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ROMAN LAW RENUNCIATIONS
AND THE RISE OF CAPITALISM

By

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I. The Legal Tradition of the	
<i>Corpus Iuris</i>	11
II. The Period of the	
<i>Corpus Iuris</i>	29
III. The Period of the	
<i>Corpus Iuris</i>	41

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STUDY OF RENUNCIATIONS IN PERTONIANI, 2177
BY J. H. ...

TABLE OF CONTENTS

	Page
INTRODUCTION	1
CHAPTER	
I. The Legal Protection in the <u>Corpus Iuris</u>	11
II. The Period of Transition, 550-1100	29
III. The Period of High Economic Activity, 1100-1250	41
IV. The Renunciations in Notarial Formularies	64
V. The Renunciations in Municipal Legislation	91
CONCLUSION	104
BIBLIOGRAPHY	109

LIST OF BOOKS AND PERIODICALS CITED

BY A MUCH ABBREVIATED TITLE

ASI.: Archivio storico italiano

Atti Veneto.: Atti del R. istituto veneto di scienze,
lettere ed arti.

BIMA.: Biblioteca iuridica medii aevi, ed. by Augusto
Gaudenzi, (3 vols., Bologna, 1888-1901, 1913-14).

Bibl. soc. stor. subalpina.: Biblioteca della societa
storica subalpina.

Buckland, Roman Law.: William Buckland, A Textbook of
Roman Law from Augustus to Justinian. 2nd ed. Cam-
bridge, 1932.

HPM.: Historiae Patriae Monumenta.

Mem. Veneto.: Memorie del R. istituto veneto di scienze,
lettere, ed arti.

MGH.: Monumenta Germaniae Historica.

NRDF.: Nouvelle revue historique de droit français et
étranger.

Anyone who has ever studied the commercial acts of the late twelfth and later centuries has surely noticed the numerous renunciation clauses in the documents.

In the Genoese notarial instruments which will be a principal source of study for this paper, the clause appears in 1156, in the earliest register, that of Giovanni Scriba: "et renuncio exceptioni non numerate pecunie." In succeeding documents we find statements in the following ways: "abrenuncio iuri ypothecarum et senatus consulto Velleiani;" "abrenuncians legi qua cavetur quod principalis debitor primum debeat conveniri;" "abrenunciamus omni iuri pro quo usura dari prohibetur;" "abrenunciamus preterea iuri quo cavetur debiti comuniter suscepti quemque debitorum de sua parte solutionis teneri, et nostri fori privilegio ac illi iuri quo primo secundus debet postea debitor conveniri."¹

This is the type of clause which pervades the notaries in greater and greater profusion until, in the developed economy of the thirteenth century, no act appears complete without them. Despite their wide use, however, there is an amazing paucity of analysis. In fact, there is, to the best of my knowledge, only one fundamental discussion, that

¹Mario Chiaudano and Mattia Moresco, Il Cartolare di Giovanni Scriba (2 vols., Turin, 1935), I: x, lviii, cciv, ccxxxii. (Hereafter the simplest explicit reference will be given for document citation.)

of Edouard Meynial.² Since the turn of the century, when he wrote, the clauses have received some attention in editions of notaries and histories of law, but no basic changes have been made in approach or interpretation. The only recent discussion is a note which traces the historical appearance of renunciations in Flanders.³

Giry sums up early writers on diplomatic who treat the clause as the result of a legal chicanery which developed at the end of the twelfth century. This in turn resulted in the further complication of the notarial art, and the increased expense to the client. He implies that, since the notary was paid in proportion to the length of the document, he embellished each with as many formulas from the revived Roman Law as was possible. He also believes that the renunciations had little practical effect, both for this reason, and because the jurists did not consider them valid.⁴ A later specialist, writing long after Meynial, repeats Giry's comments, and summarizes Meynial's thesis in

²"Des renonciations au moyen-âge et dans notre ancien droit," in NRDF., XXIV: 108-142 (1900); XXV: 241-277; 657-697 (1901); XXVI: 49-78; 649-710 (1902); XXVIII: 699-746 (1904). These will be referred to as Meynial I., II., etc.

³John Gilissen, "Contribution a l'étude de l'introduction du droit romain dans le droit flamand au XIII^e siècle," in Revue belge de philologie et d'histoire, XVI: 939 (1939).

⁴Arthur Giry, Manuel de diplomatique (Paris, 1894), 560ff.

5
 detail.

This thesis is essentially a footnote to Meynial's series of articles. Meynial, who was professor of Roman law at the University of Montpellier, emphasizes the theories of canonists and civilians in his work, devoting almost no attention at all to a discussion of the renunciation in practice. Therefore, though we may find in great detail the opinions of Azo, Cynus or Bartolus upon a passage relating to the capacity of minors or women, we find no discussion of the economic instruments which utilized the renunciations; there is little attempt at social or economic history.

Meynial's basic theory is that the renunciation developed from a struggle between two systems of law, the Germanic customary, and the Roman. The renunciation was the weapon of a free folk of untrammelled spirit and long tradition of individuality and personal competence against the imposition of the complex Roman legal system which had its origins in a different type of society.

When the texts of the Digest and Code had been revived and revived by the Bolognese lawyers, they spread from Italy into France. This country as a whole, at least in its teaching and theorizing, was conquered by the Roman

⁵Alain de Boüard, Manuel de diplomatie français et pontificale (2 vols., Paris, 1929), I: 285-290.

Law. The acceptance of the new law by the practitioners was another story, however, and for two centuries the renunciation was the principle weapon of resistance. Confronted with the choice of accepting or rejecting the new law, a really impossible alternative, the practicing lawyers decided to reject those portions alien to their traditions. So quick, indeed, was their reaction, that scarcely was a new theory developed in the schools than a new renunciation appeared in the contracts.⁶

The theorists could never admit that the will of the parties to an agreement should alone suffice to overthrow their ponderous principles. Hence special studies were made of individual cases, different moral pressures, and a large subtle literature developed on the subject. Their general conclusion was to reject...in France, though in Italy, Meynial writes, the renunciations were usually accepted.⁷ And if there was a single renunciation that the theorists attacked it was that general clause which refused the aid of all Canon and Roman law. The practitioners replied to them by renouncing "iuri dicenti generalem renuntiationem non valere."

Little by little, however, Roman Law took hold, and eventually penetrated the customary law to a point where

⁶Meynial, I: 108-120.

⁷Meynial, V: 691

it practically became the customary law itself. It then modified both laws, becoming in effect, a synthesis of the two. Referring to the end of the middle ages, when the renunciations were so répandues, Meynial writes, "les renunciations ont rempli leur rôle historique." Only a few persisted with any efficacy, for example, that to the exceptio non numeratae pecuniae, one of the earliest to appear and last to disappear. These persisted until the sixteenth and seventeenth centuries, remaining one point of resistance which the Roman Law was not able to destroy.

Meynial studies the popular reaction to Roman Law as well as that of the theorists to renunciations.⁸ In this connexion he regards the renunciation as the continuation of a barbaric tendency which opposed the humanitarian influence of Roman Law. He aligns the schools and people on one side, the practitioners on the other. Popular reaction in literature and song was not directed at the Canon and Roman laws as such, but rather at the Bolognese-trained savants who developed their own interpretations. The simple man was no match for the sly dealing of the adroit lawyer...a man disloyal to his country when he introduced foreign ideas, and disloyal to his community when he charged excessively for his services.

⁸E. Meynial, "Remarques sur la réaction populaire contre l'invasion du droit romain en France au XII^e et XIII^e siècles," in Mélanges Chabaneau, Romanische Forschungen, XXIII: 557-590 (Erlangen, 1907).

The Canon lawyers received their share of the resentment. As a result, a general movement developed within the Church after 1150 to restrain ecclesiastics from going into law causam lucri. One result of this movement was the cessation of law study at the University of Paris.

Throughout his work Meynial sees no connection between the new European economic life during the twelfth century and the contemporaneous widespread use of renunciations. He views the economy as basically agricultural, taking little note of the great Italian trading cities, or the manufacturing towns of Flanders. He makes no use of Italian notarial or statutorial documents. Only in one case does he ascribe influence to mercantile affairs: having stated that Roman-Law principles finally triumphed in defense of the minor, he remarks that the triumph itself sprang from economic changes, that is, the aggregations of wealth, and the increase in the number of transactions. He then places this triumph in the fourteenth and fifteenth centuries...which places him at least two centuries off.⁹

The object of this thesis, then, will be to correct Meynial's theory wherever necessary, on the basis of the study of the twelfth and early thirteenth century, particularly in Italy. The assumption is this, that the renunci-

⁹Meynial, II: 243.

ation was more a response to an historical situation than the arm of a folk spirit against a more sophisticated foreign law. The situation posited is the restraint upon the contractual capacity of minors, women, and others with special benefits, which was imposed by the Roman law. The aim of the renunciation was to give these persons freedom to alienate and contract, both necessary prerequisites for the active Mediterranean economy.

Unfortunately, the best potential sources for such a study - court verdicts or responsa to renunciation problems - do not exist in any quantity for this early period. The decrees offer information in ratio to the tremendous number of titles in the law, and the earliest collection of responsa is that of Dinus de Mugello of 1274, late for our purpose. The extant statuti date almost exclusively from the last quarter of the thirteenth century and later. The earliest complete collection is that of Pisa of 1160, which is already well into the period of commercial revival. And the status of notarial material is similar. Early notaries have been published, but in reality only a single substantial corpus exists, that for Genoa. The earliest Florentine notaries, for example, date from c.1250, and are in manuscript. The great mass of unpublished thirteenth-century notarial documents tantalizes us when we find an occasional reference to renunciations in practice and in

suits in the earlier registers.

This situation, of course, makes the task of showing any validity of the renunciations difficult, and for this reason, the thesis must remain suggestive. And, though a chronological pattern exists which well establishes a temporal relationship between the development of Italian commercial relations and the appearance of the renunciations, such a parallel is always at the mercy of a newly-discovered document. No document exists which would say that in the year 1156, for example, because of exigencies resulting from a restrictive Roman Law, a certain loophole, the renunciation clause, was discovered and thereafter inserted in commercial agreements. No, the process is much more subtle, and even were such a document to be found, its value would be doubtful.

The question of timing is very important and delicate here. Certainly our chronological sequence will 'look good', but what will we be able to decide from its analysis ...only that in certain places in certain years renunciations do appear. The possibility that they existed earlier in the twelfth century, perhaps in the eleventh, remains always to be answered. The fact is that Roman law was in use in Genoa much before the date of the earliest renunci-

ation, at least by the turn of the century.¹⁰

As we shall see, some authorities are certain that there was definite continuity of notarial theory and practice across the period of barbarian domination. This raises the possibility that the renunciation was used throughout the 'dark ages' and was in no way dependent on the new commercial society for its employment. It might well be that the renunciation flourished simply because the rest of the Corpus flourished.

This is possible, but not probable, for we are not dealing here with absolutes. The 'rise', the 'growth' of any movement or institution is slow and indistinct, and normally the lines between any two successive stages are shadowy. In this period of Europe's initial economic recovery the stages themselves are enveloped in shade. The important question to answer, therefore, is not whether the Roman law and commerce persisted, but rather at what point they began to exercise a decisive influence upon society. Quantity and cumulative effect are the elusive elements, and very surely they had definite qualitative effects. It was only when, both the Roman law and the new trade having become vital factors in society, commerce exerting powerful economic influence, that the renunciations appear. Tremendous poten-

¹⁰For example, see Luigi Belgrano, "Cartario Genovese del registro accovescovile" in Atti della società ligure di storia patriae, II: pt.1, doc. clxix (Genoa, 1870).

tialities were latent in the Corpus Iuris, both in the realms of government and business, and as was the case with the Aristotelian Corpus it took perhaps a century for the medieval thinkers first to re-appreciate, then to comprehend, and finally to use the concepts creatively. The early glosses are a far cry from Accursius or the more detailed special studies of the fourteenth and fifteenth centuries. The renunciation, then, was used at a point in time when, on the one hand, the economics of society had developed sufficiently to demand a relaxation of contractual restrictions, and when, on the other hand, the technique of the law had developed sufficiently for the lawyers and merchants to see the inherent possibilities of the renunciation as a means to this end. In this sense, then, the important factor is the state and/or nature of society, and not the persistence of Roman law from the late Roman Empire.

CHAPTER ONE

Before examining the renunciations as they appeared in notarial registers and city statuti, we must first discuss those exceptions and benefits in the Roman law which contracting parties renounced. Though renunciations as such were not used in classical law, they may be related to the old Roman defensiones, numerous examples of which also appear throughout the invasion period.¹ The renunciation belongs to a species of clause which appeared in documents long before the time of Justinian, when renunciations first appeared: the defense which seeks to maintain and perpetuate the validity of the contract.

The benefits to which the renunciations applied were already being granted in classical times, for example, the Senatusconsultum Velleianum in A.D. 46.² Nevertheless, the fully-developed and modified law of benefits which the medieval notaries and lawyers renounced was the work of Justinian. His legislation tended further to restrain and

¹Meynial, I: 108 and note 2.

²D. 16.1., note 6. References to the Corpus Iuris Civilis are to the Berlin edition edited by Theodor Mommsen and Paul Krueger, 3 vols., Berlin, 1889-92), and references to the Novellae, to the edition of Rudolph Schoell and Wilhelm Kroll (Berlin, 1895). I have also used the 'medieval edition' "...Pandectis Florentinis...commentariis Accursii" (5 vols., Venice, 1641).

protect women, and to deal more equitably with sureties and guardians.³ Meynial notes that the old Roman law of the Midi was based on the Breviary of Alaric which in turn depended upon earlier codes, especially the Theodosian.⁴

The exceptions and benefits with which we shall deal may be divided into two types, dilatory and peremptory.⁵ The former were only temporary, their single effect being to postpone for a time the plaintiff's right to sue. For example, the exception was granted upon plea of an agreement not to sue for a certain period. Dilatory exceptions were sometimes allowed because of personal incapacities, those relating to agency, for example, as in the prohibited case of a party wishing to be represented by a soldier or woman. Peremptory exceptions were deterrents of unlimited time which destroyed the plaintiff's legal basis for suit. Fraud, intimidation, and agreement never to sue were offenses against which a peremptory exception was invoked.

Although distinctive renunciations are legion, and although Butrigarius, writing in the late thirteenth century,

³Nov. 61 and 99.

⁴He gave this as another explanation of local resistance to the Justinianic law which radiated from Bologna. I: 111.

⁵Buckland, Roman Law, 653-657. Buckland summarizes the classification of exceptions which the classical jurists, themselves, made. He defines the exceptio as a "defense which did not deny the prima facie validity of the claim, but alleged some circumstance which nevertheless barred it." See I. 4.13.

was able to cite 52 different clauses, nevertheless, many of these were variations on a theme.⁶ The four basic categories of renunciations were those relating to procedural exceptions, to the security of women and children, to consent and contract, and finally, to the use of all aid which the Civil or Canon law might afford. We shall now discuss the benefits in each of these categories.

The beneficium or privilegium fori, a procedural exception, refers to the legal necessity that the suit be heard in the defendant's court,⁷ whether or not he had changed his residence since the time of the incident in question.⁸ And, lest there be any manipulation of property in a suit which might be detrimental to the plaintiff, the proconsul is to do all he can to prevent this mischief. No person's legal status is to be hurt by another's act, but should this happen, an action in factum is permissible. The object of this law was to prevent transfers of litigious property to persons in another province (which meant change of jurisdiction), or to persons of superior wealth (which implied pressure which would not have been possible to the

⁶Jacobus Butrigarius, "De Renunciationibus" in Summa Rolandina Artis Notariae (2 vols., Lyons, 1537-38, and Venice, 1588). This treatise was also printed in Tractatus Universi Juris, VI:pt. 2 (22 vols. in 28, Venice, 1584). Of these 52 Butrigarius discussed 24 at length.

⁷C. 3.19.3.

⁸C. 3.13.2.

original defendant).⁹ In addition, certain persons had the privilege of trial in special courts. Members of any professional collegio could not refuse its jurisdiction, which pertained to them by virtue of their membership.¹⁰ The soldier was to be hailed before his magister militum, and he could claim this right even when the plaintiff was a private citizen.¹¹ The cleric had the privilege of Church courts.¹²

The most important passage connected with this benefit is one of a few in late classical law which constantly appeared in medieval discussions. It concerns the renunciation of the beneficium fori by any one to whom it applies for reasons of military service or civil or ecclesiastical dignity. Were he to renounce the privilege knowingly he might no longer appeal on that basis; those who so renounced, "litem suam facere intellegantur."¹³

Renunciations appeared constantly to titles which permitted the distribution of a debtor's liability. One

⁹D. 4.7.1.

¹⁰C. 3.13.7.

¹¹C. 3.13.6.

¹²C. 1.3.32.

¹³C. 2.3.29.

was usually given in this manner in the notarial documents: "legi qua cavetur quod principalis debitor primum debeat conveniri," or more simply, "quod principalis debitor." To the best of my knowledge the renunciation was never to a specific legal title.¹⁴ The law states that if anyone accepts a fideiussor, sponsor, or mandator as surety, nevertheless he shall act first against the principal debtor, and shall not be swayed by guile. Then, if he receives satisfaction, he shall not summon the others, nor shall the property of the sureties be attached before that of the principal debtor.

Other passages further defined the changing debtor-creditor relationship. When several are obligated, it suffices that one be summoned, and though it is permitted to take the full amount from the single surety, nevertheless, the others may be attacked simultaneously.¹⁵ Justinian changed this for humanitarian reasons, so that all the debtors were responsible.¹⁶ And soon afterwards he promulgated the so-called epistola divi Adriani which applied to several sureties, stating that although all remain liable for the full amount, the debt shall be divided equally according to equity.¹⁷ The last of Justinian's legislation

¹⁴Nov. 4 (535).

¹⁵C. 8.39.3. (294).

¹⁶C. 8.39.4. (Sept., 531).

¹⁷C. 4.18.3. (Nov., 531); I. 3.16., 20.4.

on this matter perhaps was his most important. It was referred to constantly in the later documents as the novae constitutionis. If two defendants have obliged themselves as sureties, then, each (being solvent and present) is to be summoned pro parte, despite the fact that he had acknowledged his obligation in solidum, that is, that he is responsible in his own person for the entire debt. If one is insolvent, however, or absent, then the other must be held in solidum, or to that amount which the other was not able to pay.¹⁸

Auxiliary to these passages on the order of summons are those regarding the personalities of the sureties. Certain persons when summoned are liable only to the extent of their capacity. Those in this category include the partner summoned by another partner, the patron summoned by his wife and/or their children, the husband summoned on account of the dowry, and the soldier summoned while in service.¹⁹ These are to be held as stated, but any one who fails to meet his obligations because of poverty, but later acquires wealth, is to be hailed to account.²⁰

¹⁸Nov. 99. (539). De Bouard, in his Manuel de diplomatique, asserted that the novae constitutionis was a medieval reaction to a classical restraint, hence 'novae'. I believe, however, that the correct reference is to this novella of Justinian.

¹⁹D. 42.1. 16,17, 18.

²⁰D. 42.3.3.

The second group of renunciations attacked those laws which benefited women and children. The S.C. Velleianum forbids women to take the liability of others upon themselves, acting as surety, by novatio, or in any other way which would release the person primarily liable. It notices that the courts had generalized the earlier prohibitions against intercession on behalf of the husband.²¹ It bars not only surety, novatio, or pledge for another, but also the undertaking of primary obligation.²² The reforms of Justinian were again important, especially his novel which distinguishes the intervention of a woman in her husband's interests from other interventions.²³ Intercession for the husband is always invalid, however often the woman confirmed her own action. But engagement as surety is permitted when its purpose is to provide another's dowry, or the money upon which the manumission of a slave is contingent. Her action is binding in so engaging as surety after two years if she confirms it,

²¹D. 16.1.2. Basic to this subject, a book which treats woman's varying legal position from the earliest times is Paul Gide, Etude sur la condition de la femme dans le droit ancien et moderne, et en particulier sur le Sénatus-Consulte Velleian (2nd edition, Paris, 1885).

²²D. 16.1.2.1,5. The law does not, however, bar a woman from alienating her property, for what is forbidden is intercession. There is nothing to prevent her from selling her property and then paying off her husband's or another's debts, nor does the S.C. apply when she has no intention of regaining her money, nor when the creditor is of greater dignity than the woman. See Paul Girard, Manuel de droit romain (7th edition, Paris, 1924).

²³Nov. 134.8.

is known to have received money for undertaking it, or if she acknowledges that she was paid. In all cases three witnesses and a written agreement are required.²⁴

Another safeguard of woman's frailty was that granted by the so-called ius hypothecarum, to which renunciations were frequent.²⁵ This forbids the alienation or hypothecation by the husband of any donatio propter nuptias in land, even with the woman's consent. With this consent, however, and with a statement that the alienation was not prejudicial, alienation or hypothecation was possible after two years of marriage. The husband remains responsible in his own goods for the possible recompensation of the wife, and his goods are liable to their fullest extent. The novella also provided for a similar alienation of the dowry. This was obviously an extension of the earlier lex Julia which prohibited alienation or hypothecation of Italic land granted in the dowry, for it extended these same provisions to Provincial land.²⁶ The object was to safeguard the female sex from its own weakness, lest the woman waste her property.

²⁴C. 4.29. 22-25. See Buckland, Roman Law, 448-49, who notes a statement of renunciation in the enactment that allows a woman to be tutor to her children provided that, as tutor, she renounce protection of the S.C.. The passage is Nov. 118.5., which is substantiated by Pomponius (D. 16. 1.32.4.) but rejected by Ulpian quoting Julian (D. 14.6.11.).

²⁵Nov. 61

²⁶I. 2.8.; C. 5.13.1.15.; D. 23.5.4.

Protection for the minor was attacked by renunciations to the beneficium minoris etatis and the S.C. Macedonianum. Restitutio in integrum is given by the praetors to persons on several occasions when intimidation, craft, youth or absence demand it.²⁷ The beneficium was a general provision that transactions with minors were to be carried on on a footing of justice, otherwise these persons of deficient physical and mental strength would be put to great inconvenience since no one would have dealings with them.²⁸ On this basis the benefit is very inclusive, taking within its scope the various cases in which restitutio may be made.

Minors are aided not only when they suffer loss of property, but also when they have personal interest in not being worried by litigation or expense.²⁹ This involves a broad interpretation of the minor's legitimate activities which was made to include buying, selling, borrowing, and entering into partnership. He is not aided when he falsifies his age, nor when he intercedes for another by engaging himself as surety.³⁰ Yet, if judged contumacious, he may still petition for restitutio.³¹

²⁷D. 4.1.1., D. 4.4.1. See below.

²⁸D. 4.4.24.1.

²⁹D. 4.4.6.

³⁰D. 4.4.7.

³¹D. 4.4.8.

The minor also has the benefit in the case of a good already sold, but for which he has received a better offer. The court is to practice caution in this case, however, and the case may be reopened only when clear corruption or partiality is proved against the guardian.³² If a minor grants his debtor a formal release without cause he retains his right of action against both the debtor and his sureties; the same applies when there are two debtors.³³ When, however, a filiusfamilias contracts to the benefit of his father or another mandator, he does not receive restitutio, for in this case the result would have benefited a person of mature age, not the minor.³⁴ The title concerning minors that had the greatest significance in later centuries regulated his capacity in land sales. Were he hurt in such a transaction, the judge might order restitutio. But if the minor did not wish to avail himself of the benefit, this too was permissible, for "unicuique licet contemnere haec que pro se introducta sunt." This passage appeared time and again as justification for all renunciations, and provided the basis for the medieval dichotomy of renunciations in odio and in favore.³⁵

³²D. 4.4.7.8.

³³D. 4.4.27.2,3.

³⁴D. 4.4.23.

³⁵D. 4.4.41. See below, Ch. IV.

The S.C. Macedonianum restricted money loans to minors, though it did not apply to loans on other property, sale with interest, or action as surety for a loan to a third party.³⁶ The benefit did apply, however, if the contracts were frauds or masks, the real purpose being a loan.³⁷ One aspect of the benefit was the protection afforded the father against an actio de peculio, that is, a pernicious act on the part of the son acting in some administrative capacity for the father.³⁸

Equitable limitations to the benefit developed. It did not apply when there was no reason to consider the borrower a filius, or when the creditor was deceived either by the son, or by society's general opinion of his capacity.³⁹ Nor did it apply when the loan was in any way to the father's profit.⁴⁰

The renunciation of the clausulae generalis attacked the restitutio in integrum itself, the basis for redress when the various exceptions were applied. This was "an exercise of the Praetor's imperium by which, in effect, he caused to be treated as non-existent some event which had

³⁶D. 14.6.3.

³⁷Idem.

³⁸I. 4.7.7. This passage refers to minors plotting against their parents when they, themselves, had contracted impossible debts.

³⁹D. 14.6.3.; C. 4.28.1.

⁴⁰D. 14.6.7.; C. 4.28.2,4.

prejudiced another's legal position."⁴¹ His jurisdiction extended also to those older than twenty-five, in fact to all persons who had erred because of intimidation, fraud, and the other mischiefs.⁴² Equity was to determine the application of the edict,⁴³ and under no circumstances was service to the state to prejudice in litigation. In all cases of clear and unintentional delay or inability arising from state service restitutio was to be given.⁴⁴

The third category of renunciations attacked the laws of contractual good faith, and the various forms of action granted to the person deceived. The most general benefits were the exceptiones doli vel metus causa. The old form of the praetor's edict on metus included the words 'force and fear.' At the time of Justinian, however, fear was considered as presupposing intimidation, and had come to mean "mental trepidation on grounds of urgent recognized danger." It was to be outrageous, of exceptional severity, and contrary to all morality. And it was to be recognized as such by the strong-minded as well as by a weak nervous person.⁴⁵

note 28.⁴¹Buckland, Roman Law, 719. See below, Ch. IV, foot-

⁴²D. 4.1.2.

⁴³D. 4.1.7.; D. 4.6.26.9, 38.

⁴⁴D. 4.6.29.

⁴⁵D. 4.2.1, 3, 5, 6.

The exception could be claimed against any agent, be it a single person, mob, municipal body, guild, or corporation.⁴⁶

If, for example, a dowry were promised under threat, no obligation arises, such a promise being the same as none at all.⁴⁷ And, since the right of action is expressed in rem, not in personam against the agent who applied the force (which would imply infamia, possible only through a more specific action), if a surety were to use force to obtain his release, restitution of the right of action against the principal debtor was not granted, but the surety was required to pay fourfold, unless he reestablished the creditor's ability to act against the principal debtor. Then, if the sureties had been released through the act of the principal debtor who had intimidated the creditor, action was available against the sureties to enforce against them their old liability. But, if a third party having no connection with the surety used force to obtain the surety's release, the latter was liable to renew the obligations of the principal debtor too.⁴⁸

The exceptio doli differed from the exceptio metus in that it was directed against the person who committed the

⁴⁶D. 4.2.9.1.

⁴⁷D. 4.2.21.3.

⁴⁸D. 4.2.9.8, 10, 11.

fraud.⁴⁹ In this case the praetor gives assistance against shifty and deceitful people who use craft to the prejudice of others, the object being that the former not profit by their cunning, and the latter not lose by their simplicity. The action was available only in the absence of other defenses, since an action involving infamia was not to be treated lightly. In cases of doubt as to the applicability of another action, it was to be granted.⁵⁰ One example of its use is the case in which one person tells another that a third party is a man of means when, in reality he is not. Intent to deceive is obvious here.⁵¹ Although it seems that another action was preferable to the exceptio doli, nevertheless, it sometimes replaced other equitable exceptions.⁵² The beneficium erroris calculi deserves mention at this point for, when there was an error in calculation of the amount of the debt by the debtor, the condictio, another form of action, was at the disposal of the creditor.⁵³

⁴⁹D. 44.4.4.33,34.

⁵⁰D. 4.3.1.1,4, 7.3. The action could not be granted to children or fideiussores who wished to sue their paterfamilias or patron, the reason being that infamia was again involved. See D. 4.3.11.1.

⁵¹D. 4.3.8.

⁵²D. 44.4.5.

⁵³C. 2.5.

The beneficium iuris et facti ignorantia was often renounced. This benefit, stating it in general, declared that ignorance of the law hurt some, ignorance of the facts didn't. Minors were allowed this benefit, as were women in certain cases because of their weakness. Whenever ignorance was involved, and not delict, no action was possible. They could not, however, invoke the benefit if they expected to realize profits from the contract, and the cases in which it was applicable were to be specifically stated by the law.⁵⁴ The soldier might also oppose the benefit in his own interest, even after the sentence had been given, and again presumed ignorance was the basis of action. The adult, although considered fully competent, could appeal by a late entreaty in the special case of his renunciation of an inheritance. The minor, however, who has just become an adult, may not claim ignorance if he does not petition within a reasonable length of time. Too great a lapse was presumably an irrevocable and tacit repudiation of the benefit.⁵⁵ Neglectful ignorance is another excuse for which the benefit had no sympathy.⁵⁶

There was no rule in Roman Law to regulate the adequacy of prices, and in purchase and sale the contracting

⁵⁴D. 22.9., 6.2, 6, 10.; C. 1.18.11.13.

⁵⁵C. 1.18.1., 2, 3.

⁵⁶D. 22.6.6.

parties were free to take advantage of each other...upon principles of natural law.⁵⁷ Two laws in the Code--both attributed to Diocletian--state the contrary, however, to the effect that if land has been sold at less than one half the value, the seller could have the sale rescinded unless the buyer should agree to make up the difference to the full value.⁵⁸ The action resulting from the laesio enormis, as the exception was called, was frequently renounced. There were several variations in the exact terminology, but the renunciation often referred to the exceptioni... dimidiam iusti pretii, or to a price which was minus medietate quam valeat.

Another favorite topic of the later jurists was usury, the taking of which was implied in the renunciation to the querela non numeratae pecuniae. The legislation which most often came under attack was, as we have seen in several important cases, Justinian's.⁵⁹

⁵⁷D. 4.4.16.4.

⁵⁸C. 4.44.2, 8. I follow Buckland, Roman Law, 486 and note 6. Buckland says that both titles show signs of interpolation, and are probably of Justinianic origin. They do not appear to have been applied to anything but land sales, and there is no reason to suppose that the buyer had an analogous right in the converse case. Buckland refers to Albertario's view that for the classical law 'iustum' meant in accordance with law, and where it means fair is interpolated. Buckland thinks this probable, but notes that it seems to have been used occasionally to mean actual value as opposed to that reached by iuramentum in litem (that is, the oath being taken in good faith).

⁵⁹Buckland, Roman Law, 434-43.

The exception developed from the nature of the stipulatio, a contract made by question and answer which required no witnesses, and originally no written agreement. For cases in which the creditor sued for money which in reality had either not been loaned at all, or had been given to the distressed lender only in part, a new defense, the exceptio non numeratae pecuniae, was introduced, in which the burden of proof was on the plaintiff, the creditor, rather than the reverse which was the case with the other exceptions.⁶⁰

The exception was also helpful to the debtor in that the written record did not constitute full evidence against him. Without doubt, the money lenders had gone too far in their exploitation of the poor who were willing to sign for sums larger than those they actually received. Justinian limited the extent of the exception to two years, reducing it from five to which it had been extended by Diocletian, but at any time within the two years the debtor could make it permanent by notifying the creditor or certain officials. He also extended it to other loans for consumption.⁶¹ The result was, of course, to make the

⁶⁰C. 4.30.3. I follow Buckland, Roman Law, 442-43, and Girard, Manuel, 527-30, quite closely on this difficult topic.

⁶¹C. 4.30.14.

benefit anathema to every lender, which accounts for the subsequent near ubiquity of the renunciation.

The last of the renunciations whose target we shall discuss is the exceptio rei venditae et traditae. The benefit protected a bonitary owner against the former doninus. Since the latter could easily prove that the thing or land was his ex iure Quiritium, which was the highest and most complete ownership known to the Romans, the praetor's edict allows the bonitary owner to plead that the transaction had been lawful and complete, proof of which was a complete defense.⁶²

These, then, were some of the principal benefits and rights with which the Roman law protected its subjects. It is easy to see their importance for the preservation of both the individual's status, and the social structure of the state, indeed, of the state itself. Later, when the renunciations were attacked, the clash of renunciation and public welfare was used time and again as an argument against them.

⁶²D. 21.3; D. 44.4.4.31.

CHAPTER TWO

The first problem before us is to trace the renunciations through the 'dark ages', from the days of Byzantine domination of Italy to the development of the independent Italian communes, approximately 600 to 1100. We must discuss the differences between Germanic and Roman laws, the question of notarial continuity from the late Empire, and, to the extent the documents allow, changes in form. We shall also study the chronology and location of the presence of renunciations, and determine the connection, if any, between the appearance of the clauses and the economic character of the city among whose documents they exist. And, if there is validity in our thesis, we shall find the renunciations in economic agreements, used to render them more efficacious.

Since this study is concerned with the historical relation of the renunciation and economic life, if any, and since I am not a student of Roman law, only the most general inferences will be drawn from apparent similarities in legal phraseology. Close approximation is not sufficient here for identification, and although passages which aim at the complete validation of the contract, the defensiones, appear in many instruments which do not contain a renunciation, nevertheless, these are merely interesting as such but superfluous for the present purpose, and will therefore

be mentioned but summarily. The renunciation was a definite legal form of which type there were, at the high point of its development, over fifty variations; each of these variations refers to a specific benefit, as we have seen, granted by a specific passage in the Corpus Iuris.

The earliest renunciation in post-classical documents that I have thus far found dates from 587 when, in the defensio of a land gift to a church in Ravenna, the donor promises, on behalf of himself and his heirs, "ne omnium beneficia quae de revocandis donationibus et de sexu femineo Belianus senatusconsultus mulieribus subvenire adsolet..."¹ The next Ravennese document of any value comes in 767, after almost 200 years of very sketchy records. This document is much more explicit. Again it is a donatio of land, to the monastery of Santa Maria in Cosmedin. The woman renounces, "legum beneficia juris et facti ignorantia, foris, locisque, prescriptione alia, Senatoque Consulto, quod de mulieribus prestitit, beneficio retractandi..."²

To the best of my knowledge, renunciation clauses are not to be found in other Ravennese documents of this period, nor in those of the Carolingian Empire. There are, however,

¹Gaetano Marini, I papiri diplomatici (Rome, 1805), 144-46.

²Ludovico Muratori, Antiquitates Italicae Medii Aevi (6 vols., Milan, 1738-42), III:889. Muratori comments upon the inclusion of the renunciation, and relates the reference to the S.C. Velleianus which, he has noticed, was included in the Leges of Ravenna.

numerous defensiones in which the parties promise to abide by the terms of the contract, to bind themselves and their heirs for perpetuity, and to pay fines should they contravene the agreement.³ And, though there are no renunciations, this type of defensio is present in almost all, if not all, the Carolingian formularies.⁴

The presence of renunciations in Ravennese documents may indicate the economic importance of the form. For Ravenna, both in 587 and 767, was in commercial contact with Byzantium, then Europe's commercial metropolis. In fact, after the Arab conquests had substantially reduced the sea

³Eugene de Rozière, Recueil général des formules usitées dans l'empire des francs du V^e au X^e siècle (3 vols., Paris, 1859-71).

⁴The MGH. offers no assistance: Legum IV, ed. F. Bluhme (Hanover, 1868), and Legum V: Formulae Merovingici et Karolini Aevi, ed. K. Zeumer (Hanover, 1886). There are no renunciations in the Quaestiones ac Monita, nor in the formularies Marculf, Andegavenses, Turonenses, Bituricensis, Senonenses, etc. Also, see Ludwig Rockinger, "Drei carolingischen Formelsammlungen," in Quellen und Erörterungen zur bayerischen und deutschen Geschichte, VII (Munich, 1858); and "Briefsteller und Formularbücher des elften bis vierzehnten Jahrhunderts," in Quellen, IX (Munich, 1863). Also, E. Rozière, Liber Diurnus ou Recueil des formules usitées par la chancellerie pontificale du V^e au XII^e siècle (Paris, 1869); all show Roman-law influence but no renunciation clauses. See also Alessandro Lattes, II diritto commerciale nella legislazione statutaria della città italiane (Milan, 1884), 58. He confirms the fact that references to commercial practices are rare in Germanic law because the Germans were not negociatores. Despite the many instances of trade throughout the Carolingian period, the basic economy was agricultural and did not need a developed commercial law.

traffic of the West, Ravenna was the main outlet for Western Europe, and also the main port of entry for ideas. No doubt there was a continuity of classical legal traditions at Ravenna, yet the fact that the city did decline soon after its incorporation into the Carolingian west argues for the dependence of Roman law upon a commercial economy for its active and continued employment. Besides, the absence of the renunciation in the comparatively large number of Frankish sources strengthens the probability that economic life was a most important factor.⁵

Parallel to the economic factor is the fact that Germanic law developed in a rural society, very different from the urban background of Roman law. It could not satisfy the complex needs of a commercial society, especially one in which new and unusual cases were constantly demanding demanding solutions. Basic differences existed between Roman and Germanic concepts of family, property, and inheritance, and the relations of women and minors to these institutions.

⁵Francois Ganshof, "Note sur les ports de Provence du VIII au X siècle," in Revue historique, CLXXXII:28-37 (1938). Ganshof, although generally maintaining Pirenne's thesis shows that trade did persist in the Provencal ports. Provence was also the center of the first French reception of Roman law in the twelfth century, and on this point see Emile Jarriand, "L'évolution du droit écrit dans le Midi de la France," in Revue des questions historiques, XLVIII: 208(1890). He remarks that Roman-law contractual principles were very influential in the Midi.

In the Roman law there is no driving necessity to maintain the family's property as a perpetual unit. Although it was impossible to transfer property without a restriction against alienation, this prohibition disappeared, probably under Justinian.⁶ The feudal family also felt the necessity for self preservation, but depended for its direction more on the collective will than upon the word of an all-powerful paterfamilias. It was by the maintenance and extension of the landed property of the group that the family gained wealth and prestige; restrictions upon women and inheritance logically aimed at preserving the familial holdings.⁷ Hence, the pattern of society developed so that women could exercise full rights, although being simultaneously and always under the authority of her family. She might, as a widow, act as feudal suzerain, and yet be under her family's ultimate protection.⁸

Among the pre-invasion Germans this was even more the rule, for it was impossible for a woman to seek justice under a legal system which offered combat and judicial ordeal as solutions. Church doctrine supported the already-high importance of woman's position among the Germans. The basic

⁶Buckland, Roman Law, 190.

⁷E. Meynial, "Roman Law," in The Legacy of the Middle Ages (Oxford, 1926), 391.

⁸P. Gide, Etude sur...la femme, 396; and Meynial II:267, 289.

object of marriage was the perpetuation of the species; because of this, the woman had to have greater authority over her dowry goods, the better to safeguard the future interests of her children. The picture, then, is of a fusion of property in marriage, of woman's rights developing with the pacification of society, rights which were hers to the limit of her life, which reverted to the family upon her death.⁹ An example of her capacity is given by Liutprand's Edictum Langobardorum in which the woman is allowed, if she should wish, to sell her property in common with her husband. She must, however, obtain the consent of her nearest relatives if the pact is to remain perpetually valid. Besides, the transaction must be concluded in the presence of the "...principis, aut iudicis vel sculdahis."¹⁰

The Roman law, on the other hand, starting from a more sophisticated view of the family based upon a more commercial society, held the woman incapable, and protected society against any special pleadings which the woman might make on the basis of weakness. Yet, at the same time that it gave the husband full direction of her dowry goods, it separated her economic interests from his, and gave her these

⁹P. Gide, op. cit., 177ff, 188-90, 198-99: Meynial II: 264.

¹⁰"Edicta Regnum Langobardorum," IV.1. 4, 11. in HPM., VIII (Turin, 1855).

protective privileges.¹¹ Later, in the Italian communes, restrictions upon the woman's use of her property became even more stringent.¹² In a sense the city state approached the concept of the German family unit, for a fear of the city was that the woman might, were she to have full control over her dowry, alienate landed property to the hurt of the commune, thereby attacking the public welfare.

The basic concept of individuality as opposed to group control is manifest again in Roman and Germanic ideas of inheritance. The classic principle was that only the patrimony formed an indivisible unit. Upon the death of the paterfamilias without heir the nearest relative received it, regardless of line, and if there were several heirs, the estate was shared, favoritism being conferred only in certain necessary provisions made for the deceased's parents, and wife and children. In folk law, however, the basic principle was conservation of goods in the family, whence derived the individual's status; property

¹¹Meynial, II:264. See above, chapter I.

¹²p. Gide, op. cit., 305,310-11. Gide says that all the cities fixed the amount of the dowry and limited the woman's control of it; also there were restrictions against the marriage of citizens of two different cities. The statuti he cites are late, Pisa, 1531, and Sinigaglia, 1584. Also, the commercial importance of both cities is not too great, even Pisa which declined after her absorption by Florence. There were, however, many loopholes in the statuti.

of the wife, for example, reverted to her parents.¹³ The capacity of the minor was also different in the two systems. The folk laws were interested in protecting the child only until the day that he could defend himself against the physical aggression of strangers. Roman law was interested in another kind of aggression, that of considered deceit, or threatened violence and also the potential self-injury arising from inconsidered acts. Under Roman law males were not considered full agents until they were twenty-five. Under the Lombards, who by the time of Liutprand had already absorbed much classical law, the age was nineteen. Younger than this the minor could not alienate without his father's consent, and even with it, the lord of the locality had to consent to the transaction lest harm come to the youth contra rationem.¹⁴

Finally, theories of procedure differed. Roman theory aimed at a final settlement of the dispute based upon an appeal to a standard written law, one which might be made the basis for contractual agreement. German procedure, however, aimed at only a temporary settlement, for

¹³E. Jarriand, L'évolution du droit écrit, 212-13.

¹⁴Edicta Regnum Langobardorum, IV.1.

there was always hope of forced re-adjudication.¹⁵

The gaps in this period of German domination bring up the question of notarial continuity. All the authorities insist on it, and emphasize Byzantine influence obtaining from Ravenna, and persisting through the Lombard hegemony.¹⁶ This may help to explain the quickness with which the renunciation was adopted by the lawyers, but it can not explain the wide area nor range of topics over which the use of the clause spread.

Savigny, pursuing his general theme that the Roman law never ceased to be studied and practiced, asserts that the medieval notarius was the same official as the classical tabellio. In the Ravennese church, the writers attached to the chancellery were called both notarius and tabellio.

¹⁵E. Meynial, "De l'application du droit romain dans la région de Montpellier au XII^e et XIII^e siècles," in Atti del congresso internazionale di scienze storiche, IX: 158 (Rome, 1903).

¹⁶Melchiorre Roberti, "Un formulario inedito di un notaio padovano del 1223," in Mem. Veneto, LXIV pt.2 (1905); Luigi Schiaparelli, "Note diplomatiche sulle carte langobarde: II. Tracce di antiche formulari nelle carte langobarde," in ASI., ser.7, XIX:3-66 (1936); Gino Masi, Formularium Florentinum Artis Notariae (Milan, 1943), xxiff; Pier S. Leicht, "Formulari notarili nell'Italia settentrionale," in Melanges Fitting (2 vols., Montpellier, 1906-08), II:49-59; Friedrich v. Savigny, Histoire du droit romain au Moyen-âge, translated by C. Guenoux (4 vols., Paris, 1839), I:239-40; C. Desimoni, "Notes et observations sur les actes du notaire génois: L. di Sambuceto," in Revue de l'Orient Latin, II:1-34 (1894); and A. Lattes, "Nuovi documenti per la storia del commercio e diritto genovese," in ASI., ser.5, XLVI:81-125 (1910).

Little by little the distinction disappeared; yet though only notarius remained in use among the Lombards, the terms were synonymous as late as 1148 in Rimini.¹⁷

Lombard reception was responsible for the preservation of many Roman forms, and here the influence of Ravenna was paramount. The Lombard defensio which is the form closest to the renunciation, or is, rather, the section of the document in which the renunciation was included, has the basic form of the Ravennese defensio.¹⁸ In regard to the persistence of entire formularies there is general though hesitant agreement among the authorities. Leicht argues in one passage that the great variation in the expression of an idea shows that influence existed rather than a definite example. Perhaps the idea was traditionalized and handed down from father to son or from teacher to pupil within the notarial profession. But in another passage, a study of dispositions of property, he argues for the existence of a formulary. For, on comparison, the receipts for land sales in Pavia in 835 and 919, Asti in 910, and Verona in 1062, all show the same phraseology with only the slightest variations in the defensio: "quod si defendere non potuerimus." This spread of 250 years supposes a master-to-pupil

¹⁷Savigny, idem.

¹⁸L. Schiaparelli, Note diplomatiche, 13.

relationship that is improbable.¹⁹

Masi states categorically what Leicht suggests; that two formularies existed, one an antique Roman form of the second century, in Piacenza, the other, Byzantine, of the fifth to seventh centuries, in Ravenna. North Italy and Tuscany--not clearly delimited--he constitutes as a 'diplomatic zone' which used the first of the formularies. The other area was in the orbit of Ravenna where a law school existed in the tenth century, and which, though influencing the North, was not itself subject to influence. What basic transference there was predominated in family law; terminology may be traced, but poor copying, illiteracy and misunderstanding were the rule.²⁰

Two formularies of Verona and Padua belong to the Lombard school, and evidence a fusion of German and Roman elements. Many of the chapter headings of the Verona text, especially those relating to dowry disposition, women, and minors in contracts, are of Roman derivation.²¹ Both are late enough to show the mark of the medieval adaptation of

¹⁹P. Leicht, *Formulari notarili*, 50-53. Leicht posits the existence of a law school at Pavia throughout this period.

²⁰G. Masi, (*Formularium Florentinum*), xxi-xxxi.

²¹Enrico Besta, "Un formulario notarile veronese del secolo XIII," in *Atti Veneto*, LXIV, pt2:1167-68 (1905). Especially interesting are two dealing with renunciations quarundam personarum and de restitutione in integrum minoris.

classical law, and Roberti has noticed a similarity between the late-twelfth-century renunciation of the S.C. Velleianus and that of the sixth century of Ravenna, already cited.²²

We have seen, then, that notarial influence, perhaps even a formulary or two persisted, exerting influence which was both classical and Byzantine upon Lombard customary law. We have also seen that two schools existed, at Ravenna and Pavia.²³ This continuity does not necessarily vitiate our thesis. As we shall see, the important factor in the extension of the use of the renunciation as an evasion was the quantity of trade that already existed in the twelfth century. Had there been a continuity of legal and notarial though without a revival of the economy, the renunciation would have remained only a potential in the Corpus Iuris.

²²M. Roberti, Un formulario inedito...padovano, 30-32.

²³See above, footnote 19.

CHAPTER THREE

Although I have not found renunciation clauses in any eleventh-century documents, the commercial agreements show, almost from year to year, an increasing use of Roman law phraseology. This was especially true from 1050 on. Among the more noticeable indications are the restated stereotyped sale forms which appear in document after document. Not only was there this repetition which indicates both the use of a formulary and the necessity for a consistent standard, but there was also a developing sophistication in the language of the phrases themselves - if an approach which has the hallmark of the Roman law is taken as the final aim of development. Nor was this advance confined to the work of a single notary.¹

The documents, mixtures of Germanic and Latin forms, show defensiones which come very close to the renunciations themselves, for they use classical terminology almost identical with that of Genoese documents some fifty years later. In one agreement of 1077 the seller binds himself and his heirs "in integrum et ab omni omine defensare," and promises, should he or they contravene the contract, "in

¹Adalbert Hortschansky and Max Perlbach, Lombardische Urkunden des elften Jahrhunderts (Halle, 1890), passim. See also L. Belgrano, Cartario genovese del registro arceviscovile, passim.

duplum eadeam vendita...vobis restituamus."²

For the twelfth century, the Liber Iurium of Genoa gives us our earliest information. In a decree of 1130 the consuls affirm that a married woman, at least eighteen, acting jointly with her husband, may legally make a pledge (pignus), gift (donatio), or sale (venditio). Seventeen years later this statute is repeated, affirming the validity of contracts made since the promulgation of the original statute.³ What appears to have been the cap to this period of growing recognition of personal capacity is the recognition in 1168 of the minor's ability. From that date court decisions could be directed against minors as though they were ordinary litigants.⁴

Giovanni Scriba, our earliest notarial source, dates his earliest surviving document from December, 1154, and his first use of a renunciation, that of the exceptio non numerate pecunie, is in March, 1155.⁵ This document acknowledges receipt of a loan of s. 100. Thereafter the renunciations are frequent, though not in every document. The earliest

²Andrea Gloria, "Codex diplomatico padovano," in Monumenta della reale deputazione di storia patriae di Venezia, ser. 1, II:doc. 237, 240, 264 (1877).

³"Liber Iurium Rei Publicae Januensium," xxv; cxxviii, in HPM., VII (Turin, 1854).

⁴Liber Iurium, cclxi.

⁵Scriba, I:x.

renunciation of the S.C. Vellieanus and the ius hypothecarum is in an instrument of August, 1155, in a land sale which involves nobles; the earliest renunciation of the "lex qua cavetur quod principalis debitor primum debeat conveniri" is in April, 1156.⁶ Then, within the next two years almost all the clauses are included, either by full reference to the title of the beneficium or exceptio, or by a phrase such as that above which expresses the substance of the law. Men and women renounce, "nostri fori privilegio, omni universaliter iuri, occasione minoris etatis, beneficio novae constitutionis, legi Julie," and, singularly, "omni iuri pro quo usura dari prohibetur."⁷

The renunciations occur in every type of document, indicating the great variety of business which made up the ordinary daily life of the city: land sales, manumissions,⁸ loans for maritime or land trade, and gifts to monasteries. From their study we may determine their applicability, and to some extent, their validity.

We have already noted that all the important renunciations appear in Scriba's acts. We may also note that

⁶Scriba, I: lviii.

⁷Scriba, I: ccxxxii; cdlxxxiii; ccxxxii; xciv; and cciv.

⁸For the economic life of Genoa during the twelfth century, see, for example, Eugene Byrne, "Commercial Contracts of the Genoese in the Syrian Trade of the Twelfth Century," in Quarterly Journal of Economics, XXXI:128-70 (1916), and Robert L. Reynolds, "A Business Affair in Genoa in the Year 1200," in Studi...in onore di Enrico Besta, (4 vols., Milan, 1937-39), II: 165-181.

they are never used haphazardly. Men and women or their notaries and legal advisors seem to know what they are doing, and women invariably renounce their three special protections with the consent and advice of their parents, relatives, or close friends. In one case the wife of Jordanus, who has been ordered to surrender his claims on a wall which he and Oliverius have in common, surrenders, "quid iuris in eo muro habet ei quantum ad hoc abrenunciavit."⁹ The wording would imply that the woman is aware of her special rights in the case. Also, the fact that she renounces in a document resulting from court action would argue for both the necessity and potential validity of the renunciations. In another case an act is drawn with no other object than to renounce the availability of exceptions to the fideiussor of a minor.¹⁰

Two of Scriba's entries mentioning exceptions to usury are indicative of the use of this renunciation. The phraseology of the earliest has just been cited. This agreement concerns a loan of L. 50. to a couple, of which amount the document plainly states, they are to receive, L. 47. Besides the renunciation of restitution for usury, the wife renounces the S.C. Velleianus, and the ius hypothecarum. No

⁹Scriba, I:dccxvi.

¹⁰Scriba, II: mlxxxv.

mention is made of the loan's purpose.¹¹ The second reference is an acknowledgment of debt. No precise sum is mentioned for the loan itself, but the borrowers are to repay L. 26. The contract ends with a long defensio containing the usual renunciations about the principal debtor, joint obligation, change of venue, and concludes, "...nec occasionem scienter dabimus nec reclamacionem faciemus vel fieri faciemus quod occasione usure debitum istud minus solvatur."¹²

That the renunciation was considered a valid clause of the agreement is suggested also by a decision of the consuls. They "absolverunt W. Gattam ab M. Golia de sexta parte palmate quam postulabat ab eo pro ovio suo,...hoc ideo fecerunt quia...recordatus fuit se iurasse patris sui ordinatione quod terram illam vendiderat quod inde non deberet aliquam movere querelam, unde cum lamentacione refutaret laudaverunt ut supra."¹³

The fragments from Lanfranco's register which dates from 1180 offer nothing new. Cassinese is our next important source.¹⁴ Once again renunciations are used widely and

¹¹Scriba, I: cciv.

¹²Scriba, I: ccxxxii.

¹³Scriba, I: xlv.

¹⁴M. Hall, H. Krueger, R. Reynolds, Guglielmo Cassinese (1190-1192) (2 vols., Turin, 1938).

sensibly. Most often renounced are the iuri solidi (which we have discussed already as the novae constitutionis), the iuri quo cavetur principalem debitorem primo conveniri, the woman's three benefits, and omni iuri (which we shall discuss later).

Among several interesting documents is one concerning the renting of church land. The provost and the canons of San Lorenzo renounce "quisque iuri solidi et omni iuri."¹⁵ In another, the wife renounces her protections, and gives up all right of action against the property of her husband who has ceded all his goods to the hospital of the Croci-feri into which, indeed, he is to retire himself. And in a societas agreement we find the woman renouncing the usual three protections.¹⁶

Cassinese is most significant, however, for his information regarding possible gouging or usury. First, in several instances of loans specified pro amore or gratis there are no renunciations of the non numeratae pecuniae. In each case other renunciations are made, for example the woman renouncing her protections.¹⁷ This is important, for

¹⁵Cassinese, I: 343. This is indicative of the normal use (by churchmen) of regular business procedures and of various renunciations.

¹⁶Cassinese, I: 15, 55.

¹⁷Cassinese, I: 336, 340, 385, 402, 719; II: 1357, 1363, 1532.

this use presages the overwhelming though not universal feature of Guiberto's register of some twenty years later: with few exceptions the renunciations to the exceptio non numeratae pecuniae and the mutuo gratis do not coincide in the same document.¹⁸

The renunciation to the exceptio non numeratae pecuniae almost always appears in Cassinese in land sales. There are only two cases in which it does not appear in such a document. The first is a societas agreement in which the socius tractans acknowledges receipt of the other members' money. The second exception to the rule is a loan agreement. The borrowers admit that they have received "tantum", and promise to repay L. 40 in a year.¹⁹

In the land documents the renunciation to the non numeratae pecuniae is almost invariably accompanied by the phrase "quod plus valet (titulo emptionis et donationis) inter vivos ei cedit," and by the renunciation of the protection against the laesio enormis. The former is present in almost every land sale, even without the renunciation of the non numeratae pecuniae, while the reference to the laesio enormis almost always appears with the renunciation.²⁰

¹⁸M. Hall-Cole, H. Krueger, R. Reynolds, Giovanni di Guiberto (1200-1211) (2 vols., Genoa, 1939), I: 105, 271, 1152, 1160.

¹⁹Cassinese, II: 1508, 1828.

²⁰Cassinese, II: 1400, 1490, 1494, 1527, 1648, 1729.

The earliest use of the exceptio appears in a sale made by Hugo Embriacus, a member of one of Genoa's most important business families. He declares himself "quietum et pagatum," renounces the exceptio, and cedes "quod plus valet...."²¹ In another land sale one of the Malloni, another of Genoa's great families, is involved. The seller renounces the "iuri solidi et iuri quo cavetur ut si quis deceptus fuerit ultra dimidiam justii pretii agere possit vel ad rei resitutionem vel ad pretium suppletionem, et exceptioni non numerate pecunie et omni iuri."²² Of similar documents only two bear mention. Wilielmus Embriacus is the purchaser in another land transaction involving the formula of the laesio enormis; and in the case of a notary buying land we note the renunciations concerning the just price and the non numeratae pecuniae.²³ We may expect that the notary, required to be versed in the laws of his city, would have inserted in his own contract only those legal clauses which were necessary either for his own protection, the validity of the document, or both. We may also expect that the notary, being familiar with the 'ropes' of his trade, and in this case the one to pay for the notary's services, would not allow verbiage to cause him expense. (But of course, one

²¹Cassinese, I: 816.

²²Cassinese, II: 1400.

²³Cassinese, II: 1755, 1494.

notary may have extended professional courtesy to another, so that expense would have been no item!)

While these land contracts show the possibility of evading the prohibitions on just price,²⁴ several loan agreements mention usury. The phrase common to these documents is as follows: quod occasione usure vel ecclesie non facient ut perveniat ad aliquod dampnum.²⁵ In many of these documents no sum is mentioned as having been received. Instead, the borrower confesses that he has received "tantum", and promises to repay a specified sum, the relationship of which to the "tantum" we can only suppose.²⁶

Bonvillano's register concerns us next.²⁷ He did not use the renunciations as frequently as the others. Few such clauses appear in societas and accomendatio agreements; there are some omissions when women involve themselves for

²⁴There are two possibilities regarding the actual practice. In land contracts where the laesio enormis may not have been applicable because one half the just price had been paid, the exceptio non numeratae pecuniae may have been available as a protection to the buyer. Or, the seller might acknowledge that he didn't count the money as required in land sales because he had received the sum in the form of a bank account, or just took it in a bag by weight. I owe these suggestions to Professor Robert L. Reynolds.

²⁵Cassinese, I: 291, 553, 575, 640, 798, 856, 946, 949, 964; II: 1386.

²⁶Cassinese, I: 291, 533, 575, 964.

²⁷J. Eierman, H. Krueger, R. Reynolds, Bonvillano (1198) (Genoa, 1939).

loans. The notary does know about all the various clauses, however. One series of documents deserves mention. It concerns a decision rendered in the suit between Ansaldus and Simonis over a strip of land between them. The judgment is that Ansaldus and his heirs are to be held to defend the decision concerning the disposition of the property, "quoniam per voluntatem divisionem inter se celebraverunt et penam sol. C sibi inter se vicissim compromisserunt habendi firmas divixionem et non contravenire..." Then, in another judgment immediately following, the judges confirm Ansaldus' rights in his portion of the divided property, "quod ipse Simonis et eius heres teneantur adiuvere legitime et defendere et auctorizare predictam consignatam partem predicto Ansaldo et eius heredi."²⁸ Both documents suggest a decision based upon the validity of the defensio.

If anything, the register of Guiberto gives the impression of greater comprehension and facility. The documents have a well-practiced look about them. Renunciations are present in more and more varied agreements than before. There are tendencies towards abbreviation, and to direct citation of the title rather than to a verbal statement of the benefit. And although it is noticeable earlier, it is very evident throughout Guiberto that the renunciation is placed in juxtaposition to the monies it concerns, or in

²⁸Bonvillano, 10, 11.

that section of the document to which it directly applies rather than placed loosely without consideration for purpose.

Loans and land sales continue to be most important. The agreements for trading associations are not too important in our consideration of renunciations because the participants are all, so to speak, on the same side of the fence, the result being that there is little encouragement to deceit. Again we find a woman renouncing in an instrument which obeys a court settlement. The widow divides her land, and for the fulfillment of the decision renounces her protections.²⁹ And again a notary, in this document purchasing land from the son of a count, renounces the "non numerate pecunie vel non soluti pretii et iuri quod non possit se iuvare quod valeat duplum vel ultra duplum."³⁰

Most interesting, however, is the suggestion that loan agreements which included the non numeratae pecuniae were usurious. For with very few exceptions among the very numerous documents the clause never appears in loans gratis. There are, however, examples of loans neither gratis nor with the exceptio, and five agreements which include both

²⁹Guiberto, II: 2048.

³⁰Guiberto, I: 53.

31
 phrases. An explanation is possible, however, for two the anomalies in Guiberto. One document concerns borrowing by the abbot for the monastery of San Fruttuoso. The involvement of the clergy in manifest interest taking might not have been politic in a public document. The second agreement is between Ugolino and Nicola Mellone, possible involving the concept of brotherhood which had to be respected: "We may infer from this coincidence and from our knowledge of the legal significance and history of the non numeratae pecuniae that it was used in loans and land sales to mask either interest taking or unjust price. The consistency of its inclusion further suggests that it was not without effect.

The next documents, which are statutes, are in a line of perfect chronological and geographical development for our thesis, and originate in Nice, just west on the coast, in 1162. A statute of the city validates the contract of a minor accompanied by the father's consent.³² Then, we may

³¹Guiberto, I: 451; II: 1286, 1704, 1992, 2061; and see also Bonvillano, 43 which employs both phrases.

³²"Statuta et privilegia civitatis Niciae," in Leges Municipales I:52, MPH., II (Turin, 1838).

imagine the manipulation of minor's property following upon this law by examining another statute promulgated in 1197; if a tutor or other guardian should misappropriate the money or property of a minor he shall be judged and sentenced so that the minor suffers no harm; and special contracts written diligenter must be made by the minor's relatives or agents.³³ The potential and actual influence of a commercial 'giant' as was Genoa, upon a city within its commercial orbit, and in turn, the influence of the smaller city upon its hinterland, the town which it supplied with goods from the outside world is demonstrated here. Sayous explains the spread of commercial, and by implication, legal techniques during the twelfth and thirteenth centuries by the trade relations among the Mediterranean cities.³⁴

A mass of material for the history of renunciations exists in documents of the Italian communes for the thirteenth century. But before examining these documents, let

³³Ibid., 53-54.

³⁴Andre Sayous, "Le commerce de Nice avec l'interieur," in Annales d'histoire sociale, I:59 (1939). Also, on the importance of commerce over an even greater distance, upon a different legal system, see William Holdsworth, A History of English Law (2nd. ed., 12 vols., London, 1937), V:115. He stresses the influence of continental law after 1300 when notaries begin to appear in any considerable number in England, and emphasizes the business basis for the existence of notaries on the continent...denying the persistence of the classical tabellio through the 'dark ages.'

us follow the spread of the renunciations westward, across Southern France into Spain.

The earliest renunciation in France that I have noted is that mentioned by the Leges of Arles of 1142, by which a woman is allowed to renounce all hereditary rights.³⁵ The city was then engaged in sea trade with Italy, and it is to this period that Fitting, relying, among other evidence, upon the great amount of commercial law in the work, attributes the Provençal Lo Codi.³⁶ He specifies the influence as Genoese, and although the earliest documents in Scriba do not mention Arles specifically, there is an acomendatio of 1158 for a trading trip to Montpellier, a short distance away.³⁷ The earliest renunciation there dates from 1171, but the town records show complex sale formulas reaching far back into the twelfth century.³⁸ Besides,

³⁵P. Gide, Etude sur...la femme, 394.

³⁶Herman Fitting, Lo Codi (Halle, 1906), 25ff.

³⁷Scriba, I: cdxciiv.

³⁸Camille Chabaneau, Liber Instrumentorum Memorialium (Montpellier, 1884-86), xciii. See also E. Meynial, De l'application du droit romain...Montpellier, 156-57. Parenthetically, the Canon law also entered France about this time, showing great Roman-law influence, that of the Exceptiones Petri, for example. On this matter see Stephan Kuttner, "Les débuts de l'école canoniste français," in Studia et documenta historiae et iuri IV (Rome, 1938).

Roman terminology had been in use in the Midi a long time. In 1155, accio, stipulatio, and accione appear in the surviving documents; in 1158, petitio, and between 1175 and 1200, mutuum, usura, and the non numeratae pecuniae. There are no basic differences in renunciation usage between Genoa and the French cities. The non numeratae pecuniae is constantly used in loans and property transfers, for example, in the receipt for a loan of L. 11,000, s.350.³⁹

The progress we are able to trace continues West, for in 1210 we have the earliest renunciations in Marseilles: renuntians ex certa scienta exceptioni non tradite michi pecunie; the next year the usual non numeratae pecuniae,⁴⁰ and in 1212, the three benefits pertaining to women. After that they are common. The documents in which the women renounce include commenda to Bougie and Oran, and the contract between a woman and a societas.

Meynial, in his discussion of the 'renaissance romaine', remarks upon the fact that, although there was a twenty-five-year gap between the reception of Roman law in Montpellier and Marseilles, once it had taken root, the new law flourished and developed very quickly at Marseilles.

³⁹ Liber Instrumentorum, cxix.

⁴⁰ Louis Blancard, Documents inédits sur le commerce de Marseilles au moyen-âge (2 vols., Marseilles, 1884-85), I: 7, 8, 12-13. These are the earliest documents which have survived.

Yet, he gives no explanation for this, nor for the complement, that the renunciations were never as numerous around Montpellier, even at the end of the thirteenth century.⁴¹ Caillemer, on the other hand, realizing the importance of commerce, notices that the Roman-law penetration of Provençal family law is slow, far behind its absorption into contract law.⁴² In other parts of the Midi, where Roman law exerted an influence especially in the matter of dowry, renunciation began to appear from 1216, for example, at Lyons. These were rudimentary, however, and as late as 1220 we have the tentative "omni exceptioni et omni beneficio et auxilio juris canonici et civilis."⁴³ Lyons was then already an important trans-shipping point for goods coming up the Rhone, down from the Low Countries, and across the Alps from Milan and the Po Valley. From Lyons the trade route went southwest to Toulouse, and from there along the pilgrimage route to Spain.

More important than this route, however, was that by sea. As early as 1156, Scriba's entries show a societas

⁴¹E. Meynial, De l'application du droit romain.... Montpellier, 152, 158.

⁴²Exupere Caillemer, "Lo Codi et le droit provençal au XII^e siècle," in Annales du midi, XVIII:503 (1906).

⁴³E. Caillemer, "Les idées coutumières et la renaissance du droit romain dans le sud-est de la France," Essays in Legal History, ed. Paul Vinogradoff (London, 1913), 186 and note.

formed to trade at Valencia; two years later another societas makes plans to trade to "Yspaniam, inde Sciciliam vel Provinciam vel Januam, a Provincia Januam vel Sciciliam, si voluerint a Scicilia Romaniam et inde Januam, vel a Scicilia Januam."⁴⁴ There is nothing unusual about this societas; obviously these entrepreneurs took such a voyage as matter of course. The facts are that commercial intercourse between Italy and Spain was substantial, and that there was much more than business traffic. For Spanish notaries studied at Bologna; Canon and Roman-law manuscripts were in the cathedral library of Barcelona before 1200; and Barcelona had been under the political hegemony of the Counts of Provence at the beginning of the twelfth century.⁴⁵ So, in 1210, we find renunciations in a document of Barcelona: "cedimus omnia iura et actiones sive...renuntiamus omni exception non numerate pecuniae et specialiter restitutionis in integrum beneficio."⁴⁶ The 'specialiter' is

⁴⁴Scriba, I: cxliii, di. Although there are not too many agreements formed for trade with Spain, there is no way of telling how often a captain may have taken advantage of the 'inde quo velit' in his agreement to break the long voyage home from Africa with a stop at Barcelona or Valencia.

⁴⁵Eduardo de Hinojosa, "La reception du droit romain en Catalogne," in Mélanges Fitting, II: 395-98.

⁴⁶Ibid., 400 and note. Hinojosa explains the increased number of references to Roman law by the familiarity with Italian notarial formularies. Among the favorites he mentions Passaggerius, whom we shall discuss later.

significant, indicating, perhaps, that the Spaniards had already been inconvenienced by the wide application of the benefit to unfair practices.

The renunciations having been adopted at the end of a tenuous but palpable commercial strand, in Spain, it was only natural that the Italian cities should have quickly seized upon them. The existence of a full-blown economic life, comparable in many respects to our own, in medieval Italy, needs no proof here. The statuti of towns and guilds, published notarial records, responsa of legists, all these are evidence. Hence we need only record the dates of the earliest appearances or probable references to renunciations.

Apart from the Genoese,⁴⁷ the earliest Italian sources are Luccan documents, which show the renunciations from the middle 1180's, probably 1185, though a document of 1183 shows an undeveloped form which the seller gives up all "iure et actione et proprietate mihi pertinente." Women alone are concerned in the earliest renunciations to 1190.⁴⁸

The earliest Paddan renunciation dates to 1187, and is that of the epistola divi Adriani; these exist in the

⁴⁷ Giuseppe Rossi, "Documenti sulle relazioni commerciali fra Asti e Genova (1182-1310) con appendice documentaria sulle relazioni commerciali fra Asti e L'occidente (1181-1312)," in Bibl. soc. stor. subalpina, LXXII:2 (Asti, 1913). Generally speaking, Rossi draws his material from the Genoese archives.

⁴⁸ Pietro Guidi and Oreste Parenti, Registro del capitolo di Lucca (3 vols., Rome, 1910-33), II: doc. 1547.

records for almost every year to 1200. Of the eighteen Roman-law expressions which Roberti considers usual and repeated in this period, eleven are renunciations.⁴⁹

Unfortunately, no Florentine notarial registers date earlier than 1250, by which time the documents are filled with all the different types of clauses, usually abbreviated, a condition which presupposes a certain familiarity.⁵⁰ A few charts of the late twelfth century are extant, however, and in these we find some general renunciation clauses. A donatio of a local noble closes "et omni iuris et legum auxilio et beneficio pro meo favore vel alia facti vel iuris occasione...renuntiamus." The only specific renunciation appears in the sale of land made by a mother and her two sons. After an interminable defensio which would appear to make the contract binding upon all people for all time, the document ends "in tantum firmum semper et incorruptum tenere et nullo modo etatis occasione vel alio modio retractare."⁵¹ We may also note, with regard to Florence, the Formularium Florentinum Artis Notariae which, written in 1220, is ex-

⁴⁹M. Roberti, Un formulario inedito...padovano, 30-32.

⁵⁰I have examined the earliest Florentine notaries and have found them almost identical in content and form to Genoese notaries of the same period: Arrigo di Ianni, Archivio Notarile de Stato Firenze, A. 943; and Ildino di Buoncristiano, 7.106.

⁵¹Pietro Santini, Documenti dell' antica costituzione del Comuni di Firenze (Florence, 1895), 30 (1189), 366 (1192).

tremely complete both on the enumeration and use of renunciations. Florence, then, one of the great centers of medieval trade and industry, early learned the use of renunciations, and her public notaries were not slow in inserting the clauses in their instruments.

Next, the evidence comes from Bologna, in 1205, which is the approximate date given to the so-called Formularium Tabellarium Irnerii. This Bolognese formulary is remarkably complete, for in each sample instrument for a land sale, loan, antifact, etc., the renunciation necessary for the validation of the document and the pre-requisite legal conditions for the validation of the renunciation are appended.⁵² Other early renunciations in Bolognese formularies date from c. 1225, and show the usual clauses in great detail.⁵³

Our records are again incomplete for Milan, with the result that our earliest reference is to the Liber Consuetudinum of 1216. A statute empowers the minor to recover at

⁵²Herman Kantorowicz, Studies in the Glossators of the Roman Law (Cambridge, 1938), 36. Kantorowicz proves that the formulary was not by Irnerius, but rather a late Tuscan adaptation of a Bolognese notary writing about 1205.

⁵³Augusto Gaudenzi, "Rainerius de Perusia, Ars Notariae," in BIMA. (3 vols., Bologna, 1888-1914), II: 50ff. Rainerius was listed in the earliest roll of Bolognese notaries (1219) and was iudex as well as notarius. See Mauro Sarti, De claris archgymnasi Bononiensis professoribus...a saeculo XI usque ad saeculum XIV (2nd ed., 2 vols., Bologna, 1888-96), I:506.

the selling price any property which may have been alienated against his will and interest. Furthermore, the law gives as reason for its enactment the fact that too many contracts were being made in opposition to the laws of the city to the hurt of minors. Other statutes restrain the capacity of guardians.⁵⁴

Renunciations then appear in the Leges of Vercelli, a town in the commercial orbit of Milan, this in 1225. Two years later the earliest renunciation that I have discovered in Siense documents appears.⁵⁶ Then, and in great detail we find them in the formulary of Martinus de Fano of 1232.⁵⁷

Venetian records present a problem, for on the one hand there is not a single renunciation in the volumes of Venetian notarial material which have been edited, documents which run chronologically almost to the end of the thirteenth

⁵⁴E. Besta and G. Barri, Liber Consuetudinum Mediolani, anni MCCXVI (Milan, 1945), tit.5, no. 1.

⁵⁵"Leges municipales Vercelli," in MPH., XVI:1151 (Turin, 1876)

⁵⁶Dino Bizzari, Imbreviature notarili (Turin, 1934), ix.

⁵⁷Ludwig Wahrmund, "Formularium des Martinus de Fano," in Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter (5 vols., Innsbruck, 1905-31), I:8. Martinus was probably a student of Azo, and was a professor by 1220. Much of his work has only recently been discovered, and Savigny did not know of this work, Histoire du droit romain, IV: 177-78. See also M. Sarti, De claris...., I: 132.

58 century. On the other hand, however, the Statuti of 1242 refer to the S.C. Macedonianum, stating that the son, under his father's control, may not make valid contracts unless "duo ex examinatoribus" countersign.⁵⁹ This familiarity with the law is confirmed somewhat by the appearance of a complicated renunciation in a public document. In an agreement in 1277 between the Doge and the lord of Tyre, John de Montfort, regarding what might anachronistically be called extraterritoriality, both parties renounce "expresse exceptioni fori, doli et in factum beneficio restitutionis in integrum, tam illi, quae minoribus, quam quae majoribus impertitur, nec non et omnibus aliis consuetudinibus, assisiis, privilegiis, literis Apostolicis impetratis, aut etiam impetrandis, et generaliter omni alii legum et decretum auxilio, quo se juvare possent contra praedicta, vel aliquod praedictorum."⁶⁰ Documents available are scattered, however.

⁵⁸Roberto Morozzo and Antonio Lombardo, Documenti del commercio veneziano nei secoli XI-XIII (2 vols., Turin, 1940); and A. Lombardo, Documenti della colonia veneziana di Creta ...1271 (Turin, 1942). Generally speaking, the Venetian documents as late as 1271 show only a shadow of the complexity of contemporary Genoese notaries. The short agreements are very similar to those of Cassinese, and there is a minimum of abbreviation.

⁵⁹Roberto Cessi, "Gli statuti veneziani di Jacobo Tiepolo del 1242 e le loro glose," in Mem. Veneto, XXX, no.2:69 (1909).

⁶⁰Gottlieb Tafel and Georg Thomas, "Urkunden zur älteren Handels-und Staatsgeschichte der Republik Venedig," in Fontes Rerum Austriacarum (vols. XII-XIV, Vienna, 1856-57), XIV:ccclxix.

Besides, the peculiar development of Venice may have occasioned use of an indiginous technique which had the same effect as the renunciation, with which, indeed they were conversant.

There is no point in carrying this inquiry beyond 1250. By that time the renunciations are widespread throughout Italy, and have already appeared in Flanders, as we have mentioned earlier. Wherever the Italians went they took their law with them, and so we find renunciations in the Genoese colonies, in the Crimea from 1274, and Pera from 1281.⁶¹

⁶¹On Flanders, see the Introduction, footnote 3. On the colonies, George Bratianu, Acts des notaires génois de Pera et Caffa de la fin du treizième siècle, (1281-1290) (Bucharest, 1927), 35; and his Recherches sur le commerce génois dans la mer noire au XIII^e siècle (Paris, 1929), 301ff.

CHAPTER FOUR

The theory, classification, and use of renunciations expressed in the writings of notarial professors is very important, for these were the men who taught the ars notariae. They wrote formularies for their pupils who came to Italy, especially Bologna, from all Europe, and in this practical way were greatly responsible for the wide spread of Roman law. Many professors taught both law and the notarial art; all must have had some legal training, especially in the thirteenth century, from which period almost all their extant work obtains.

The very fact that these men included long detailed discussions of renunciations is indicative of their validity and importance, if not in every case, certainly in some. Early in the thirteenth century the renunciation was treated within the professor's sample document, and we must interpret from the nature of the inclusions. But by about 1300 Butrigarius has summed up existing theory in a special treatise, complete with legal citations and explanations.¹

The basic distinction that the formularies make is

¹For example, one of the earlier writers was Rainerius de Perusia whose Ars Notariae has already been cited. Butrigarius' De Renunciationibus exemplifies the later type of treatise. See also Meynial, V: 651-53, where he speculates upon the nature of the development of classical Roman law. Since it developed gradually, including only those provisions which were necessary to society, it had no need for renunciations, hence for a general theory on them. In addition, it was just those rights which are emphasized in the Roman hierarchy that the medieval renunciations first attacked.

that between renunciations in odio and in favore. The distinction is not original with them but appears in regard to exceptions in the disputationes and quaestiones of the twelfth-century Bolognese. Hugolinus, for example, considers the non numeratae pecuniae valid only if presented in favorem debitoris.

The distinction is not too clear, for as Meynial has shown, the legists had a desire both to protect the weak and injure those who would profit from the weak.³ Hence they showed bias; there was more than a simple desire for the equity which time and again is stated to be the determining factor. The glossators and notaries (by which simple title we shall refer to the notarial professors) are unanimous in allowing the woman to renounce the S.C. Velleianum. They are equally in accord in prohibiting the minor from renouncing the S.C. Macedonianum. The former benefit was introduced in favorem mulieris, and one may repudiate a favor. The S.C. Macedonianum, on the other hand, was introduced in odium creditorum, for which reason its renunciation is disallowed.⁴ Here is the definite attempt not only to

²Giovanni Palmerio, "Quaestiones Dominorum Bononien-
sium," in BIMA., I:95.

³Meynial, V:667.

⁴See, for example, the Gloss to tamen si, D.14.6.11, and to Zenodorus, C. 4.28.2. No full theoretical explanation is given. The base of the distinction probably is the statement "unique licet contemnere haec que pro se introducta sunt," in D. 4.4.41. The Gloss to this passage states that the minor "in hoc ipso esset deceptus."

render the minor's will inoperative, but beyond that, to make the would-be deceiver lose his chance forever to profit at the minor's expense. The reasoning here is similar to that in D. 4.4.24 which demanded justice in the affairs of minors so that people would have business with them, so that they, the minors, might profit. To be excluded from business was obviously considered harmful in itself.

An inexperience is presumed in the case of the minor greater than that accorded the woman. Intent to deceive the minor is presupposed, while this is not the case with the woman who is restrained rather because of her fragility and her possible intervention against her husband's creditor than because of an almost predestined loss. She is also restrained because her alienation might possibly injure the state. This capability is not presumed of the minor. The distinction then is one of degree: in the extent of the law's disgust for deceivers which, in turn, is based upon its subtle evaluation of real capacity. Passaggerius goes so far as to denote the renunciation itself as evidence of fraud, to say nothing of the content of the contract.⁵

⁵Rolandinus Passaggerius, Summa Rolandina Artis Notariae (Lyons, 1537-38), 173. Rolandinus, notary from 1234, became professor of the ars notariae, proconsul of the Bolognese college of notaries, and finally one of the leaders of the city. Although he is noted for having been the city's correspondent with Frederick II, his most important work was this Summa. See F. Savigny, Histoire, IV:181-83, and M. Sarti, De claris...Bononiensis professoribus, I:509-12.

From this shadowy definition the notaries drew their general rule which might best be stated in the words of one of them than paraphrased:

Defensiones, exceptiones, et beneficia a legibus sunt quaedam in favorem, quaedam in odium introducta. Unde contingit, quod illae personae pro quibus, vel quarum occasione introducta sunt per illa iuvantur, ne teneantur de illis obligationibus quas fecerint. Verum quamvis regulariter tradatur quod licitum sit renunciare... quae pro se introducta sunt. Aliquae tamen sunt defensiones, exceptiones, et beneficia quibus renunciari non potest, et si renunciantur, renunciatio non impedit quominus ipsa beneficia, et exceptiones opponi possint. Aliquae vero sunt quibus renunciari potest et renunciatio facta tenet. Et illae personae quae ante renunciationem per ipsa beneficia iuvantur, renunciatione facta, postea non iuvantur. Aliquae sunt quibus quo ad quid renunciari potest, et quo ad quid non.

Similar statements are to be found in several other formularies, and usually the purpose of the renunciation's is defined in the same passage. Rainerius writes "nam omnia beneficia sunt in favorem hominum introducta quibus renuntiare debent... ut contractus plenum sortiatur effectum." In the Paduan formulary the notary instructs his pupils to include the renunciation so that the sale may have full force. The Florentine teacher advises women to renounce "ut contractus maiorem obtineat firmitatem." Martinus de Fano gives a general admonition to renounce every possible benefit and exception, and Butrigarius claims that it is customary to renounce all benefits of Civil and Canon law whenever this

⁶ Ibid., 172v.

may be helpful.⁷

Another usual section concerns the use of general renunciations, about which theoretical arguments pro and con go back to Ulpian.⁸ He, in a case involving judgment not contract, repeats the opinion of Atilicinus that the general renunciation is invalid.⁹ Whereupon the glossators, using this passage as their weapon, and having extended its implications to contracts, fought the practitioners. The latter had, as we have seen inserted the general clause in almost every agreement.

From this struggle in which opponents employed fine concepts of quasi-contract and double nature, the opinion of Bulgarus emerged victorious, to be supported, among others, by the notaries. Rainerius states it as follows, in the passage cited above:¹⁰

nam omnia beneficia...renuntiare debet, primo sane specialibus, deinde generalibus. Cuilibet enim renuntiare licet iuri quod est pro se introductum.

⁷Rainerius, 29; Formulario...padovano, 54; Martinus, ccxlvii; Formularium Florentinum, 91; Butrigarius, 97.

⁸For the theoretical discussions among the legists see Meynial, V: 683-710, where he goes into their great subtleties. The high point was reached with Durandus' Speculum Iuris in which he discusses at least six alternatives (690, n.3).

⁹D. 2.11.4.4. See the long commentary in the Gloss.

¹⁰Rainerius, Idem.

Qui, tamen, speciali beneficio non potitur minime renuntiat generali; generalis enim renuntiatio alicui obligationi adiecta secundum quosdam nullum videtur robur instrumento vel obligationi prestare, nisi specialiter ei cautius preponatur.

Another formulary, some twenty years later, gives the argument a scholastic twist, for ¹¹Butrigarius has the same view, to the effect that the renunciations must be enumerated, and that the general renunciation is not valid unless ¹²preceded by a specific. He also states that it is impossible within the framework of the general renunciation for one to renounce future rights. He gives the example of two heirs, one of whom, wishing to sell his share of the inheritance to a third party, gets his co-heir's general renunciation of all rights in the property sold. Butrigarius calls the renunciation invalid because the right belongs to the future and therefore may not be renounced. The consent of both parties is forseen in a future right, while if one

¹¹C. Cicognario, "Summa Notariae Aretii, composita annis MCCXL-MCCXLIII," in BIMA., III, cxxxvii. This follows instructions to place the general renunciation after the special which appears in the discussion of form. The same idea is expressed in Martinus, ccxlvii.

¹²Butrigarius, 97, where we read "consuetum est renunciari in instrumentis quandoque omni juris auxilio tam canonici quam et civilis...Et licet de ista generali renunciatione videatur facere...tamen dicunt doctores quod modicum valet, nisi dicatur quod renunciatus juri dicenti generalem renunciationem non valere, nisi praecesserit specialis." On Butrigarius, see M. Sarti, *op. cit.*, I:209-303. He was born in 1274, took his degree in 1307, and died in 1347. A renowned scholar, his major work was a commentary on the Corpus Iuris Civilis.

renounces first, he is the sole person renouncing, and at a time which is not germane. This refers to the "beneficio quod dicitur conditionis incertum." Passaggerius, however, declares such a renunciation valid.¹³

From the very beginning the use of the general renunciation in the Genoese cartularies would appear to support Bulgarus, though, of course, every document in which it does not appear tacitly upholds the theory of complete nullification of Azo. Nevertheless, the usual renunciation omni iuri appears to have been used in the notaries as an additional specific rather than as a universal 'catch-all'. Surely it did not mean the complete renunciation of all rights, but rather those which pertained to the immediate sense and purpose of the other renunciations in the contract. For example, in one agreement to repay a loan, the debtor renounces "iuri solidi et omni iuri."¹⁴ Throughout the Cassinese register debtors are wont to renounce "iuri quo caveatur principalem debitorem primo conveniri" in like agreements. It is very possible that omni iuri when used by Cassinese in this sense means other pertinent laws, the renunciation of which was as recognized and accepted a fact as that of the expressed benefit or benefits. Omni iuri is

¹³Butrigarius, 91-91v; Passaggerius, 179v.

¹⁴Cassinese, II: 1685.

used exactly the same way by Guiberto with this difference. He specifies the renunciation "iuri quo cavetur..." allowing the omni iuri to cover the understood application of the other renunciation.¹⁵ For answers to such questions court records would be invaluable. The few that have been published unfortunately have yielded only such evidence as we have seen.

One more precept appears in the theoretical chapters of the formularies: that those who renounce, especially women and children, do so ex certa scientia. This is intimately connected with the questions of general renunciations, the distinction in odio and in favore, the oath as a validation for questionable renunciations, and the surrender of future and/or unknown rights, all of which have been acutely analysed by Meynial, and will not be discussed here. From the earliest references in Scriba, a woman's cognizance of her rights is expressed in the documents, in his register, usually in such a manner as "Ego, Matilda, hoc faciens consilio propinquorum meorum..."¹⁶ The male relatives or friends are presumed to know the law. All the formularies agree on this point. The early Irnerian formulary indicates it as established usage for "uxor...consensit et de jure ypotecarum

¹⁵ Guiberto, I: 364.

¹⁶ Scriba, I:dxxxv.

know, cognizance of all ramifications? Or was it enough for the woman to parrot some quickly-memorized phrase, one, perhaps, which may itself have become a standard evasion? Whatever the purpose of the certification we can see clearly that it was at best but a dilatory tactic, at its worst perjury involved in the woman's breaking the oath with which she admitted knowledge of her rights and bound herself in contract.

Having propounded their theories, the notarial professors proceeded to discuss individual benefits and their renunciations. Very often a sample document was vehicle enough for their explanation, but almost from the beginning, references to laws appear. We shall discuss only the more important, grouping renunciations under general headings of 'renounceable' and 'non-renounceable'. It is remarkable how few renunciations the lawyers and notaries found it necessary to condemn.

"Beneficium ne quis condemnetur nisi in quantum facere potest" refers to liability in court action, the law itself being adequately defined in the statement of the renunciation. All references that I have found forbid its renunciation for variations of the same reason. Butrigarius gives it neatly: *istud est aliud beneficium in odium (creditoris) introductum.*" Equitably, the want or insufficient property of the debtor ought not to hurt the creditor.

cerciorata...renuntiavit."¹⁷ Rainerius includes a special clause for the benefit of his students: Item Maria dicti venditoris uxor certiorata de iure hypothecarum quid sit, eidem renuntiavit, consensit et promisit."¹⁸ Martinus de Fano posits full knowledge of the law by the notary: mulier renuntiavit iuri ypotecarum, certiorata a me infrascripto notario de dicto iure et beneficio quid sit et quid dicat."¹⁹ The Paduan notary, in his model for a quittance of debt includes "mulier expressime certiorata..."²⁰

This is, of course, nothing more than rationalization and lip service to strict theory, for the real desire of the notary is to give the woman contractual ability. It would have been extremely difficult for a plaintiff to prove that the woman had not known her rights. Then again, what is 'knowledge'-full knowledge in the sense that a lawyer might

¹⁷Formularium Irnerii, 202.

¹⁸Rainerius, I: 6.

¹⁹Martinus, ccxxx.

²⁰Formulario...padovano, 48, where the woman admits first being asked about the law, then being apprised of it by the notary, all before her renunciation, as though this were a prerequisite to the notary's inclusion of the clause. In this connection a Florentine statute of 1322 is interesting. The notary is to give "in instrumento talis dationis quod auctoritate quam habet dederit...et tempore dationis fuerit in matricula artis iudicum et notarium." See Romulo Caggese, Statuti della repubblica fiorentina (1322-25) (2 vols., Florence, 1910), I:106.

Beyond this contractual theory, Martinus invokes a higher authority; he claims the renunciation runs counter to "bonos mores" since the benefit obtains between father and children, husband and wife, patron and client, and among partners. The reasoning is that familial relations have almost a sacredness about them, blood ties being on a far higher level than ordinary business relationships. For a son to attack his father would be to break a law far more significant than the commercial, the natural law of the family. This pertains to partners because of the similarity between partnership and brotherhood. With regard to women, Passagerius mentions that the renunciation would run counter to the reverence granted husbands. The benefit is personal and may not be granted; it is valid for heirs only when they are defendants against the mother when she acts to regain her dowry.

One exception is allowed, however, and from the phrasing of the following sentence in Butrigarius we may suppose that constant attacks were made upon this benefit: Sed posset aliquis quaerere ego video tota die contrarium. Does this not imply a reiterated appeal for relaxation. The single case in which the restriction upon renunciation is relaxed concerns members of a societas who make contracts as individuals. These may renounce in one case, when the benefit has been introduced ratione contractus, for then there

would be no reference to a ratione personarum as in the case
²¹
of son against father.

Another renunciation usually prohibited because it violated natural law was that which attacked the law "ob aes alienum," which denies one's right to oblige himself as security for a loan, his person then being liable to seizure as though it inanimate property.²² Again the explanation is contra bonos mores; Passaggerius adds that the renunciation would be "damnosa libertati," implying slavery.²³ Similar to this in the sense that the person is primarily concerned is the benefit condictioni ob turpem causam. Martinus mentions it, and implies that the renunciation is invalid because it concerns urging another on to a crime.²⁴

Rather than discuss each of the very numerous valid renunciations, validity seeming to be the norm against which assertion of in odium or an appeal to a higher law must be made, we shall confine ourselves to the study of those contractual and procedural renunciations the legal bases for which we have already examined. On some matters there is unanimity, on others dissent, and for a third category,

²¹ Butrigarius, 88 and 95v; Martinus, ccxl; Passaggerius, 173v. On the transfer of personal rights see I. 1.2.6.

²² C. 4.10.12.; Nov. 134.7

²³ Butrigarius, 88; Martinus, ccxxviii; Passaggerius, 174, 177.

²⁴ Martinus, ccxxxvii.

fragmentary evidence.

The formularies universally sanction the renunciation of the novae constitutionis, the epistola divi Adriani, and the law regarding the principal debtor. Where there are sample documents these are always renounced. Butrigarius, for example, states that the renunciation "consuevit renunciari," and then gives a brief summary of the benefit and those whom it protects. His permission is based on the fact that the protection was introduced in favore. For the same reason he allows renunciation of the lex a divo Pio which applies to the order in which a debtor's goods may be taken in case of default.²⁵

The exceptio non numeratae pecuniae receives special attention for, although all are agreed that it may not be renounced, they are equally agreed that it may be included in the agreement, and with this effect: that the burden of proof is now on the renunciant whereas before his great benefit was the demand for the creditor's proof. Passaggerius treats the matter as follows, which is as complete and typical an exposition as the formularies give:²⁶

²⁵Butrigarius, 89v, 90, 95v; Martinus, ccxvii, ccxxii-iv; Rainerius, IV:9; Formularium Florentinum, 15: Formulario... padovano, 43ff; Passaggerius, 177-77v.

²⁶Passaggerius, 175v.

Exceptio non numeratae pecuniae, sive non traditae, vel redditae rei, aliquando competit intra duos annos, aliquando intra XXX. dies, aliquando intra unum annum, aliquando intra tres menses. Ecce enim debitor, qui confiteretur, se mutuo pecuniam accepisse, quam non recepit, potest opponere exceptionem non numeratae pecuniae intra duos annos a die consessionis factae. Creditor, vero, qui confessus est sub spe futurae numerationis creditum suum accepisse a debitore habet exceptionem non solutae pecuniae intra XXX. dies. Maritus autem qui confessus fuit sub spe futurae numerationis, dotem accepisse, habet exceptionem numeratae dotis, qui est opponenda intra annum post solutum matrimonium et hoc si matrimonium duravit minus duobus annis, vel est opponenda intra tres menses, si matrimonium duravit plus duobus annis, sed minus decennio. Et exceptionibus non potest renunciari, et si renunciatur, renunciatio non impedit, quominus intra dicta tempora opponi possit. Verumtamen in hoc prodest renunciatio, quia si non esset facta renunciatio, deberet probare adversarius confitentis, se pecuniam ipsam soluisse, ac postquam facta est renunciatio, incumbit confitenti et renunciatio convertit onus probationis in renunciatam.

Parallel to this renunciation is the beneficium conditionis sine causa which may be renounced under certain conditions. The benefit grants restitution to one who has promised away his belongings without cause. Although it militates against the promisee, it is basically in favorem the promissor. Passaggerius applies the condition that dolus must not be present for the renunciation to stand.²⁷ In regard to restitutio in integrum which is at the heart of all restitutions, Butrigarius advises the renunciation of the clausulae generalis. It is usual to renounce this ("consuevit renunciari"), he says, which takes care of any injury arising from any cause. But, the praetor or judge shall con-

²⁷Butrigarius, 91: Passaggerius, 179v.

tinue to order restitution on grounds of equity.²⁸

Equity also governs suits deriving from the sale of incomplete or faulty products. The benefit involved is the actionis redhibitoriae, which applies to all who have bought bad goods without having been apprised of the defects. However, notification to the buyer nullifies the benefit. If the seller knew the goods to be bad renunciation was not possible; if he too was unaware the renunciation might be made. Restraint is also applied by a six-month time limit, at the expiration of which claim must have been made. The basic question here is that of awareness, and presumably the burden of proof was on the defendant, a fact which would indicate the persistent importance rather than the nullification of the benefit. In a few cases where the seller was definitely not at fault the benefit is void regardless of other considerations.²⁹

With respect to errors of calculation and definite deceit I've found little documentation in the formularies. The general rule seems to have been to renounce, then to let extenuating circumstances of the immediate situation play their role in court. Butrigarius admits the renunciation of the beneficium erroris calculi.³⁰ Passaggerius allows the

²⁸Butrigarius, 95.

²⁹Butrigarius, 91v; Martinus, ccxxxi, Passaggerius, 181v; Formularium Florentinum, 16-17.

³⁰Butrigarius, 95.

renunciation of the *exceptio doli* (as does Butrigarius).³¹

Johannus Bassiani, writing about 1180, writes as follows, giving the impression that equity determines the individual case although the renunciation is allowed:³²

adversus autem doli exceptionem non datur doli replicatio ut puta si dolo inductus ab aliquo permittendum induxeris, vel ad renuntiandum, hic enim, cum eum repelles doli exceptione non adiuvatur doli replicatione quia dolus dolo recompensatur.

A final benefit in contract which one may conditionally renounce is the condictionis indebiti which states that if one satisfies a debt which is invalid, and which he ought not to pay, he may seek redress for his loss. Martinus acknowledges the renunciation if it does not portend future injury or run counter to good custom. Butrigarius states that the benefit is not valid in many cases, giving a proctor the benefit of the doubt by bringing in questions of probable and improbably knowledge and other hard-to-prove conditions. If, however, one paid through ignorance, either in his own name or for others, the benefit is valid, and the renunciation is invalid. Probable ignorance implies error in an unknown case, which is excusable. Improbable ignorance is error in one's own affairs, which is inexcusable.³³

³²Giovanni Tamassia and Giovanni Palmero, "Iohannis Bassiani, Libellus de Ordine Iudicorum," in BIMA., II: 242.

³³Martinus, ccxxxiv-vi; Butrigarius, 90-90v; Passaggerius, 179.

The privilegium fori may be renounced, but not in all cases, the exceptions probably outnumbering the permitted renunciations. This is a personal benefit, granted for reasons of birth, residence, or membership in a certain group or class. In all cases the benefit applies to one summoned under one law who wishes to be tried under his own. The exceptions include the merchant whose very business demands a fixed locality; he may not claim the benefit, nor may tutors who are held to report to the court which gave them their authority. Women must take the court of their husbands; delinquents must be summoned to the court of the locale of the trouble; the debtor who specified a place of repayment and who now wishes to escape the judgment of that city's law is also refused the benefit. One may not claim the jurisdiction of the city of Rome for Rome is 'common' to all Christendom; and finally, certain persons may not claim the exception because of the nature of their persons, for example, soldiers, scholars, and clerics.³⁴

Martinus also qualifies the renunciation, but only after demonstrating a long form in which the renouncer promises "se ubilibet et sub quocumque iudice...respondere...sub tali poena in quolibet capitula stipulata." This may be renounced only when the potential defendant consents "ex certa scientia" to be tried in the court of the plaintiff, which is the con-

³⁴Butrigarius, 88-88v.

trary of usual procedure under which the trial court is that of the defendant.³⁵

A distinction is made between students and soldiers on the one hand and clerics on the other. All are agreed that the former may renounce, since the law was introduced in their favor. The soldier may obtain military jurisdiction merely by saying, "Volo respondere sub magistro militum." In all cases except those involving action against human life or the welfare of the state his request is to be granted. The student may renounce the court of his "doctore vel magistro," but not superior jurisdiction, because, to paraphrase, since it is easier to bear special privileges than to be subject to ordinary law, the obligations to the greater privileges must be observed.³⁶ Equally universal is the prohibition against the cleric's renunciation, "quia istud beneficium est introductum in favorem totius cleri, et non alicuius clericii specialis et si posset renunciari tunc minor praeiudicaret maiori."³⁷ Martinus, however, had differentiated much earlier between Canon and the Roman Law, allowing the renunciation of the latter.³⁸ In this he is in

³⁵Martinus, ccxxiii-iv.

³⁶Martinus, ccxxv.

³⁷Butrigarius, 88v-89.

³⁸Martinus, ccxxvii.

the company of two other professors who indicate a certain validity, if not general use (as the notarial cartularies continually do) of renunciations by clerics. The Paduan formulary advises the cleric to renounce the prescriptioni fori, and if he contracts as a representative (of an ecclesiastical corporation), to specify that he did so for the benefit of the church. Florentine advice is similar, and the proctor is warned to specify his authorization, and then, to renounce "omni ecclesiastico privilegio, et iuris divini et humani beneficio et canonum beneficio (et) auxilio sibi vel ecclesiae patrocinantibus vel competentibus".³⁹ When these suggestions are added to the evidence in the notarial registers which show the frequent renunciations made by the clergy, we may surmise that the Church was perhaps forced by economic necessity to conform in practice to the usual business practices of the times.

The Church was, however, respected in the formularies in another way: in the application of the beneficium feriarum. This protected those summoned on feast days, when business transactions and court decisions were invalid. One might renounce this protection for harvest or grape-gathering days, or fair days, but not for religious holidays. In other words, the debtor was allowed to make himself available for

³⁹Formulario...padovano, 43ff; Formularium Florentinum, 105-07.

all days but religious feasts.

What is interesting about the privilegium fori is the opportunity it presented to usurers. With moneys fluctuating widely and rapidly, with clipping, sweating, and alloying the usual practices of rulers, a usurer, one whom we might expect to know the latest relative values of coins, might very easily circumvent the general censure by demanding payment in another city where the law was as favorable as his own, and the currency differential profitable.

Instructions concerning women's renunciations are very complete. Generally speaking the woman may renounce those rights in favore, such as the S.C. Velleianum. Butrigarius, however, notes one criticism, to the effect that the woman is led to renounce by the same cause which led to her original obligation, "for the fragility of woman is so great, the wisdom of man is of such great abundance that women are deceived by the bland words of man."⁴¹ It is usually stated in addition that she be informed of her rights and confirm the contract by oath. Rainerius, Butrigarius, and the Paduan and Florentine formularies all tell her to renounce with the greater validity of the contract as her object. On this

⁴⁰Passaggerius, 181v; Butrigarius, 92, 95-95v; Martinus, ccxxxix.

⁴¹Butrigarius, 96v. Nevertheless, his final opinion confirms her ability to renounce, 91v.

matter as on others regarding women the notaries follow the Italian civilians closely. For example, in a passage which also shows the influence the Church would have had the oath exert, the civilians and the Gloss claim the renunciation is invalid even if the oath is taken. However, "de iure Canonico expeditum est."⁴² Probably, the renunciation of the S.C. Velleianum became automatic, for in the formulary of Martinus it is included even where the woman does not renounce it in her own name; in fact, it appears in every document including a woman's act.⁴³ Rainerius, Martinus, and the Paduan notary all mention several cases in which the S.C. may be invoked. These include intervention for the liberty of a slave, on behalf of her own dowry, or for money to compose the dowry of another woman.⁴⁴ She may also renounce the protection of the lex Julia which prohibits the husband from alienating dowry property, again because it was introduced in her favor.⁴⁵

The ius hypothecarum may also be renounced, but the

⁴²Butrigarius, 96v. This refers to the fact that the husband is prohibited from using the woman's property except when his investment is proved to be in her behalf.

⁴³Martinus, ccxxi.

⁴⁴Martinus, ccxxi; Rainerius, IV:9; Formulario... padovano, 43.

⁴⁵Butrigarius, 96.

woman must be aware of her rights (to the husband's goods which are hypothecated to her, expressly or tacitly, in return for his use of the dowry). If the renunciation does not appear in the instrument, shall it be presumed understood? Butrigarius mentions this controversy, and declares in the negative, because general renunciations do not hold in contracts. She may not renounce to forestall the action of a creditor against her husband who, therefore, always remains involved for the debt despite the woman's renunciation in his favor.⁴⁶

The treatment of the non numeratae dotis is similar to that of the non numeratae precuniae, and the benefit itself concerns the enumeration of dowry money or property which in reality has not been conveyed. The right of protection may not be renounced "quia quantumque renuntiatio interveniat, poterit opponere; sed (mulier) incombit onus probandi in renunciatores ut supra." Butrigarius, then, confirmed the opinion of his predecessor, Martinus, who likewise transferred the burden of proof, should the renunciation be stated.⁴⁷

The practical-type formularies bear out what Martinus, Passaggerius, and Butrigarius formalized. Their models are

⁴⁶Butrigarius, 91-91v; Martinus, ccxxx.

⁴⁷Butrigarius, 89; Martinus, ccxlii.

replete with precautions. In fact, as early as the formulary of Rainerius, c. 1220, the contracts are so full of renunciations by women of second-degree relationship that we might expect that no business was ever transacted. The length of time it took for every mother, sister and aunt to renounce her rights must have been exasperating.⁴⁸

We shall be following the pattern of the formularies in discussing the beneficium restitutio in integrum in connection with the rights of minors. For it is upon this action that the S.C. Macedonianum, his principal protection, is based. The benefit "competit minoribus toto tempore minoris etatis...si in minori etate decepti fuerint eorum facilitate vel adversarii calliditate. Et huic beneficio non potest renunciare, quia eo ipso deciperetur, si renunciaret minor."⁴⁹ Although Rainerius assumes the right of restitution to be tacitly implied in every contract of a minor, he suggests that it might be better for him to declare first than to have litigation later. He further suggests affirmation by oath, or confirmation by parents' or guardians' consent.⁵⁰

⁴⁸Rainerius, I: 16ff.

⁴⁹Passaggerius, 173.

⁵⁰Rainerius, IV: 8-9.

According to Butrigarius, the benefit also pertains to minors' guardians, and to the question "an ei possit renunciari?", he answers "non quod a eo ipso iure videtur deceptus; sed numquid potest remittere per pactum quod non petat restitutione, Respondeo non." He is also of the opinion that the renunciation should be reduced to the form of a sacrament since it operates as a sacrament. And, although the minor himself may be asked by a judge to make restitution, he need not, for the benefit was made in his favor, and should, therefore, not be used against him.⁵¹

The S.C. Macedonianum may not be renounced, Passaggerius listing it first in that category. For, "beneficium ...competit filiofamilias qui pecuniam mutuo accepit sine patris voluntate ...et huic beneficio quod introductum est in odium foeneratorum renunciari non potest."⁵² Rainerius uses the same phrase with regard to the money lenders, but allows the youth to contract when his action is on his father's order.⁵³ Both Martinus and Butrigarius agree with Passaggerius when the latter lists several prerequisites for

⁵¹Butrigarius, 87v. Martinus, commenting upon the validity of the minor's oath, rejects it, stating that the parents' consent is necessary for the minor to acknowledge fulfillment of a debt. He also states that the restitution shall not be granted if the minor falsifies his age: ccxiv, ccxv.

⁵²Passaggerius, 172v.

⁵³Rainerius, VI:9.

the invocation of the benefit. The minor must legally be a filiusfamilias, he must accept money qua loan money, and must take it without his father's consent. Butrigarius also quotes the Gloss which sanctions validation of the renunciation when made under oath.⁵⁴

In the formularies which evidence practice the validity of the renunciation made under oath or with consent seems to assured. For this reason the prohibition would appear to have been as ineffacacious in practice as that applied to the woman's right to renounce. Subterfuges are always possible.

In the Florentine formulary, in a long defensio of a land sale, the seller is made to renounce his minor's rights, to state that he is over fourteen, all this if he should accidentally be a minor. Rainerius includes a long renunciation "nec contravenire minoris etatis pretextu."⁵⁵ Yet, the Paduan notary notices that "quis, tamen vendet, emit sicut paterfamilias bene quam accipisse mutuum et ille tenetur quem creditor nescivit esse filiusfamilias." And in another passage he states that one who presents himself as of age "frustra restitutionem beneficium implorabit, videtur enim

⁵⁴Butrigarius, 87v.

⁵⁵Formularium Florentinum, 86-88; Rainerius, I:15.

animo diciendi fecisse."⁵⁶ Both these statements imply that as long as the minor was using the benefit in his own behalf, without intent to profit by it, it held. It is probable, considering that the renunciation is authorized just a few sections previous in the treatise, that equity again determined validity in the individual suit. We must also remember that municipal affairs may have exerted influence upon the decision of a case. Probably, the renunciation was more often recognized than not, otherwise, why would it be constantly included in the notary's advice? It is also interesting to observe that the Church had placed itself in a dilemma. For at the same time that it labored to protect the weak, as was its moral duty, its Canon law, reaching out for greater authority, succeeded in extending its power through the oath, its success in this instance militating against the best interests of the weak.

If any development is traceable during the century, it is one towards greater definition, towards rational use. The formularies of Rainerius, Passaggerius, and the Florentine and Paduan notaries all show wide use of the renunciation without real explicit clarification. In the notarial Summae Aretii and Belluni everything possible is renounced, possible, that is, under the few conditions by which they

⁵⁶Formulario...padovano, 42.

restricted themselves.⁵⁷ Was this the actual, necessary practice that had to precede the systematization of Butrigarius? If so, then the theory was firmly anchored in practice, for there are very few cases in which Butrigarius clashes with earlier classification.

Passaggerius had earlier validated the beneficium conditionis in incertum without comment. Butrigarius rejects it on the ground that it renounces a future right.⁵⁸ The law progressed in such subtleties. And in another instance the Summa Aretii included "renuntians illi decretali de foro competenti...et fori clericalis privilegio." But as we have noted, theory and practice seem usually to have differed widely on this point.⁵⁹

It might be well to conclude this chapter with a passage from this same Summa which well indicated the general plan of approach of the notarial formularies:⁶⁰

Et talis renuntiatio scriptarum, litterarum, privilegiorum et contractum...in compromissis, refutationibus, solutionibus, quietationibus, confessionibus solutionem fieri maxime consuevit.

⁵⁷Giovanni Palmerio, "Summa Notariae Belluni," in BIMA., III:1.

⁵⁸See above, footnote 12

⁵⁹Summa Notariae, cxxxvii. See above footnote 38.

⁶⁰Idem.

CHAPTER FIVE

Italian municipal legislation offers documents for evaluations. Unfortunately, our greatest available collections of statuti come from just that period in which notarial documents are most fragmentary, not because they do not exist, but because they have never been published. The result is that we can make no close historical comparison. By the time that constitutions are available, from the second half of the thirteenth century, the Italian economy had already experienced the growing pains of an experimentative youth, and was in its sedate prime of life. With the exception of Genoa, and a few fragments from Nice and Pistoia, and the probability of the twelfth-century origin of a Piacenzan code, documentation on the formative period is lost to us. What we have to deal with is the legislation of the Italian commercial commune, to all intents and purposes a city state bent on safeguarding and expanding its own boundaries, and on fostering the economic life which might make such expansion possible. We shall examine, therefore, those passages in the statuti regarding state welfare, alienation of property, and sanctity of contract, and the relation of women and children to these concepts. Evidence for the main topic of our thesis must be inferred, for there is very little legislation on renunciations as such.

The cities found themselves in a paradoxical situation. Greater trade was their goal, but what of their obligation to restrict the commercial activity of women and children who would increase that trade by their participation? What was to be the relation to the state of these who were, naturally, to be the first hurt in business transactions? How was the conflict to be resolved between the new city laws and the Corpus Iuris, which, never forgetting its protective titles, was the theoretical inspiration of the statuti? What was to be the relationship of volume qua volume to the position of fundamental welfare of each group in the community? Were minors to gain more in the final analysis by freedom of contract, or by protection? What was to be the effect of freedom of contract (renunciations) upon the rise and fall of social groups in medieval society? Legislation answered some of these problems.

A primary object of the commune was to maintain its property intact, to protect its physical borders against an apparent invader, and its more subtle property dominions against foreign ownership. We find provisions, therefore, against alienation of corporation property not only in the laws of cities, but also in statutes of the Church and guilds. An early statute of Pistoia (1107) forbids alienation of Church property without "consensu totius capituli vel maioris partis et consensu Potestatis vel omnium

consulum vel maioris partis."¹ Three guild statutes of Bologna of the thirteenth and early fourteenth centuries give parallel evidence which, indeed, is typical from the early thirteenth.²

Two typical statutes prohibit alienation of city property. Florentines are forbidden "vendere seu donare vel alienare...alicui persone loco vel universitate seu collegio sive capitulo...aliquos colonos censitos...angaria...vel aliqua servata personalia vel realia...comitatus vel districtii Florentinii."³ A statute of Piacenze contains practically the same admonition, while another forbids alienation in prejudice of another citizen.⁴

¹ Francesco Berlan, Statuti di Pistoia del secolo XII (Bologna, 1882), fasc. I:24.

² Augusto Gaudenzi, Statuti del popolo di Bologna del Secolo XIII (Bologna, 1888), 49, 97, 369. On problems of consent, summons, and public welfare see the articles of Gaines Post, "A Romano-Canonical Maxim, 'Quod Omnes Tangit,' in Bracton," in Traditio, IV:197-251 (1946), and "Plena Potestas and Consentain Medieval Assemblies (1150-1325)," in Traditio, I:355-408 (1943).

³ Romolo Gaggese, Statuti della Repubblica Fiorentina (2 vols., Florence, 1910), I:59.

⁴ Giuseppi Bonora, Statuta varia civitatis Placentinae (Parma, 1860), 461, 311-12. An interesting example of the supremacy of the public welfare is furnished by a statute of Amalfi. If necessary the use of a ship must be diverted by an owner "ad usum Rivera civitatis pertinentes non obstante aliquo pacto publico vel privato et contractu." See Nicolo Alianelli, Antiche consuetudini e leggi marittimi delle provincie neapolitani (Naples, 1871), 106-07.

To further the economic development of the city whose status had thus been protected, laws were passed to sanctify the contract. In other words, to be somewhat anachronistic, the city's 'credit rating' had to be good enough to invite trade. The most complete collection of these laws that I have examined obtains from Florence, and shows developed ideas.

The basic concept is the inviolability of the contract. Once it is "in libro alcuius mercatoris cuiuscumque negotiationis...no action may be brought against it "nisi per contrariam scripturam factam manu illius in cuius favorem prima scriptura facta fuisset."⁵ This rigidity seems not to have allowed the use of exceptions, an exclusion which would have validated the renunciations included in the Florentine agreements. At least this was so in surety obligations for "non obstante petitione vel exceptione que fieret de predictis, iudex coram quo peteretur precise teneature executioni mandare usque integram satisfactionem." Business men are to be jailed in case of default, "et absque dilatione et omni exceptione cessante, pronuntientur, et exbanniantur et condemnentur et in omnibus et pro omnia habeantur et

⁵Statuti...Fiorentina, II: 119-20. On the denial of his own writing the person was liable to a fine of L. 50.

tractentur."⁶ As a general rule the judges of Florence were to hold valid "omnes et singulos contractus, promissiones et obligationes et pacta inita aliquos mercatores et alios artifices."⁷ And as though in example, contracts made by the syndics of the city were to remain "firme et retractari non possint"⁸ despite the one-year term of the official.

Regulations concerning the capacity of women as sureties differed from city to city, some requiring the husband's consent for the woman's intervention, others assuming a tacit consent which in effect gaver her full powers, while still a third category did not even suggest this.⁹

The earliest references come from the Liber Iurium of Genoa for 1130, and are those we have already mentioned. To repeat, women over eighteen, acting conjointly with their husbands, may legally sell, borrow, or make a donation.

⁶ Ibid., 139-41, 133.

⁷ Ibid., 10-12. The statuti of Modena offer the same conclusions, implying that everything in writing should be honored, nulla exceptione iuris vel facti obstante." See Emilio Vicini, Statuta Respublica Mutiensis (Milan, 1929), 50-51.

⁸ Statuti....Fiorentina, 112.

⁹A. Lattes, Il diritto commerciale, 84-85.

This was confirmed in 1147, validating all contracts made in the interim.¹⁰ Two laws of the same period demand the presence of two or three of her relatives, or friends should blood relations be unable to appear.¹¹ This provision was always observed in the notarial registers.

The only other early document comes from Piacenza, in 1135. It states that "si aliquo tempore mulier voluerit ordinare (de dotibus) non sit ei licentia sive consensu maritii."¹²

The Venetian statuti of 1242 offer the next reference, and this of secondary importance. It restrains the woman living under her husband's roof from taking any valid action against the antifact or her own dowry. She may alienate only those goods that she, herself, possesses. The gloss notes that in past times a iudex countersigned the contract.¹³

A sketchy reference in Florentine fragments from 1254 informs us that women may not defend the property of their husbands which, again considering the usual Florentine contracts, indicates that the renunciation of the S.C.

¹⁰Liber Iurium, xxv, cxxviii.

¹¹Ibid., cxi, cxxi.

¹²Arrigo Solmi, "Le leggi piu antiche del commune di Piacenza," in ASI., ser. 5, LXXIII:1-81 (1915), 56.

¹³Statuti veneziani...1242, 70

Velleianum was invalid. The widow, however, may defend his goods to the limit of her dowry in any case which others may have against the estate of the deceased.¹⁴ Although this indicates that the woman may not intercede for her husband, the ultimate effect is that she is prevented from harming another in the community.

The Sieneſe constitution of 1262 also tends to restrict the woman. She is held to repayment of all debts incurred on her own property, and is responsible for the husband's debts with all her property except the dowry itself.¹⁵ This injunction was reiterated in a later constitution which demands satisfaction, all other laws to the contrary.¹⁶ The woman may not alienate her childrens' property except in cases of urgent necessity.¹⁷ Sanctity of contract is again held inviolate, and the property of minors is protected.

Florence offers several documents, the general purport of which is to place the woman definitely under the control of her husband, at the same time validating their

¹⁴Giuseppi Rondoni, I piu antiche frammento del costituito fiorentino (Florence, 1885), 35.

¹⁵Ludovico Zdekauer, Il costituito del commune di Siena dell' anno 1262 (Milan, 1897), 134, 214.

¹⁶Alessandro Lisini, Il costituito del commune di Siena volgarizzato nel MCCCIX-MCCCX (2 vols., Siena, 1903), I:253.

¹⁷Ibid., 214.

joint actions. The net effect was, probably, to loosen all restraints. We may interpret one statute as accepting the renunciation: *et non intelligatur currere vel currisse alicui mulieri, durante matrimonio, aliqua prescriptio in rebus sibi obligatis pro dote, nisi consensisset vel renuntiavisset expresse.* And in the same statute the contract made with the husband's consent is made inviolable. Nor may she bring suit against him.¹⁸ Another statute restrains her from court action against her debtors while her husband is still alive.¹⁹ Then, somewhat for her protection, there is a general provision that, if she is willing, the husband may govern the use of her property, the increment of which will be for her benefit.²⁰ The will is all important. The law need protect the woman no longer if she so desires. She may choose to accept the protection remaining, or may offer her husband full powers.

We may see the culmination of this development in the documents of Piacenza. The statuti place the woman on an equal footing with the man:²¹

Item quod quilibet tam masculus quam femina admittatur ad agendum et referendum et conquerendum

¹⁸Statuti...Fiorentina, II:116.

¹⁹Ibid., II:100.

²⁰Ibid., II:111.

²¹Statuta...Placentinae, 115.

de suo debitore vel creditore in qualibet causa
pertinente ad mercandiam non obstante quod sit
minor, vel filiusfamilias et compellatur solvere
seu satisfacere quodlibet debitum..."

Time and again variations on the 'tam masculus quam
femina' appear.

If we are to make any interpretation of these few
laws, it is that the Roman-law principles of protection
did not take hold in the Italian statuti as they did in
France.²² Even where the trend towards full individuality
was temporarily checked, as in Florence in 1254, and
Siena in 1262, women were finally granted full capacity
by the business city.²³ Minors fared similarly.

The earliest statuti regarding minors are prac-
tically contemporaneous, coming from Genoa and Nice.
The Genoese validated sentences delivered against minors,
nor are those against their guardians to be revoked
"pretextu minoris etatis."²⁴ The leges of Nice also permit
the contracts of minors (which is implicit in the Genoese
decree), but at the same time protect him from his guard-

²²Meynial has shown that both the S.C.Velleianum
and the ius hypothecarum were rejected in France, the re-
nunciations of these rights, that is. He says nothing
about their favor in Italy. II:272; III:77.

²³See above, Ch. III, footnotes 20-22.

²⁴Liber Iurium, cclxi.

ians. They must approve his contracts, but are severely restrained from misusing his funds, neglecting his education, in general, prejudicing his position in society.²⁵

Milan presents a somewhat different picture in our chronological series. Minors have full opportunity; *pro equali pretio infra annum et diem poterit exigere*. He has a claim against the guardian who fails to protect him.²⁶ And, if he has been injured, he may demand restitutio in integrum.²⁷ As has been noted, the neighboring town of Vercelli denied the renunciation of the minor, though it consented to his contract made with the guardian's or relative's consent.²⁸ We have also seen that Venice forbade the minor to contract unless two officials countersigned.²⁹

Bologna too protected the minor - to a degree. He may not contract alone, nor may he renounce his rights unless his guardian consents. Hence wide avenues are open for

²⁵Statuta Niciae, 53-55.

²⁶Liber Consuetudinum, tit.5 no. 1; tit.26, no. 1.

²⁷Ibid., tit. 20, no. 3. This statute modified both the Roman and Lombard laws, raising the age limit of those living under the latter to 20, reducing the Roman-law limit from 25.

²⁸See above, Ch. III, footnote 51.

²⁹See above, Ch. III, footnote 55.

evasion despite the nominal protection.³⁰

Florentine evidence shows similar possibilities. The tutor is forbidden to conceal a debt, and his own good faith must eventually be proved by a witness.³¹ In a later statute, however, the minor's position is aggravated as was the woman's. If he belongs to a societas he may be held with the others for the full amount of the debt. Even if he is younger than fifteen he may be held responsible upon legitimate proof of his membership.³² Another provision, more general, makes him responsible for the debts of his estate regardless of exceptions.³³

In the Piacenzan constitution the title which gives women full competence confers the same upon minors.³⁴ Restrictions are placed upon him, but these may be avoided with the father's consent.³⁵ Thus, with regard to the minor the general trend was towards emancipation, again in

³⁰Gino Fasoli and Pietro Sella, Statuti di Bologna dell' anno 1288 (2 vols., Vatican City, 1937-39) I:61-65.

³¹I piu antiche frammento...fiorentino, 59.

³²Statuti...Fiorentina, II:126

³³Ibid., II:134-36.

³⁴See above, footnote 23.

³⁵Statuta...Placentinae, 152, 174, and 299.

contradistinction to the development in France.³⁶

In almost every case, as we have seen, the Italian communes, if day-to-day practice is to be assumed from their legislation, destroyed in large measure the theoretical protective provisions of the Roman law. A choice had confronted them. Were they to accept at full value the classical law whose contractual restrictions kept property in the hands of the weak who needed it for their own support or education? Or were they, in defiance of Christian ideal and the logic inherent in the make-up of a society, to expose the weak to the vicissitudes of commercial life, participation in which, despite legal rationalization, was not always profitable. They chose the latter course, at least in the statuti we have examined.

The effect of this program, apart from commercial stimulation, may be surmised. On the highest level it wrenched hard against traditional concepts of interdependence, brotherhood, corporate action, and placed commercial higher than natural law. It broke down the moral cohesion which held the city together. Finally, it added numerous potential burdens to the city which had hoped to profit, for the moral obligation to maintain any misused women or minors now lay at the merchant-fathers' doors.

Future research upon contract legislation in the late-

³⁶Meynial, II:260-62.

medieval statuti, and its effect upon the various social groups in the cities, those that retained commercial superiority and those that did not, might prove interesting. The entire problem presents many indistinct facets to analysis. Basic to the analysis is this question: to what extent does the total welfare of a society depend on the well-being of its weaker members?

CONCLUSION

The conclusions to this thesis must remain tentative. Although there was an historical coincidence between the appearance of renunciations and the revival of commerce around the Mediterranean world, nevertheless, logically, this simultaneity must remain a basis for hypothesis. For the premises upon which an interrelationship is posited are themselves too inclusive to be the driving arguments in a syllogism. There is nothing in what I have written to make one believe that the renunciations must have had an effect on the new trade. The thesis begins to take on validity when we recognize the relationship of the renunciation to those features which are logically necessary for commercial life, and which universally have been present in commercial societies.

Historically, the renunciation appeared in those societies which participated in the business life of Europe, beginning in the twelfth century. Essentially, it was the Italian merchant who, carrying with him new techniques, introduced his advanced contract law into burgeoning cities. We have especially noticed the importance of Genoa in the network of the Western Mediterranean. Nice, Arles, Montpellier, Marseilles, and Barcelona, all were in trade contact with Genoa; all adopted the Italo-Roman law in varying degree. The historical appearance of the earliest

renunciations in the documents of the various cities jibes well with initial commercial relations. Although it is obvious that nothing definite is provable here, nevertheless, it is exciting to watch this almost immediate manifestation.

The documents suggest several uses for the renunciations. Basically, they were evasions of certain legal restrictions placed upon the contractual capacity of women and children, and of prohibitions placed against contractual bad faith. Freedom of contract being a prerequisite for the existence of any type of exchange, the renunciation aimed at its facilitation. But besides these theoretical bases, the individual renunciations had definite raisons d'etre. The renunciation of the exceptio non numeratae pecuniae opened the way to gouging and usury, concealing the true state of affairs in an incomplete contract.¹ The privilegium fori, as it applied to merchants, had much the same effect. Renunciations which attacked protections against fraud crippled the necessary morals of the business world. No doubt the medieval entrepreneur

¹Sayous has noted the possible use of a variation on the exceptio non numeratae pecuniae in dealings with farmers. Advances may have been made to the farmers, future crops being the security for present money. He takes the validity of the renunciation clause for granted; in fact his theory is based upon this assumption. See A. Sayous, Le commerce de Nice, 50-51.

found many more uses for the renunciation than we are able to imagine.

The use of the renunciations was not confined to any city or other geographical area, nor was any social class or group prohibited their use. Churchmen and nobles used them as did merchants; Saracen and Jew as well as Christian.² Quantity of money, land, or merchandise had no bearing on the renunciation's use. In short, the clause involved purely legal procedure, subject only to the personal and equitable qualifications discussed above.

Sufficient evidence exists for us to consider the renunciation as a valid clause of the contract, not as the notary's expensive perquisite. For one thing, it is difficult to imagine the same phrase used for the same purpose-prolixity-over such a wide geographical area. A phrase might 'catch on' to this extent if its purpose were legitimate, but why, from all the titles in the Corpus Turis should the notaries of Spain and the Midi have chosen the renunciations as the ineffectual clauses with which to pad their documents? Is their training at Bologna a sufficient explanation? Besides, the century and a half that we have

²A Saracen renounces as purchaser "ex certa scientia exceptioni non traditarum michi rerum...et omni iuri." See L. Blanchard, Documents...de Marseilles, I:18-19. Renunciation by a Jew appears in a document of the late 1250's. He renounces the "exceptio non numeratae pecuniae et dotium non traditarum." See Archivio de Stato Genova, Cartulary of the notary Bartolomeo Fornario, Reg.I, sec. 2, fo 162.

seen the renunciation in use seems too long a period for a purposeless phrase to traverse. Why too did the notaries find it necessary to develop the phrase if it was just a formal addition? The answers to these questions would certainly vitiate the concept of the clause traditional among the diplomatists.

We have evidence as well as speculation to support our theory. The Genoese decision of 1156 was based on the sanctity of the contract, the renunciation included.³ Frequent appearance in the cartularies argues for validity as well as for pointlessness. More important, the phraseology of the formularies indicates validity. Butrigarius introduces almost every renunciation "consuevit renunciari."⁴ And Rainerius includes the clauses, he tells his students, "ut contractus plenum sortiatur effectum."⁵ We have also noted that notaries included renunciations in their personal contracts, which would have been a needless expense were they without effect. Finally, if the renunciations had no legal effect there would have been no need for the extended discussions in the formularies which dealt with the niceties of the law and circumstance.

The questions that have been raised regarding class

³See above, Ch. III, footnote 13.

⁴See above, Ch. IV, footnote, 25.

⁵See above, Ch. IV, footnote 7.

welfare and the status of the community are too fundamental to be quickly answered here. The renunciations were certainly not the cause of any social upheavals; but certainly, if any concept of moral tragedy is involved, they were villians in the piece.

Again it must be emphasized that this has been an attenuated study, circumscribed by the great mass of thirteenth-century notarial documents and the responsa which remain to be read. These potential sources for the study of the renunciation in daily use.

Finally, it must be stated that the final validity of the thesis will always be open to question. For as I have suggested in the introduction, in a qualification which has been basic to the entire discussion, it is only an assumption that the earliest renunciations are coincidental with the earliest extant documents. It is possible, though I hope I have shown not probable, that the discovery of new documents might show the renunciation to have been in use throughout the 'dark ages'.

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