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Ratio Decidendi: Guiding Principles of Judicial Decisions, Vol. 2: 'Foreign' Law

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Ratio decidendi

Guiding Principles of Judicial Decisions

Volume 2: 'Foreign' Law

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Serge Dauchy
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Table of Contents

<i>W. Hamilton Bryson</i>	
Introduction	
<i>Knut Wolfgang Nörr</i>	
<i>Iura novit curia: aber auch fremdes Recht?</i>	
<i>Albrecht Cordes</i>	
Acceptance and Rejection of 'Foreign' Law Around 1500	
<i>Alain Wijffels</i>	
<i>Orbis exiguus. Foreign Legal Authorities in</i>	
<i>Serge Dauchy and Véronique Demars-Sion</i>	
Foreign Law as <i>ratio decidendi</i> . The 'French' Law and Early 18 th Centuries	
<i>A. Mark Godfrey</i>	
Ratio Decidendi and Foreign Law in the History of	
<i>Juan Javier del Granado and Alejandro Maya</i>	
Roman Law and <i>ratio decidendi</i> in Spanish Law of the 17 th and 18 th Centuries	
<i>James Oldham</i>	
Foreign Law in the English Common Law of the 17 th and 18 th Centuries	
<i>W. Hamilton Bryson</i>	
The Use of Roman Law in Virginia Courts	
<i>Jean-Louis Halpérin</i>	
Foreign Law in French Courts from 1804 to 1914 Trusts	
<i>Georges Martyn</i>	
In Search of Foreign Influences, other than the Civil Law, in English Court Decisions	
<i>Heikki Pihlajamäki</i>	
"Stick to the Swedish law": The Use of Foreign Law in Nineteenth-Century Finland	

Magistrats français et Droit musulman 187

h

American Law 207

Supreme Court 1899–1900 217

Comparative Law 229

..... 237

W. HAMILTON BRYSON

Introduction

This collection of essays is concerned with the subject of *ratio decidendi*, which is a technical legal term of art in Anglo-American jurisprudence. This legal concept is opposed to the idea of *obiter dictum*. *Ratio decidendi* is the reason of the judge in coming to a judicial decision in a lawsuit presented to the court by the litigants for an official decision. *Obiter dictum* is whatever else a judge might say in passing. In Anglo-American legal cultures, the *ratio decidendi* of the courts accumulated over time is the law. If the community does not like what their courts have stated the law to be, then the law can be changed by their legislature. These essays consider the concept of *ratio decidendi* in different nations of western Europe and their former colonies at different periods of early-modern history. The concept of *ratio decidendi* operated very differently in different places at different times as is demonstrated by the first part of this title, which was published in 2006.

This group of essays focuses on one narrow aspect of *ratio decidendi*, the use by the courts of foreign law as the basis of their decisions when appropriate to the issues to be decided in a particular case brought to them by the litigants. The term foreign law is a technical legal term of art of Anglo-American jurisprudence. It refers to law that is not part of the law binding upon the court; in other words law outside the court's system of jurisprudence. Thus, one must consider what is the local, domestic, municipal law in order to discern what is foreign to, or outside of, it. This distinction and definition varies greatly from place to place and from time to time, as these essays demonstrate.

These essays are not concerned with the concept of choice of law, also called conflict of laws, which is a matter of private international law. This is a matter of a court's applying foreign law, rather than local law, to the particular parties in a particular lawsuit because it applies specifically to them. But these essays here are concerned with the incorporation of foreign legal principles into the local law for general uses and future applications. If the courts take a comparative approach to the law and find a legal principle or procedure that is believed to be preferable to the local one or where there is no local one at all, they may adopt the foreign law and incorporate it into the local law.

Although the technical legal term foreign law is well understood in current Anglo-American thinking, it may not translate easily into the jurisprudence of the continent. It was not so obvious in the past. Was it conceivable before the rise of

the nation state in the early-modern period? What is its relationship to the concepts of comparative law and conflict of laws?

The study of the process of the assimilation of foreign law is the scope of this book. The observation of this process in the past in different legal cultures of western Europe is enlightening. It gives a better understanding of the current law by showing how we got to where we are today.

KNUT WOL

Iura novit curia: ab Eine rechtsges

I. Zur I

In der deutschen Zivilprozessordnung te unverändert gebliebene Vorschrift zu

Das in einem anderen Staat geltende Rechte des Beweises nur insofern, als sie dem Rechtsnormen ist das Gericht auf die v beschränkt; es ist befugt, auch andere E einer solchen Benutzung das Erforderliche

Der Text enthält mit „Gewohnheits Begriffe, wenn wir die Gesetze der gr des 19. Jahrhunderts – vom Allgemeinen zum Bürgerlichen Gesetzbuch 1896 – a Verknüpfung „Gewohnheitsrechte und stellen. In einer solchen Lage denkt ma historischen Entwicklung, die zu der Ne haben könnten, und in der Tat gibt es k prozessordnung, die in Wortlaut und A bunden wäre wie die unsere, wobei dies war, sondern weit in das Mittelalter zu stellen eine Übersetzung der *consuetud* den *statuta* der italienischen Stadtstaaten

Alle Teile des § 293 verstanden und v chung von dem allgemeinen „uralten“ nicht der Parteien ist, das Recht anzuw schaffen, also sich um die Kenntnis der Wenn dem Richter im römischen oder i wurde, den Gesetzen und Rechten gemä tung auch die Erwartung impliziert, sich gung stehenden Mitteln selbst zu besch *iura novit curia* gekleidet worden. Im L Frage, was genau unter den *iura* zu verst