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CIVIL AFFAIRS INFORMATION GUIDE

MODERN CIVIL LAW

WAR DEPARTMENT 4 MAY 1944

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WAR DEPARTMENT,
Washington 25, D. C., 4 May 1944.

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By order of the Secretary of War:

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NOTE

Civil Affairs Information Guides are designed to aid civil affairs officers dealing with problems in liberated areas, each guide being focused upon a specific problem in a particular area. These guides are not basic collections of factual information, as are the Civil Affairs Handbooks, nor are the recommendations contained in the guides intended to take the place of plans prepared in the field. They are rather designed to point the factual information toward the making and executing of plans by those civil affairs officers assigned to this work in the theaters of operation.

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AN INTRODUCTION TO MODERN CIVIL LAW

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The purpose of this brief outline of the civil law is to provide a general view of the important principles of that legal system, - especially of rules differing radically from the common law - for those who have an immediate interest in pursuing the law of countries which our armies are now, or may soon be, temporarily occupying.

The basic material for this synopsis was presented in a series of lectures delivered at the Latin American Institute, in Washington, D.C., in the summer of 1943, by former professors, judges, and lawyers of Germany, France, Italy, Czechoslovakia, Poland, and South American countries, recently employed as consultants by various Federal war agencies. These include Robert Neuner, Ernest C. Stiefel, Vladimir Gsovski, Heinrich Kronstein, Raphael Lemkin, and David S. Grant.

In the organization of this material and in the development of the various subjects, reliance has been placed in handbooks of common law students of the civil law — Amos and Walton's "Introduction to French Law," Schuster's "Principles of German Civil Law," and Goldsmith's English Law from the Foreign Standpoint." Translations of the French Civil Code (C.C.) by Wright and by Henry Cachard, and of the German Civil Code (B.G.B.) by Wang, and a translation of the Italian Civil Code (not yet completed) have been used and cited. Approximately 200 articles dealing with the civil law, published in legal periodicals of this country, have also been collated and reviewed.

Without a working knowledge of the civil law, the code provisions, even in English translations, will frequently be found unintelligible or misleading.

SUBJECTS

History, Practice and Procedure.
The Law of Commerce.
Obligations: Contracts, Remedies, Ex Delicto Obligations (Torts).
Persons: Nationality, Domicile, Capacity; Marriage, Divorce and Annulment; Parent and Child; Succession and Wills.
Property.
Criminal Law.
Administrative Law.

A SUMMARY OF THE CIVIL LAW

History, Practice, and Procedure

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Civil Codes v. Unwritten Law.- The fundamental difference between the civil law and the common law is that the common law is based upon decisions occasionally modified by statutes, whereas the civil law is set forth in codes. There are, in general, five codes: civil, commercial, penal, civil procedure, and criminal procedure.

The decisions of our courts not only illustrate the law, but are the law, and this is not so in civil law countries. Where we recall a noted case, the civil lawyer remembers an applicable code provision, even by number. Nevertheless there is a constantly growing tendency in the civil law countries for the decisions of the courts to be cited in arguments and in opinions and to be referred to in judgments, and judicial reports can now be found in cities and towns of any importance. Today a decision of the high court of France -- Cour de Cassation -- has authority almost equal to that of a Supreme Court decision in this country. This tendency is most marked in the field of torts. This new subject (the principles were not recognized in Roman law) occupies a large part of the time of the courts, yet its development has been so rapid that the subject is almost unnoticed in the codes as compared with the law relating to the family. The adaptability of the common law system to changing conditions is strikingly illustrated in this case. In fact, the French law on torts today, in effect, is "common law."

Although decided cases still have somewhat less authority in civil law countries, textbooks and opinions of civil law scholars have more weight, because theoretically the judges do not "make law," and it is felt that the scholars are more learned at interpreting the written law. The records of public discussions preceding or accompanying legislation are also of great importance.

The civil law is considered more certain than the common law. An attorney in France, consulted by the victim of a motor vehicle accident, from rudimentary knowledge of the code and of civil law practice will say at once that there are only three alternatives: The client is wholly to blame, in which case he will recover nothing; he is entirely free from blame, in which case he will recover full damages; or both parties are at fault, in which case the court will award damages in its discretion on a reduced scale according to the degree of fault. The American attorney must first consider many relevant and analogous cases on contributory negligence, and his advice in the end will be less concise and no more certain.

To the civil lawyer a new statute is the final word. He pays attention to the sense of the law rather than to the words composing it. The same word may be used with different meanings in the same statute without reproach when the sense is clear. In this country the common law is jealously guarded by the lawyers, and a statute which modifies the common law is restricted as much as possible.

History of Civil Codes.- Most of the modern codes throughout the world are based upon the Code of Justinian (533 A.D.) -- The Corpus Juris Civilis -- the codification of 1000 years of development of the Roman law. The Code of Justinian was adopted, with minor changes, by the Spanish in 1263 in Las Siete Partidas. This was superseded in 1889 by the Codigo Civil -- the present law of Spain. Las Siete Partidas was also extended to the Spanish colonies, and has formed a basis for the law of all Spanish American countries. These countries later adopted the more modern and democratic French Civil Code or a substantial part of it.

The oldest of the existing civil codes is that of France, the Code Civil, which owes its existence to Napoleon. Prior to the adoption of this Code in 1804, the law of France was the custom of the community, differing widely from place to place, but bound together by the influence of the Roman law. As with Justinian, Napoleon appointed a commission to prepare the code. Napoleon's commissioners drew largely from the Roman law. Again it was a conquest of order over disorder.

The civil code of Italy was adopted by Victor Emmanuel II. in 1865, largely from the Code Civil. After some years of research the civil code was reenacted in 1941. A modern penal code was adopted in 1890, and a criminal procedure code in 1912. Both of these were considerably modified in 1931.

The German civil code (Burgerliches Gesetzbuch), enacted in 1896 and effective in 1900, was the result of the work of a commission originally appointed in 1874, following the Franco-Prussian War. (The Japanese later adopted, substantially, the first draft of this code -- that of 1887.) In the latter part of the 19th century there was a variety of law in the German states, although the Roman law and the Code Napoleon had much influence and were actually adopted in some states. Considerable effort was made to break away from the Roman law and to give the German law a Teutonic base, but Nazi writers presently criticise it as, basically, Roman law, and Hitler early forbade the teaching of Roman law in the universities. In 1934, the German Law Academy was organized by Hitler to draft laws and to give expert opinions to the new government. It prepared a criminal code which is more in accord with the views of the Nazi Government, and is drafting a new civil code.

At the time of the Revolution of 1917, due to the influence of Catherine the Great, the Russian law was based upon the Code Napoleon. Russia now has a Code of Civil Procedure, and a Civil Code which deals principally with the status of workmen and with other economic matters. All former laws have been swept away, and it is individual laws and regulations which for the most part form the law of Russia.

There have been numerous amendments to the various civil codes, principally in facilitating marriage and divorce and removing restrictions upon married women, but the substance has not been materially changed. Other legislation has been enacted, especially in recent years and in the dictator-controlled countries, but this has been principally in fiscal and administrative matters. There is, of course, also a considerable amount of subordinate law consisting of executive decrees, administrative regulations, and temporary military orders.

The Courts.- The civil court system of civil law countries is quite similar to our system.

United States	France	Germany	Italy
1.Local Courts Justice of Peace (limited jurisdiction in civil and criminal cases)	Juge de Paix	Amtsgericht (also the land registration court)	(Conciliatore (Pretore
2.Courts of First Instance County and Municipal (appeals from J.P.; original jurisdiction for more important cases)	Tribunal de Premier Instance (Cours d'Assises in criminal matters)	Landgericht (exclusive in divorce and commercial matters; also has a criminal branch)	Tribunale (also commercial cases)
3.Appellate Courts	Cours d'Appel (civil cases only)	Oberlandesgericht	Corte di Appello
4.Supreme Court	Cour de Cassation	Reichstgericht	Cassazione

Appeals may be taken to the next higher court (except to the Supreme Court), and there is no original jurisdiction in the Supreme Court or appellate courts. The courts generally have criminal jurisdiction also.

The principal differences are (1) that the supreme courts upon request (revision) confirm or correct decisions on matters of law or logic only and do not go into the merits or give a new judgment (although the Reichstgericht may do so); (2) the courts cannot pass upon the constitutionality of legislation (this "judicial veto" power increases the prestige of the judiciary); (3) the administrative system disposes of a very considerable amount of litigation which in this country would be tried in the ordinary courts.

Judges are generally appointed by the Ministry of Justice (the administrative head of the judicial system), according to grades on the bar examination, but the pay is relatively low.

Dictator Courts.- By means of the party system the judges of Germany, Italy, and occupied territory largely have come under dictator domination. Authority given to the Ministry of Justice by Hitler to make any changes deemed advisable in the courts, notwithstanding any law to the contrary, facilitated this. The notorious "People's Court" (Volksgericht) was established in 1934 to try crimes against the state. The proceedings are secret and the judge governs according to his will. The trial is, in effect, a "star chamber" proceeding to carry out the will of the Nazi Party. The Italian Tribunal for the Defense of the State, established in 1926, is somewhat similar.

Civil Practice and Pleading

Trial.- The procedure for a civil law action is substantially the same everywhere. In Germany the complaint is generally drawn by an attorney who attaches his power of attorney. The complaint states the facts, what witnesses will testify to each fact, and asks a date for hearing and judgment. The court sets a date and sends a copy of the complaint to the defendant. The answer may set up legal reasons why the complaint is not good, and may also deny the facts stated in the complaint, or set up matters of defense. Upon the date of hearing, the attorneys appear and merely refer to their pleadings, and the judge sets a date for the decision. If the defendant defaults, judgment is rendered immediately, provided the allegations are proper. If the court decides for the defendant on a question of law, judgment is given against the plaintiff. If not, the "decree" merely calls for witnesses to the points which the judge wishes to consider, and service is made on these witnesses by mail.

The questioning of witnesses, although public in theory, actually takes place in a small room and is confidential. The judge instructs them on the seriousness of perjury and questions them personally, taking notes of the testimony. He also is the judge as to what evidence is material -- there is no complicated law of evidence. Ordinarily each witness is allowed to tell his story with little interruption, and the attorneys neither ask questions nor object to testimony. They may remonstrate with the judge concerning his questions or the testimony, and may ask questions through the judge, but there is no formal cross examination.

At one time neither plaintiff nor defendant could testify, but the judge can now call upon either for information in certain cases. Similarly, expert witnesses are called only by the court and are witnesses for the court -- not for one of the parties. As a result a system of permanent court experts has grown up in most of the civil law jurisdictions. The decree can be amended if there is sufficient new evidence, and another hearing will be allowed to produce new evidence. The judge may look at the criminal register to see if defendant has a criminal record, or the counsel may request the judge to do so. The judgment contains the decision, a review by the judge of the testimony, and the reasons for the decision. Costs are borne entirely by the loser, but attorneys' fees are set.

Execution.- Enforcement of execution is simple. If no appeal is taken, the sheriff serves the judgment, and if it is not paid he levies execution on the personal property and sells it if sufficient to pay the judgment. If not, the plaintiff can ask the court to set a date to examine the defendant concerning his property. This is serious because notice of this proceeding goes on the record of credit companies, with the result that the defendant will be prevented from doing business. At this hearing the plaintiff can ask (1) for a decree against creditors, if any, of the defendant, (2) for the registering of a compulsory mortgage against any real property, (3) for the appointment of a receiver to collect the real property's income, or (4) for the formal sale of the real property (which is complicated).

Appeal.- The usual appeal was for a trial de novo in the next higher court. It is customary for the plaintiff to enforce the judgment notwithstanding the appeal, but he can be required to give a bond or a bank guarantee, or the court can postpone carrying out the decision until the appeal. Since June 1943, in Germany appeals are directly to the Court of Appeals, and only to reverse a conclusion of law or of fact.

Jury.- There is no jury in civil cases, and experiments in criminal cases with this Anglo-Saxon instrument of justice have not been very successful. (See Criminal Law.) Emphasis has been upon developing a scientific method of proof.

Equity.- It will be recalled that our Equity law was an outgrowth of the failure of the common law, resulting from the insufficiency of the common law writs. There is no similar institution in civil law. Through the centuries, all of the Roman law equitable principles and local customs have become an intrinsic part of the law, which was finally codified. It is probable also that "the claims of national morality never had so free a field as they won for themselves in England" when the Chancellor's equitable jurisdiction was being built up.

THE LAW OF COMMERCE

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The Law of Commerce has the same basis throughout the world -- the Law Merchant. This law originally was merely the custom of the Merchants' Guild in the Middle Ages. Because of the contempt entertained for merchants, they were not welcome in the courts. Moreover, the courts were not familiar with their customs as they were with other customs. The merchants, therefore, enforced their customs by boycott and by penalty. During the period 600 to 1300, these customs grew into a well established system of law. Then they were codified in Spain in the Consolato del Mare. Later, the Central European traders made a similar codification -- the Judgments of Orleans; the Baltic Sea merchants adopted the Regulations of Wisby; and the West Indies merchants, the Code of Amalfi. The Ordinances of Bilbao were adopted in 1757, and in 1829 these ordinances became the first true commercial law when the Spanish Government adopted them. Other civil law countries now have a similar Code of Commerce. In England, Lord Mansfield adopted the Law Merchant in a decision, and eventually succeeded in amalgamating the rules of the Law Merchant with those of the common law (second half of the 18th Century). From that time on, the Law Merchant has been a part of the common law. In all civil law countries, however, the Code of Commerce remains as a distinct law, governing the transactions of merchants. It covers substantially the subjects of negotiable instruments, sales, partnerships, corporations, and agency.

1. Jurisdiction of Commercial Law.- Since the Merchants' Code, not the Civil Code, in general governs the legal activities of merchants, it is essential to determine whether a transaction is governed by this Code or by the civil law. If a real estate man buys a house, even for himself, the rights and remedies may be different than if a doctor buys the same house. For instance, a summary judgment under the Law Merchant has no counterpart in the civil law. The Law Merchant rests upon two concepts -- the "merchant," and the act of commerce. A merchant ("kaufmann," "commercant") is defined as "a legal or natural person engaged customarily in commerce for profit." The Codes do not define what constitutes acts of commerce; they are enumerated. In general, "commerce" includes activities of commercial associations and insurance, credit, and transportation facilities. Farming is not "commercial" activity. (See Handelgesetzbuch (H.G.B.) 1-3; Code de Commerce, 632, 633.)

The most practical test to determine whether a person is a merchant is to examine the Mercantile Registry, in which all merchants are required to register. Those who are not registered do not have the privileges of the Law Merchant. The Register also includes agents,

brokers, representatives, etc. The merchant is registered in the town where the principal business is transacted. The fact that a person is not registered is not conclusive that he is not a merchant. However, if, for example, an individual who is not registered helps to sell a farm, he will not be able to claim a commission as a merchant unless there is a specific agreement for commission. The same contract may be commercial as regards one party and civil as regards the other. If the seller is a registered merchant and the purchaser is a doctor, in the event of litigation the seller must proceed in the civil courts, but the doctor has his choice of jurisdictions.

Although a merchant has certain great advantages, for example, superior credit and banking facilities, certain obligations are assumed, including publicity as to changes of personal status, maintaining certain books of accounts, retaining records and correspondence, rendering of reports, and publication of balance sheets.

2. Commercial Courts.- Cases involving the Law Merchant are tried in the commercial courts. In France, as in most other civil law countries, these courts are composed of unpaid lay judges who are elected by, and from among, the members of the commercial community. In France, three judges form a court. Appeal lies to the ordinary courts of appeal, and beyond, on questions of law only, to the Court of Cassation. The strict general rule of the Civil Code, requiring written evidence, does not apply to the commercial courts, although many of the more important commercial agreements must be in writing.

The jurisdiction of commercial courts is (1) litigation relating to acts of commerce, (2) bankruptcy proceedings, (3) litigation between shareholders relating to business of commercial companies, and (4) proceedings for the enforcement of mortgages of businesses.

3. Legal Capacity.- Only persons having the necessary legal capacity may engage in commerce, and the limitations in civil law countries are numerous. The age of majority varies from 18 to 25 years, and a minor may need recorded parental authority. A married woman may need formal authority of her husband. Foreigners, whether natural or artificial persons, may have no legal status. In any event, legal persons must be organized as commercial entities.

4. Notary Public.- One of the principal differences in commercial transactions in civil law countries is the notary public and the notarial contract. The Notary Public is an honorable profession. Appointment is made by the Ministry of Justice, generally for life; the appointee is always a lawyer, and he has quasi-judicial powers. His fees are set by law, but he often drafts the document, in which case he is paid legal fees. A notarized document is a "public instrument." It is still written in long hand in South America, although this custom has almost vanished in Europe.

The original is filed with the notary, and only a copy is retained by the interested party. Moreover, the original can be seen only by those who can prove an interest in it. The effect of a notary public certificate is conclusive in the courts. Therefore, any valuable document should contain a notary public's certificate concerning the parties to the transaction, the actions taking place in the notary's presence (such as the transfer of cash or other property), and every other point important to the transactions. All facts contained in the certificate must be proved to the notary's satisfaction, but his certificate in turn will give the complete story of the transaction. The notary can certify conclusions of law, but these are only of presumptive weight in court. Frequently a notary will be requested to accompany a party "in order to give faith" to an act to be performed, such as the handing of a letter to another person. Moreover, almost every transaction involving payment is consummated by a notary's receipt. The notary (or his successor) can then be produced in court, if necessary, at any future date to prove the act.

5. Public Instruments.- All recorded transactions must be by public instrument, and since many transactions, especially conveyances of property, must be recorded, this is an additional reason for obtaining notarization. Moreover, in most civil law jurisdictions, "preventive attachments" can be obtained on a public instrument. For instance, where a locomotive has been delivered and payment of $5,000 is due January 1 -- if this agreement is witnessed by a public instrument, the locomotive can be attached immediately upon nonpayment of the $5,000 on January 1.

6. Power of Attorney.- Although a private power of attorney is adequate for specific acts concerning chattels or small transactions, it is generally advisable to provide a public instrument power. A general power is proper for acts of general administration, but a power must be specifically conferred for many special acts, such as submission to arbitration. Corporation or partnership powers of attorney should be complete as to proof of underlying authority, such as proof of corporation's organization and of the due election of the board and of the officer appearing for the corporation.

7. Agents.- Although civil law does not recognize agency as a special field, the common law and the civil law conceptions of agency are quite similar. (See the "Mandat," Code Civil, Arts. 1984-2010; the "Stellvertretung," Arts. 164 et seq., B.G.B.) In the commerce of civil law countries two distinct agency relationships should be considered — dependent and independent auxiliaries of commerce.

a. Dependent Auxiliaries (Mandatarios).- This class includes factors and clerks.

(1) A factor, as in this country, is a full powered commercial representative. This includes the business representative of an American concern abroad. A power of attorney or other formal authority is almost universally required before such an agent is recognized, and the

power must be recorded in most countries. The factor must act in the name of the principal even if the principal is undisclosed, and contracts in the factor's name bind the factor as well as the undisclosed principal. Factors can not trade for their own profit nor delegate their authority without the consent of the principal. They are liable for government penalties or fines imposed on the principal.

(2) Clerks, whether in charge of a business or having similar executive authority, or merely store clerks, are included in the category of dependent agents. In the former case it is generally required that the authority be defined in some written form.

b. Independent Auxiliaries (Comisionistas).- Brokers, auctioneers, and other commercial agencies dealing in their own name, are included in this category. The principal distinction is that they generally act in their own name and act for numerous principals. A license is required to engage in these occupations. Some proof of honesty and competency and the furnishing of a bond may be required to obtain the license. There also may be age and citizenship requirements in certain countries. Frequently, in Europe or South America, brokers will be found organized by trade into guilds or associations which impose their own requirements in addition to the necessary legal restrictions. Brokers and similar independent agents must keep books and give memoranda of transactions, and entries in such books are proper evidence in court. Special laws frequently govern their operations.

c. Commercial Travelers.- There is a class of "traveling salesmen" who solicit business for concerns abroad but who are not considered agents. Offers for products displayed by them are made to the principal at home. Consulates frequently furnish special facilities to this group.

8. Commercial Organizations.- The common law distinctions between commercial partnerships and corporations are scarcely known to the law of commerce, in which both are considered as juristic persons — entities separate from the individuals forming them. Any organization whose objects are commercial in character is subject to the laws and usages of commerce, including liability to bankruptcy. Companies or associations which have no commercial object are, nevertheless, considered as commercial companies if they have a commercial form. In France, Sociétés de Personnes, which include Sociétés en Nom Collectif and Sociétés en Commandite Simple, are similar to our partnerships, and Sociétés de Capitaux (which have assignable shares) correspond to our commercial corporations.

a. Sociétés de Personnes (Partnerships).-

(1) Organization.- The principal differences in organization from the common law partnership is that a civil law partnership can not exist by word of mouth. Nor is there such a thing as a de facto partnership (or corporation). There must be a written partnership contract — a public notarial instrument — and the same formalities as for a share company —

registration, the filing of returns, publicity upon organization, etc. Certain facts must be stated in the organization contract. These facts are set forth in the Commercial Code and include the firm name and names of partners, the capital purchased by each in cash or property, the scope of business, duration and dissolution provisions.

(2) Partnership Authority.- In the oldest and most common form of agreement ("Société en Nom Collectif" — "Sociedad Colectiva" —"Offene Handelsgesellschaft") the partners are jointly and severally liable without limit for partnership debts. Any partner can automatically bind the rest, as at common law, unless the partnership deed contains a limiting provision designating one partner as "managing partner," who alone acts for and limits the firm. If properly published, this is valid against third persons. This managing partner's name generally appears on the letterhead of the partnership. If he disappears or becomes incapacitated, a new manager will be appointed by the court, upon application therefor.

(3) Limited Partnerships (Sociétés en Commandite Simple (S. en C.)).- These are somewhat similar to limited partnerships in this country (one or more full, and one or more limited, partners), except that the partnership must give the requisite publicity to this, and the limited partner's name must not be used in the firm. Limited partners have a right to examine the books, generally restricted by contract provision. (H.G.B. 320-334.)

(4) Share Partnerships.- A partnership may be represented entirely by shares, in which case it is known as a "limited partnership by shares" (in France, Société a Responsibilité Limitée"). The liability of all partners is limited by their contributions. Participation is based upon the partnership articles, and the shares generally are not alienable. In France, shares of such a partnership may be transferred to strangers if approved by a majority of members representing three-quarters of the capital. This form is used for smaller companies where a change in shareholders is infrequent.

(5) Termination.- A partnership form of company can be terminated in the same manner as at common law — by death, etc. Frequently the agreement provides for continuation by taking in the heir of a deceased general partner, but in such case this interest generally becomes limited.

b. Societes de Capitaux (Business Corporations).-

(1) Organization.- Business in civil law countries, especially in South America, has been so much a family affair, with pride in family integrity, that devices to suggest limitation of liability have not had the same appeal as in this country. However, the rapid development of business has made necessary a search for capital outside the family, resulting in an increase in the use of an assignable share form of organization with limited liability, similar to our business corporations.

These associations (the Societes de Capitaux (the societe anonyme is the common French form), the Corporaciones, the Korperschaften of private law) are organized under the general laws in much the same manner as business partnerships, through the registration of a public instrument, the statut (Satzung, constitucion), which sets forth the detailed information required by law, and other agreed stipulations. For the societe anonyme, there must be filed at the same time a notarial declaration that statutory requirements concerning subscription to capital have been met (full subscription, 25% paid in); a copy of the resolutions of the first shareholders' meeting; and a list of subscribers. The corporation is not looked upon as a creature of the State, commencing existence by an agreement with the State (although executive approval is needed in Argentina and certain other South American countries, and the Codigo Civil recognizes the limitation on corporate powers (Arts. 37 and 38)). The organization commences to exist by its own act, and registration is conclusive evidence of its existence. Therefore, there is no "de facto" corporation, and the doctrine of "ultra vires" generally has little significance. Moreover, there may be no by-laws, the usual by-law provisions being contained in the "statut."

Generally there must be a minimum number of incorporators holding at least one share, but, as in this country, shares are commonly assigned to the organizers for this purpose. Where it is necessary to sell stock to the public, it is possible to comply with all formalities, except registration, prior to payment for the stock. The shares may be registered or made to the bearer (in France, bearer shares must be fully paid up). The latter is the more common.

(2) Management.- As in this country, general powers are in the stockholders. A periodic stockholders' meeting is generally required by statute. Actual management is in a managing board (conseil d'administration) chosen by the stockholders. In Germany, the Vorstand, and the Aufsichtsrat, which supervises it, together take the place of the "board of directors," and there is a similar supervising body in Mexico, Brazil, and a few other countries. The capacity of business corporations in civil law countries, as a rule, is determined by the authority given to the managers.

(3) Conflict of Laws.- The courts of this country look to the law of the state of incorporation for legal technicalities concerning the corporation. The British and French courts apply the test of control -- the law of the country whose nationals control the corporation. The German courts look to the law of the country where the corporation's head office is located, but there are sufficient government regulations to forestall any decision which would be disadvantageous to the government.

9. Bankruptcy.- Only an insolvent merchant or commercial company can be made bankrupt in most civil law countries. Commercial courts consider bankruptcy cases and the commercial codes govern the subject. (See Code Commercial, secs. 444 ff.) The unsecured creditors, as a group (la masse), have corporate personality and are represented by the receiver (the syndic). Collection and distribution of assets are similar to our procedure, but in civil law countries the bankrupt forfeits many public rights, including the right to public office and citizenship. Moreover, after termination of the proceedings subsequent earnings or trading profits, except for a legal exemption, belong in principle to the creditors. Upon full payment, or with the approval of the court and creditors, the bankrupt may be "rehabilitated," however. In some countries, such as France, "judicial liquidation" is also possible in cases where a "commercant" has become insolvent owing to causes beyond his control. The principal difference is that there is less stigma; the debtor may participate in the management of his affairs; and liquidation does not involve loss of electoral rights. The debtor has, of course, a right to obtain from his creditors by agreement a moratorium and a composition (abatement of claims) before bankruptcy proceedings are instituted.

10. Negotiable Instruments.- Our law concerning negotiability is developed from the Law of Commerce. In civil law countries the character of negotiability can be conferred upon a non-commercial debt, but as in this country, the important class of negotiable instruments is commercial paper — bills, notes, checks, etc.

Banks are much less common as places of deposit, and bank checks are not so popular. (Bank notes have a much wider circulation, and France also has a Government postal check system.) Checks must be presented for payment within a short period (in France, 5 days; or 8 days, if payable elsewhere). The date must be written in words. Bills of exchange (lettres de change) are exclusively commercial transactions. The funds in the hands of the drawee are the "provision," and, as in the case of checks, a transfer of the instrument is regarded as an assignment of the property in the "provision," title, therefore, being governed by the civil law. As a rule, the legal rate of interest on commercial loans is 6%, and on non-commercial transactions 5%.

11. Insurance Law.- The commercial codes of Italy, Belgium, Spain, and the Balkan countries govern the insurance law, which is substantially the same as the common law of insurance. (Of course, various state statutes on the conduct and supervision of insurance companies have considerably modified the common law.) The law concerning insurance contracts has been codified in the following countries: Germany (1907), Switzerland (1908), France (1930), Scandinavian countries (1934). The principal feature of the codification is to make provisions for the protection of the policyholder an implied part of every insurance contract regardless of any contrary agreement of the parties. The law of marine insurance is practically identical throughout the world, being based upon the British Marine Insurance Act of 1907.

OBLIGATIONS

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The civil law recognizes "Obligations" as a major topic, and includes not only those arising from agreement (contracts) but also those arising from law -- unjust enrichment (quasi-contracts) and wrongs (torts). (C.C., Title IV; Second Book, B.G.B.)

CONTRACTS

Causa v. Consideration.- The civil codes, not the commercial codes, govern the law of contracts. There is no such thing as consideration in the civil law. The Roman lawyer never thought in terms of what one party gives up -- his test was the formality of the transaction -- do the parties intend to be bound? Causa -- the motive -- takes the place of consideration. Thus, an instrument under seal is a Latin institution and still results in a valid contract, consideration or no consideration. The civil law contract, therefore, should incorporate the circumstances showing the intention to be bound; for instance, that one party is giving a valuable option because the other party many years previously gave his mother some medicine which healed her. (This, of course, would not be a binding agreement at common law, because it involves "past consideration.")

Capacity, etc.- The second important provision which should be stated in a contract is the legal capacity of the individuals to enter into the contract. This legal capacity is important, because many classes of people in civil law countries are still incapable of entering into a contract, although such legal incapacity is slowly disappearing. Finally, the subject matter of the contract must be certain and there must be consent by the party bound. (C.C., Art. 1108.)

Acceptance.- As a rule, a contract is not valid until accepted according to its terms. (The doctrine that a mere mailing of an acceptance is sufficient does not receive much support in the civil law.)

Beneficiary.- The rights of a beneficiary of a contract accrue as soon as he states that he will accept the benefits.

Foreign Contracts.- In foreign contracts, if there is no specific provision, the place of execution governs as to form and the place of performance as to substance, including interpretation of the contract. This is largely theoretical as to execution, because of the difficulty of proving the validity of the foreign form. It is advisable to follow the foreign form if rights may have to be enforced in a foreign court.

Contract Provisions Establishing Court Jurisdiction.- It is common for contracts in civil law countries, especially contracts involving international trade, to contain a stipulation that disputes will be settled by arbitration, or in a specific court. The former is customary among merchants of the same

trade; the latter is used by insurance companies, shipping agencies, and other large commercial firms, who benefit by employing the same lawyers and by having a suit where their witnesses live. Recent currency restrictions in Germany resulted in a demand by the Nazi Government that contracts involving German nationals or property in Germany provide for exclusive jurisdiction of German courts. Courts throughout the world have upheld such provisions if the choice of court is bona fide and not contrary to public policy. Recently a British court ignored such a provision when the plaintiff filed an affidavit "as to the probable fate of the plaintiff if he pursues his claim in Germany." (L.Q.Rev., July 1943, p.227.)

Miscellaneous.- Penal clauses are common. They are generally upheld by the courts and will be modified only if there is partial performance. Conditions precedent and subsequent are recognized as "suspensive" and "resolutary" conditions, respectively. (See C.C., Art. 1181-84.)

INJUNCTIONS

Although "equitable remedies" are unknown to the civil law, the objects attained by injunctions are nevertheless achieved in the civil law. Three types of injunction may be distinguished:

1. Perpetual injunctions to restrain the breach of a negative contract.- In place of such an injunction is the ordinary action for performance of a negative contract. The French "theorie des astreintes" and the German penalty of fine or imprisonment are available in this case.

2. Injunctions to restrain torts.- The "actio negatoria" of the Roman law is available in France to free property from servitudes. In Germany this action has been enlarged so as to comprise every interference with the property of another. (B.G.B., Art. 1004.) Moreover, actions founded on torts may generally be instituted,in every legal system, to recover damages, and in such action the civil law court may be asked to restrain the committal or continuance of an act amounting to a tort.

3. Interlocutory injunctions.- Codes of Civil Procedure generally provide for such an injunction, and, as in Germany, may grant a much wider authority, even to the sequestration of the property -- thus resembling a receivership.

REMEDIES FOR BREACH OF OBLIGATION

Specific Performance.- Historically in the Roman law, as at common law, the promisor of an agreement "owes" the promisee the precise performance to which he has agreed. At common law, if performance is not fulfilled, a totally different obligation arises which takes the place of the original agreement. Instead of performance, a sum of money as "damages" is owed -- the "secondary" obligation. In a limited number of transactions where a suit for specific performance will lie, this secondary liability is the same, or practically the same, as the primary liability.

At Roman law the court attempted to enforce the original agreement ("stipulation"). The court, the Iudex, generally "condemned" (condemnatis) the defendant to comply with his agreement. This is, in effect, specific performance. The Codes of today do not make clear in what cases the courts will order specific performance (l'execution directe). In France it can generally be enforced if a bilateral contract is involved. (C.C., Art. 1184.) In Germany, as a general rule, every obligation gives rise to a claim for specific performance or restitution in kind. (B.G.B. 249.)

The most characteristic feature of specific performance at common law, however, is the method of enforcement -- by imprisonment for contempt or by seizure of the property. In France, in theory, if the obligation is to deliver a specific article, the officers of the court will carry it off by force, but generally it cannot be found, or another party has acquired a right in it. The new method of "astreintes" (a judgment ordering the payment of a fixed sum each day until performance) is now firmly established. If the obligation can be performed equally well by another person, substituted performance at the defendant's expense can be requested, and may be allowed by the court. In some instances the mere judgment of the court answers the same purpose as performance. In Germany, enforcement is obtained by threat of imprisonment or fine. (Also, see German Code of Civil Procedure, 883-892.) In South America, on the other hand, the difficulty of enforcement is such that money damages are resorted to, almost entirely.

Rescission.- The party in favor of whom the obligation has not been performed has the choice between forcing the other party to perform the contract when that is possible, and demanding the rescission of the contract with damages. The rescission must be demanded by legal process, and a period of delay to execute may be granted to the defendant according to circumstances. (C.C., Art. 1302.) Since it is frequently impossible to restore things to the status quo, the court may make such orders (for instance, repayment of expenses incurred) as will satisfy the equities of the case.

Damages.- Whatever is the present civil law concerning specific performance, damages generally can be recovered for breach of contract (B.G.B. 249-251, 326; C.C., Art. 1142), although, as in France, it may be necessary in a certain case to allege that specific performance is impossible. If there is partial performance, this may be accepted and damages claimed for the balance; and if rescission of the entire contract is sought, the court has discretion to refuse and to give damages for the unperformed part. Before liability to pay damages is incurred, the debtor must generally be put in default by an affirmative act. In France, this is true, even when there is a breach of a specific provision concerning time of performance, and the procedure of "sommation" is common -- a form of demand served by the bailiff. In commercial matters, a registered letter is the customary form of demand.

Prescription (Statutes of Limitation).- The concept of "prescription" is the method of acquiring or extinguishing a right upon the running of the prescriptive period (which is generally of long duration). (C.C., Art. 2219.) An "acquisitive right," the civil law "usucaption," applies to real estate and other real rights, and is automatically acquired. (At common law it is only a defense, existing if admitted.) "Extinctive prescription" is the barring, by lapse of time, of an action derived from an obligation (in contract or tort).

EX DELICTO OBLIGATIONS (TORTS)

Torts are included in that body of civil law which concerns obligations other than contractual obligations -- ex delicto obligations. Almost the entire written law on torts (delicts) is contained in one or two provisions of the civil codes.

The French Code provision (Article 1383), a masterpiece for the judge to write statutes, reads as follows: "Everyone is liable for the damage which he does, not only by his lawful acts but also by his negligence or imprudence."

The German Code provisions (Articles 823 and 826) are much more narrow. They read:

Article 823.- A person who willfully or negligently unlawfully injures the life, body, health, freedom, property, or similar rights of another person is bound to compensate such person for any damage arising therefrom. A person who infringes on statutory provisions intended to serve the protection of other persons incurs the same obligation. If, according to the scope of the statute, infringement is possible even without fault on the part of the wrongdoer, the duty to pay damages arises only if some fault can be imputed to him.

Article 826.- A person who willfully causes damage to another person in a manner inconsistent with the principles of good morals is bound to compensate the other for the damage.

The German and French rules differ very much in all cases in which negligence, and not intention, is involved. Under German law a person is liable for the consequences of his negligence only if body (life, health, or freedom) or property or a similar right of a person is injured. Under French law any damage to any interest of another person, arising from an act of negligence, is a sufficient basis for a suit for damages. In cases of intentional violation of the interest of another person, German and French law give damages.

The narrow provision of the German law relating to negligence made special legislation in many respects necessary: For example, Germany has special statutory liabilities upon railroads, air carriers, etc., which

protect the public. In general, these special statutes are very strict. As an example, the owner of an automobile is absolutely liable for damages caused by the automobile, even if it is used without his knowledge. Either as a result of these statutes or as a justification of these statutes, public or private insurance protects almost everyone. For instance, the public insurance placed in effect by Bismark takes care of the entire risk of the employer in connection with his liability for the torts of employees. An interesting example of a special statute using very broad language is the statute relating to unfair competition, under which any intentional or any negligent act of unfair competition is a basis for a suit for damages.

Judge-Made Laws.- Interpretation of Code Provisions:

1. An act includes not only actions but omissions and nondisclosures of facts when there is a duty to state them; for instance, a person who recommended a clerk, knowing that the clerk had had five years' penal servitude for theft, was held liable for nondisclosure of this fact.

2. Damage includes moral damage; for instance, libel and slander actions.

3. Fault includes every ground of liability from fraud to the slightest negligence, in crimes as well as ordinary torts.

4. Negligence is determined by the objective standard -- a standard of the average person, except in the case of children. (See hereafter.)

5. Consequences.- Whether the damage is the result of the act is determined by the "reasonable" rule rather than the "natural" rule; i.e., Could the damage reasonably be anticipated as a consequence of the act?

Liability.- A violation of a statute is, by law, a tort in itself. There is tort liability without fault in some cases (the common law of res ipsa loquitur). For example, a passenger injured in an elevator accident, a person injured in a terrific explosion, etc., need not prove the fault of the owner. With respect to nuisances, the German law (Art. 906) provides that although the owner of real property can not prevent odors, heat, noise, and other nuisances, from adjoining property, he can obtain damages if the nuisance is greater than usual. For example, if it is legal to erect a laundry on certain property, the adjoining property owner has no valid legal complaint unless the odors or heat from the laundry are greater than could reasonably be expected from a laundry of that nature.

Damages.- Under the civil code the great problem in winning an action ex delicto is the difficulty in proving damages. The remedy of injunction is used very greatly in connection with ex delicto acts. For example, Bismark, in his autobiography, wrote certain very prejudicial statements against the Kaiser, but provided that the autobiography was not to be published until some years after the Kaiser's death. An effort was made to publish certain of these disparaging remarks prior to this time, but an injunction was granted under Article 826 (the unfair competition provision) preventing such publication.

Defenses.- Statutory defenses are as follows:

1. Self defense in attack.- This may be with any means reasonably necessary to protect oneself, regardless of the result. (For example, in civil law, a person attacked need not "retire until his back is to the wall" before he is justified in killing a person in self defense, as at common law.

2. Special license.- The Government gives permits to do certain acts. These special licenses are a defense to any action done pursuant thereto.

3. Public officials.- A person who commits an act while engaged in a public official duty is not liable for the result of such act. This has furnished a great opportunity for the Nazis to protect themselves from liability.

Contributory Negligence.- When both plaintiff and defendant are responsible for an act an obligation rests on the more negligent person. (At common law, neither person is liable where both are responsible.) Actually, the court will give judgment for the person who is most damaged, but the amount is equitably adjusted, depending, for instance, upon the extent of physical injury, and, in general, will be only a proportion of the actual damage sustained.

THE LAW OF PERSONS

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Nationality and Domicile.- Civil law countries, in determining personal status, -- the system of law to which a person is subject as regards personal and domestic relations -- almost universally apply nationality rather than domicile (which, as a rule, is considered only to determine jurisdiction). The civil codes and statutes vary considerably on the methods of acquiring nationality, although all countries permit "naturalization." In France, citizenship is as important as nationality, since only citizens have political rights, and the Civil Code provisions relating to personal status apply in principle only to citizens. Generally speaking, the native inhabitants of French colonies are not citizens.

Civil codes generally provide that a person's domicile is at his principal place of business. (Code Civil, Art. 102.) However, in Germany, domicile is where permanent residence is. In most cases, intention is an important element. A married woman's domicile is that of her husband, except in specified cases, such as judicial separation. Registration of domicile and notice of change of domicile are generally required. Italy and France specifically permit the designation of another domicile for certain special purposes. (See Arts. 102-111, Code Civil; B.G.B., 7-11; Codice Civile, 43-47.)

Names.- Much greater prominence is given in civil law countries to the law relating to names. In law a woman does not change her name on marriage, and in a notarial act or in a judgment her maiden name is used. Moreover, a person can lawfully change his name only by following rigid procedure. The courts will enjoin the wrongful adoption of a name, which is generally considered a criminal offense, and various statutes provide for damages for wrongful infringement of a person's name.

Birth, Absence, and Death.- Personality sufficient to create legal rights commences upon the completion of birth, and life for one moment is sufficient. (B.G.B., Art. 1.) Registration of birth must be made within a specified period immediately following the birth, and the hour and date of birth and other relative information must be set forth. (C.C., Chap. II.)

Civil codes recognize the status of "absence" -- the disappearance of a person -- and provide methods for protecting the interests of the absentee. In France, and under the new Italian code, there is a period of presumed absence in which interested parties may request the court to direct measures for conserving the absentee's property. After a further period, upon request, the court can effectuate a provisional distribution of the estate, and after a further period (in France, either 30 years from the initial proceeding, or the Roman law period of 100 years from birth) the court makes this final, although subject to rights of recovery

if the person reappears. In cases of persons (generally, military personnel only) disappearing in connection with war activities, or in certain other specified types of accident implying sudden death, the codes or special statutes provide very short "judicial declaration of death" periods. For example, in Italy and Germany a presumption of death of a combatant can be declared three years after the end of hostilities. (Code Civil, Arts. 112-38; Codice Civile, 48-68; B.G.B., 13-20.) The presumption established by declaration of death in most countries also establishes a presumption of the duration of life to that moment. (B.G.B., Art. 19.)

The Roman law "presumptions of survivorship" still exist, with modifications, in some codes. (For instance, in France it is presumed that if persons succumbing to a common danger are all over 60, the youngest survives. (C.C., Arts. 720-22.).) However, in Germany, it is presumed that such persons die at the same moment, so that none has a right as survivor in the estate of another. (B.G.B., Art. 20.)

Incapacities.- Although an alien cannot exercise the public rights of a citizen, he is generally allowed the protection and the rights derived from private law, such as property rights and those resulting from marriage and paternity. Usually, however, an alien cannot act as witness to a notarial act or to a will. Specific discriminations of various statutes, especially of the Nazis, make the subject too complex for a precise statement.

Unmarried women are subject to few if any disabilities. The civil law principle that a married woman can neither contract nor litigate without the husband's consent has been repudiated in Germany, and made substantially ineffective by exceptions in France and most other civil law countries. (See Effects of Marriage, B.G.B., Art. 1353 ff.; C.C., Art. 212 ff.)

Generally speaking, persons who have not completed their twenty-first birthday are considered "infants" (minors), and can be parties to no act in the law, but they can be "emancipated" at an earlier age by marriage or by parental consent. (C.C., Arts. 388, 476-487; B.G.B., Arts. 2-5.) Civil law is characterized by the authority over the child of the parent or guardian, who is also the legal representative of the minor. (C.C., Arts. 371-387; B.G.B., Arts. 1627-98.)

A person "interdicted for insanity" (determined by the courts to be insane) is under complete incapacity (which is not necessarily so in common law countries). (See B.G.B., Art. 104; C.C., Arts. 489-512.) Restrictions upon prodigals, - spendthrifts - derived from the Roman law, are still found in the civil law, which provides for a guardianship. (B.G.B., Arts. 6, 114; C.C., Art. 513.) There are also provisions for guardianship of mental defectives, including habitual drunkards and aged. (B.G.B., Arts. 6, 114.)

Juristic Persons.- Juristic persons of the civil law -- artificial persons -- may be classified as (1) public corporations,- including the state, municipalities, and public establishments (see Administrative Law); (2) foundations,- in which property is transferred to a corporate body, generally for charitable purposes, with instructions to the managing board (the common law trust is unknown to the civil law); (3) associations for profit,- which include societies governed by the commercial law (for business corporations and partnerships, see Commercial Law) and civil societies governed by the civil code,- defined as contractual associations of two or more persons contributing common stock for purposes of profit (C.C., Art. 1832); and (4) non-profit associations,- such as cooperative associations. In Germany, juristic personality is acquired by registration; in France,by a declaration deposited at the Prefecture.

There is a small class of non-mercantile associations which are not juristic persons. Included are certain artisans' associations, syndicates, and joint adventures(single transactions). Such associations have important limitations: (1) They have no right to a firm name; (2) The property is generally considered to be in the partners as co-owners and not in the partnership; (3) There is no general authority to act for other partners. (Cf. German commercial and civil code provisions, H.G.B., Arts. 124, 125, and B.G.B., Arts. 705, 715, 718.)

Marriage

Validity.- In general the civil codes, although modified frequently in recent years, are still more restrictive than our laws concerning marriage. For example, parental consent up to a certain age after majority is required in France, Japan, and certain other countries, and provisions against a widow's remarrying within 300 days from dissolution of the previous marriage are common. In Germany, marriage for the purpose of conferring the husband's nationality or name upon a woman was prohibited in 1938, and restrictions have been enacted upon marriage of persons suffering mental disorders or contagious diseases. Recent legislation is not entirely liberal. For instance, the notorious German law (September 15, 1935) to "preserve the Aryan race" prohibits marriage between Jew and "nationals of German or similar related blood." In most civil law countries, including France and Germany, a marriage is void if not celebrated publicly before an appropriate public official. In Italy, Spain, Brazil, and a few other countries, a religious ceremony is sufficient. The publication of "banns" -- notice of the intended marriage -- is generally required some days before the wedding (in France, 10 days), although a designated public official may, for grave cause, dispense with this. The marriage must be registered, and a copy of the entry in the marriage register is the best evidence of its celebration. (C.C., Arts. 63-76, 144-177; B.G.B., Arts. 1318-21, 1435-36, 1558-63, 1303-22.)

Annulment and Divorce -- Void and Voidable Marriages.- Impediments to marriage have different effects. They may cause the marriage to be (1) non-existent (as where, in France, the official performing the ceremony is not an "officier de l'etat civil"); (2) void, but it must be so declared

by judgment obtainable by any interested party (the nullity may be cured by a form of estoppel, as, where the parties have not reached the age of consent, pregnancy or attainment of that age cures the nullity); (3) voidable, but only by a party or a person whose consent was necessary but lacking. The impediment also may be merely a statutory penalty, having no effect upon the marriage (such as the French requirement that soldiers or sailors obtain the permission of their superior officers).

Although divorce (both by mutual consent and by wish of one party) was recognized in Roman law, the Canon law doctrine is that marriage can not be terminated in this manner, and this was the civil law until recent times. Thus the principle of annulment thrived, and separations (divorce a mensa et thoro) became recognized. Today divorce and judicial separation are almost universally recognized. As a rule, causes for divorce are extensive and are liberally construed, although this is still not so in South American countries. (Annulment, C.C., Arts. 180-202; B.G.B., Arts. 1323-1352. Divorce, C.C., Arts. 229-305; B.G.B., Arts. 1564-1587. Separation, C.C., Arts. 306-311; B.G.B., Art. 1575.)

Effects of Marriage.- Both spouses are under a legal duty to live together in "conjugal community," with express provisions concerning fidelity, support, and cohabitation. The Roman law doctrine of the wife's subordination to the husband's authority survives to a limited extent. (See C.C., Arts. 203-226; B.G.B., Arts. 1353-1362.) "Matrimonial regime" is the descriptive term for the effect of marriage on the property of the spouses. "Statutory regime" means the rights as determined by statute. "Contractual regime" refers to valid marriage contract provisions. Upon marriage, there are three potential patrimonies -- that of the husband, that of the wife (the Roman "parafernales"), and the "community." The latter is composed of all movables of both spouses at the time of marriage, or acquired by either thereafter; all immovables acquired by either during marriage, unless by gift, legacy, or inheritance; the use of, and the profits provided by, the separate property during marriage. Administration is vested in the husband, who also, as a rule, administers the wife's separate property. Rights of creditors and administration and dissolution of the community are fully covered by the codes. (See C.C., Arts. 1400-1496; B.G.B., Arts. 1363-1556.)

Parent and Child.- The laws concerning legitimacy are set forth in detail in the civil codes. The rights, powers, and duties of parent and child in the civil law differ from the common law principally in these respects: the parent's right to the usufruct (the enjoyment and income) of the minor's property; the greater authority in matters of marriage; and the mutual obligations of support imposed upon sons and daughters-in-law and their parents-in-law. Adoption is generally not encouraged. For instance, in France the adopting person must be above fifty years of age, without legitimate descendants, and more than fifteen years older than the adopted person. (C.C., Art. 343.)

In the law of guardianship, the Roman law distinction between "curator" and "tutor" is preserved in some of the codes. The latter has custody of the infant, and it is his duty to provide for its care and maintenance, whereas the curator is appointed primarily to protect and manage the ward's property. (In France and in Spanish American countries, the institution of the "family council" still survives -- the judge de paix and six relatives or friends of the child. It supervises all activities of the tutor, the latter also managing the ward's property.) (C.C., Arts. 389-475.) The guardian is appointed by a court of the ward's nationality, and his power extends to all property of the ward, wherever situated.

Succession.- The civil law rules of succession are complex but, apparently, satisfactory, for fewer wills are made as compared with this country. Of course, marriage contracts and the matrimonial regime to a large extent govern the disposition of the estate. "Succession" means both the transmission at death to one or more persons of the estate of the deceased (the "de cuius"), and the estate transmitted. The estate is considered as a single mass -- the "patrimony" -- the total of a person's assets and liabilities. (Personal actions do not "die with the person," as in this country.) The succession "opens" at the instant of death, in favor of those entitled to it by law or by will, subject to the right of any heir to "renounce" the succession. There is no personal representative; succession is "universal" -- the theory of Roman law that the heirs continue the legal personality of the "de cuius." In general, heirs of the blood can take possession at once.

The term "heir" in the civil law has a very different meaning than in the common law, applying to all persons succeeding to the estate of deceased persons,- by act of the deceased as well as by operation of law. "Universal heirs" receive the whole or an aliquot part of the estate. From a practical view, they are the heirs responsible for paying the debts. The person created universal successor by will is called the "testamentary" heir, and has duties somewhat similar to the executor at common law; an "heir by intestacy" corresponds to the administrator. "Particular" ("singular") succession is succession which is not universal. It applies to the bequest merely of a particular thing which is part of the estate.

An estate may be accepted unconditionally or under "benefit of inventory." The latter involves the filing of an inventory of the estate and, generally, administration under court supervision, but liability is limited to the value of the assets received. A renunciation of the estate must be made before a competent official; acceptance may be implied, except that a person under a legal disability must accept according to law.

The civil law prevents the disinheritance of children and other specified heirs (known as "forced heirs"), by limiting the portion of estate which is disposable if there are such heirs. Germany and a few other countries arrive at this result by considering such heirs as creditors of the estate. (See C.C., Art. 711 ff.; B.G.B., Art. 2338 ff.) "Collation" is the principle which requires any such heir who had received an inter vivos donation from the deceased to pool it with the other assets, so that distribution among all such heirs will be equal. There may be, of course, a possibility of defeating heirs by modern financial devices, such as investment in annuities, or large insurance policies, as in this country. There are two methods of determining proximity of relationship for intestate succession in civil law countries -- the French method and the German method, both of which are complicated but are set forth in detail in the codes. The order of succession generally is (1) descendants, (2) ascendants, (3) collaterals, (4) surviving spouse, (5) the state, but each code has some variation. The spouse is entitled in any event to a portion of the estate, generally one-third or one-fourth of it, and to household articles. There are a variety of provisions concerning illegitimate children's rights.

Co-heirs contribute toward payment of debts in proportion to the share of estate received. Creditors may oppose a division of the estate until paid, or may make demand upon the heirs. In some countries, insolvent estates may be liquidated in bankruptcy.

Wills.- In civil law countries, holographic wills are by far the most common form of testamentary disposition. They are written, dated, and signed by the testator personally, and no other formality is necessary. After death such a will must be presented to the court or other proper official and deposited with a notary. A notarial will is made in the presence of a specified number of qualified witnesses before a notary (or notaries) who becomes responsible for the validity of the will. There are also specific code provisions which waive certain formalities in the case of special persons, such as soldiers on active duty, or in unusual circumstances, for instance, while at sea. Nuncupative wills are also generally recognized. The revocability of a will is universally a characteristic, and may be express or by implication -- i.e., incompatible provisions of a later will.

PROPERTY

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Local custom in civil law countries has influenced the law of property more than any other branch of the law. In general, however, the Codes of France, Italy, Spain, and the South American countries are quite similar; and those of Germany, Austria, and Switzerland are similar. The law of France is here considered, with the most important distinction of the German property law considered finally.

It is not intended here to go into a theoretical discussion of the law of property, but only to outline some basic rules as appear from the French Code Civil and subsequent legislation.

KINDS OF PROPERTY (BIEN)

The Code Civil declares, "All property is either movable (meubles) or immovable (immeubles)." (C.C., Art. 516.) While this distinction is less fundamental than that of real and personal property at common law, it has numerous important consequences. The Code provisions concerning such things as possession, transfer, the hypothec, patrimony, and statute of limitations differ with respect to this classification. Moreover, whether property is of one class or the other is strictly governed by the Code and can not be changed by agreement of the parties.

Immovables (Immeubles).- "Property is immovable either by its nature, or by its destination, or by the object to which it is applied." (C.C., Art. 517.) A fourth class, "immovables by declaration," has been created by legislation subsequent to the Code.

1. By nature.- This includes land and buildings, growing crops and vegetation; standing timber; and, generally, anything attached to the land. (C.C., Arts. 518-521.)

2. By destination.- This includes certain movables which by a fiction of law are deemed to form part of an immovable, because the movable has been placed by the owner on or in the immovable for the service and exploitation of the property. Horses and cattle; farm and industrial machinery; and, in general, all movables which are necessary to the equipment of a farm, a factory, a mine, or other immovable, as an instrument of production, become immovables when so appropriated by the owner. (C.C., Arts. 524-525.)

3. Objects to which applied.- This includes real rights, less than ownership, over immovables, such as usufructs, servitudes, and rights of action having as their object something immovable. (C.C., Art. 526.)

4. By declaration.- The most notable example of such an immovable is shares in the Bank of France, upon which the owners are empowered by statute (Loi 16.1, 1808, Arts. 7 and 8) to impress the character of immovables by declaration registered at the bank.

Movables (Meubles).- "Things are movable either owing to their nature or because decided to be so by law." (C.C., Art. 527.) This includes all things not included in the category of immovables. While the Code does not use the expression, certain immovables by nature which are destined in the near future to be separated from the land, such as crops nearing maturity, and stone in a quarry when sold for removal, are commonly referred to as "movables by anticipation."

Intangibles.- Debts, shares of stock, trademarks, patents, and copyrights generally are not recognized as property.

Property in relation to those who own it.- (1) Private property.- This includes all property owned by persons, which is inclusive of companies; (2) State property.- This includes all property owned by the state. State property is regulated by special Code provisions; (3) Communal property.- This is property in which the inhabitants of a commune have acquired a right. (C.C., Art. 542.)

Special types of property.- There are special Code provisions governing such things as: (1) Mines.- The law recognizes in principle the surface-owner's property right in minerals, but places all power of disposition in the state; (2) Water power.- A law of 16 October 1919 created a new thing (bien) known as hydraulic energy, and provides for the utilization thereof by government concession; (3) Homesteads.- By law of 12 July 1909, the institution of "bien de famille" was created along the analogy of Homestead Laws in the United States; (4) Superficie.- When a building and the land on which it stands have different owners, it is said that the building owner has a right of superficie, which is a form of immovable property and may be acquired by prescription and which may be hypothecated; (5) Flats or apartments.- Multiple ownership of apartments in some buildings is recognized; (6) Copyright.- Under special provision of the law, a copyright continues during the lifetime of the author and for benefit of his heirs or assigns for fifty years after his death; (7) Offices.- Certain offices, the most notable being that of Notary, are recognized as property and salable, subject to professional fitness of purchaser; (8) Letters.- A letter in transit is the property of the sender, but upon delivery, with certain limitations, it becomes the property of the addressee.

OWNERSHIP

There is little or no substantial difference between the Code and the common law concept of ownership. The Code definition of ownership (C.C., Art. 544) and that of Blackstone (Commentaries, Vol. I, p. 138) are almost identical. The ways of acquisition and disposition of ownership are almost identical under both systems. (C.C., Arts. 545-546 and 711-717.)

POSSESSION

The theory of possession has a more important place in civil law than in common law. It combines physical possession with intent to possess, animus possendi. The possessor must have the intention to exercise the material mastery (animus domini) on his own behalf. A bailee does not have true possession -- he has only possession précaire -- the true possession being in the bailor. Possession carries presumption of title. In case of movables it is in principle absolute (C.C., Art. 2279), while in case of immovables it may be rebutted. Other consequences of possession are:

1. Title by prescription.- Length of time required depends upon (a) whether possession was based upon an act (not radically void in point of form) of a nature to convey ownership and (b) was acquired in good faith, and further (c) according as the alleged true owner lives within (10 years) or outside (20 years) the regional jurisdiction of the Court of Appeal in which the immovable is located. (.C.C., Art. 2265.) Where good faith is absent, 30 years' adverse possession is required. (C.C., Art. 2262.)

2. Rights to the fruits and profits.

3. In case of immovables - the right to exercise the possessory actions: (a) Complainte (to recover possession).- Plaintiff must have enjoyed possession animo domini for a year, and action must be brought within a year; (b) Reintegrande (for violent dispossession).- Proof required under complainte is dispensed with; (c) Denonciation de nouvel oeuvre (where there is a threatened trespass).- The relief aimed at is a temporary prohibitory injunction pending trial of title. The question of title cannot be put in issue under the possessory actions and the defendant must wait until the action au possessoire has been disposed of before instituting his action au petitoire, directed to the issue of title. These actions (possessoire) are very advantageous, because it is difficult to prove title (petitoire). As between the parties, title (petitoire) passes by contract in case of both movables and immovables, while as to third persons transfer of possession is necessary in case of movables and registration in case of immovables.

CONVEYANCES

The principal ways in which property may be acquired or transferred are by contract inter vivos, inheritance ab intestato or by will, prescription, judgment, and by operation of law. (C.C., Arts. 711-712.)

As between the parties an agreement to convey a right in rem is self-executory (C.C. Art. 1583), except in cases where it would be impossible, or where such transference of title was foreign to the intention of the parties.

The law does not in all cases require contracts conveying real rights to be in authentic form nor in writing. Only certain contracts require a notarial act. Principally among these are contracts of marriage (C.C., Art. 1394), hypothecs (C.C., Art. 2127), and contracts of donation (C.C., Art. 931).

MORTGAGES .

All mortgages must be made before two notaries, or a notary and two witnesses (C.C., Art. 2127), and are recorded in a special register (C.C., Art. 2146). This registration is a protection against third persons. There are also judicial mortgages (such as those resulting from a judgment against the property owner)(C.C., Art. 2123), and statutory or legal mortgages (The married wife has a legal mortgage against all the assets of the husband for the proper administration of her assets, and the child has a similar mortgage against the assets of the father (C.C., Art. 2121). This legal mortgage is known as an occulte (secret) mortgage. Moreover, it is a "general" mortgage, and not required to be registered).

Mortgages are also divided into (1) general (those covering all property), (2) specific (those covering certain kinds of property), and (3) special or contractual (which must specify the property covered thereby). The French mortgage is similar to the "lien theory" of mortgage which exists in most of the states in this country -- a contract by which one binds property to secure the payment of a debt (as distinguished from the "title theory" -- conveyance of property to secure a debt).

Generally, movables cannot be mortgaged, except by delivering actual possession, in which case the pledge of the movable is a "pawn." (C.C., Arts. 2119, 2071-2084.) However, by laws of 1906, 1909, and 1913, respectively, (1) the stock and equipment of agricultural properties, (2) business concerns (fonds de commerce), and (3) the furniture and equipment of hotels may be hypothecated. Ships (Law of 1874), river craft (Law of 1917), and aircraft (Law of 31 May 1924) are also susceptible to hypothecation.

REGISTRATION

By law of 23 March 1855, the registration of deeds was adopted as a general thing. Until then only certain rights were subject to registration. (C.C., Art. 939.) To the present day, such rights as (1) adverse title by prescription,(2) transmission mortis causa, whether by intestacy or by will, (3) judgments rescinding contracts, and (4) certain occult charges are not required to be registered.

Notaries are charged with the registration of acts, each having a register of the property of his clients which has been with the predecessor of the notaire for generations. There are no court records, and many conveyances are never registered.

JUS IN PERSONAM AND JUS IN REM

The distinction between the rights in personam and rights in rem is almost entirely ignored in common law. It must be kept in mind in every property transaction in civil law. Under our law, a sale of goods creates rights in personam and, at the same time, in rem; title passes automatically to the purchaser. In civil law, the transfer of title is, generally speaking, dependent upon an overt act, such as transfer of possession, or registration.

GERMANY

Conveyancing.- The great difference between the French and the German property law is in the system of conveyancing. Germany has a land registration system somewhat similar to the so-called Torrens system, but even more effective. All real property must be registered, and it is in the ownership of the person under whose name it is registered. In 1900, by law the entire country was split up into small districts (cadastres). A cadastrel survey was made of every parcel within each district, and the property was then registered, with a detailed physical description. The survey has, of course, great military value, and, upon invasion, records would doubtless be destroyed. All registration proceedings take place before a judge, whose sole duty it is to supervise the registration in his district. There is a State insurance fund to protect against mistakes in registration. Moreover, if, for example, an interest in property has not been recorded, an application can be made to the court, setting forth the facts, and the register amended accordingly. There is one folio for each parcel of land and there are three columns in each folio. The first column gives the location and generally includes the photostat of the military surveyor's map. The name of the original owner and the names of all subsequent owners, including the date of conveyance, are also set forth. The second column sets forth encumbrances, except mortgages. The third column sets forth all mortgages.

Mortgages.- Germany has a unique system of mortgages. There is the usual debt security mortgage, the grundschuld, and the rentenschuld.

1. The grundschuld is a mortgage with no present indebtedness nor with any existence except on the part of the mortgagor. In effect, it is the redemption of a right to create a prior lien as security for a debt which may be contracted in the future. Thus, the property owner may borrow money on a second mortgage, retaining the grundschuld or prior mortgage. Subsequently, he can borrow money on the grundschuld to the extent specified when the grundschuld is created. The grundschuld, of course, is set forth on the register. Moreover, if the grundschuld is retired there is no merger, as in this country. As a consequence, the second mortgage does not become the first mortgage, and the mortgagor may again borrow money on the grundschuld.

2. The rentenschuld is a mortgage existing for an indeterminable period, with a fixed annual payment. As an example of this type of security, a father may deed his property to his son and take back a rentenschuld, which provides him with a fixed annuity for his life, secured by the property.

Foreclosure.- Foreclosure takes place by sale through the judge of the registration court. There is no equity of redemption -- the sale is final.

CRIMINAL LAW AND CRIMINAL PROCEDURE

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CRIMINAL LAW

Criminal law in European countries deals with the punishment of certain deeds by the courts as specified in the Criminal Code. (There is also a system of punishment by fines, and even imprisonment, by certain administrative agencies; and in civil procedure the court can, in certain circumstances, impose a fine or imprisonment, somewhat similar to the common law punishment for contempt.) The Criminal Code is divided into two parts: general and special. The general part includes provisions applicable to all punishable acts, such as those concerning conspiracies, attempt, intent, and guilt. The special provisions are those applicable to specific crimes.

Criminal law in Germany and in German occupied countries is now important only for the matters of daily routine; for example, theft. In all cases of political importance the secret police enters the field. It can imprison at will, and the Reichsgericht has held that the courts can not pass on a decree of the Gestapo ordering an individual to a concentration camp. It should be noted that even the Gestapo has a procedure for questioning individuals, and the defendant can obtain an attorney (though the Gestapo might refuse to deal with the attorney) and can appeal to a higher official. Although the substantive law imposing punishments is in the Criminal Code, there have been many and today there are, especially in German occupied territory, innumerable special criminal statutes, such as the recent provision against intercourse with Jewish women.

Nulla Poena Sine Lege.- The maxim that "there can be no punishment unless expressly provided by statute" is basic in continental law. It has its limitations, since it confines the court to a literal interpretation, and numerous acts of a criminal nature, not specifically covered by the law, go unpunished. Moreover, if the state comes under control of a Hitler the laws can be changed at will. For example, at the present time in Germany not only one who commits a deed which is a declared crime, but one who commits an act which violates a principle of criminal law and which should be punished "according to the sound sentiment of the people" (the Nazi doctrine), is guilty of committing criminal acts. (Sec. 2, German Criminal Code.) This provision has been so strictly interpreted by the courts that cases which are not specifically covered by the Code are generally handled by the secret police or tried in the People's Court (see hereafter). Moreover, even if a court in "greater Germany" finds that an individual is not guilty of the crime charged, it can impose "measures of public security and rehabilitation," such as restriction upon the liberty of the defendant, but the conditions under which the court can act in this case are well specified. (See Sec. 42a to h, German Criminal Code.)

Classes of Criminal Acts.- All punishable deeds are divided into three classes:

1. Major crimes include any deed punishable by death, forced labor, or imprisonment within a fortress (Festung) for more than five years. (The latter imprisonment is a mild form of imprisonment imposed upon gentlemen for such acts as duelling.)

2. Minor crimes include deeds punishable by simple imprisonment or by imprisonment within a fortress for less than five years, or by fine of more than 150 marks.

3. Misdemeanors include deeds punishable by mild imprisonment, or by fine up to 150 marks.

(Imprisonment is of four natures: Hard labor, regular imprisonment, imprisonment in a fortress, and mild imprisonment.)

International Criminal Law.- The German Criminal Code contains express provisions concerning the applicability of German law. Originally the basic principle was that German criminal law is to be applied to all acts committed within German territory. Recently the law has been changed. The basic principle now is that German criminal law is applied to all acts committed by German citizens whether within or without Germany. This basic principle is largely modified in order to expand German jurisdiction over aliens. (Secs. 3 and 4, German Criminal Code.)

Orders of a Superior Officer as a Defense.- Orders of a superior officer -- Is this a defense? The German Military Code provides that only the person giving the command is responsible for action which violates the Criminal Code. However, the individual who obeys will be liable as an accomplice if he knows that it would be a violation of the Criminal Code to carry out the command, and he is punishable for acts which exceed the command. (Sec. 47, German Code of Military Criminal Law.)

CRIMINAL PROCEDURE

Criminal Courts.- The same courts handle both civil and criminal cases in most of the civil law countries. (In France there is a separate criminal court of first instance -- the assize court.) In Germany there are, moreover, two unique criminal courts (within the framework of the ordinary court system):

1. The Schoeffengericht -- a special court of one judge and two laymen (schoeffen)(connected with the county court, Amtsgericht). The Code states what deeds may be brought before the judge of this court alone, and which deeds must be brought before both the judge and the schoeffen.

2. The Jury Court -- a court composed of three judges and six jurors (connected with the district court, Landgericht). In either case, a majority opinion governs, and the Code states before which court the criminal case is to be presented. (Courts composed of jurists and laymen were an old custom in commercial matters.)

Historically the jury was adopted from the common law (in the course of the 19th Century), because it was regarded as the bulwark of liberty. It was gradually given up, however, because of its defects. It was found that the jury was frequently swayed by resentment and cases were not tried on their merits.

Certain crimes have to be tried before the Court of Appeals. Moreover, in 1936 a People's Court was created which would try so-called "political" crimes. There is also a disciplinary court to try offenders in the civil service, and the Nazi Party has a disciplinary court system.

The Procedure of Adhesion.- European countries, except Germany, follow the French Code, which now provides that the injured person can pursue damages in a criminal action. The criminal proceeding is res judicata. Since, in the criminal case, "the court has to be convinced of the truth of the allegations" (which is analogous to the common law "proof beyond reasonable doubt"), the claim of the injured is endangered. (As in this country, the civil proceeding is, in fact, though not in theory, determined by the preponderance of the evidence.) Therefore, the civil law provides that the court can acquit the defendant, and yet can reserve to the plaintiff the right to proceed in a separate civil suit. This procedure is very frequently used in France.

Arrest.- Ordinarily, the police, in making an arrest of a person suspected of having violated a criminal law, act under authority of a decree of a judge or of the governmental prosecuting authority (similar to a warrant). Even a private person can make an arrest of a person violating criminal law if he suspects the criminal of flight. (Private citizens rarely exercise this authority.) The arrested person must be brought before the judge (in Italy, the chief of police) the same or the following day. The judge then determines whether the individual is to be held pending trial or released (in rare cases upon bail). If restraint is ordered, the defendant may appeal and he can later ask for a reexamination of the decree under which he is held. This is the continental "habeas corpus." The conditions under which an individual suspected of a crime can be held are specified in the Code:

1. If there is a suspicion that he will interfere with the investigation.
2. If there is a suspicion that he will commit another crime.
3. If there is a suspicion of flight.
4. If a crime is involved (the suspicion of flight is assumed)

5. Under a recent Nazi amendment of the Code, if the crime is serious and the public is aroused. (An example of such a situation would be the arrest of an engineer on a passenger train which had been wrecked, causing severe loss of life.)

Institution of Criminal Proceedings.- Criminal proceedings are instituted by the public prosecutor "on suspicion." If the "suspicion" exists, he must bring the action. However, in certain cases a private person can institute the action; for example, in cases of slander. Moreover, if the crime involves injury to an individual, the individual can request the proceeding, and if the prosecutor refuses, the individual can appeal to the courts. In some cases -- for example, in cases of extortions, misdemeanors, and when the injured has the right of prosecution -- it rests with the discretion of the public prosecutor whether he wants to institute proceedings or not. The procedure is as follows:

1. The proceeding starts when, upon information, the police commence an investigation.
2. The police inform the prosecutor.
3. The prosecutor carries on the investigation, collection of evidence, etc., unless and until he is satisfied that there is not sufficient evidence to justify further action.
4. In the more important cases, the prosecutor applies for a court inquisition (the French "instruction").
5. The "instruction" consists of an investigation by a judge.
6. The prosecutor, on the basis of the evidence collected by the judge, applies to the court to open trial or to nolle prosse the case.
7. The court decides whether there should be a trial. (If the decision is in the affirmative, this decision is equivalent to the common law indictment.)

The Trial.- Unlike the civil law trial, the criminal trial is similar to the common law -- one trial continuing to judgment. The accused must be present. (The Nazis have codified a few exceptions, including "if the sound sentiment of the people requires it." The accused can not be a witness but he can state his case, which, for practical purposes, is satisfactory. The court examines witnesses the same as in civil cases (no common law rules of evidence, very little examination by attorneys, etc.) There is a certain amount of judge-made law as to the kind of evidence admissible and as to the obligation of the court to admit offered evidence. The Nazis have enacted provisions which leave to the discretion of the court how much evidence is to be admitted.

Appeals.- Appeals are the same as in civil procedure. Here, also, there is a tendency to restrict the appeal. Since both appeal and révision are not permitted in the same case, an appeal is taken where a case is stronger on facts than on law.

Mandate.- In many cases the judge or an administrative officer can issue a "mandate," especially in minor offenses, such as speeding. This is, in effect, a judgment in absentia. The condemned can "protest" against the mandate, and then an ordinary trial is held. It is a proceeding analogous to our traffic violation proceedings.

Indemnity for Errors of Justice.- A unique principle of the civil law is that if an individual connected with a crime later proves his innocence he is compensated by the state.

ADMINISTRATIVE LAW

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The subject of administrative law, whether in the common or civil law, is the same -- laws concerning police powers, health, safety, etc. The principal problems involved are the protection of the individual in administrative activities and the separation of executive and judicial powers. The most important difference is in the organizational set-up. Within the European continent the system of administrative law is substantially the same.

Organization.- The organization for administrative functions on the Continent is:

An Administrative Hierarchy -- the Minister, with a series of officials under him, one above another, each of whom can give orders to the officials under him. Moreover, the higher official can change or revoke orders made by lower officials. Similarly, one can appeal from such orders all the way up the chain of command -- the recours hierarchique. Occasionally, a group -- a "collegiate body" -- will take the place of one individual in the hierarchy. (In this country, an administrative board frequently is set up in place of an administrator.) This system is, in effect, an army in civilian clothes.

Civil Service.- All administrative personnel are in the civil service and occupy career jobs. They maintain a dignified status in the community. (Although the civil service in this country is gradually approaching this high standard, our civil service employees are still regarded as clerks, and our higher officials as "officials.") There are different classes of civil service employees, and there are many statutes concerning their rights and privileges -- pensions, salaries, promotions, etc. Examinations must always be taken for entrance into the civil service, and the higher positions are always filled by promotion. Only the posts of the Ministers and some of the very highest administrative positions are not filled from the "ranks."

Self Government.- There exists a considerable amount of self government on the Continent, especially in municipalities. This was copied after the English institutions, and developed in the 19th Century. Although there is always a conflict whether the supervisory authority of the state can order the municipality to do certain acts, such as keeping up the roads, or lighting the streets, even the Nazis had not been able to abolish this self government entirely until the war broke out.

By general statute, certain functions are made exclusively municipal duties, such as street lighting and disposal of sewage. In these cases the municipality exercises its discretion as to the manner of carrying out its responsibilities. There are also "mandated" functions imposed by statute, such as taking the census. In these cases

the municipality must follow orders of the superior state authorities. There is little source of income for the municipalities. It is largely from fees for services, such as water service. Each municipality gets its share of real estate and income taxes for its upkeep. Originally, Mayor and Municipal Council were elected. In Nazi Germany they are appointed by the state and the party.

Territorial Administration.- There is throughout Europe a territorial system of government similar to our state-county-township system. Each territorial entity has its corresponding administrative official. For example, France is divided into Departments, with a Conseil General in charge, and the Departments are divided into Arrondissements. Germany is similarly organized. There are towns too large for the territorial district and these have been taken out of the system, but they are subordinate to the next higher agency, and the town then performs the administrative functions of the territorial unit which it replaces. Larger estates in Germany are frequently territorial units. In the capital cities of Europe there are other special provisions for administration. For instance, the police are entirely in the hands of the state.

The officials in these districts -- the hierarchy -- have general jurisdiction for the state administration. While other new administrative agencies have been created from time to time, these new agencies could be abolished and the skeleton organization would still be left, trained to administer every phase of government. Therefore, although these territorial districts have little independence, their officials constitute an organization which might be invaluable in administrative control of the area by an occupying army.

The governments of continental countries have their various Ministers, but the Minister of Interior is responsible for most of the administrative functions. His hierarchy of under officials is complete through the territorial subdivisions, as in the following illustrations:

France	Germany
Minister of Interior	Minister of Interior*
Prefet (Department)	Stathalter, Oberpräsident
Sous-Prefet (Arrondissement)	Regierungspräsident (of Bezirk)
Mayor	Landrat (of Landkreis)

*The Minister of Interior of the German Reich is the Minister of Interior for Prussia also, and under him is the "Oberpräsident" (in place of Stathalter) of each province. Each former state of Germany still retains its ministers in title only, but certain distinctive features of the states remain, such as special laws, but these are being gradually abolished. In the event of a decentralization of Germany, these ministers might play an important role.

Other department officials of the continental nations, such as the Minister of Justice, have a somewhat similar hierarchial organization, with their own "field offices." The finance and tax systems also have their own hierarchy. In any event, all of the administrative agencies are within the ministerial structure, because of the thoroughly established system of responsibility.

Special Administrative Agencies.- There are numerous entities throughout Europe which have been organized for special purposes, such as power plants and water supply. There are also many other administrative agencies, such as the department supervising insurance companies, the manpower authority, the unemployment insurance agency. These are of three types:

1. Public Establishments (Etablissements Publics) -- are independent organizations similar to the Reconstruction Finance Corporation -- generally a corporate body utilized by one of the administrative agencies or a municipality; for instance, the State Savings Banks, the Universities, the tobacco and other monopolies, Postal Savings Banks in Germany, power plants, hospitals, slaughter houses.

2. The agency may be in the form of a private corporation whose shares are owned by the state.

3. Finally, the state or a subdivision may carry out a specific function directly, as in the case of the post office system in this country.

The principal legal question in these cases is whether public or private law governs. If the agency is a Public Establishment, the state itself, or a subdivision of the state, it is governed by public law, and the ordinary courts have no jurisdiction. Moreover, it is within the administrative hierarchy for purposes of control -- the administrative officials have, especially in the cases described in 3, above, the final decision even on matters concerning management and operation. The details vary. For example, if electricity is purchased from a Public Establishment the amount due for the current is a fee and not a debt; and the remedy for damage must be sought through administrative channels and not by way of an action for damages pursuant to the Law Merchant.

Concessions.- A further method of public administration is by way of concession -- a license which transfers certain public powers, such as civil police powers, to the concessionaire. Certain of the railroads in France are an example.

The Nazi Government has established administrative agencies similar to the ancient "guilds." These concern professions in industry, such as the Publishers' Association or the Association of Artists. No person can belong to any such Association unless he is "politically reliable," and no person can exercise the occupation of publisher unless he is a member. The industry was organized in groups, with the purpose of regulating the economic life.

Administrative Courts.- The administrative courts of the European continent determine legal questions of public law -- the legality of administrative decisions. They are courts of high standing. In France the high administrative court is the Conseil d'Etat. If an individual wishes to take out a license for a restaurant, and the license is refused, he appeals to the next higher official. If he obtains no redress from the Hierarchy, and he can show that the refusal is based not on "administrative discretion" but on a legal question, he may appeal further to the proper administrative court.

For certain administrative functions, there may also be an administrative tribunal of a lower grade which may decide the application in the first instance, and then appeal is taken from this court to the higher administrative tribunal. (These lower tribunals have been abolished in Germany as a war measure.) Only those persons whose "subjective" rights are violated can bring an appeal. This includes the person directly injured, but it is generally necessary to look up the case law to determine whether a person's "subjective" rights have been violated in a given case.

While France and Italy have a supreme administrative court (Conseil d'Etat), Germany is still considering the adoption of such a court. In the meantime, some German states still rely on the judicial courts for review of administrative decisions. As in this country, there are, of course, numerous special administrative "courts" in Europe. For example, in Germany there are courts for tax matters, for social insurance, for cartel contracts, and for claims arising out of the Peace Treaty of the last war.

Protection of Individuals.- The right to bring suit against the state in its "corporate functions" - where it acts in a business capacity - is a principle of private law in civil codes. Moreover, there is a fairly constant trend toward increasing the responsibility of the state for injuries arising out of misfeasance or tort of its officers performing governmental functions. In France, this development, accomplished in the administrative courts by "case law," now includes accidental injury, such as an injury resulting from an explosion of a munitions dump. The distinctions between "personal" and "official" torts, and between government and corporate acts, are disappearing. Here the individual has been well safeguarded against administrative action by an administrative body - not by a judicial body as in the United States or certain states of Germany - because of historical suspicion of the French judicial system. Exces de pouvoir (ultra vires) acts are reviewed, as well as detournement de pouvoir (abuse of power). Moreover, ordinances can be challenged in administrative courts by a declatory judgment. (See Borchard, 18 Iowa L. Rev. 133.) In Germany, the protection of the individual citizen was best afforded by the honest and efficient administration founded by Frederick the Great. As a result of

the Nazi Party control, this security may be permanently lost. However, legislation has given the German citizen an extensive privilege to sue the state for money damages when injured by an official in performing "governmental functions." Moreover, it is probable that a Federal administrative court, similar to the Conseil d'Etat, will be established after the war.

Although the individual in France looks primarily to the administrative courts for protection against administrative activities, the judicial courts to a considerable extent still act as the guardians of civil liberties and of property rights. The administrative department will not tolerate its own acts to be condemned, except by its own tribunals, but its interest is concerned with the administrative purpose of a specific act, and the judicial courts may deal with the secondary effects of the act if these are wholly out of proportion to the original purpose. It is less injurious to administrative prestige to say that a highly improper act is not an administrative act, and to permit discipline by the judicial court. As a result, the doctrine of "administrative trespass" (voie de fait) has developed.

The civil courts of France now review cases arising from usurpation of power as reflected in its effect on private rights, and cases arising from the unlawfulness of the means employed — from disregard of procedural requirements. For example, both the civil courts and the Conseil d'Etat refused to take jurisdiction in an action for damages by a canning plant which had been taken over by the military authorities. The Tribunal des Conflits ordered the judicial court to take cognizance because the requisition, in failing to comply with statutory formalities, constitured a trespass. Other examples involve illegal arrest and detention by a prefect of police; interference with religious property through improper execution of a town council resolution; improper taking of road material by reason of nonobservance of statutory formality; illegal encroachment on private property while installing electric telephone line equipment, without statutory or regulatory authority; seizure of a newspaper by the prefect of Paris where such seizure was not indispensable for the maintenance of public order. (Uhler, 37 Mich. L. Rev. 209.)

The individual, of course, may have the civil law right of action against a civil servant for his personal mistake (faute personnelle), but this application depends upon whether the official is acting from personal motives. For example, the Tribunal des Conflits held that the prefect of Paris, when he ordered seizure of certain newspapers on sale, undeniably was acting not from personal motives but for the purpose of maintaining public order in the city of Paris. (See Uhler, 37 Mich. L. Rev. 209.)

In the early part of 1943 these groups were vested with large powers which virtually place in them economic management of the war. They have authority to allocate materials and thus can close submarginal factories and destroy all competition. This system takes the place of the German cartels.

The Nazi Party is another German administrative innovation. It has the right to appoint members of the Municipal Councils, and thus controls the municipality.

Separation of Powers.- Since matters of public law are decided by administrative agencies, and matters of private law by the courts (frequently with the opportunity for appeal to an administrative court), the problem is constantly presented whether a case comes under public or private law, and the lawyers thrive on these questions. It is largely a matter of tradition. For instance, water rights are governed largely by public law, whereas railroad traffic is governed by the Law of Commerce; and it is generally necessary to look to the commentaries to determine the question.

There may be a conflict of jurisdiction between a court and an administrative agency. Either both claim jurisdiction over a certain case or both refuse to handle the case. Such a conflict is decided by a special court, - in France, the "Tribunal des Conflits."

Power of the Agencies -- Their Procedure.- Governments have been divided into three groups, in so far as administration is concerned: (1) the Justizstaat, in which administrative action is subject to the control of the courts (as in the United States); (2) the Polizeistaat, in which administrative action is unfettered; and (3) the Rechtsstaat. During the 19th Century the principle was developing on the Continent that an administrative agency has only such powers as are given to it by statute and that protection to individuals is afforded through administrative courts, independent of the administrative authorities -- the "Rechtsstaat." These statutes, however, were often interpreted in a broad way, as giving the agency a wide "police power," especially in Prussia (Allgemeines Landrecht II. 17. S 10). In Nazi Germany the "police power" now is without limits — it has become a virtual Polizeistaat.

The administrative agencies normally follow rules of procedure which are laid down in general and special statutes, although in France there is a considerable amount of judge-made law governing the exercise of administrative power.

The administrative agencies enforce their decisions themselves through imposing fines and imprisonment (similar to contempt of court proceedings), "vicarious activity" (for example, it orders a fence to be built at the expense of the party), or the direct employment of force (the police disperse a mob). This enforcement must have a statutory basis, except in Nazi Germany.