

THE JOURNAL *of the* SOCIETY *of* PUBLIC TEACHERS *of* LAW

* * * 1937 * * *

CASE LAW IN ROMAN EGYPT

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ONE of the best known differences between English and Roman law lies in the distinction between precedents and *responsa*. Whereas English law is developed, apart from statute, almost exclusively by judgments, the Romans relied for similar purposes mainly on answers by experts to legal questions. I have no desire to upset well-established conclusions on this point, but there are, I believe, reasons for thinking that in their treatment of decided cases the Romans of classical and earlier ages were not so unlike the English as is generally supposed. It has indeed never been asserted that the Romans of any period were quite indifferent to precedent. There is presumably no system of which this could be said by any intelligent observer, and Roman approximations to case law have often been discussed. The practice of the centumviral court is known to have been largely instrumental in developing the *querela inofficiosi testamenti*; the judgments of the Emperor, his *decreta*, were treated as conclusive authority for the rules they laid down.¹ The *responsa* themselves, in so far as they were often given on an issue raised before a court, contain an element of case law, and there are in Justinian's *Corpus Juris* three well-known passages which recognise, at least to some extent, the authority of decisions.² The writers on rhetoric also several times mention *res iudicatae* or *iudicatum* together with *leges*, *senatusconsulta*, edicts, etc., among the constituent elements of law. On the other hand, it has been said by Savigny and others that these rhetorical references only occur because their writers, not being lawyers, did not distinguish between sources of law and titles to rights, and so can include not only judgments, but contracts.³ In the legal lists of sources given by Gaius,⁴ Papinian⁵ and Justinian,⁶ *res iudicata* does not appear, and Justinian himself said emphatically that cases were to be decided according to statutes, not precedents—*non exemplis sed legibus iudicandum est*.⁷ What exactly he meant by this, seeing that he left the references to cases in the Digest and the Code, has been much discussed. The chief passage in the Digest puts concurrent decisions and custom together as authoritative in the interpretation of ambiguous statutes, and Dr. Allen,⁸ for instance, thinks that Justinian's

¹ Buckland and McNair, however, *Roman Law and Common Law*, p. 7, say: "In fact the usual mode of statement puts the emphasis wrongly. We ought not to say that decisions were binding if they were by the Emperor, but that what the Emperor laid down was law even if it was merely in a decision."

² D. 1. 3. 34; 1. 3. 38; C. 8. 52. 1.

³ Savigny, *System*, I. 109; Brie, *Gewohnheitsrecht* (1899), 52.

⁴ I. 2.

⁵ D. 1. 7.

⁶ J. 1. 2. 3.

⁷ C. 7. 45. 13.

⁸ *Law in the Making* (2nd edn.), 119.

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constitution is so clearly inconsistent with it that it must be taken to be repealed. Others, like Dernburg,¹ believe that Justinian was only concerned to make it clear that single decisions even of superior courts were not to be held binding. Again, even if precedent is admitted, there is the question whether it is to be treated as a separate source or as merely a branch of custom. Some think it essentially different, on the ground that customary law springs from the acts of those affected, whereas case law comes from the acts of courts,² but the general view, at least for Roman law, is that case law is simply regarded as a part of customary law.³ For the *Corpus Juris* this view is almost certainly right, but there does not seem to me sufficient reason for importing dogmatic conclusions drawn from Justinian's compilations into the law of earlier ages.

Since the classical works on Pandect law were written, our knowledge of the actual working of Roman law has been enormously enriched by the publication of legal documents of all sorts preserved in the Egyptian papyri, and it is here that we find the clearest evidence of the use of precedent. In reports of judicial proceedings and elsewhere there are to be seen citations of judgments by way of authority sufficiently definite and sufficiently numerous to make it impossible, so it seems to me, to regard them merely as evidence of custom, unless one is prepared to take the same view with respect to the English practice also. The fact that these citations exist is well known, but comparatively little has been written about them. There is a footnote on the subject in Jörs' text-book⁴ (which appears to have been omitted in the second edition by Kunkel), and Egon Weiss in the *Savigny Zeitschrift* for 1912 devotes a few pages expressly to it,⁵ but otherwise I have been able to find only scattered references, and one document, perhaps the most interesting of all, has only recently been published. To this document and to Weiss' article I shall have to recur, and I shall also have to quote an article by Professor Collinet,⁶ which treats of case law, but does not mention the papyri because it is concerned with the importance of the single *iudex* under the old formulary system which was never in use in Egypt at all. First, however, something must be said of the method of reporting, the nature of the citations and the reasons for thinking that it is no mere evidence of custom which they provide. There are reports of judicial proceedings dating from Ptolemaic, as indeed from still earlier times, but the form in the Roman period is different. In the Ptolemaic documents the court itself appears to recount the proceedings before it and its own judgment,⁷ but the reports of the Roman age are extracts from the official diaries of the magistrate or other person—in particular a magistrate's delegate—who had tried the case. These diaries were compiled by the magistrate's clerk, submitted by him for approval day by day, and then placed among the archives. They were by no means confined to judicial activities, but embraced all the official doings of each day.

¹ *Pandekten* (8th edn.), 47, n. 2 (§ 23).

² Dernburg, *loc. cit.*

³ Brie, *op. cit.*, 56-58.

⁴ *Geschichte u. System des römischen Privatrechts* (1927), I, n. 5.

⁵ *Z.S.S. Rom. Abt.* 33 (1912), 212-239, especially pp. 217-232.

⁶ *Le Rôle des juges dans la formation du Droit romain classique, Etudes Gény*, I, 23-31.

⁷ Jörs, *Z.S.S.* 36 (1915), 274 sqq.

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The chief document of the sort that has survived is the fragmentary diary of Aurelios Leontas, strategos of the nomes of Omboi and Elephantine in A.D. 232,¹ and in it we read of his transacting official business, and of his attendance at functions, including sacrifices and other celebrations in honour of the Emperor's birthday, as well as of judicial proceedings before him. Another document, more recently published, of A.D. 161 gives us an extract from the diary of an epistrategos describing a meeting of the strategos' council at which the epistrategos was present and evidently took the chair as superior in rank.² The debate is of an administrative, not a judicial character.

The origin of these magisterial diaries—*διοικηματασιμολ*—is a matter of doubt. None dating from Ptolemaic times has come to light, but Wilcken in his original article published in 1894,³ which is still the chief work on the subject, nevertheless conjectured that they were a Ptolemaic institution. Some Hellenistic rulers are known to have had detailed records of their activities kept, and of Philadelphus it is related that every day he had the previous day's record read to him and corrected where necessary, apparently in much the same way as Aurelios Leontas in the third century A.D. passed each day's diary by writing "I had read" beneath the entry. Wilcken, indeed, believes that the practice was initiated by Alexander the Great. Mommsen, on the other hand, in his *Strafrecht*⁴ took an entirely different view. The royal records of Hellenistic times were, as he points out, very different from the magisterial diaries that we know, and he regarded it as certain that these diaries must have been introduced by the Romans among whom the keeping of magisterial *commentarii* was undoubtedly a very ancient custom. Premerstein, in his article on *commentarii* in Pauly-Wissowa's Classical Dictionary,⁵ prefers Wilcken's view, but he admits that provincial technique was probably influenced by the practices of the central government, and Wilcken himself, in a later work,⁶ says that the question must be regarded as an open one.⁷

When the diaries report a trial, the description is often lively. The whole debate is not given in full, but the statements of advocates and witnesses as well as those of the presiding judge are reported, and important remarks, in particular the decisions, are given verbatim.⁸ These are usually quite short—at least in comparison with those of our own judges, and there is not the same disproportion between the space allotted to the words of learned counsel and to those of the Bench as in our reports, but some reasons may be given. In the reported dialogue there is some resemblance with the Year Books, and, as in the Year Books, flashes of temper sometimes appear. It is curious to note how a case is called on, as with us, by name—*So-and-so* v. *So-and-so*—and that the custom whereby the advocate identifies himself with his client by using the first person is already prevalent. The diaries were compiled by sticking together the sheets of papyrus on which the day's doings were entered, and each page was provided with a number. When a roll of sufficient length had been thus produced a new one was begun, and the rolls also received numbers.

¹ Par. 69 = Wilcken, *Chrestomathie* No. 41.

² PSI 1100.

³ *Philologus* 53, 80-126.

⁴ p. 513.

⁵ Col. 747.

⁶ *Chrestomathie*, p. 60.

⁷ Diocletian replaced the old diaries by a different form of report. Bickermann, *Aegyptus* 13, 346.

⁸ Cf. Wilcken, *Z.S.S.* 17 (1896), 165.

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It was thus possible for references to be exact, and we find in one place δ στρατηγός κολλήμ(ατος) δς τόμου β, *i.e.* "page 77, Vol. II,"¹ and in another γ τόμου κολλή(ματος) γ, *i.e.* "Vol. III, page 3,"² probably with reference to a diary of the Idios Logos in 159/60. Usually, however, the reference by volume and page has not been preserved, or not been copied in the first instance, but the name and rank of the judge, together with the date, provide sufficiently definite information. One of the most interesting of all, dating from A.D. 124,³ begins (after the superscription) "From volume— (Wilcken conjectures that the number is lost) of the diary of Blaesus Marianus, Prefect of the First Flavian Cohort of Cilician Cavalry. By delegation of his Excellency Haterius Nepos the Prefect (*i.e.* of Egypt), in the 8th year of the Emperor Caesar Trajanus Hadrianus Augustus, on the 18th day of Pharmuthi (*i.e.* April 13, A.D. 124), in the presence of Artemidorus, a jurisconsult (νομικός), Aphrodisius, the son of Apollonius v. Ammonius the son of Apion. Aphrodisius having alleged through Soterichus the advocate—," etc. Another⁴ is shorter: "Copy. On the delegation of Petronius Mamertinus, Prefect of Egypt, in the 18th year of Hadrianus Caesar, our lord, Mecheir 17th (*i.e.* February 11, 135), in the matter of Chenalaxas v. Petesuchos and Dionysios. Menander the judge said to the parties,—," etc. The diaries were, it appears, open to the public before they were deposited in the archives—so at least Wilcken⁵ interprets the phrase προθεῖς δημοσίᾳ which precedes the word κατεχώρισα at the end of the columns in Leontas' diary—*i.e.* the whole phrase means "I (the clerk) have registered the page from the diary in the archives after having put it up for public inspection." It is also clear that people might obtain copies of parts of the diaries as of other documents in the archives. This was indeed a common practice of which we have several Latin examples, *e.g.* the rescript of Gordian to the Scaptopareni of A.D. 238, known from an inscription,⁶ which states that it is copied and verified (*descriptum et recognitum*—the standard phrase) from a roll of the emperor's rescripts (*ex libro libellorum rescriptorum*), or the much earlier (A.D. 69) judgment⁷ of a proconsul of Sardinia in a boundary dispute between two communities, which is similarly *descriptum et recognitum* from a "volume of tablets with a handle" (*ex codice ansato*), and certified at the end by the seals of a number of witnesses. As Weiss⁸ points out, however, we have no evidence that judgments certified in this way were ever read in court—a point of some importance when we come to consider how precedents were actually handled in practice. No doubt the copies had to be paid for, and we have, in an account of expenditure dating from the middle of the second century, an entry which probably refers to such payments.⁹ Sums are mentioned as paid to νομογράφοι for "writing" and for "searching for two ὑπομνηματισμοί"—here presumably in the sense of judgments—of the Chief Justice. "Writing" must mean "copying,"¹⁰ and the νομογράφοι were probably officials, though

¹ See Wilcken, *Philologus* 53, 102.

² BGU 16 = Wilcken, *Chrest.* 114.

³ CPR 18 = Mitteis, *Chrest.* 84, = Bruns, *Fontes* (7th edn.), 189.

⁴ BGU 19 = Mitteis, *Chrest.* 85, = Bruns, 190.

⁵ *Chrest.*, *loc. cit.* Cf. *Archiv.* 12, 235.

⁶ Bruns, 90.

⁷ Bruns, 71.

⁸ *Op. cit.*, 230.

⁹ *Oxy.* 1654.

¹⁰ Wilcken, *Archiv. für Papyrusforschung* 7, 96.

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this is disputed.¹ We cannot say for certain by whom the payments were made in this case, but it is at least likely, in view of the other items in the account, that they were made by a *πραγματικός*, an attorney, who needed the copies for a client.

Now it may, no doubt, happen that copies of judgments are needed for other purposes than that of citation in court as precedents. They may, for instance, be taken by parties as evidence of their rights, and we find references in reports of judicial proceedings to previous decisions relating to the same matter as that before the court, which were presumably taken from copies that had been made and preserved by the parties for the purpose. This was indeed particularly desirable in Egypt, where the system of administering justice made it possible for cases to drag on for a long time before different authorities. We also find that in a petition from certain priests to the Prefect in A.D. 71-2² they quote a decision of an Epistrategos in which they say "he reserved the land for us, the legitimate priests, according to the report in our possession." But it is also clear that sometimes the copies must have been made for the purpose of using them as authorities for legal propositions. The chief evidence of this comes from a number of collections of authorities in which extracts from reports appear, and which can only have been compiled for this purpose. The clearest of these is that contained in the Cattaoui papyrus completed by one from the Berlin collection.³ In it there are collected together seven reports, the first fragmentary, but the remainder well preserved, of decisions by prefects and others dating from the reigns of Trajan, Hadrian and Antoninus. They are of different lengths, but they all relate to the same subject, the proprietary difficulties arising from the rule that soldiers' unions could not count as legal marriages. A shorter collection, from the third century, concerns the rules of prescription.⁴ It consists of a constitution of Severus and Caracalla of A.D. 199, already containing the rule of ten years *inter praesentes* and twenty years *inter absentes*, followed first by an extract from the report of a trial before the prefect Subatianus Aquila, dated March 13, A.D. 207, and then by a very short extract from a much earlier trial dated November 20, A.D. 90, in which the prefect Mettius Rufus points out to the provincial plaintiff against whom time has run, how little he has to complain of, seeing that the Roman periods of usucapion are much shorter than those of the provincial prescription. "Consider," he says, "that with us a year's possession is sufficient to give ownership." It is curious that the only trial reported in the surviving parts of Leontas' diary also refers to prescription, and that another collection,⁵ unfortunately much mutilated, contains, with other matter, accounts of three cases of the early second century, two before prefects and one before an Epistrategos, all connected with the bringing of actions after long periods have elapsed. It was no doubt, as the editor, Vitelli, says, compiled by an advocate or someone of the

¹ Literature, Mitteis, *Grundzüge* 56, n. 7. P. M. Meyer, *Zeitschr. f. vergl. Rechtswissenschaft* 39 (1921), 245, doubts whether his original view that they were not officials can be upheld since the publication of *Oxy.* 1654.

² *Teb.* 302, l. 27, cf. *Teb.* 287 (= Wilcken, *Chrest.* 251), l. 12, where an *εἶδος* of importance to an association of weavers and fullers is apparently preserved by them.

³ *BGU* 114 = Mitteis, *Chrest.* 372.

⁴ *Strasb.* 22 = Mitteis, *Chrest.* 374.

⁵ *PSI* 281.

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sort from diaries. Three reports of proceedings before the Prefect Mamertinus (second century),¹ all concerned with *cessio bonorum* were no doubt also put together for the purpose of showing the conditions in which cession was allowed, and incidentally help us considerably to see why all insolvent debtors were not able to make use of this convenient method of escaping the worst consequences of bankruptcy. The Prefect, before granting the application for cession, orders the debtor's means to be investigated. A pair of extracts from the diaries of the Prefect M. Junius Mettius Rufus look as if they were meant for use as precedents.² One is dated August 3, A.D. 89, the other February 2, probably A.D. 94, and both concern failure to appear on summons. The five-year interval shows that they cannot well have been even in the same volume originally. The citations in the Dionysia papyrus of the second century, to which I shall come in a moment, must almost certainly have been taken from collections.

From the fourth or fifth century, *i.e.* much later than anything quoted so far, we have a curious document³ which consists of short reports and judgments of prefects in a number of sensational cases, the murder of a woman detected in adultery, a sexual offence, (two ?) murders of prostitutes and some offence against a corpse. In the last the Prefect says to the prisoner: "You seem to me to have the soul of a beast, not a man—or rather not even of a beast, for beasts attack men, but spare the dead." The facts are related freely, but the remarks of the Prefect (or Prefects) are given verbatim, and Wilcken⁴ thinks that we have here too a collection of decisions made for use as precedents, the connecting link being that the offences are all against women, for the corpse, too, may have been that of a woman. It seems to me, however, to differ very considerably from the earlier compilations with their careful citation of names and dates, and almost gives the impression of an extract from the yellow press. It was perhaps rather a note of practice in criminal cases made by someone in an office. Some of the crimes at any rate led to the death penalty, and the reports would not have been of much use to defending counsel.⁵

Some additional evidence of collections is also provided by the phrases with which a report is sometimes introduced. In the list of cases on *cessio bonorum* the second case is preceded by the words ἄλλου τοῦ αὐτοῦ, *i.e.* a copy of another decision by the same magistrate, and in another papyrus⁶ where two authorities are annexed to a petition the second begins καὶ ἄλλου. We can therefore generally assume when we find a similar phrase⁷ that there was a collection of at least two reports. It must be admitted, however, that the collection need not have been made for the purpose of quoting the cases merely as precedents. In one example⁸ we find "similarly of the same

¹ *P. Ryl.* II, 75; cf. P. M. Meyer, *Z.S.S.* 44 (1924), 617.

² *P. Hamb.* 29.

³ *BGU* 1024.

⁴ *Archiv.* 3 (1906), 302.

⁵ *P. Oxy.* 2111 contains part of a report of cases heard by Petronius Mamertinus about A.D. 135, but it can hardly have been compiled with a view to argument in court, for the subjects are too disparate. *P. Oxy.* 2112 is a "list of judicial decisions" of the late second century, but a summary only, and may have been made for purposes of execution.

⁶ *P. Mich. Inv.* 2922. Boak, *J.E.A.* 18 (1932), 69-76.

⁷ E.g. Bell, *Aegyptus* (1933) 514 = Bilabel, *Sammelbuch* 7601; *BGU* 361, II, 10.

⁸ *BGU* 361, III, 11.

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Postumus" introducing an extract which clearly refers to proceedings closely connected with the actual matter dealt with in the preceding report.

If we turn from the evidence provided by the mere existence of collections to the use made of the precedents themselves, we find that citations appear with other legal authority in petitions to magistrates, in the arguments of counsel and in the decisions of judges.

Some of the best illustrations come from the famous "Petition of Dionysia," a complex document addressed to the Prefect Pomponius Faustianus in A.D. 186.¹ The chief question at issue is the right of Dionysia's father, Chaeremon, to break up her marriage against her will, and Dionysia alleges first that there is no law allowing fathers to do this, and secondly that if there is one it does not apply in her case because she was born of a "written marriage" and herself married in this way. She then goes on :²

"In proof of my contention, and in order to deprive Chaeremon of even this pretext, I have appended a small selection from a large number of decisions on this question given by Prefects, Procurators and Chief Justices, together with opinions of lawyers, all proving that women who have attained maturity are mistresses of their persons, and can remain with their husbands or not as they choose . . ."

And, in fact, there follow extracts from diaries as well as a lawyer's opinion on different questions raised in the petition. Dionysia's father had also written a letter to the Prefect³ to which he had appended "a selection from a large number of cases bearing on the question," and had on another occasion appended judgments which had been quoted by the Chief Justice, although, as Dionysia contends, the (previous) Prefect had refused to pay any attention to them as they were not in point—*ἀνομοίαις ὁδοῖς εἰς παράδειγμα*.⁴ Whether this is true or not we do not know—there are reasons for thinking that Dionysia is not being quite frank in the matter—but the cases she herself quotes certainly appear to be in point. The first⁵ includes a judgment of the Prefect Titianus dating from A.D. 128, *i.e.* fifty-eight years before Dionysia's petition, in which he decides that the woman in question is to live with her husband or her father as she prefers, and in the second, which is from the records of an Epistrategos six years later, the judgment of Titianus is read and the same decision is given with explicit reference to it—*καθὼς ὁ κράτιστος Τίτιανος ἐκρίνευ πύσσονται τῆς γυναίκος*. The case is a particularly strong one, as there was an "Egyptian law," which had been read (though it is not preserved) apparently laying down the opposite rule. As the editors say,⁶ the strength of Dionysia's case lay, not in the Egyptian law, but in the judgments of prefects and others overruling it. A third judgment⁷ which is cited is much older, dating from A.D. 87, *i.e.* almost a hundred years before Dionysia's case. It was given by a *iuridicus*, but the text is mutilated and the point consequently not quite clear. The lawyer's opinion,⁸ itself forty-eight years old, is also worth noticing, for it mentions *ὑπομνηματισμοί*

¹ P. Oxy. 237.
² VII. 19 *sqq.*

³ VII. 13 *sqq.*
⁴ p. 169.

⁵ VI. 12 *sqq.*
⁶ VI. 39.

⁷ VI. 29.
⁸ VIII. 2.

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which "help the girl," but it is so short that we cannot be absolutely certain that the trials recorded did not concern the actual case on which the lawyer's advice had been sought. Later again in the papyrus¹ there is another quotation from a report, in this case one would have thought rather a superfluous one, for it appears to record merely the direct application of a decree that had just been quoted in full.

Another petition is that of Apollinarion to the Dioiketes of A.D. 200,² in which she asks, by reason of her sex, to be relieved of the duty of cultivating the Crown lands that had been compulsorily assigned to her father, whose heiress she is. To her petition is annexed the report of a trial dating from 154/5, *i.e.* forty-five years old, in which we find an advocate asserting that it has been decided by Prefects and Epistrategoi from time to time that women are not bound to cultivate Crown lands, and saying that his client claims "to read the judgments and be relieved of the cultivation." The magistrate orders that "the decisions in similar matters" are to be read, and there follow references to a prefectural *διάταγμα* of Tiberius Alexander of the second year of Galba, *i.e.* about eighty-six years earlier, and to two decisions, one of a Prefect and the other of an Epistrategos of comparatively recent date, about thirteen and eight years old respectively. It is true that *διάταγμα* means an edict, not a judgment, but the other authorities appear to be judgments, and in this case, too, the magistrate's own judgment—his rank is not known, but he was perhaps himself an Epistrategos—is explicitly based on the authorities that have been cited to him: "Parmenion said: In accordance with what has been read (the petitioner) can be relieved of the cultivation." Somewhat similar is another fragmentary report,³ from which unfortunately the judgment is missing, in which an advocate says that his client relies on three decisions "in like cases," and in which it is added that he read the decisions of three *iuridici* as well as "one letter of recent date of the Prefect Honoratus." The question raised by a document of A.D. 135⁴ is of more general interest. Can a grand-daughter succeed to her paternal grandmother's property, when her father has predeceased the grandmother? The point would not have presented any particular difficulty at Roman law, but in this case the parties were evidently Egyptians, and the grand-daughter, in support of her claim against her paternal uncle and cousin, quoted a "grace" of Hadrian's, which apparently did not in terms apply to Egyptians, as well as a decision by the Prefect, Gellius Bassus, allowing grandchildren to succeed. A further difficulty lay, however, in the fact that, as was shown, the grandmother had died before the date of the imperial "grace," and the judge applied to the Prefect, who had delegated the case to him for instructions, because, as he says, it was a matter of principle (*ἐπει καθολικὸν ἦν*). The Prefect's answer does not itself quote any precedent, but decides that judgment is to be given for the plaintiff in accordance with the imperial enactment, without referring at all to the question of retrospective application. There would, of course, be nothing very surprising in treating an imperial rescript as merely an authoritative exposition, but the word grace (*χάρις*) used

¹ VIII. 19.

² *P. Oxy.* 899 = Wilcken, *Chrest.* 361.

³ *P. Cairo Preis.* 1.

⁴ *BGU* 19 = Mitteis, *Chrest.* 85.

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here does make it look as if the enactment in question had introduced an innovation.

The documents I have quoted so far have all been known for many years, but I now come to two that have been more recently discovered. The earlier is a tax case,¹ Castor the son of Asclepiades v. Heron, the Inspector of the ἐγκώλιον tax, heard on July 12, 135, by Claudius Apollonius, strategos of the Heracleopolite nome, and the question raised is whether the exemption granted to citizens of Antinoopolis applies only to property in the city itself or elsewhere also. After the inspector has said that his predecessors had exacted the tax in circumstances similar to those of the taxpayer, the taxpayer replies that the Epistrategos has referred such matters to the Prefect, and the Strategos' decision is that like his superior "in a similar case" he will refer the matter to higher authority. From fragments which probably preceded this report as well as from the beginning "of another from the diaries . . ." it looks as if there had at one time been a collection of cases.

The other new text was published by Mr. T. C. Skeat and Miss Wegener in the *Journal of Egyptian Archaeology* for 1935.² Its date is in all probability A.D. 250, and though it is by no means perfectly preserved, it contains by far the most extensive account of proceedings in a Prefect's court hitherto known, and though, like other reports, it is not verbatim, it does, as the editors point out, here and there allow some glimpses of forensic rhetoric to appear. The question at issue is the liability of κομητῆς, villagers, to appointment to the office of κοσμητήης, like all municipal offices at this period a burden which everyone did his best to escape. Some villagers had, it seems, actually been appointed by the Senate of Arsinoe and appealed to the Prefect, before whom both sides were represented by several advocates. A good many documents are quoted, but unfortunately they are referred to in the report only by their initial words—"and he read the document annexed, of which the beginning is . . ." Presumably there was an appendix of documents, but it has not survived. The villagers appear to have had the better of the argument throughout, for they could rely upon an enactment (νόμος) of the Emperor Severus, which seems to have laid down in terms that villagers were not to be forced to undertake liturgies in the district capitals,³ and the Prefect refers to this enactment in his decision,⁴ but they also quoted cases. One of their advocates says "We are villagers and we read judgments,"⁵ after which he proceeds to read a judgment of Honoratianus, who had been Prefect from 231 to 236. Also when the presiding Prefect, Sabinus, rather unkindly says to counsel for the Senate "Do you too read me a law,"⁶ one of the villagers' advocates chips in and says "Since Severus all Prefects have judged thus." Counsel for the Senate is in fact driven to the argument that laws are to be interpreted according to the needs of the State, for he cannot really get over the statute. In putting forward this plea he makes a tantalizingly obscure reference to cases, and possibly to the relation between statutes and cases. "The laws," he says, "are to be revered, but you must judge with your

¹ Bell, *Aegyptus* 13 (1933) 514, cf. above, p. 6, n. 7.

² *P. Lond. Inv.* 2365, *J.E.A.* 21, 224-247.

³ l. 83.

⁴ ll. 105-106.

⁵ ll. 57-58.

⁶ l. 85.

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eyes upon the (? decisions) of Prefects who have been moved by the needs of the cities; it is the need of the city which limits the force of the law. For this reason Prefects have often, when such laws were put before them, given judgments . . ." ¹ but here the papyrus again becomes too fragmentary to translate. A little further on ² we find the words τὸ ἐφ' ἑνὸς κριθὲν ἐπὶ πάντων ἰσχυρὸν λαμβά[νεται], i.e. if we can trust the restoration "what is decided in one matter has force in all." But the text is incomplete and the remark does not fit well into the context. Almost immediately afterwards the Prefect asks the advocate "What do you say to the law of Severus and to the judgments?" and the advocate takes refuge in the *clausula rebus sic stantibus*. Severus enacted the law, he says, when the cities were prosperous, as they no longer are. This is near the end, and though the judgment is not fully preserved it must pretty clearly have been for the villagers.

This new papyrus clearly provides us with further evidence of reliance on decided cases. Being longer and more detailed than the other reports it also gives us more insight into the type of argument used. There seems actually to be a statement in general terms of the principle of *stare decisis* and a suggestion that laws are to be applied with regard to cases that have been decided since they were passed. This latter argument can be paralleled from a juristic source, the passage in the Digest quoting a rescript of Severus as laying down that a series of agreeing decisions is to be decisive in the interpretation of ambiguous statutes.³ If there is really a discussion of the relation between different sources of law, one can also perhaps find a parallel in another papyrus,⁴ which, however, is the report not of a trial, but of a meeting of the Senate of Arsinoe in the second century where one speaker says "If there is a contradiction, the precedent (παράδειγμα) is not valid, for laws and edicts are preferred to everything else." On the whole, however, the discussion probably proceeded on accustomed rhetorical lines. The argument that laws apply only so far as the welfare of the State permits is a rhetorical commonplace,⁵ and so is the argument that a law remains valid only so long as the circumstances are unchanged.⁶ Neither here, nor elsewhere in the papyri, is there, so far as I can see, evidence of definite rules concerning precedents, or even of a settled technical terminology.⁷ Weiss ⁸ indeed does consider that the surviving documents show one requirement for the validity of case law which is always logically demanded by

¹ Il. 86-88.

² l. 98.

³ D. I. 3. 38.

⁴ Wilcken, *Chrest.* 27. Possibly some discussion of the relative authority of κρίσεις and prefectural orders is concealed in *P. Cairo. Preis.* I. (cf. p. 8, n. 3 above), where, after one party's advocate has read three judgments, the other mentions *one epistula* of a Prefect "of recent date."

⁵ Cf. Cic. *De Inv.* I. 33, 56; 38, 68.

⁶ Arist. *Rhet.* I. 15. 11.

⁷ Παράδειγμα is used, but is not confined to judicial precedents, cf. above, p. 7, n. 4. Now also *P. Harr.* 67, ii. 16. In *P. Ryl.* 75, I. 6 sqq. the Prefect says: "His means are to be enquired into; there is already a τύπος according to which I have often given judgment," etc. The editor translates "principle," no doubt rightly. If "ordinance" were meant the Prefect would not speak so vaguely or feel it necessary to say that he had often followed it. ὅπως appears twice in *P. Lond.* 2565, once, l. 115, referring to a rule laid down by a previous prefect cited as authority, but we cannot be certain that the rule was laid down in a decision. In the other instance, l. 28, it itself occurs at the beginning of a judgment, κατὰ τὸν ὅρον τὸν δοθέντα καὶ τὰ ἐξῆς. It certainly can mean "decision" v. *Preisighe, Wörterbuch* s.v.

⁸ *Op. cit.* 231.

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those who consider it merely a form of customary law, *i.e.* that there must be a whole series of decisions. In the succession case mentioned above,¹ where the plaintiff quotes only a single decision of an Epistrategos in her favour, the judge does not follow it but asks his superior for instructions. In one of the reports in the Dionysia papyrus an Epistrategos does indeed decide simply in accordance with a single recent decision of a Prefect that a wife is not to be taken from her husband against her will,² but in Weiss' view this can be explained, not only by the difference in rank between the judges, but also by the change that was preparing in the Roman rule on the matter at this period. According to our evidence, however, it had not yet changed,³ and the point about disparity of rank is probably the more important. One can well believe that no Prefect would have considered himself bound by the judgment of an Epistrategos, but Dionysia's advisers thought it worth while to quote in a petition to the Prefect decisions not only of Prefects but also of ἐπιτροπῶν (which probably means Epistrategoi here) and of Chief Justices, as well as a much earlier one of a *iuridicus*, although the Prefect was the highest authority in the land. Even here then one cannot safely assume a hard and fast rule, and it looks as if judgments even of minor officials sometimes by reason of accidental preservation in collections came to be quoted many years after they had been given. Nor is there really sufficient ground for importing into the law of classical or earlier times the dogmatic conclusion that case law is only justifiable as a form of custom that is rightly drawn from Justinian's compilations. One passage which is often quoted in this connection is from Cicero's *De Inventione*.⁴ Here Cicero, after defining customary law as that which age has approved by the consent of all without a statute, and giving as chief example the praetorian edict, proceeds *Quaedam autem genera iuris iam certa consuetudine facta sunt; quod genus pactum, par, iudicatum*. At first sight this puts *iudicatum* under the general heading of custom, but if this is the meaning it is difficult to see how it came to be associated with *par* and *pactum*. Cicero's language is certainly lax, but I believe he means rather that custom has approved certain sources of law and of rights—*i.e.* it is a customary rule that you can base arguments on considerations of equality, or on what the parties have agreed, or on decisions. A few lines further on he defines *iudicatum* as that *de quo iam ante sententia alicuius aut aliquorum constitutum est, i.e.* the decision of one or more persons, and this gives no support to the view that a single decision is without value. Apart from this passage the chief prop of the custom theory is a rescript of the Emperor Alexander Severus, A.D. 224,⁵ which in the title on custom in Justinian's Code reads as follows:

“The Governor of the province after proof of what has been commonly decided in the city in the same sort of disputes will investigate the matter and decide. For preceding custom and the reason which gave rise to the custom is to be preserved, and the Governor of the province will make it his care that nothing should be done contrary to long-continued custom.”

¹ P. 8, n. 4.

² For the difficulties *v. Corbett, Roman Law of Marriage*, 123, 239.

³ 2. 22, 67.

⁴ Above, p. 7.

⁵ C. 8. 52. 1.

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But the same rescript appears also in another title in the Code,¹ in its original context, which shows the actual point of law that was raised, and here the second sentence, which alone makes any reference to custom, is not to be found. It looks, therefore, as if the implied equation of custom with decided cases were an addition purposely made by way of explaining the validity of case law. Such an explanation might indeed well seem necessary to a compiler who bore in mind Justinian's definite prohibition of decisions based on *exempla*, and the language used gives some support to this suggestion.² At any rate it is not safe to use the constitution as evidence for the classical law.

One may say then that there existed a definite practice of citing decided cases as authority in courts of law, that judgments were sometimes expressly based on such authority, and that the practice was facilitated by the use of official diaries and collections made from the reports that they contained. But it is unlikely that there was much in the way of a theory of case law, though it was no doubt clear that judgments had to give way to "laws," including especially imperial enactments of any sort, and quite possibly some idea that a judge need not consider too carefully the decision of one whose rank was inferior to his own. In particular there is no reason to suppose that case law was justified as a species of customary law.

The next question which we have to ask is how and when the practice originated. The earliest date to which we can assign a definite citation appears to be 134, the date of the decision quoted in the Dionysia papyrus in which the judgment of the Prefect Titianus is followed, but the collection of precedents on soldiers' marriages takes us back to the reign of Trajan, that of cases on prescription to A.D. 90, and in Dionysia's petition the judgment of a *iuridicus* quoted dates from 87. On the other hand, the latest date we can give with certainty is that of the new papyrus—A.D. 250, when the system is still in full working order, so that it may well have continued for a considerable time longer. The period for which we have evidence thus corresponds not too badly to that of the classical Roman law. Was the practice then Roman in its origin or was it Greek? Weiss does not go into this question expressly, but he has an argument which bears on it. He points out that the authority upon which the court is expected to rely is produced and read by the parties, and that this reading ἀναγιγνώσκειν = *recitare*, is a Greek practice.³ In the ancient world it was not so easy as it is to-day for a court to make itself acquainted with the authorities on which its judgment should be based. In Greece this was sometimes facilitated by inscribing the laws or some particular part of them with which the court was concerned on the walls of the court-house, but the common practice, as we know from the orators, was that when a speaker reached a point of his speech at which he wanted to refer to a law, he called for an officer of the court to read it, as he also did when documents and the depositions of witnesses were concerned. This procedure was a necessity at Athens

¹ C. 8. 10. 3.

² The form of the second sentence is not happy, for *ad sollicitudinem suam revocabit praeses provinciae* comes clumsily after the *praeses . . . statuet* of the first sentence. It may have been suggested by *rem ad suam aequitatem rediget* in C. 8. 1. 1, which was originally part of the same constitution.

³ *Op. cit.* 217 sqq.

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where the large jury-courts consisted of persons who had no particular legal knowledge. The procedure evidenced by the papyri is essentially the same. Laws, edicts and precedents are constantly read to the court, the only difference being that they are read by the advocate himself, not by an official. Now this system of reading authorities at length is, I think, less familiar to a modern Continental jurist than it is to us, and is apt to raise difficulties in his mind about the maxim *iura novit curia*.¹ Weiss, in fact, concludes from it that "in ancient procedure and particularly in Roman provincial procedure the maxim had no application."² The general conclusion is doubtless right—no such principle was ever stated—but, as Weiss recognises, the reverse proposition was not true either. The court was not bound to shut its eyes to all authority for rules of law which had not actually been produced to it by the parties.³ But I doubt very much whether the reading of authorities has anything to do with the matter. In England the court takes judicial notice of all sources of law with but minor exceptions, and yet the judges spend a good deal of their time listening to the reading of reports and even of statutes by counsel. The reason lies in the preponderating importance, according to English procedure, of oral argument in court. Whereas on the Continent a mere reference in a written pleading may be sufficient, it is often necessary for oral argument that the actual words of the authority should be immediately presented to the judge's mind, and this is particularly true of case law, which does not lend itself so well as statute to argument by way of reference. Weiss, though he does not actually say that *iura novit curia* applied in Rome, does draw a distinction between Rome and the provinces, holding that *recitatio* of authorities did not spread to Roman procedure in the strict sense until the Byzantine period, when it was applied *inter alia* to the works of the classical jurists. If, he says, we compare Roman with Attic forensic speeches we see that in the former a knowledge of the law as far as it applies to the matter under discussion is presumed, and in spite of Cicero's speeches *pro Milone* and *pro Roscio Amerino* we have not got the texts of the laws on murder—the implication being that if these speeches had been by an Attic orator we should find them inserted in the midst of the speeches.⁴ I think, however, that Weiss exaggerates the distinction that he draws. It is not quite easy to dispose of all the "apparent exceptions," as he calls them, in Cicero. In the *pro Tullio*⁵ Cicero speaks of laws of the XII Tables which his opponent has "recited," and his tone is certainly ironical, but that does not prove that the laws were not, in fact, read. Nor is it quite correct to say that the citation of laws occurs regularly "only by way of illustration and comparison and not to give the judge the basis on which he is to decide."⁶ In the *pro Cluentio*,⁷ which Weiss mentions, Cicero's allegation that his client has implored him not to rely on the technicalities of the statute is merely a rhetorical subterfuge.

¹ Gradenwitz, *Z.S.S.* 16 (1895), used the argument that the maxim must have applied at least to the extent of making the reading of recent orders of the Prefect unnecessary, but see Wilcken, *Z.S.S.* 17, 159 *sqq.* and *Archiv.* 5, 269.

² *Op. cit.* 239.

³ He cites a rescript of Diocletian, C. 2. 10, which was probably intended to guard against this misconception.

⁴ *Op. cit.* 214.

⁵ Weiss, *op. cit.* 214.

⁶ 47. 48. Weiss, *op. cit.* 217, n. 2.

⁷ 52. 145.

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In fact, he quotes the *lex*, and gets his point well home to the jury. In the *pro Archia*¹ again he gives part of a *lex* almost verbatim, and this *lex* constituted the whole legal basis of his client's claim to the citizenship, which was the point at issue. We may well concede that there was a difference between the atmosphere of a court at Rome and one in the provinces. In the provinces the formulary procedure was rare, whereas it long survived at Rome, and a Roman judge would be better acquainted with the law as it applied at home than with the special circumstances of a province. But it must be remembered that most of our evidence for Rome comes from Cicero, in whose time there was not nearly the same mass of authority available for citation as there was later in the provinces with their wealth of imperial and magisterial ordinances of all kinds. Essentially, for the present purpose, conditions in Rome and the provinces did not differ so greatly. In both cases the judges were not professional lawyers but, whether magistrates or not, members of the governing classes with some knowledge of public life, and in neither case were the modern conveniences for easy access to the sources available. Consequently the parties must of necessity try to produce authority which they believe to be in their favour, and where necessary for comprehension, read it in full, though the court is not bound to shut its eyes to everything that is not produced by them. Had it been so bound, some strict rule for authenticating citations must have been laid down, but there was nothing of the kind in Egypt any more than there was at Rome; the copies of judgments used are, as we have seen,² not certified.

No argument then from the prevalence of recitation in Egypt and its rarity at Rome can be used to prove a provincial origin for the practice of citing cases. On the contrary, I believe it to be a Roman development, which disappeared again when the classical period was over. "Provincial" in this connection must mean Greek, but there is no evidence that the Greeks had any such system as existed in Roman Egypt. Of course they were sometimes influenced by precedent.³ Demosthenes, for instance, towards the end of the speech against Dionysiodorus,⁴ reminds the jury that they will be legislating for the whole market and that numerous merchants are waiting to hear the result of the case, and Aristotle has something to say in the *Rhetoric* about the use of παραδειγματα. It is to be noted, however, that he regards them as better suited to deliberative than to forensic oratory,⁵ and when he speaks of "judgments" at some length,⁶ though he includes actual judgments of a court, it is clear from his illustrations that he is using the word in a sense wide enough to include all expressions of opinion whatsoever, the view of Theseus, for instance (as shown by his conduct), that Helen was a virtuous woman, or of the goddesses who preferred Paris to other men. In Ptolemaic Egypt,

¹ 4. 7.

² Aristotle, *Ath. Pol.* 3. 4, says that the six junior archons, the thesmothetai, were chosen ὅπως ἀναγράφαντες τὰ θέσμινα φυλάττωσι πρὸς τὴν τῶν ἀμφισβητούντων κρίσιν, which Lipsius, *Attisches Recht.* 12, n. 44, takes to mean that rules emerging in trials were to be noted for future use. But the words do not warrant this conclusion, and the arrangement seems too complex for the period of Solon. If it ever existed it left no trace.

³ Dem. LVI, § 48, p. 1297. See Vinogradoff, *Hist. Jurispr.* II, 79. Cf. also Isocrates, *Antidosis*, § 173.

⁴ 3. 17. 5.

⁵ Above, p. 4, n. 8.

⁶ 2. 23. 12.

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so far as our evidence goes, there is no mention of precedent, though other sources, such as laws, royal decrees and the statutes of the Greek cities are mentioned in petitions and decisions. Weiss observes¹ that the reason why judgments were not read in Ptolemaic times may be that officials did not yet keep diaries, but one cannot help thinking that if there had been much demand for copies of judgments for use as precedents some method of obtaining them would have been invented, and in fact we have a number of copies to show that they were recorded. The question whether the diaries themselves were a Ptolemaic institution which happens to have left no trace, or a Roman importation is, as I have mentioned, undecided, but it is quite certain that Roman magistrates kept *commentarii* long before the annexation of Egypt, and that in public life generally, and religious observance in particular, the greatest regard was had to the precedents—in the wide sense—these recorded. But there is also evidence of precedent in the restricted sense at Rome. Professor Collinet, in the article mentioned before,² produces, besides quotations from rhetorical writings, two instances in which the decision of a single *iudex* is known to have made law,³ and it is worth noting that the *Auctor ad Herennium* includes in *iudicatum* not only the *sententia* of a *iudex*, but the *decretum* of a magistrate.⁴ It is true that one always suspects a writer on rhetoric of following Greek models, and Cicero's remarks on *exempla*, where he deals with the subject generally,⁵ are almost as theoretical as Aristotle's, but he does say elsewhere⁶ that Crassus in a famous case used many examples, which must, in view of the technical matter under discussion, almost certainly have been drawn from real life. The *Auctor ad Herennium* in the passage quoted uses technical Roman terminology, gives Roman illustrations and adds some sound advice. The orator should, he says, compare "judge with judge"—a process well enough known in our courts, though not generally avowed—"period with period" and "number with number." One certainly has the impression that he knew from experience how precedents were actually handled by Roman advocates. There is thus considerable ground for Professor Collinet's comparison of the conditions at the end of the Republic with those prevailing in England to-day. It is possible that the growth of *responsa* in the early Empire caused less attention to be paid to precedents at Rome, but the annexation of Egypt comes at the end of the Republic, and republican practice is thus sufficient to explain the development in that country of a system which appears to be thoroughly in keeping with the practical genius of Roman administration.⁷

¹ *Op. cit.* 229, n. 6.

² Above, p. 2, n. 6.

³ D. 24. 3. 66. pr.; Cic. *de Off.* 3. 16. 65-67.

⁴ 2. 13. 19, cf. Cic. *de Leg.* 1. 16. 43.

⁵ *De Inv.* 1. 42. 79; 44. 82-83.

⁶ *Top.* 44.

⁷ I have not touched on the complex questions raised by the Gnomon of the Idios Logos, but it certainly shows that the Roman official in Egypt noted the decisions of magistrates in particular cases. Nor can these cases be neglected as "administrative," for they involved important questions of what we should call "private law," in particular with regard to succession. It is also worth noting that in the criminal law of the Empire, where fixed rules, especially with regard to punishment, are rare, the jurists sometimes just state what is the common practice. See, e.g. D. 48. 10. 32. pr.; 48. 19. 28. 15.

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After the preceding Presidential Address, delivered on Saturday, July 17, 1937, at the University of London, the following discussion took place :

Mr. Powell asked whether the development of the doctrine of precedent in Egypt had been affected by the Law of Citations. *Professor Jolowicz* thought not.

Professor Campbell pointed out that the prefects were also administrators, and that administrators always tended to secure continuity by following what had been done before. Did the evidence show that that was what was happening here or did it show a pure recognition of the doctrine of precedent ?

Professor Jolowicz replied that the precedents were quoted with other official authorities.

Lord Atkin, speaking as an honorary member, said that he was interested to find the same problems in the first, second, and third centuries as were met with in the courts now, when we are bound by precedents. The test of whether a precedent is binding is whether a judge is bound to follow it even if he disagrees with it. It is evident that precedents should have great weight. Where there is continuity in the administration of justice the same court will always tend to decide the same question in the same way. Much depended also on the relative positions of the judge deciding the case and the judge quoted. The inferior judge in Roman Egypt might be influenced by the fact that the prefect would dismiss him if he failed to follow his judgments. It is often difficult to distinguish between administrative and purely legal questions. There is a general tendency to follow precedent in administrative and semi-judicial matters. This is manifest even in sport, e.g. the laws of golf, and in the rules of universities and of the Inns of Court. The doctrine of precedent is a natural result of human nature. A treatment of precedent which at first sight seems very similar to that of the Egyptians is to be found in French courts to-day and in the jurisprudence of Quebec.

Dr. Jennings referred to the position occupied in the doctrine of precedent by decisions of the Judicial Committee of the Privy Council and their work in developing the Canadian constitution. He pointed out also the wide variety of meanings in which the term precedent could be used and doubted the possibility of drawing a strict dividing line between them.

Dr. Radcliffe doubted whether the practice of Egyptian judges in keeping diaries could be based on the corresponding Roman practice. Most judges in Egypt were natives. Even the higher officials were not typical Roman officials. It was unlikely that such as these would have imported the custom. The method of arguing back to a prior and parallel institution was also dangerous. Had any appeal from Egypt to the Emperor in any of the cases in the papyri been preserved ?

Professor Kantorowicz referred to the influence of the Christian Church on the doctrine of precedent because of the stress it laid on the judge following his own conscience even at the cost of disregarding precedent. This principle was in theory now generally accepted on the Continent. The German Penal Code even laid down a penalty of ten years' forced labour for the judge who decided against his conscience, though this had never been known to be imposed. In fact, political and economic influences compelled judges to decide according to precedent.