

COMMON LAW AND CIVIL LAW JURISDICTIONS DISTINGUISHED

1. NATURE AND SIGNIFICANCE OF THE DISTINCTION

In Re Shoop

Supreme Court of the Philippine Islands, 1920.
41 Phil. 213.

■ . . . MALCOLM, J.* Application has been made to this court by Max Shoop for admission to practice law in the Philippine Islands under paragraph four of the Rules for the Examination of Candidates for Admission to the Practice of Law, effective July 1, 1920. The supporting papers show that the applicant has been admitted to practice, and has practiced for more than five years, in the highest court of the State of New York.

The Rules

That portion of the rules of this court, in point, is as follows:

"Applicants for admission who have been admitted to practice in the Supreme Court of the United States or in any circuit court of appeals or district court, therein, or in the highest court of any State or territory of the United States, which State or territory by comity confers the same privilege on attorneys admitted to practice in the Philippine Islands, and who can show by satisfactory affidavits that they have practiced at least five years in any of said courts, may, in the discretion of the court, be admitted without examination."

The above rule requires that New York State by comity confer the privilege of admission without examination under similar circumstances to

a. Many of the questions presented by this case had been discussed, four years earlier, in an extensive article by Malcolm, *Philippine Law*, 11 *Ill.L.Rev.* 331, 387 (1916-17).

A look at the names of the judges who participated in deciding this case is not without interest. It appears that "there was a well-established policy throughout the period of American administration to maintain marginal but majority control [of the Supreme Court] by allocating five seats to Americans and four (including the Chief Justiceship) to Filipinos." A. B. Salmonte, *The Philippine*

Supreme Court: A Study of Judicial Background Characteristics, Attitudes, and Decision-Making, in G. Schubert & D. J. Danel-ski, *Comparative Judicial Behavior* 157, 162 (1969). For an interesting discussion of the history of that policy, see *ibid.* The author quotes a 1909 telegram from the Governor General to the U.S. Secretary of War, reading: "Believe that the appointment of Filipinos to the Supreme Court, making the majority of that body native, would have very disastrous effect upon capital and those proposing to invest here. . . ."

attorneys admitted to practice in the Philippine Islands. The rule of the New York court permits admission without examination, in the discretion of the Appellate Division, in several cases, among which are the following:

"2. Any person admitted to practice and who has practiced five years in another country whose jurisprudence is based on the principles of the English Common Law."^b

This court is advised informally that under this rule one member of the bar of the Philippine Islands has been admitted to practice, without examination, in the State of New York, and one member of the same bar has been refused such admission, the latter being the more recent case. The rulings of the New York court have not been brought to the attention of this court authoritatively, but assuming that reports of such rulings by the New York court are true, in view of the apparent conflict, it seems proper to enter upon the consideration of whether or not under the New York rule as it exists the principle of comity is established. It must be observed that under the rules of both jurisdictions, admission in any particular case is in the discretion of the court. Refusal to admit in any particular case is not necessarily conclusive as to the general principles established by the rules.

... What is "jurisprudence based on the principles of the English Common Law?" ...

Common Law in the United States

We must assume that the New York court, in using this phrase, considered that the jurisprudence of New York State was based upon the principles of the English Common Law. We should, therefore, consider to what extent the English Common Law principles apply to New York. In a case in 1881 we find the following:

"And the Common Law of England was the law of the colony at that date (April 19, 1775), so far as it was applicable to the circumstances of the Colonists. And it has since continued so to be, when conformable to our institutions, unless it was established by an English statute which has since been abrogated or was rejected in colonial jurisprudence, or has been abolished by our legislation." *Cutting v. Cutting*, 86 N.Y., 522, p. 529....

b. For a summary of the comparable (and largely similar) rules presently in effect, see *Pascual v. State Bd. of Law Examiners*, 79 A.D.2d 1054, 435 N.Y.S.2d 387, 388 (3d Dep't 1981), motion for leave to appeal denied, 54 N.Y.2d 601, 442 N.Y.S.2d 1027, 425 N.E.2d 901 (1981). New York now requires, additionally, graduation from a law school substantially the equivalent of an "approved" law school in the United States. This requirement is established or denied by the Board with the aid of consultants who are experts

in the law of the foreign country in question. As reported 435 N.Y.S.2d at 388, only two Philippine law schools were at that time considered by the consultants to be the substantial equivalents of "approved" law schools. As reported in *Benitez v. Williams*, 1987 U.S. Dist. LEXIS 6722 (E.D.Ill.1987), the Illinois Board of Bar Examiners rejected a Philippines attorney of twenty-six years' standing in 1975 "on the ground that the Philippines system of jurisprudence was not based on principles of English common law."

In *Morgan v. King* (30 Barber [sic], N.Y., 9), the New York court said that in adopting the English Common Law, New York adopted:

"The written law of England as a constantly improving science rather than as an art; as a system of legal logic, rather than as a code of rules,—that is, that the fundamental principles and modes of reasoning and the substance of the rules of the Common Law are adopted as illustrated by the reasons on which they are based, rather than the mere words in which they are expressed."^e . . .

The above statements of the New York court clearly indicate the scope of the English Common Law in that state. In most of the States, including New York, codification and statute law have come to be a very large proportion of the law of the jurisdiction, the remaining proportion being a system of case law which has its roots, to a large but not an exclusive degree, in the old English cases. In fact, present day commentators refer to American jurisprudence or Anglo-American jurisprudence as distinguished from the English Common Law.

Accordingly, in speaking of a jurisprudence which is "based on the English Common Law," for present purposes at least, it would seem proper to say that the jurisprudence of a particular jurisdiction is *based* upon the principles of that Common Law, if, as a matter of fact, its statute law and its case law to a very large extent includes the science and application of law as laid down by the old English cases, as perpetuated and modified by the American cases.

Common Law Adopted by Decision

The concept of a common law is the concept of a growing and ever-changing system of legal principles and theories, and it must be recognized that due to the modern tendency toward codification (which was the principle of the Roman and Civil Law^d), there are no jurisdictions today with a pure English Common Law, with the exception of England itself.* In the United States the English Common Law is blended with American codification and remnants of the Spanish and French Civil Codes. There a legal metamorphosis has occurred similar to that which is transpiring in this jurisdiction today. Some of the western states, which were carved out of the original Louisiana territory, have adopted the Common Law by decision. [Citations.]

Louisiana has long been recognized as the one State of the Union which retained a portion of the Civil Law. In a case in 1842 in Louisiana, the court considered the question of whether a protest on a promissory note had been made within the required time. The court rejected the

c. This is a paraphrase rather than an exact quotation of the language used by James, J., in *Morgan v. King*, 30 Barb. 9, 14-15 (N.Y.Sup.1858), reversed on other grounds, 35 N.Y. 454 (1866).

d. Is this statement correct in respect of classical Roman law? See the note on The

Codes' Break With the Past, *infra*, sec. 2B, at nn. 50 & 51.

e. Is it correct to assume that in England "pure English common law" is in force today, or was in force at the time this opinion was written?

straight Civil Code rule, and adopted the custom of New Orleans, which was the law of the sister States, saying:

"The superior court of the late territory of Orleans very early held that although the laws of Spain were not abrogated by the taking possession of the country by the United States, yet from that event the commercial law of the Union became the commercial law of New Orleans; and this court has frequently recognized the correctness of these early decisions, principally in bills of exchange, promissory notes and insurance." *Wagner v. Kenner*, 2 Rob. [La.], 120.² . . .

Louisiana, by statute, adopted certain common law rules, and with reference to these the court said, in *State v. McCoy* (8 Rob. [La.], 545):

"We concur with the counsel in believing that the legislature in adopting the Common Law rules of proceeding, method of trial, etc., adopted the system as it existed in 1805, modified, explained and perfected by statutory enactment, so far as those enactments are not found to be inconsistent with the peculiar character and genius of our government and institutions."

From this brief survey of the extent of the English Common Law basis in the States, we may conclude—(1) that the New York Court in referring to a jurisdiction whose jurisprudence is based on the English Common Law, uses the phrase in a general sense; and (2) that such Common Law may become the basis of the jurisprudence by decision of the courts where practical considerations and the effect of sovereignty gives ground for such a decision. If, in the Philippine Islands, a comparatively young jurisdiction, English Common Law principles as embodied in Anglo-American jurisprudence are used and applied by the courts to the extent that such Common Law principles are not in conflict with the local written laws, customs, and institutions as modified by the change of sovereignty and subsequent legislation, and there is no other foreign case law system used to any substantial extent, then it is proper to say in the sense of the New York rule that the "jurisprudence" of the Philippine Islands is based on the English Common Law.

In the Philippine Islands

The extent of the English or the Anglo-American Common Law here has not been definitely decided by this court. But when the subject has been referred to by this court there has been a striking similarity to the quotations from the American decisions above cited with reference to the English Common Law.

f. For background on the Civil Law in Louisiana, see *supra*, ch. I, sec. 1A. The Custom (coutume) of Paris was in effect in French Louisiana until it was replaced by the law of Castile and of the Indies in 1769. There was no such thing as the "custom" (coutume) of New Orleans properly speaking.

Presumably, the reference is to commercial custom prevailing in New Orleans under United States rule. See R. H. Kilbourne, Jr., *Louisiana Commercial Law: The Antebellum Period* (1980). As to coutumes in pre-revolutionary French law (*ancien droit*), see *infra* sec. 2A.

In *Alzua and Arnalot v. Johnson*, 21 Phil., 308, this court, in passing upon an objection of counsel, that while a certain rule was universally recognized and applied in the courts of England and the United States, it was not the law in the Philippine Islands, said:

"To this we answer that while it is true that the body of the Common Law as known to Anglo-American jurisprudence is not in force in these Islands, 'nor are the doctrines derived therefrom binding upon our courts, save only in so far as they are founded on sound principles applicable to local conditions, and are not in conflict with existing law' (U.S. v. Cuna, 12 Phil., 241); nevertheless many of the rules, principles, and doctrines of the Common Law have, to all intents and purposes, been imported into this jurisdiction, as a result of the enactment of new laws and the organization and establishment of new institutions by the Congress of the United States or under its authority; for it will be found that many of these laws can only be construed and applied with the aid of the Common Law from which they are derived, and that to breathe the breath of life into many of the institutions introduced in these Islands under American sovereignty recourse must be had to the rules, principles, and doctrines of the Common Law under whose protecting aegis the prototypes of these institutions had their birth." ...

"And it is safe to say that in every volume of the Philippine Reports numbers of cases might be cited wherein recourse has been had to the rules, principles and doctrines of the Common Law in ascertaining the true meaning and scope of the legislation enacted in and for the Philippine Islands since they passed under American sovereignty." Pp. 331, 333.

And later in speaking of the judicial system of the Philippine Islands (page 333):

"The spirit with which it is informed, and indeed its very language and terminology would be unintelligible without some knowledge of the judicial system of England and the United States. Its manifest purpose and object was to replace the old judicial system, with its incidents and traditions drawn from Spanish sources, with a new system modelled in all its essential characteristics upon the judicial systems of the United States. It cannot be doubted, therefore, that any incident of the former system which conflicts with the essential principles and settled doctrines on which the new system rests must be held to be abrogated by the law organizing the new system."

In *U.S. v. De Guzman*, 30 Phil., 416, the court spoke as follows:

"We have frequently held that, for the proper construction and application of the terms and provisions of legislative enactments which have been borrowed from or modelled upon Anglo-American precedents, it is proper and oftentimes essential to review the legislative history of such enactments and to find an authoritative guide for their interpretation and application in the decisions of American and En-

glish courts of last resort construing and applying similar legislation in those countries...."

In *U.S. v. Abiog and Abiog*, 37 Phil. 137, this court made this further statement on the subject:

"... What we really have, if we were not too modest to claim it, is a Philippine Common Law influenced by the English and American Common Law, the *derecho comun* of Spain and the customary law of the Islands and builded on a case law of precedents. Into this Philippine Common Law, we can properly refuse to take a rule which would estop other courses of reasoning and which, because of a lack of legal ingenuity would permit men guilty of homicide to escape on a technicality."

At this juncture, three years after the last quoted comment, the influence of English and American jurisprudence can be emphasized even more strongly. A survey of recent cases in the Philippine Reports, and particularly those of the last few years, shows an increasing reliance upon English and American authorities in the formation of what may be termed a Philippine Common Law, as supplemental to the statute law of this jurisdiction.^g An analysis will show that a great preponderance of the jurisprudence of this jurisdiction is based upon Anglo-American case law precedents,—exclusively in applying those statutory laws which have been enacted since the change of sovereignty and which conform more or less to American statutes, and—to a large extent in applying and expanding the remnants of the Spanish codes and written laws.

Philippine Statute Law

Introductory to analyzing what Spanish written laws remain in force to-day, we will consider in a general way those Spanish laws which were in force at the time of the change of sovereignty.

Spanish law became highly codified during the nineteenth century. All of the laws of Spain were, however, not made applicable to the Philippine Islands: only those were effective here which were extended by royal decree. The chief codes of Spain made effective in the Philippines were as follows:

Penal Code	1887
Code of Commerce	1888
Ley Provisional, Code of Criminal Procedure, and Code of Civil Procedure	1888
Civil Code	1889 ^h
(Except portion relating to marriage, thus reviving a portion of Marriage Law of 1870)	
Marriage Law	1870
Mortgage Law	1889
Railway Laws	1875 and 1877
Law of Waters	1866

^g. Concerning the approach to this problem in Puerto Rico, see *infra* this sec.

^h. On the history of the Spanish Civil Code, and its roots in the Code Napoleon, see

In addition to these there were certain special laws having limited application: *Las Siete Partidas*; *Las Leyes de Toro*; *Leyes de las Indias*; *La Novisima Recopilacion*; Mining Law; Notarial Law; Spanish Military Code, and the Copyright Law.¹

The foregoing were written laws which, by change of sovereignty, acquired the force of statute law in the Philippine Islands. There was no properly called Common Law or Case Law of Spain to accompany and amplify these statutes, although there were, of course, the customs of the people of the Islands, which constituted, in a sense, unwritten law. Spanish jurisprudence does not recognize the principle of *stare decisis*; consequently, there could be no Common Law in any sense analogous to the English or American Common Law.¹ **Article 6 of the Civil Code provides:**

"When there is no law exactly applicable to the point in controversy, the customs of the place shall be observed, and in the absence thereof, the general principles of law."^k

In order to determine the general principles of law "judicial decisions cannot be resorted to". (2 *Derecho Civil* of Sanchez Roman, pp. 79-81; 1 *Manresa*, p. 80.)¹ A lower court of Spain is at liberty to disregard the decisions of a higher court. This is the general continental rule. (Holland's *Jurisprudence*, 11th Ed., pp. 68-70.)^m

"The *Partidas* is still the basis of Spanish Common Law, for the more recent compilations are chiefly founded on it and cases which cannot be

H. W. Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in "Notarial" Jurisprudence*, 53 *Tulane L.Rev.* 3, 90-91 (1978).

i. As to these sources and their hierarchical relationship (*prelación*), see the note on *The Law of Castile and of the Indies*, *infra* this sec.

j. Pre-codification Castilian law, which supplies most of the substance of the Spanish Civil Code of 1889, is (and was) commonly referred to as *derecho común*. See the terminology in *Abiog v. Abiog*, quoted in the principal case, *supra*.

k. The new Preliminary Title of the Spanish Civil Code, enacted in 1974, replaced article 6 with a new (but essentially similar) authoritative listing of the sources of Spanish civil law. See translation and discussion *infra*, ch. V., sec. 2.

l. This is a correct quotation from a respected and influential treatise; but the question has long been highly controversial among legal writers in Spain. See Brown, *The Sources of Spanish Civil Law*, 5 *Int'l & Comp.L.Q.* 364, 367-72 (1956).

m. The last two sentences in the text illustrate the danger of over-generalization which is ever-present in comparative law. In many continental countries, such as Germany and France, a lower court is in theory free to disregard prior decisions of higher courts, even though in practice the lower courts ordinarily hesitate to invite a reversal by exercising this freedom. So far as Spain is concerned, however, the statement in the text was not even theoretically correct. Article 1692 of the Spanish Code of Civil Procedure then provided that an appeal to the Supreme Court may be based on the lower court's violation of "a law" (written law) or of a *doctrina legal*. The latter term (now changed to *jurisprudencia*) has been defined by the Supreme Court as meaning a doctrine which has been followed and applied by that Court in more than one decision. The question of the extent to which the notions of "general principles of law" and of "*doctrina legal*" overlap and perhaps conflict, has given rise to fascinating academic controversies. Article 1(6) of the Spanish Civil Code, *infra* ch. V, sec. 2, now provides that *jurisprudencia* "complements" the legal system.

decided either by these compilations or by the local *fueros* [customary laws] must be decided by the provisions of the *Partidas*." (IV Dunham, History of Spain, p. 109).ⁿ

The *Partidas* is a code law and cannot in any proper sense be considered as Common Law. It specifically provided, however, for recourse to customs when the written law was silent. The customs to which resort is to be had are the customs of the particular place where the case arises;^o the customs of one locality in Spain having no effect on the application of law in another place. 1 Manresa, pp. 77, 79; Civil Code, art. 6; Code of Commerce, art. 2. Accordingly, the Spanish customary law could not have any force here. The law or custom cannot be migratory. Manresa does not define what is meant by "general principles of law," but from his discussion under article 6 of the Civil Code it appears how far from a case law system is Spanish jurisprudence. He formulates the rule that courts are governed: first, by written law; second, by the customs of the place; third, by judicial decision; and fourth, by general principles of law. In fact, in urging that resort to judicial decisions should come before resort to general

n. Does this statement indicate that (in the absence of an applicable *doctrina legal*) the *Siete Partidas*, promulgated by Alfonso X of Castile and Leon in 1265, must be looked to today as one of the important repositories of the "general principles of law"? Cf. Geigel v. Mariani, 85 P.R.R. 43, 50 (1962), where a provision of the *Siete Partidas* was relied upon to answer a question left open in the Code.

In the hierarchy (*prelación*) of sources of pre-codification Spanish ultramarine law, the *Siete Partidas* ranged last (see *infra*). Nevertheless, this text (a legal manual in the form of a code) had a tremendous influence on the development of the law not only in Spain, but also throughout Spanish-America, including the Southwestern part of the United States (supra, ch. I, sec. 1A). For an English translation see Scott, Lobingier & Vance, *Las Siete Partidas* (Commerce Clearing House, 1931). A summary of the contents of the *Partidas*, with a brief but masterful historical introduction by the late Max Radin, is to be found in Nichols, *Las Siete Partidas*, 20 Calif.L.Rev. 260 (1932).

o. In Spain, the victory of central Government and unified law over regional customs and privileges was less complete than in Germany and especially in France. Arts. 12 and 13 of the Spanish Civil Code preserve the local laws and customs (the so-called "foral laws") of Aragon, the Balearic Islands, Catalonia, and several other provinces. The foral laws thus preserved are not as comprehen-

sive as a modern civil code; they deal mainly with matters of testate as well as intestate succession, and with matrimonial property regimes. But as to points covered by it, an applicable foral law prevails over the provisions of the national Civil Code. The latter thus becomes a mere subsidiary source of law in those provinces whose foral laws have been preserved. See Brown, supra n. l, at 372-77. For comprehensive discussion, referring also to the recent official compilations of most of the foral laws, see Hierneis, *Das besondere Erbrecht der sogenannten Foralrechtsgebiete Spaniens*, especially the introductory chapter, at 1-81 (1966); J. Cadarso Palau & J. W. Fernandez, *The Spanish Constitution of 1978: Legislative Competence of the Autonomous Communities in Civil Law Matters*, 15 Vand.J.Transnat'l L. 47, 48-57 (1982).

It should be noted that the regional *fueros* are written sources of law. They originated as customs, but were reduced to writing long before the age of codification. Spanish lawyers clearly distinguish between (a) the *fueros*, which are a form of written regional law, and (b) *costumbres*, i.e., unwritten customs. The latter, although under certain conditions theoretically recognized as sources of law, play no significant role in Spanish legal practice; but the *fueros*, as pointed out above, are of enormous practical importance in certain parts of Spain. The opinion in the principal case fails to even mention the distinction between *fueros* and *costumbres*.

principles of law, Manresa rather implies that the practice of the courts is the contrary.^p

English Common Law is quite a different conception. While it grew out of the early Anglo-Saxon customs, it came in time to be a case law of binding force which controlled custom. In fact, it became so binding that it was found necessary, in order to effect justice in particular cases, to establish the Court of Chancery, which became the court of equity. The English Common Law recognizes custom only so far as it does not conflict with the well settled principles of that law. Under the Spanish system, on the other hand, when the written law is silent, before considering precedents in the cases the court is governed by the customs of the locality at the time.

Consequently, by the change of sovereignty there was no body of case law or common law of Spain which could be considered as existing in connection with the written law retained in force in these Islands. The only amplification of that written law was the local customs of the people of the Islands. This is particularly true of Spanish decisions rendered since the change of sovereignty, which do not preclude the local courts from exercising an independent judgment. *Cordova v. Rijos*, 227 U.S. 375, 33 S.Ct. 350.

Spanish Statute Law

The Spanish statute law, as amplified by Spanish commentaries but without a background of Spanish precedent or case law, was by the change of sovereignty, severed from Spanish jurisprudence and made effective in this jurisdiction to the same extent as if Congress had enacted new laws for the Philippines modelled upon those same Spanish statutes. This retention of the local private law was merely in accordance with the principles of International Law in that regard.^q However, by the mere fact of the change of sovereignty, all portions of that statute law which might be termed political law were abrogated immediately by the change of sovereignty. Also, all Spanish laws, customs, and rights of property inconsistent with the Constitution and American principles and institutions were thereupon superseded. *Sanchez v. United States*, 216 U.S. 167, 30 S.Ct. 361.

... [The court refers to a great number of Spanish statutes which were repealed and replaced by new enactments.] Even the Spanish Civil Code^r has been largely modified as will appear from the [following] table ...

p. The statement by Manresa to which reference is made in the text undoubtedly is one of that famous author's contributions to solving the controversial problem of the relationship between "general principles of law" and "doctrina legal." For a fuller discussion of Manresa's theory, see Brown, *supra* n. 1, at 371.

q. International law would not have prevented the new Sovereign from subse-

quently repealing all of the Spanish codes. In fact, however, there was no such wholesale repeal. Compare the methods employed in the Philippines with the laws adopted for the Trust Territory of Saipan, where by one stroke of the legislative pen the common law was substituted for the pre-existing civilian code system. Cf. *Caldwell v. Carmar Trading Co.*, 116 F.Supp. 546 (D.C.Haw.1953).

r. Compare the outline of the Spanish Civil Code, reproduced here from a footnote

by the court, with that of the French Civil Code, *infra* ch. V., sec. 1.

CIVIL CODE

Book and title	Subjects	Status	By what law affected
BOOK I			
Preliminary.....	1. General rules for the application of laws	Modified.....	Act No. 2711
Title I.....	2. Citizenship	Repealed.....	By change of sovereignty; Acts of Congress, July 1, 1902, Aug. 29, 1916; Act No. 2927
Title II.....	3. Status of persons, natural or juridical	Slightly modified....	Code of Civil Procedure
Title III.....	4. Domicile	In force.....	
Title IV.....	5. Marriage	Never in force in Philippine Islands	See Marriage Law, 1870; G.O. No. 68; Act No. 2710
Title V.....	6. Paternity and filiation	Slightly modified....	Code of Civil Procedure
Title VI.....	7. Support	In force.....	
Title VII.....	8. Parental authority (with regard to persons and property of children).	Modified.....	Do.
	9. Adoption	Repealed.....	Do.
Title VIII.....	10. Absence	Modified.....	Do.
Title IX.....	11. Guardianship	Repealed.....	Do.
Title X.....	12. Family council	do.....	Do.
Title XI.....	13. Emancipation and majority	Modified.....	Code of Civil Procedure; Act No. 1891
Title XII.....	14. Registry of civil status	Never in force in Philippine Islands	See G.O. No. 68 and Act No. 2711
BOOK II			
Title I-III.....	15. Property, ownership, and its modifications	Slightly modified....	Code of Civil Procedure
Title IV.....	16. Special properties	Modified.....	Act No. 2152; Act of Congress, July 1, 1902
Title V.....	17. Possession	Slightly modified....	Code of Civil Procedure
Title VI.....	18. Usufruct	do.....	Do.
	19. Use and habitation	In force.....	
Title VII.....	20. Easements	do.....	
Title VIII.....	21. Register of deeds	Largely modified....	Mortgage Law; Act Nos. 496 and 2711
BOOK III			
Title I.....	22. Occupancy	In force.....	
Title II.....	23. Donations	Slightly modified....	Act No. 496
Title III.....	24. Wills	Mostly repealed....	Code of Civil Procedure
	25. Inheritance	Slightly modified....	Code of Civil Procedure
	26. Executors	Repealed.....	Do.
	27. Intestate succession	Slightly modified....	Do.
	28. Property subject to reversion	In force.....	Do.
	29. Accretion (in succession)	do.....	Do.

Cases Under American Derived Statutes

It thus appears that the bulk of present day Statute Law is derivative from Anglo-American sources; derivative within the sense of having been copied, and in the sense of having been enacted by Congress or by virtue of its authority. This court has repeatedly held that in dealing with the cases which arise under such statute law the court will be governed by the Anglo-American cases in construction and application. [Citations.]

To illustrate more clearly the scope of the use of Anglo-American cases in this connection, a brief analysis of some of the more recent decisions of this court is advisable. For convenience the cases will be taken up in the note by subjects. [The voluminous Note is omitted.] In all of them, Anglo-American decisions and authorities are used and relied upon to a greater or less degree. Although in many cases the use is by way of dictum, neverthe-

Book and title	Subjects	Status	By what law affected
	30. Acceptance and repudiation of inheritance	Mostly repealed	Do.
	31. Collation	Slightly modified	Do.
BOOK IV			
Title I	32. Partition	Modified	Do.
	33. Obligations	Slightly modified	Do.
Title II and III	34. Contracts (including also dowry, paraphernal property, conjugal property, separation of property of spouses).	Slightly modified	Do.
Title IV and V	35. Purchase and sale, and barter	do	Do.
Title VI	36. Lease	do	Do.
	37. Labor contracts	do	Do.
	38. Carriers	do	
Title VII	39. Census	do	
Title VIII	40. Partnership	do	
Title IX	41. Agency	do	
Title X	42. Loans	do	
Title XI	43. Bailments	do	
	44. Sequestration	Repealed	Do.
Title XII	45. Insurance	Modified	Act No. 2427
	46. Gambling	Repealed	Act No. 1757
	47. Life annuities	In force	
Title XIII	48. Compromise	do	
	49. Arbitration	Repealed	Code of Civil Procedure
Title XIV	50. Suretyship	In force	
Title XV	51. Pledge	Modified	Act No. 1508
	52. Mortgage	do	Mortgage Law; Act No. 496; Code of Civil Procedure
	53. Antichresis	In force	
Title XVI	54. Quasi-contracts	do	
	55. Torts	do	
Title XVII	56. Preference of credit	Mostly repealed	Act No. 1956
Title XVIII	57. Prescription	do	Code of Civil Procedure

less, the net result is the building up of a very substantial elaboration of Anglo-American case law.

From the foregoing selection of the more recent and typical cases, it appears how broad is the scope of the use of Anglo-American authorities and precedents in the field of law subjects affected by American derived legislation. In the application of those statutes in the many cases which come before the court, there is bound to be developed a substantial common law. There is no question that this exists. We are merely concerned with its extent and source.

Cases under Spanish Statutes

In addition to the subjects covered above, there is a wide field of use of Anglo-American cases in the interpretation and application of the remnants of the Spanish statutes. Such is of even greater importance in showing the real permanency of the hold which Anglo-American Common Law has fastened upon the jurisprudence of this jurisdiction....

To illustrate the scope of the use of Anglo-American cases in connection with the remaining Spanish statutes, a brief analysis of the more recent cases under a few of the principal subjects, will be appropriate. [Note omitted.] Frequently in these cases reference to Anglo-American precedents is for the purpose of showing that Spanish law and the Anglo-American law is the same, and frequently it is for the purpose of amplifying or extending the Spanish statutes." In most cases it is for the purpose of applying those statutes to the particular case before the court; but whatever the use, the fact remains that through the influence of these cases a broad exposition of American case law is made....

The foregoing two groups of cases in combination, those under the subjects covered by Spanish statutes and those under the subjects covered by American-Philippine legislation and effected by the change of sovereignty, show conclusively that Anglo-American case law has entered practically every one of the leading subjects in the field of law, and in the large majority of such subjects has formed the sole basis for the guidance of this court in developing the local jurisprudence. The practical result is that the past twenty years have developed a Philippine Common Law or case law based almost exclusively, except where conflicting with local customs and institutions, upon Anglo-American Common Law. The Philippine Common Law supplements and amplifies our statute law.

Collateral Influences

This conclusion is further justified by the practical situation which has surrounded the Bench and Bar of the Philippine Islands for many years

a. The Supreme Court of Puerto Rico now publishes its decisions only in Spanish, and freely refers to post-1898 Spanish authorities and decisions. See, e.g., *De Jesus Diaz v. Carrero*, 112 D.P.R. 631, 636-38

(1982). The Court has also, at least on occasion, expressed its displeasure at unnecessary references to "continental" (United States) law. See the next case, *infra*.

and which there is every reason to believe will continue unabated in the future.

This court has, in an increasing degree during the past twenty years, cited and quoted from Anglo-American cases and authorities in its decisions. The following analysis of the citations of the last twenty volumes of the Philippine Reports show this graphically. [Table omitted.]

The American citations are over ten times as numerous as the Spanish citations. (In Vol. 1 there were 63 Spanish to 53 United States.) Add to this the cumulative effect of perpetuating this ratio through the citations of Philippine cases in which American cases have been cited, and it is obvious that Spanish decisions have had comparatively slight effect in the development of our case law.

It is a fact of considerable practical importance that there are no digests of Spanish decisions to aid the study of Bench and Bar. On the other hand, the local libraries contain both digests and reports of the Federal Courts and Supreme Court of the United States, and of most of the State courts, and also many reports of the English courts. Added to this is a liberal supply of English and American text books. The foregoing not only has a natural influence on the results of the work on the Bench, but it has a very decided influence on the development of the present Bar of the Philippine Islands; each year adds to the preponderance of lawyers trained chiefly from a study of Anglo-American case law.⁴

The fact that prolific use of Anglo-American authorities is made in the decisions of this court, combined with the fact that the available sources for study and reference on legal theories are mostly Anglo-American, present a practical situation at this moment from which this court can draw but one conclusion, namely, that there has been developed, and will continue, a common law in the jurisprudence of this jurisdiction (which for purposes of distinction may properly be termed a Philippine Common Law), based upon the English Common Law in its present day form of an Anglo-American Common Law, which common law is effective in all of the subjects of law in this jurisdiction in so far as it does not conflict with the express language of the written law or with the local customs and institutions.

Conclusions

We may summarize our conclusions as follows:

t. For an account of the initial phase of that process, see A. L. Garcia Martinez, *La Americanización de Filipinas—la Justicia—la Imposición del Idioma Inglés en los Tribunales en el Periodo 1898-1906*, 45 *Rev. Abo.P.R.* 143 (1984). Unsurprisingly, its main propelling force was none other than the author of this opinion, who as a "young graduate of the University of Michigan law school," proposed the establishment of a law school in the Philippines in 1910 and became the first permanent dean of the College of

Law, University of the Philippines, one year later. I. R. Cortes, *Legal Education in the Philippines: The Role of the Philippine Law Journal in the 1990s*, 65 *Phil.L.J.* 1 n. 1 (1990). Justice Malcolm served on the Supreme Court of the Philippines from 1917 to 1936. The tenure of other "state-side" judges on that court was usually (but not invariably) much shorter. D. F. Batacan, *The Supreme Court in Philippine History, 1901 to 1971*, table at 29-36 (1972).

... (2) In interpreting and applying the bulk of the written laws of this jurisdiction, and in rendering its decisions in cases not covered by the letter of the written law, this court relies upon the theories and precedents of Anglo-American cases, subject to the limited exception of those instances where the remnants of the Spanish written law present well-defined civil law theories and of the few cases where such precedents are inconsistent with local customs and institutions.

(3) The jurisprudence of this jurisdiction is based upon the English Common Law in its present day form of Anglo-American Common Law to an almost exclusive extent.

(4) By virtue of the foregoing, the New York rule, given a reasonable interpretation, permits conferring privileges on attorneys admitted to practice in the Philippine Islands similar to those privileges accorded by the rule of this court.

Accordingly, the supporting papers filed by the applicant in this case showing to the satisfaction of the court his qualifications as an attorney-at-law, his petition is hereby granted and he is admitted to the practice of law in the Philippine Islands. Our decision is based upon our interpretation of the New York rule, and it does not establish a precedent which may be controlling on this court with respect to future applications if our interpretation is not borne out by the future enforcement of that rule by the New York court. So ordered.

■ MAPA, C.J., JOHNSON, ARAULLO, STREET, AVANCENA, and VILLAMOR, JJ., concur.

Petition granted.

SUPPLEMENTARY NOTE ON THE "LAW OF CASTILE AND OF THE INDIES"

This term refers to the ultramarine possessions of the Spanish Crown, including those in the Americas and the Philippines but excluding some islands. Constitutionally, these ultramarine possessions were part of the Crown of Castile,¹ and their legal orders were derived from Castilian law to the exclusion of other Peninsular *fueros*, or systems of law of local applicability.²

Nevertheless, Spanish ultramarine law, the law of the Indies, was not at any given time necessarily identical with Castilian law. Substantial identity of norms of general applicability can be assumed until 1614, but pursuant to a royal *cédula* (decree) dated December 15 of that year,³ Peninsular legislation thereafter became effective overseas only if enacted (or reenacted) by the Council of the Indies. This *cédula* is but one manifestation of the geographical division of governmental, judicial, and legislative powers between the Councils

1. Bull of Donation of May 4, 1493. *Recopilación de Leyes de los Reinos de las Indias* (R.I.) Book 3, Title 1, Law 1 (1681 ed.).

2. The 1493 cession was made specifically to the Castilian Crown. See R.I. Book 3,

Title 1, Law 1. Thus, only Castilian law applied. See R.I. Book 2, Title 15, Law 66.

3. See Decree of December 15, 1614. R.I. Book 2, Title 1, Laws 39-40.

of Castile and of the Indies which eventually led to the development of a special corpus of "Indian" law that was peninsular (metropolitan) in origin but applicable only overseas.

The chief repository of this "law of the Indies" is the *Recopilación de Leyes de los Reynos de las Indias* (R.I.), a selective and systematic rearrangement of the major relevant texts up to 1680. The R.I. contains some 6,385 provisions, representing a composite edition of about twice as many enactments, and these, in turn, were selected from over 400,000 *cédulas* or other legislative instruments pertaining to the Indies.⁴ It is frequently possible to reconstruct the "legislative history" of a *recopilada*, i.e., of an enactment incorporated into the R.I. and hence effective throughout the Indies, by tracing its legislative antecedents.

The R.I. is divided into nine books, and covers mainly what would now be considered public law. Various titles of the fourth book, dealing with population settlements, land grants, and public places, are of continuing importance in disputes over historical land and water rights, as is the sixth book, which relates to Indians. More fundamentally, however, the R.I. also contains a key provision designating the sources of law to be resorted to for the resolution of disputes and, incidentally, the relation of these sources to each other. These are, in the order of precedence, the *Recopilación* of the Indies, prior "Indian" legislation not repealed, and the laws of the kingdom of Castile in conformity with the *Leyes de Toro*. Subsequent legislation takes precedence over the R.I. whenever pertinent.⁵

The reference to the *Leyes de Toro* establishes, again by indirection, the sources and the precedence of pre-1680 Castilian private law so far as applicable in the Indies. These are, again in the order of precedence, the *Leyes de Toro* themselves, the *Ordenamiento de Alcalá*, the *Fueros Municipales y Reales*, and, finally, the *Siete Partidas*. As a practical matter, however, the reference to legislation not repealed by the *Recopilación* of the Indies included the *Nueva Recopilación* of the kingdom of Castile, which was adopted in 1567 and thus needed no separate approval by the Council of the Indies.⁶ Without sacrifice of accuracy, these ground rules can be summarized in two basic propositions: the law of the Indies prevailed over Castilian law in Spanish America, and later law prevailed over earlier law but usually did so without express repeal.

Justinian's codification of the Roman law, the *Corpus Iuris Civilis* of 533 A.D., was not a formal source of the law of the Indies, either directly or by reference to Castilian law. The reason for this is in part historical: In 533 A.D., the Western empire had been lost, and the *Corpus Iuris Civilis* could not be formally enacted in the Iberian Peninsula. Nevertheless, Roman law is reflected in many rules of Castilian law, including, e.g., some key provisions of the *Siete Partidas* relating to the ownership of beds of public streams.⁷

4. See C. García Gallo, *La Legislación Indiana de 1636 a 1680 y La Recopilación de 1680*, 9 *Boletín Mexicano de Derecho Comparado* 297, 298-99 (1976).

5. See R.I. Book 2, Title 1, Laws 1-3; id. Book 2, Title 15, Law 66.

6. See G. Margadant, *Introducción a la Historia del Derecho Mexicano* 18 (1971).

7. See R.I. Book 3, Title 28, Law 31. This provision is almost literally copied from Justinian's *Institutes* (J. Inst. 2,1,23).

Even more importantly, until about the middle of the eighteenth century, Latin was the language, and Roman law the substance, of civil law instruction at the Spanish and ultramarine universities. Justinian's codification furnished the text, and the professor occasionally referred to the *derecho real*, i.e., the Royal law sanctioned by the King of Spain (also called *derecho patrio*, or law of the country), by way of illustration. The standard book of instruction in use in Peninsular law faculties was *Institutionum Imperialium Commentarius*, by A. Vinnius, a four-volume commentary on Justinian's Institutions written by a Netherlands scholar.⁸

All this changed in the latter half of the eighteenth century. At a transitory stage, commentaries of Justinian's *Institutes* were expanded through the inclusion of references to the *derecho real* (or *patrio*), which in Peninsular editions did not include the legislation of the Indies. An exception in this respect is *Elucidationes ad Quatuor Libros Institutionum Imperatoris Justiniani Opportune Locupletatae Legibus Decisionibusque Juris Hispani* by J. Magro, posthumously completed by E. Bentura Belaña and published in Mexico in 1787 with some annotations to the law of the Indies which, however, their author judged to be insufficient.⁹

By the end of the eighteenth century, Royal insistence on teaching in the *derecho patrio* had brought about a fundamental change. The order of instruction was almost exactly reversed, with the *derecho patrio* (in Castilian) furnishing the text, and Roman law supplying the occasional examples. A Castilian-language work, Juan Sala's *Ilustración del Derecho Real de España*, which first appeared in 1803, became the standard book of instruction as well as one of the leading sources for practitioners.¹⁰ After setting forth the relation of Mexican, "Indian," and Castilian law as outlined above, the 1845 edition of the "Sala Mexicano" states, with respect to Roman law:

The Roman laws are not, and may not be called, laws in Spain. They are learned opinions, which may only be followed where there is a gap in the law, and to the extent that they are inspired by natural law and follow the Royal law (*derecho real*). The latter, not Roman law, is the *derecho comun*, and neither the laws of the Romans nor those of other foreigners are to be used and observed.¹¹

For the practical consequences of all this, see H. W. Baade, Roman Law in the Water, Mineral, and Public Land Law of the Southwestern United States, 40 Am.J.Comp.L. 865 (1992).

THE PHILIPPINES

Being caught in the dynamic process of amalgamation of common-law and civil-law elements in the legal system of the Philippines, the Supreme Court of

8. See M. Perset Reig, *Derecho Romano y Derecho Patrio en Las Universidades del Siglo XVIII*, 45 Anuario de Historia del Derecho Español 273, 317 (1975).

Justiniani Opportune Locupletatae Legibus, Decionibusque Juris Hispani x (1787).

10. See Perset Reig, *supra* n. 8, at 336-38 & 468.

9. See 1 J. Magro, *Elucidationes ad Quatuor Libros Institutionum Imperatoris*

11. 1 Sala Mexicano 159 (1845)(foot-note omitted).

the Islands became highly skilled in the use of the comparative method, and its opinions, even though they show a certain amount of wavering between civil-law and common-law methods,¹² contain many valuable contributions to our subject. Frequently, the decisions of the Court demonstrate that the common law and the civil law, in spite of differences in terminology and technique, ultimately reach identical results. See, e.g., *Cuyugan v. Santos*, 34 Phil. 100 (1916). The opinions of a Court in the Far East thus furnish some evidence of the essential unity of "Western" civilization. More importantly, even today United States Supreme Court decisions which (before Independence) were rendered in cases originating in the Philippines occasionally provide guidance as to rules of Spanish public land law affecting land titles in California and other parts of the United States. See, e.g., the reference to *Jover y Costas v. Insular Government*, 221 U.S. 623, 31 S.Ct. 664 (1911), in the recent case of *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, at 201, n. 1, 104 S.Ct. 1751, 1753-54 (1984).

On July 4, 1946, the Philippine Islands became an independent nation. This did not, however, bring about a radical change in legal methods. American legal materials continue to be generally available to Philippine judges, lawyers and law students, while Spanish authorities, especially judicial decisions, were at one time somewhat difficult to obtain.¹³

There are, moreover, several other factors which strengthen the common-law component of the Philippine legal system:

(a) Since Dean Malcolm's tenure at the College of Law, University of the Philippines, *legal education* has followed the American pattern in the English language.¹⁴ Some use is made of American casebooks, and new teaching tools published by Philippine law teachers not only tend to adopt the American style of "Cases, Text and Materials", but often contain American as well as Philippine cases. Young lawyers in the Philippines, in their formative years, thus become accustomed to American legal folkways.

(b) At the time of the change of sovereignty in 1898, Spanish *public law* was in large measure automatically superseded by a new Anglo-American body of public law.¹⁵ Upon independence, the Philippines stabilized their public law on a common-law basis by incorporating Anglo-American principles into their own Constitution.¹⁶

12. See Gamboa, *An Introduction to Philippine Law* 75-78 (7th ed. 1969).

13. See N. J. Quisumbing, L. A. L. Javellana & Y. Quisumbing-Javellana, *Philippine Legal Bibliography* 69-70 (1953).

14. G. A. Malcolm, *The College of Law, University of the Philippines*, 1 Phil.L.J. 4 (1914). At that time, English was the "future official language" of the Philippine Islands. Id. 5.

15. Gamboa, *The Meeting of the Roman Law and the Common Law in the Phil-*

ippines, 4 Seminar 84, 96-97 (1946); Gilmore, *Philippine Jurisprudence—Common Law or Civil Law*, 16 A.B.A.J. 89 (1930).

16. Even the unlamented 1973 Constitution still retained many provisions patterned on the American model, and the commentators stated that construction of the Constitution should be governed by American-derived principles. See 1 J. G. Bernas, *Constitutional Rights and Duties* 19 (1974); E. M. Fernando, *The Constitution of the Philippines* 27-30 (1974). The 1986 Constitu-

(c) Civil and criminal *procedure*, and the organization of the judiciary, follow the American model.¹⁷ Although the jury system has not been adopted, the admissibility of evidence is governed by American-derived rules.¹⁸ This basic character of Philippine adjective law has not changed in recent years.

(d) The Spanish-derived *substantive private law* never suffered wholesale abrogation. The new Civil Code of 1949–50, an enactment reflecting thorough revision largely the work of Dr. Jorge C. Bocobo,¹⁹ retains much of the basic structure of its Spanish predecessor. The old Code of Commerce is still in force,²⁰ although many of its provisions, especially those dealing with negotiable instruments and with corporations, have long been replaced by more modern, American-influenced statutes.²¹ Thus, on the face of the principal codes, the substantive private law of the Philippines in part has retained the appearance of a civilian system. But the tendency mentioned in the Shoop case, *supra*, to infuse common-law methods into the application and construction of the codes themselves, now receives additional impetus from Art. 8 of the new Civil Code, which expressly provides that “judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines.”²²

tion marks a new beginning, but references to United States Supreme Court jurisprudence abound in contemporary Philippine constitutional jurisprudence. See, e.g., *V. V. Mendoza, A Year and a Half of Constitutional Law: 1987–1988*, 62 Phil.L.J. 130 (1987).

To what extent actual practice was in harmony with that Constitution is another question; this, however, is a problem not limited to the Philippines. See *infra* ch. IX, sec. 3.

17. See G. W. Pugh, *Aspects of the Administration of Justice in the Philippines*, 26 La.L.Rev. 1 (1965); Gamboa, *supra* n. 12, at 421–63.

It is interesting to note, however, that one important feature of civilian procedure, i.e., the victim's right to intervene and to seek damages in a criminal proceeding (see *infra* ch. IV, sec. 2D), has been preserved in the Philippines. See A. F. Tadiar, *The Administration of Criminal Justice in the Philippines*, 47 Phil.L.J. 547, 557–8, 570–76 (1972).

18. See the surveys of decisions on Evidence in the Philippine Law Journal. As they operate without a jury, Philippine courts apply the rules of evidence in a spirit of liberality, not unlike that exhibited by American

courts in non-jury cases. See Pugh, *supra* n.17, at 15–16.

19. His contribution is documented by J. R. Rivera, *The Father of the First Brown Race Civil Code: The Story of the Civil Code of the Philippines* (1978). See 1 Paras, *Civil Code of the Philippines Annotated* (9th ed., 1978), where at p. 9 the author remarks that “The new Civil Code contains 2270 articles, 43% of which are completely new provisions.” Some of the new provisions, such as the Title dealing with express and implied trusts (Arts. 1440–57), clearly reveal their Anglo-American ancestry. See Gamboa, *supra* n. 2, at 248–52.

20. Title Two of the Code of Commerce preserves the commercial register, a typically civilian institution (see *infra* ch. V, sec. 3B(2)).

21. See 1 Agbayani, *Commentaries and Jurisprudence on the Commercial Laws of the Philippines* 3–4, 79 (1964); 3 *id.* 1137 (1964).

22. For discussion see C. L. Villanueva, *Comparative Survey of the Judicial Role and Its Effect on the Theory on Judicial Precedents in the Philippine Hybrid Legal System*, 65 Phil.L.J. 42 (1990).