simply affirm the former judgment.⁹⁰ For practical reasons more than for logical ones, when the judgment is affirmed, the rights of the parties arise out of the judgment of the lower court; in other words, the appeal is supposed never to have been taken.⁹¹

The party who is unsuccessful in the court of appeal may in some cases bring the case to the supreme court,⁹² within two months after

⁸³Art. 1, Law of April 11, 1838. The phraseology of this article is rather defective, but is interpreted by the writers and the courts as stated in the text: See E. Garsonnet and Ch. C  zar-Bru, *op. cit.*, sec. 812.

⁸⁴Art. 449 of the Code of Civil Procedure.

⁸⁵Art. 443 of the Code of Civil Procedure.

⁸⁶"Appellant" and "Intim  " are the French words for appellant and appellee.

⁸⁷Art. 456 of the Code of Civil Procedure.

⁸⁸R. Japiot, *op. cit. supra*, n. 21, sec. 1058.

⁸⁹Art. 443 to 474 of the Code of Civil Procedure.

⁹⁰R. Japiot, *op. cit. supra*, n. 21, sec. 1077.

⁹¹See, for instance, art. 472 of the Code of Civil Procedure.

⁹²Called "La Cour de Cassation".

the notification of the judgment of the court of appeal to the other party.⁹³ The supreme court can only take jurisdiction because of an error of French law,⁹⁴ lack of jurisdiction,⁹⁵ or errors of form, which avoid the judgment.⁹⁶ So, the French supreme court is *not* considered as a third degree of jurisdiction; it supervises the judicial enforcement of the law. A practical consequence of this idea is that a judgment which is not susceptible of appeal to the court of appeal, can be brought, nevertheless, to the supreme court directly.⁹⁷ Another consequence is that the French supreme court does not reverse a decision: it only "disaffirms"⁹⁸ the former decision and refers the case to another court of the same degree as the court whose decision has been disaffirmed.⁹⁹ This other court will try the case over again, and will by no means be bound by the decision of the supreme court. If it affirms the decision which has been disaffirmed, and if the case comes up again to the supreme court, the latter will have to sit in full bench in solemn proceeding. It is not bound by its former opinion and can now affirm a decision that it disaffirmed the first time. But, if the supreme court reaffirms its previous opinion and again disaffirms the judgment on the same grounds, the court to which the case will be referred will be bound by the decision of the supreme court.¹⁰⁰

This illustrates how far precedents are not binding under the civil law.

When a judgment has been rendered by default in the lower court, the party in default can, within a certain period, ask the very court which rendered that judgment to withdraw its decision and to give him an opportunity to be heard.¹⁰¹ Then, after this new trial, the court may cancel its former judgment, and all the rights will arise out of the second judgment.¹⁰² But, when the former judgment is affirmed, whether the rights of the parties flow from the first or from the second judgment is a controverted question, the supreme court admits that the first judgment is destroyed entirely as soon as the second proceedings are introduced,¹⁰³ the courts of appeal hold the

⁹³Art. 1 of the Law of June 2, 1862.

⁹⁴Art. 7, Law of April 20, 1810.

⁹⁵R. Japiot, *op. cit. supra*, n. 21, secs. 1124-1125.

⁹⁶Law of November 27, 1790, art. 3. Law Germinal 4, an II, art. 2 to 4. Const. Fructidor 5, an III, art. 255, and Primaire 22, an VIII, art. 66.

⁹⁷R. Japiot, *op. cit. supra*, n. 21, sec. 1121.

⁹⁸"Cour de Cassation" comes from "casser," which means "to break".

⁹⁹Art. 87 of the Law of Ventose 27, an VIII.

¹⁰⁰See on this 2d revision by the supreme court, the law of April 1, 1837.

¹⁰¹This procedure is called "opposition" and is regulated by article 157 to 166 of the Code of Civil Procedure.

¹⁰²R. Japiot, *op. cit. supra*, n. 21, sec. 999.

¹⁰³Sirey, 1913, part I, p. 363.

view that the first judgment is the one to which the rights of the parties must be traced back; the text-writers follow the opinion of the courts of appeal.¹⁰⁴

Instead of going to the upper court, the loser may in exceptional cases, start proceedings somewhat analogous to the motions for a new trial and to the motions to set aside a judgment¹⁰⁵ and ask the court which has rendered the judgment to cancel it and try the case over again. The conditions in which such a proceeding is allowed are twofold:

(1) the former judgment must not be susceptible of appeal,¹⁰⁶
 (2) the demand must be made for one of the following causes: (a) fraud by the other party which has been the cause of the decision,¹⁰⁷—(b) discovery since the judgment of new evidence having a direct bearing on the decision, which has been withheld by the opponent,¹⁰⁸—(c) recognition that the documents on which the judgment has been rendered are forged,¹⁰⁹—(d) defect of form in the proceedings which nullify the judgment,¹¹⁰—(e) variance between the judgment and the declaration¹¹¹ (failure to give judgment on one of the things asked for; judgment on a thing not asked for; judgment for more than has been asked for),—(f) internal contradiction of the judgment.¹¹² A few other causes are also mentioned but are of no practical importance. The party who is to use this proceeding must first present an affidavit signed by three lawyers who have practiced for at least ten years within the district of the court of appeal, stating that their opinion is that such a proceeding is rightly brought.¹¹³ If the original judgment is affirmed, the rights of the parties will flow from the original judgment; otherwise, all that the court will do will be to cancel its former judgment. The *status quo* prior to the judgment will be re-established.¹¹⁴ It is only by a subsequent proceeding that, after a new trial, a new judgment will be rendered.¹¹⁵

Finally, the loser may bring a complaint against the judge who rendered the judgment.¹¹⁶ Of course, this procedure is very ex-

¹⁰⁴Revue Trimestrielle, 1911, p. 862.

¹⁰⁵Called "requête civile" explained in art. 480 to 505 of the Code of Civil Procedure.

¹⁰⁶Art. 480, Code of Civil Procedure.

¹⁰⁷Art. 480, sec. 1 of Code of Civil Procedure.

¹⁰⁸Art. 480, sec. 10 of Code of Civil Procedure.

¹⁰⁹Art. 480, sec. 9 of Code of Civil Procedure.

¹¹⁰Art. 480, sec. 2 of Code of Civil Procedure.

¹¹¹Art. 480, sec. 3, 4, 5 of Code of Civil Procedure.

¹¹²Art. 480, sec. 7, Code of Civil Procedure.

¹¹³Art. 495, Code of Civil Procedure.

¹¹⁴Art. 501, Code of Civil Procedure.

¹¹⁵Art. 502, Code of Civil Procedure.

¹¹⁶This proceeding is called "prise à partie" and is regulated by art. 505 to 517 of the Code of Civil Procedure.

ceptional since, as a general rule, the judges have the privilege of immunity. These cases are specifically enumerated in different provisions of the statutes and code, and are mainly cases of fraud, bribery, or negligence.¹¹⁷ The complaint against a judge of the lower court is brought before the court of appeal; against a judge of the court of appeal, before the supreme court.¹¹⁸ The judgment against the judge will be an award of damages in favor of the plaintiff.¹¹⁹ Another consequence will be the cancellation of the judgment in certain cases.¹²⁰

All the foregoing proceedings are available only to the parties to the original suit. Under the French system, third parties who have been indirectly prejudiced by the decision, in some cases which are not covered by the principle that a judgment cannot cause damage to persons not parties to it,¹²¹ may attack the judgment before the tribunal which rendered it.¹²² The party defendant will be the person in whose favor the former judgment was rendered. If the plaintiff in this new action succeeds, the former judgment will be modified so as to respect the rights of the new plaintiff, but will remain unchanged so far as the rest of the judgment is concerned. In other words, the function of the court will only be negative: it will extinguish some rights, but will not create new ones.

2. Commercial Courts

When the ideas of natural law became a social force, they created a body of law that the common law proved unable to absorb and synthetize, while the civil law succeeded in doing it: hence the line of cleavage between Law and Equity is ignored in the civil law.

On the other hand, when the merchants had expounded their customs in a system of rules, the common law was able to absorb it, while the civil law was not; hence a commercial Code together with a civil Code, hence commercial courts neighbouring civil courts.

Such commercial tribunals are established to judge the suits arising from commercial transactions.¹²³ These include not only all transactions which in themselves are of a commercial character, but also all transactions by persons in trade incident to their trade. Therefore, the scope of jurisdiction of such tribunals is of first importance.

¹¹⁷See on all these cases R. Japiot, *op. cit. supra*, n. 21, sec. 856.

¹¹⁸Art. 509 of the Code of Civil Procedure.

¹¹⁹Application of the general terms of art. 1382 of the Civil Code.

¹²⁰E. Garsonnet and Ch. C  zar-Bru, *op. cit. supra*, n. 57, sec. 178.

¹²¹On this delicate question see E. Glasson, *op. cit. supra*, n. 26, sec. 1052 *et seq.*

¹²²This proceeding is called: "tierce-opposition" and is regulated by art. 474 to 480 of the Code of Civil Procedure.

¹²³This matter is regulated by art. 631 to 642 of the Code of Commerce.

When a cause of action arises, the first question is: which is the tribunal before which the action must be brought? In actions *in personam* and *in rem* relating to movables, the answer is that the plaintiff can choose one of three tribunals: the court of the domicile of the defendant—the court of the place where the promise was made and the goods delivered (in case of a sale)—the court of the place where payment should have been made¹²⁴ (also in case of a sale). In commercial law, it makes no difference that one of the parties is a foreigner, and the foregoing rule applies in all the cases.¹²⁵ In actions *in rem* relating to immovables, the action must be brought in the tribunal of the situs of the immovable. In case of bankruptcy, actions must be brought at the domicile of the bankrupt.¹²⁶ When the proper situs for the action has been determined, it may be that there is no special commercial tribunal in that district, in which case the lower civil court¹²⁷ will take jurisdiction, but will follow the commercial procedure.

The civil procedure is the framework of all French procedure, so, in the absence of special provisions, the rules of the civil procedure are followed. Here we will only refer to the peculiar features of the commercial procedure. The only way to get jurisdiction over the defendant is, here also, by personal service, and what is personal service is determined by the same rules as in civil cases.¹²⁸ But at the same time the plaintiff can attach the goods of the defendant under an order given by the Chief Justice.¹²⁹ That is a means of getting security, but it is by no means a mode of getting jurisdiction over the defendant. While in civil courts, parties must appoint solicitors¹³⁰ to appear for them in court, they can appear themselves if they wish under the much less formal procedure of the commercial courts. They can also give to anyone a power of attorney to appear for them. Therefore, the distinction between barristers and solicitors does not exist in these courts. Both functions, in the big cities, are fulfilled by lawyers specializing in the field.¹³¹ The commercial procedure is entirely oral: the parties or their representatives read the items of their declaration or of their plea, and argue them orally. The whole case is directed by the judge: the evidence being most often written, witnesses seldom appear on the stand; when they do, the lawyers have

¹²⁴Art. 420 of the Code of Civil Procedure.

¹²⁵So held by the Supreme Court: D. P. 77, 1.373.

¹²⁶Art. 59, Code of Civil Procedure.

¹²⁷"Tribunal de première instance".

¹²⁸See art. 68 of the Code of Civil Procedure.

¹²⁹Art. 417, Code of Civil Procedure, and art. 172, Code of Commerce.

¹³⁰"Avoués".

¹³¹They are called "agrées".

no right to examine or cross-examine them. All that they can do is to request the presiding judge to put such or such question which seems to them relevant. This feature is important to notice since it gives a wholly different atmosphere to the French courts, obliges the lawyers to work in a different way, and perhaps has developed in the French mind a different conception of enforcement of justice. The judges, when the proceedings are over, decide the case in the same manner as in civil cases.¹³² The judgments of the commercial courts are by themselves executory, just as the civil judgments are. The appeal for the commercial tribunal is to the civil court of appeal, and the rules of the civil courts of appeal prevail, the summary procedure being always followed.¹³³

On the whole, Commercial Courts work efficiently; the results they reach are quick and businesslike.

They seldom make errors on questions of facts: they have as assistants of the courts specialists of all kinds before whom most cases are sent to ascertain both facts and commercial customs and often also the points of law involved in the case, and try to reach a compromise between the parties.

Let us take an example: suppose a suit on a breach of contract: the contract was to dye furs for a wholesale dealer, at the dyer's fancy; the plaintiff claims that the skins are very badly prepared and that the colours selected for the skins make the resale of them impossible. The court will send the case before one of the officials of the Fur Dealers Association, who will look at the skins and tell the parties what he thinks. The parties, knowing that the court will decide the case, according to the report made by that official, will in most cases settle the dispute immediately. But, if the case comes up in court, the judges, having before them a report made by a competent person, will determine accurately the facts with efficiency and no waste of time.

The aim is to reach a businesslike result and that is done.

Of course, the custom of sending most cases to referees is sometimes a defect, but one must remember that there is a court of appeal and that this defect is the price of rapidity and efficiency in the great majority of cases.

3. *Administrative Tribunals*

Administrative acts, as a general rule, cannot be reviewed by the ordinary tribunals; they are under the supervision of the admin-

¹³²Art. 433, Code of Civil Procedure.

¹³³Art. 648 of the Code of Commerce.

istrative courts; there are several of them, each one having special definite functions, but the tribunal to which the cases come, in the absence of a statutory provision to the contrary, is the Council of State.¹³⁴ As a judicial organism, it has to judge as an ordinary tribunal the controversies where an administrative act is in question. Its power therefore goes to the length of ordering restitution, damages or a *mandamus* to the administrative officer to do what he should have done.¹³⁵ So, there must be a definite, precise right in the plaintiff. For example, if an error is made in the computation of the annual income given to a wounded soldier, he can bring suit because he, personally, has a right to the proper amount. The case will be the same, although the technique would be different, if the plaintiff were suing as a member of the public who has suffered a personal damage directly caused by the administrative action complained of.

The procedure of the Council of State is not shaped on the model of the ordinary civil procedure. It differs from it in certain essential features.¹³⁶

(1)—In the civil procedure the solicitors can bring in any kind of documents they wish; they can, if they desire to do so, complicate the procedure by being very technical. In administrative courts the judge is the master of the procedure and will decide whether or not it is necessary to introduce such and such documents that the parties want to bring in. The judge takes actual charge of the whole procedure. For example, the plaintiff does not have to serve the defendant: he only addresses his request to the judge, who will take care to have the defendant notified.

(2)—In civil courts there are no briefs but a very sketchy outline of the points that will be argued orally; in administrative courts, on the contrary, the counsels present real briefs and the oral argument is only an explanation of the written briefs, as is the case under the Common Law.

(3)—While the general rule is that proceedings in a civil court are public, the rule is otherwise in administrative courts.

(4)—In the latter courts procedure is simple and inexpensive.

As there is only one Council of State, and as the defendant, being always an official of the French Government, is always within the jurisdiction, we have here no problem arising about jurisdiction.

The briefs of the lawyers¹³⁷ and documents of all kinds are con-

¹³⁴In French: "Conseil d'Etat".

¹³⁵H. Barthélemy, *Droit Administratif*, 8th Edit., p. 973.

¹³⁶The four following points are very well sketched in the book of Mr. H. Barthélemy, *op. cit. supra*, n. 135, p. 994 *et seq.*

¹³⁷A great many laws have successively regulated the administrative procedure. The last ones of importance are the laws of April 8, 1910, and May 31, 1910.

sidered by an under-section. One of the members of this under-section makes a written report which will be the basis of the discussion by the whole sub-section, which, after having made all the modifications it sees fit to make, adopts the report which always includes conclusions on the rights of the parties. Then the case will be decided by the whole section after hearing the report above mentioned, the arguments of the lawyers who may explain their arguments set forth in the briefs they have submitted to the sub-section, and the conclusions of the attorney general. When a decision has been rendered by the Council of State, there is neither appeal nor recourse to the supreme court, since there is no administrative court above the Council, and since, according to French Constitutional Law, a judicial tribunal cannot review the decision of an administrative court. But the three methods mentioned when we studied the civil tribunals, by which a party can ask the very tribunal which rendered the judgment to cancel it, are also available before the administrative court.¹³⁸

A certain number of matters of smaller importance, limitatively determined by statutes, are decided by a court sitting in each of the French "départements": an administrative division of French territory.¹³⁹ It decides especially questions of taxation. Its decision can always be appealed to the Council of State.¹⁴⁰ The procedure of the administrative courts is enforced, according to the same principles applicable to the decisions of the ordinary judicial courts, except that no lien can attach to the property of the State.

Sometimes it is difficult to determine whether a certain case falls within the jurisdiction of the administrative court or of the civil court. So it may be that both courts want to take jurisdiction. It may be also that both refuse to take it. As there can be no hierarchy between these two categories of courts, these conflicts are settled by a special court.¹⁴¹

These courts have theoretically a great defect: their judges are administrative officers and, as such, under the control of the State, or the "Département", or the City, and as such have not the independence that judges should have.

Practically it may have some inconveniences for the exceptional and inferior administrative courts, but has seldom proved to be a defect in the "State Council".

Administrative Law is the unwritten part of the Civil Law and it is

¹³⁸See, for example, the decree of July 22, 1806.

¹³⁹The name is "Conseil de Préfecture".

¹⁴⁰That procedure is regulated by the law of July 22, 1889.

¹⁴¹Called "Tribunal des Conflits".

developed through judicial precedents very much like the Common Law, except that one precedent is not binding: there must be a course of judicial precedents—a real tradition—in order to establish what the Law is.

4. *Justices of the Peace*

The justices of the peace are judges of the controversies of trifling importance. What is considered by the law of trifling importance is determined by certain rather complicated statutory provisions.¹⁴²

To determine the tribunal which has jurisdiction, the rules applicable in the lower civil courts are applied.¹⁴³ The procedure is summary and inexpensive. The justice of the peace sends a letter to the defendant telling him to appear at a certain day for an attempt at conciliation. If this attempt fails, the plaintiff must have the defendant served. The rules applied as to what the writ must contain and how it must be served are substantially those of the lower civil court. Then the parties appear themselves or by attorney or agent. The procedure is oral. The justice of the peace can give his decision at once, or wait until next sitting. The judgment must enunciate the grounds of the decision and must be rendered publicly. It is not subject to appeal if the claim of the plaintiff does not exceed Frs 600.¹⁴⁴ Above that sum, appeal, as a general rule, may be taken to the lower civil court.

The justices of the peace make all their career in the same village or town; they generally have the confidence of the community; curiously enough they can judge according to equity and are not bound by law; they render very substantial services.

5. *Council of Arbitrators*¹⁴⁵

These tribunals decide controversies between employers and employees arising out of the employment or of the contract of employment. The scope of their authority extends not only to industrial workers, but also to commercial employees. However, these courts have no jurisdiction over cases of workmen's compensation.

The rules with reference to the jurisdiction as between these tribunals differ from those applied in the civil courts. The two principles applied here are: (1) if the work has, so to speak, a situs, if it is

¹⁴²The principal law on this point is the law of July 12, 1905. See also Law of Frimaire 22, an VII, art. 844; and Law of August 23, 1871, art. 13.

¹⁴³Exceptions and special rules, however, for special matters are determined by art. 2, 6, 7, 13, 14, 17 of the Law of July 12, 1905.

¹⁴⁴Art. 2 of the Law of July 12, 1905, modified by the Law of January 1st, 1926.

¹⁴⁵The French name is "Conseil des prud'hommes". Its organisation and functions are regulated by the law of March 27, 1907.

regularly done at one place, suit must be brought in the court of the district in which that place is located; (2) if the work has no situs, the court of the place where the contract of employment was made has alone jurisdiction.

Before bringing suit the plaintiff, just as in civil cases, must make an attempt at conciliation before a special bureau of the tribunal.¹⁴⁶ If that attempt fails, the plaintiff presents his request to the court. It is the court which serves the defendant. It does it by registered letter.¹⁴⁷ The procedure is wholly oral, the parties must appear themselves; if they cannot, a fellow-worker, a barrister, or a solicitor may appear for them. The judgments of these courts have executory force by themselves, if appeal is not taken to the lower civil court.¹⁴⁸

CONCLUSION

From a comparison of civil and common law procedure, what are the main impressions that may be gathered?

In our mind, the following ones:

1. In both there is a line of cleavage due to historical factors: in the common law, Equity and Law; in the civil law, civil law *stricto sensu*, commercial law.

But while it tends to disappear in American procedure, the same tendency is not to be noticed in France.

2. In both there is a good deal of unnecessary formalism, but civil law procedure presents this advantage that formalism is so much formalism that it is empty of any substance, so that the latter has been placed elsewhere on a freer land.¹⁴⁹ So formalism is not as cumbersome under the Roman Law system as under Anglo-Saxon procedure.

3. The political conception back of each one is different. The American conception is that in a democracy it is shocking that some individuals may, as a profession, have the fate of some of their countrymen in their hands. So, the idea of a judge deciding the whole case, law and fact, does not agree with the philosophy of the land. Facts must be decided by fellow countrymen, selected by chance; law must be decided by a judge, preferably elected by the people at large.

Now the civil law conception, that claims to be as democratic, reaches quite opposite results and says democracy must be safety

¹⁴⁶Art. 26 to 29 of the Law of March 27, 1907.

¹⁴⁷Art. 29 and 30, Law of March 27, 1907.

¹⁴⁸Law of July 15, 1905.

¹⁴⁹For instance: replications, rebuttal, etc., contain nothing of any importance. It is only in the "conclusions" drawn in the freest possible way, that the substance of the arguments can be found.

against arbitrary human decisions; citizens must be judged by law and not by men; so, those who have to decide the fate of their fellow-citizens must not be picked out by blind chance and brought into the court-room with all the obscure sentiments and instincts of the crowd from which they come. The safeguard of democracy is the coolness of professional judges, their training in inductive process for the discovery of the truth, their lack of sentimental attitude. The Anglo-American philosophy back of its procedure is a sentimental democracy that wants to strengthen the links with the people at large. The Latin philosophy is an intellectual democracy wanting to protect those coming into court from the heart, the nerves, the obscure instincts and passions of the crowd and the mob. Hence in the civil law there is no jury in civil cases, judges are never elected by the people at large,¹⁵⁰ there must be three judges and a representative of the State in each court.

4. The civil law gets a stricter control over its personnel. An American is often shocked by two things: firstly, the complication of a system in which the work done by one lawyer in the United States, is divided in France between an "avoué", an "avocat", an "avocat à la Cour de Cassation", an "agrégé", a "notaire", a "huissier", and a "syndic de faillite"¹⁵¹; secondly, the monopolies that each of these professions have.

It is indeed often an evil, but it has the great advantage of allowing a proper selection and control of the personnel. Under the French system, *those in the legal profession either must give a bond and are appointed by the President of the Republic, or have their functions so narrowly and clearly defined that they cannot do much harm.* For instance, the solicitors have a rather free hand, but their nomination has been preceded by a careful examination of their character, they are under bond, have paid high prices to buy their office, and must have a substantial experience before being admitted.

On the other hand, barristers are in fact very freely admitted to the bar when they have a degree equivalent to the LL.B.,¹⁵² but their hands are tied. They cannot handle funds, or see the opponent, or represent their clients; moreover they are under the strict super-

¹⁵⁰Indeed judges in the commercial courts are elected, but by a selected class of people: the merchants. The same remark may be made for the Council of Arbitrators: some of the judges are elected by the employers, the others by the employees.

Receiver in bankruptcy. Barristers, not being allowed to handle funds, cannot fulfill such a function.

¹⁵²Notice that if no examination is required for admission to the bar, it is because all degrees are given in France by the State and have everywhere the same standard value.

vision of the disciplinary council¹⁵³ of the bar which exercises a quite efficient control.

It is submitted that such a control of the personnel is more important for the good administration of justice than any rule of procedure.

5. The proceedings in court are much more brief in France; the evidence is all gathered in writing before the trial so the judges in court have only to hear two speeches on arguments of law of which they already know the outline by the "conclusions", and of evidence of which they have had a copy. Hence proceedings in average cases last between ten minutes to one hour.

6. The civil law procedure is less cumbersome since there is no brief, no cross-examination, no jury, no stenographic report of the proceedings in court. Then, when a barrister receives from a client a case to argue before the court of appeal, the only documents he gets are a few sheets of typewritten paper. Nothing is more amazing for a civilian than to see the enormous printed volumes that represent some cases coming before a court of appeal in America.

Indeed, it does not mean that there is no unnecessary formalism in civil law procedure, but there has been a most happy segregation of substance from such unnecessary formalism. So a certain number of steps are still taken by solicitors that have no other significance than to respect certain traditional requirements, but they are left out of the file of documents¹⁵⁴ from which the barrister works on the case and argues it.

7. A trial, at common law, looks like a fight organized in a sportsmanlike manner, while a trial, at civil law, gives more the impression of a cool, inductive process towards the discovery of the truth. We can only indicate here briefly that difference of conception which seems to us fundamental and is illustrated by the whole procedure.

The necessity of coming to an issue according to certain rules and in a formal way, looks like the disposition of foot-ball players on the field before the beginning of the game.

The element of surprise, eliminated in a civil law trial,¹⁵⁵ is carefully kept as a weapon in the legal fight; the American lawyer hides his evidence from his opponent.

A thoroughly developed system of evidence in the common law

¹⁵³"Conseil de l'ordre". Indeed it is much more than a disciplinary council: it is the board of directors of the corporation of barristers, in which all barristers are necessarily enrolled.

¹⁵⁴"Dossier".

¹⁵⁵Since all evidence introduced by one party must be communicated to the opponent a reasonable time before the trial.

looks like "the rules of the game". As soon as it is admitted that lawyers can reach the truth only by certain means, and that elements which might be a real clue are necessarily disregarded, it becomes clear that the aim is not to discover the truth, but to have a fight organized according to certain rules.

Of course, the existence of the law of evidence is due to a great extent to the presence of a jury, but is not the jury itself a proof of that fighting spirit of the common law? The twelve men bring into the courts the popular feelings, sentiments, instincts, and lack of experience in inductive reasoning which maintains and develops that atmosphere charged with electricity which is not felt in a civil law court.

Such an atmosphere is increased by the personal appearance of witnesses in court. At common law, those connected with a case are present with their passions, their hopes, their hatred, their ambitions; no one knows what they are going to say, and what is going to be discovered. In civil law countries, all that lawyers have to deal with is a few sheets of typewritten paper, the contents of which are well known to everybody. The difference is striking.

It is more accentuated if one remembers that there is no cross-examination in a civil law court; when witnesses must testify, the questions are put by the Chief Justice and the lawyers remain silent, other than to look from time to time to the Chief Justice to put this or that question to the witness; there is no fight with the witness, or with the opponent about interrupting the witness.

At common law, when the two lawyers have taken the positions with their weapons (i. e. evidence), they are left alone in the arena. It would be considered as against the rules of fair game to have a third party intervening in favor of one of the champions. In civil law countries, on the contrary, the presence of a district attorney saying freely how he believes the law should be applied, in a suit on a breach of contract, for instance, changes to a considerable extent the attitude of the lawyers.

For these reasons a trial looks more at common law like a fight, at civil law more like an academic discussion and an inductive effort to discover the truth.

Which is the best? It is submitted that such a question has no meaning: there is not one good system of procedure: all are good when they are adapted to the psychology of the people and the spirit of the law to which they apply.