FORMULAE FICTICIAE A NORMAL MEANS
OF CREATING NEW LAW. *)

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Scientific research of the present day has performed on the
Corpus Juris a wonderful analytical operation, and by this
means has put us in a position to appreciate the manifold
elements of which that work is composed. There now remains
the task of re-introducing order into the vast and fragmentary
material which this analysis has collected. From such material
we must seek to acquire a knowledge of the agencies which
produced, and the rules which governed, the evolution of
Roman Law, as the supreme synthesis of the entire labours
of these last decades.

1) An extract from the present work was read on 24 June, 1924,
at Oxford, under the auspices of Professors P. Vinogradoff and F. de
Zulužta, in the Maitland library where Professor Vi-oeradoff, of undying
memory, used to hold his Seminar. The fundamental ideas were repro-
duced in an inaugural lecture delivered on 4 November, 1924, at the
University of Palermo, and published in the "Annuario della R. Uni-
versità di Palermo for 1925, under the title: Diritto pretorio romano
e diritto moderno. No occasion has been found to make alterations
in the work as it originally stood, because its theme is novel and has
not yet penetrated into the circle of current Romanistic studies. In a
second part it is proposed to treat of the individual legal creations
made by means of the formule ficticiae.

The English translation was made by Professor Kerr Wylie of the
University of Cape Town, to whom I have the pleasure of renewing
my thanks for his courteous and intelligent collaboration.
In the fervour of its researches contemporary criticism has sought to explain the unforeseen and rapid change which the law is proved to have undergone in the fourth and fifth centuries of our era, by attributing such change to the intervention of external forces and elements which, during this period, as is supposed, brought their influences to bear upon the law of Rome.

In particular it has been thought possible to maintain that the majority of the new elements in Roman Law, and in any case the most vital of these which have found their way into our modern legal systems, were the product of a post-classical elaboration carried on chiefly in the Oriental schools. Such a conclusion is, however, ill-considered and arbitrary, for it assumes the existence of a phenomenon absolutely unseen and unheard of in the course of history.

That is to say it assumes that in a period of utter decadency, of veritable dissolution, especially in everything pertaining to legal life, men were found capable of laying hands on a mighty product of the human genius such as to work of the Roman jurisprudence; of altering and destroying its structure and finally of rebuilding the same with the aid of new elements, inharmonious and disjointed no doubt in form, but nevertheless endowed with an energy which proved itself indistructible. What sort of miracle may have conferred on these scholastic lucubrations a power so great? When did the countries of the East ever show signs of a calling or aptitude for the handling of legal problems? Moreover, how came it about that the legislative enactments of this period — and such enactments constitute the most direct and important manifestations of legal activity — were both in the East and in the West, the most wretched specimens of their kind which any epoch has ever produced? Of them Cicero would have said: "Nihil ex omnium saeculorum memoria tale cognovii" ("In the history of all ages I know nothing to liken unto them).

The theory in question then involves an obvious contradiction; in fact it is plainly suspended in thin air.

The main cause of the clumsy error into which contemporary criticism has thus fallen, lies in the fact that such criticism has so far carried out its task superficially; it has taken as