- STUDENTS SECTION -

NOTES ON ROMAN JUSTICE AND EQUITY

In its strict sense, justice is "the virtue whereby a man renders to everyone his due." The opening words of the Institutes of Justinian give Ulpian's definition of justice—Justitia est constans et perpetua voluntas jus suum unicuique tribuendi.—Justice is the constant and perpetual intention to render everyone his due. Justitia then is the virtue of the human will which inclines man to act justly, to follow what justice prescribes. This definition of justitia then is borrowed from Ulpian. "The juris praecepta are there: to live honestly, to injure no one, to give everyone his due."

Justice properly so-called is had when one's due is to be rendered him in full measure, no more or less, or according to the rigor or strictness of law, namely, it corresponds with the precepts of law strictly interpreted. On the other hand there would be justice in a broad sense, if the thing due must be given because of some other virtue, e.g., religion, decency, fealty or equity. Justice then in this extensive sense differs little from "virtue"namely, goodness, honesty, rectitude, righteousness; for it includes within itself the whole circle of virtues. Thus we read in the Old Testament: "Abram believed God, and it was reputed to him unto justice." There is justice in the broad sense when an employer doubles the wage of his employee from affection or munificence. Such justice also has a place in determining the salary of workmen where a twofold intrinsic value is to be considered. There are the humane-moral and the economical-material aspects of labour; and so the personal wage with the family wage or, as it is called, "the living wage" is alone to be considered the minimum just wage.

This broader acceptation of justice is what we call natural justice as compared to or distinguished from legal justice: for while the latter signifies strict conformity with the precepts of human laws, the former denotes conformity with the natural law, requires the practice of other virtues besides that of justice, all of which must be mutually combined and made to harmonize; for the various virtues, far from running counter to one another, are fundamentally in accord, since all virtues come from God, the highest Good. Accordingly, we have the significant statement of Paulus, the Roman jurist: Not everything that is permitted by law is morally right; so too the 90th of the 211 Regulae juris, with which the Roman Digest ends, declares: "In all things, but especially in law, equity is to be regarded." Celsus, author of an early encyclopedic work on jurisprudence, with elegance and acumen defined jus as ars boni et aequi, the art of all that is good and equitable, and adds that for this reason a jurist is a sort of minister or priest. This art, ars boni aequi, ought to consist in a correction of the strict letter of law that works an injury, or when a positive human law is not in harmony with the principles of natural justice, or again when it is in itself so deficient that what is legally right becomes morally wrong. Seneca rightly observed: "How small a sphere is the domain of law in comparison with that of obligation! How numerous are the obligations of affection, humanity, liberality, justice and fealty, all of which are found outside the written law." Aristotle, in Ethica Nichamachea V-10 therefore promptly calls equity the correction of statute or written law. Summum jus est summa injuria,—very frequently the full measure of the law is the full measure of injus-

tice. Accordingly, they who always insist upon the full measure of their legal rights and take legal proceedings to obtain the same when such rights work injury to others are to be roundly condemned. Hence Gaius says. "It often happens that a person is bound according to the civil law, yet it is unjust that he should be condemned," and Paulus declares: ". . . . this pertains to equity, with regard to which pernicious errors are frequently made under the authority of the science of law."

Persecutors often appeal to written laws, as did the Roman emperors in their attacks upon the Christians. But from the natural law itself their injustice was patent. Even in our day in certain places persecutors defend their inquity by appealing to the written law. But it is absolutely cruel to assert freedom and the authority of law in those circumstances when what are called laws are actually the reverse of law and as such offend natural justice. It is not justice that is wrought by laws, but laws themselves should be formulated according to justice. Justice should not be measured by laws, but laws themselves should be adapted to justice and right.

LUMLEY v. WAGNER

Lumley v. Wagner is a case where, there being an executory contract in part positive and in part negative, the positive part being such as the Court is unable to enforce specifically, but will interfere in respect of the negative part by means of an injunction. Here the defendant entered into a contract with the plaintiff to sing at his theatre, and not to sing at any other; and Lord St. Leonard granted an injunction restraining the defendant from singing at any other theatre than the plaintiff's, though the specific performance of the positive part would have certainly been beyond the Court's power.

A contract of hire and service is not one of those contracts of which the Court will decree specific performance. You cannot directly compel me to serve you. Can you do so indirectly by obtaining an injunction to prevent me from breaking that negative but unexpressed term in the contract that I am not to enter the service of anybody else? No, you can not. This seems well settled, that a merely implied negative term in a contract which is substantially positive can not be enforced by injunction. In Whitwood Chemical Co. v. Hardnan (1891) 2 Ch. 416, Lindley L. J. said that he looked upon Lumley v. Wagner as an anomaly not to be extended. In that case the manager of a manufacturing company had agreed that during a specified term he would give all his time to the business. It was held by the Court of Appeal that the company could have an injunction to prevent him giving part of his time to a rival company.

We seem to arrive at this principle: that you can not indirectly by means of an injunction enforce the specific performance of an agreement which is of such a kind that specific performance of it would not be directly decreed; but if you can separate from this positive agreement an express negative agreement that the defendant will not do certain specific things, then you may have an injunction to restrain a breach of that negative agreement.

Accordingly, Fry on Specific Performance at page 402 states: "the position of that branch of the law on which Lumley v. Wagner is the leading authority can hardly be said to be very satisfactory. It may, it is conceived, be concluded that the principle of this case will not be extended: that negative stipulations will not be implied except in cases