

BOGDAN LESIŃSKI

## Precedents as a Source of Land Law in Poland's Past<sup>1</sup>

Our law is founded more on custom et in communi praxi, for which examples are to be found in the decrees of kings, the forebears of His Majesty ultimarum instantiarum, rather than in writing.

Jan Łączyński, *Kompendium sądów Króla Jegomości*, 1594

### The State of Research

Among the sources from which Polish land law derives, one distinguishes two foremost ones: *consuetudo* and *lex*. In modern times, that is since the sixteenth century, the latter occurs in our law under the name of *constitutio*, which was enacted by the Sejm, though other designations also happened to be employed.<sup>2</sup> The predominance of custom and

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1 Translated from: B. Lesiński, *Prejudyki jako źródło prawa ziemskiego w dawnej Polsce*, "Czasopismo Prawno-Historyczne" 1990, 42, pp. 9-49 by Szymon Nowak and proofread by Stephen Dersley. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018. This article was written by the author on the basis of his work *Podstawowe problemy prawne likwidacji skutków wojny 1939–1945 a dwa państwa niemieckie*. Chapter 5 of the monograph, *Umowa poczdamska a traktat pokoju z Niemcami* offers a number of major comparative conclusions presented in this article. The author also draws on his monograph *Umowa poczdamska z dnia 2 VIII 1945*, Warszawa 1960, p. 629, which was updated twice for the purpose of publishing it in English (1963) and French (1964). On account of a thorough source documentation in the published monograph and because a new work is going to be published soon, the author forgoes—having approval of the Editorial Board—the convention of scholarly referencing in this article.

2 S. Grodziski, *Sejm dawnej Rzeczypospolitej jako najwyższy organ ustawodawczy. Konstytucje sejmowe — pojęcie i próba systematyki*, "Czasopismo Prawno-Historyczne" 1983, vol. XXXV, fasc. 1, pp. 168–169.

statutes as *fontes iuris oriundi* seems so obvious that we tend to forget that other sources of land law existed as well. And yet the awareness of a greater variety of sources was not altogether alien to past legal authors. Describing the ways in which laws were established among Poles in his *Institutiones*, Tomasz Drezner lists not only *constitutio* and *consuetudo* but, in the chapter entitled *De aliis iuris constituendis modis apud Polonos*, mentions other factors as well. According to the author, the latter include decrees (judicial rulings);<sup>3</sup> Drezner also recognized the possibility of applying analogy, noting that: — *denique ex contitutionibus similibus, ad similes casus incidentes proceditur*.<sup>4</sup> Also, there is evidence that legal lacunae arising due to lack of pertinent provisions was to be rectified in early Polish law by regulations formulated under the principle of equity (*aequitas*).<sup>5</sup> Still, the various law-building factors cited here receive little attention in our scholarly literature.

This paper sets out to revisit and inquire more extensively into the importance of judicial rulings as sources of land law in Poland.<sup>6</sup> It does not aspire to be the conclusive and complete study of the issue, but it does collate material which even now may serve to gain better insights into the problem. Let us note that in the latest synthesis of the history of Polish statehood and law, court judgments are hardly ever mentioned

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3 T. Drezner, *Institutionum iuris Regni Poloniae libri quatuor*, Zamość 1613, pp. 10–11, Hereinafter: *Institutiones*; Cf. K. Bukowska, *T. Drezner, Polski romanista XVII wieku i jego znaczenie dla nauki prawa*, Warszawa 1960, pp. 103–104. The text relating to decrees is cited below in footnote 60.

4 T. Drezner, op.cit.

5 Ł. Górnicki, *Rozmowa Polaka z Włochem o wolnościach i prawach polskich*, in: *Pisma*, ed. R. Pollak, vol. II, Wrszawa 1961, p. 408: *But those jurists of yours tell you to resort to ad equitatem only when ius scriptum fails. Aequitas* was also referred to by S. Sarnicki.

6 The importance of precedents in municipal law also awaits a thorough study. As we know, the decisions of the higher courts (*ortyle*) played the role of precedents in municipal law (S. Kutrzeba, *Historia źródeł dawnego prawa polskiego*, vol. II, Lvov 1925, p. 214), but the observation is all too general. We do not know whether those were *ortyle* or precedents in the distinct yet broader sense that B. Groicki had in mind when he wrote that Saxons and Poles with respect to municipal law: *also judge sometimes in accordance with age-old custom or a similar case which had earlier taken place before the court*. B. Groicki, *Porządek sądów i spraw miejskich prawa majdeburskiego w Koronie Polskiej*, “Biblioteka Dawnych Polskich Pisarzy Prawników” vol. I, Warszawa 1953, pp. 25–26.

as sources of law.<sup>7</sup> Z. Rymaszewski stated recently that “the issue of the precedential nature of judicial rulings in Poland is little explored.”<sup>8</sup> The problem remains uninvestigated even though it has been referred to, even addressed directly and analyzed, but the scope of inquiry has been for the most part very narrow. The views on how precedents functioned in land law tended to vary as well.

The researchers who (in the nineteenth century) studied the statutes of Kazimierz Wielki, wondered whether the so-called precedents in the Lesser Polish compendium had derived from the actual judgments of courts.<sup>9</sup> Many of them believed that they did indeed originate from judicial practice, but no reliable evidence to that effect was provided. J. Lelewel found them to have been judgments made under Władysław Łokietek at *sąd wiecowy* (higher court colloquia),<sup>10</sup> A. Stadnicki also maintained that the precedents contained in the statutes derived from judicial practice, going as far as to assert that they were formulated at the colloquium of 1347.<sup>11</sup> The most comprehensive argument to prove the judicial provenance of those precedents was advanced by F. Piekosiński, who claimed—without any evidence to support this—that the precedents reflect the rulings made during sessions of the Lesser Polish *sąd wiecowy* after 1362.<sup>12</sup> In a somewhat later treatise he con-

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7 J. Bardach ed., *Historia państwa i prawa Polski*, 2nd edition, vol. I, Warszawa 1964 and Z. Kaczmarczyk, B. Leśnodorski ed., *Historia państwa i prawa Polski*, Warszawa 1966. It is only in vol. I that one can find one general statements concerning the role of precedent in the period of early feudal monarchy. J. Bardach ed., *op.cit.*, p. 159.

8 Z. Rymaszewski, *Instrukcje syndyków gdańskich w sprawach rozpoznawanych przed sądami zadwornymi (od końca XVI do połowy XVIII w.)*, “Czasopismo Prawno-Historyczne” 1985, vol. XXXVIII, fasc. 2, p. 201107.

9 An overview of such opinions may be found in S. Roman, *Geneza statutów Kazimierza Wielkiego*, Kraków 1961, pp. 96–102.

10 J. Lelewel, *Krytyczny rozbiór statutu wiślickiego*, in: *Polska wieków średnich*, vol. III, Poznań 1859, pp. 300–301.

11 A. Stadnicki, *Przegląd krytyczny rozporządzeń tzw. statutu wiślickiego podług przedmiotów ułożonych*, Warszawa 1860, pp. 68, 244, 279.

12 F. Piekosiński, *Uwagi nad ustawodawstwem wiślicko-piotrkowskim króla Kazimierza Wielkiego*, “Rozprawy Akademii Umiejętności. Wydział historyczno-filozoficzny” 1892, vol. 28, pp. 231–233.

sidered it almost a certainty.<sup>13</sup> Only R. Hube, speaking in favour of the judicial provenance of precedents in the debate concerning statutes, was able to cite factual instances of judicial precedents in medieval Poland and their use in drafting legal compilations.<sup>14</sup>

Next to R. Hube, there were more nineteenth-century scholars who approached the question of precedents as sources of early Polish law in a rational manner, attempting to provide evidence in favour or against it. No longer as part of the debate on the statutes, Hube was joined by M. Bobrzyński<sup>15</sup> and O. Balzer<sup>16</sup>, both of whom supported the thesis that precedents constituted a source of land law.

Nevertheless, opposing views were also expressed. J. W. Bandtkie was of the opinion that the provision on judicial rulings in the 1454 Statutes of Nieszawa (analyzed in greater detail further on in this text) had no major significance and that “prejudices”, as Bandtkie called precedents, did not serve to create new law.<sup>17</sup> A. Z. Helcel also devoted some attention to the question in his unfinished and otherwise excellent work on Polish law<sup>18</sup>, assuming a position similar to Bandtkie’s. According to Helcel, judicial decisions were not considered law that

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13 Writing: (...) namely, I have demonstrated (in Remarks) that precedents may only have emerged in the era of the colloquium courts, F. Piekosiński, *Jeszcze słowo o ustawodawstwie wiślicko-piotrkowskim króla Kazimierza Wielkiego*, “Rozprawy Akademii Umiejętności. Wydział historyczno-filozoficzny” 1896, vol. 33, p. 127.

14 In a paper delivered in 1853 R. Hube drew on the role of precedents with regard to *Constitutiones et iura terrae Lanciencensis*. R. Hube, *Przyczynek do objaśnienia historii statutu wiślickiego*, in: *Pisma*, vol. II, Warszawa 1905, pp. 276–277.

15 M. Bobrzyński expressed his opinion in the preface to *Decreta in iudiciis regalibus tempore Sigismundi I. regis Poloniae a. 1507–1531 Cracoviae celebratis lata*, “Starodawne Prawa Polskiego Pomniki” vol. VI, pp. 11, 460, Hereinafter: *Decreta* or D. and in the introduction to *Puncta in iudiciis terrestribus et castrensibus observanda anno 1544 conscripta*, “Starodawne Prawa Polskiego Pomniki” vol. VII, fasc. 2, pp. 202–203 Hereinafter: *Puncta*.

16 O. Balzer, *Geneza Trybunału Koronnego*, Warszawa 1886, p. 327; O. Balzer, *Uwagi o prawie zwyczajowym i ustawicznym w Polsce*, in: *Studia nad prawem polskim*, Poznań 1889, pp. 96–97, 106–107, 110.

17 J. W. Bandtkie-Stężyński, *Prawo prywatne polskie*, Warszawa 1891, pp. V-VI.

18 A. Z. Helcel, *Dawne prawo prywatne polskie*, Kraków 1874, written 1849–1853, p. 21f. Working on his synthesis P. Dąbkowski found that among the works of his predecessors only Helcel’s “met the requirements of modern science to the greatest extent” P. Dąbkowski *Prawo prywatne polskie*, vol. I-II, Lvov 1910–1911, p. 68 I.

applied universally, as evidenced by numerous constitutions of the Sejm which were aimed against precedents. Helcel recognized precedents to have been no more than guidelines for judges who—according to somewhat self-contradictory observation of the author—were obligated to “judge similar cases consistently as they had earlier been judged.” W. Dutkiewicz was also inclined to agree that judicial rulings had not been sources of law.<sup>19</sup>

Later scholars spoke on various occasions either for or against the existence and applicability of precedents, though they attached varied degrees of importance to the latter. Authors who wrote on the subject include B. Gruzewski<sup>20</sup>, M. Goyski<sup>21</sup>, P. Dąbkowski<sup>22</sup>, J. Makarewicz<sup>23</sup>, S. Kutrzeba<sup>24</sup>, S. Estreicher<sup>25</sup>, J. Michalski<sup>26</sup>, S. Roman<sup>27</sup>, H. Grajewski<sup>28</sup>, W. Maisel<sup>29</sup>, and Z. Rymaszewski.<sup>30</sup> We need not summarize their observations at this point, especially given that they were often highly marginal. Recently, this Journal featured a paper devoted

19 W. Dutkiewicz, *Prawa cywilne jakie w Polsce od roku 1347 do wprowadzenia Kodeksu Napoleona obowiązywały*, Warszawa 1809, p. 14. Dutkiewicz expressed a similar view in other works as well, cf. J. Michalski, *Studia nad reformą sądownictwa i prawa sądowego w XVIII w.*, Part 1, Wrocław–Warszawa 1958, p. 29039.

20 B. Gruzewski, *Sądownictwo królewskie w pierwszej połowie rządów Zygmunta Starego*, “SHPP” vol. II, fasc. 4, Lvov 1906, pp. 77–78, 100–101.

21 M. Goyski, *Reformy trybunału koronnego*, “Przegląd Prawa i Administracji” 1909, XXX-IV, pp. 307–308, 664–665.

22 P. Dąbkowski, op.cit., p. 44.

23 J. Makarewicz, *Polskie prawo karne. Część ogólna*, Lvov—Warszawa 1019, pp. 12–14.

24 S. Kutrzeba, *Preface*, in: *Cautelae quaedam in iure terrestri tentae et observatae*, “Archivum Komisji Prawniczej”, vol. IX, pp. 200, 207–209; also in: *Historia źródeł*, vol. I, pp. 157–158, 268–270.

25 S. Estreicher, *Kultura prawnicza w Polsce XVI wieku*, in: *Kultura staropolska*, Kraków 1932, pp. 68, 79, 101,

26 J. Michalski, op.cit., pp. 83, 180, 200–210, 290–291,

27 S. Roman, op.cit., p. 100.

28 H. Grajewski, *Prawo zwyczajowe w Leges seu statuta ac privilegia Regni Poloniae omnia Jakuba Przyłuskiego*, “Zeszyty Naukowe Uniwersytetu Łódzkiego. Nauki Humanistyczno-Społeczne” 1967, series 1, vol. 82, pp. 122–123, 140, 144.

29 W. Maisel, *Trybunał Koronny w świetle laudów sejmikowych i konstytucji sejmowych*, “Czasopismo Prawno-Historyczne, 1982, XXXIV, vol. 2, pp. 91–92, 101.

30 Z. Rymaszewski, op.cit.; also in: *Sprawy gdańskie przed sądami zadwornymi oraz ingerencja królów w gdański wymiar sprawiedliwości XVI–XVIII w.*, Wrocław 1985, pp. 156–157.

ed to an unknown compilation of royal judgments from the sixteenth century, which added to our knowledge of precedents. I. Dwornicka and W. Uruszczak, the authors of that valuable contribution, stated that “the question whether adjudications of courts, in particular the rulings of higher courts of Polish law, were a source of law in Poland of the past centuries is a problem that science still needs to resolve.”<sup>31</sup> However, they claim elsewhere (in the conclusion) that “it would seem appropriate [...] to consider them [i.e. rulings of the royal courts – B.L.] one of the sources of law.”<sup>32</sup> Such observations only confirm that the matter deserves to be examined.

### **The Statute of Nieszawa of 1454 on Precedents. Its Reflection in the Compilations and Treatises of Historical Polish Jurists**

A number of researchers (J.W. Bandtkie, A.Z. Helcel, R. Hube, P. Dąbkowski, I. Dwornicka and W. Uruszczak) drew attention to the provision on precedents included in the Statute of Nieszawa. This is the only statutory regulation (besides the inoperative provision in the Correction of Laws of 1532)<sup>33</sup> which prescribes use of precedents as a source of law; therefore it deserves particular attention.

In the complex structure of the Statute of Nieszawa<sup>34</sup>, the article pertaining to precedents appears twice: in the Greater Polish Nieszawa edition (I) of November 12th, 1454,<sup>35</sup> and the standard version (II) contained in the alleged charter of Kazimierz Jagiellończyk issued in

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31 I. Dwornicka, W. Uruszczak, *Nieznaný zbiór wyroków sądów królewskich (Decreta regia) z lat 1517 - 1550 w rękopisie Biblioteki Jagiellońskiej*, “Czasopismo Prawno-Historyczne” 1988, XL, vol. 2, p. 183.

32 Ibidem, p. 193.

33 Cf. p. 5 below,

34 S. Roman, *Przywileje nieszawskie*, “SHPP” 1957, VII, vol. 2, Wrocław 1957, p. 213f.

35 Ibidem, p. 27–28. The entire text of that edition was published by B. Ulanowski, *Najdawniejszy układ systematyczny prawa polskiego z XV wieku*, AKP vol. V, pp. 61–69.

Nieszawa on November 23 1454<sup>36</sup>, but which in fact was drafted in 1496 as part of the confirmation of Jan Olbracht at the Sejm of Piotrków.<sup>37</sup>

Thus, according to our current knowledge on the charters of Nieszawa, the origins of the article on precedents should be sought in Greater Poland. R. Hube, having found it to be absent in the Lesser Polish editions, attributed it even to certain unique character traits of Greater Poles.<sup>38</sup>

The content of the article is cited after the standard version (II) of 1496<sup>39</sup>, as this very redaction (the aforesaid first version differed little from the second)<sup>40</sup> was incorporated into Łaski's edition that Polish legal writers relied on later, as well as reprinted in *Volumina Legum*.<sup>41</sup> The article reads as follows:

De libro iudiciorum

Item statuimus, quod pro iudiciis iuste expediendis et negotiis in iudicium deductis scribendis ideliter, fiat unus liber iudiciorum seu actorum in qualibet districtu. Et dum in aliqua causa in iudicium deducta super aliquo articulo causa in iudicium deducta super aliquo articulo audita propositione et responsione, fuerit in iudicio sentenciatum, quod ilia sententia in librum actorum inscribatur, ut postea super eodem articulo vel ei simili, similis sententia proferatur.

36 On that charter see remarks by S. Roman, op.cit., pp. 55–60; ibidem, the entire discussion concerning the so-called universal charter.

37 Ibidem, pp. 28 and 56–60.

38 R. Hube, *Statuta nieszawskie z 1454 roku*, Warszawa 1875, p. 48: “In any case, the predilection of Greater Poles for a formal, strictly determined order and the abhorrence of indeterminacy is most vividly manifested in the demand they have advanced and which they continually support, namely to adhere to written laws and to grant binding force to precedents.” V. also ibidem pp. 44, 46.

39 J. Łaski, *Commune incliti Poloniae regni privilegium*, p. 93v. Łaski used the text of the original, cf. S. Roman, *Przywileje nieszawskie*, p. 28.

40 The only difference is that version I reads *sit unus liber*, whereas in version II this is *fiat unus liber*. However, sections *De dissimili sententia cause equalis* (I), *De libro iudiciorum* (II) are indeed distinct.

41 *Volumina Legum*, I, p. 115, f. 250. Hereinafter: VL. I quote *Volumina* following the Petersburg edition by Ohryzko, additionally providing pages of the Piarist edition.

The text is lucid and does not arouse any particular doubt. According to the provision, each district should have one—one could say special<sup>42</sup>—court ledger in which the ruling should have been entered after a case had been adjudicated, so that in an identical or similar case the same (literally: similar – *similis*) decision would be made. The article thus provides with respect to two issues: 1) the establishment of a ledger, 2) formulation of a judgment based on earlier rulings. The latter clearly seeks to recognize precedent as a basis for adjudication: in the same case (*super eodem articulo*) one should deliver a similar (which, considering the intention of the legislator, is likely to mean “the same”)<sup>43</sup> judgment. What is more, it goes even further as it provides for the use of ruling in similar cases (*vel ei similibi*), aiming for admission of the principle of analogy.

The practical application of precedents, initially provided for only in the Greater Polish charter (I) was to take place—as followed from the article—already at district level, i.e. in land (*ziemski*) or municipal (*grodzki*) court. Thanks to the universal charter of 1496 (II) it came into effect nationally, meaning that the courts throughout Poland were to comply with the rule. This should be reflected in the sources relating to those courts, but no such evidence can be found.<sup>44</sup> What is more, the injunction to establish a ledger in which rulings would be entered should also be manifested in the structure of court books after 1454. However, court books show no traces of a separate ledger for which the Statute of Nieszawa provided.<sup>45</sup> One may therefore suspect that the

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42 Most likely, this is how the provision was understood by J. W. Bandtkie and P. Dąbkowski.

43 Obviously, such an interpretation may give rise to objections: in the literal sense, *similis sententia* merely means similar rather than the same ruling. However, it was probably the intention of the legislator—evinced in the directive to record judgments separately—to have identical rulings in the same cases. At any rate, the principles of modern interpretation should not be applied to medieval texts.

44 Cf. I. Bielecka, *Inwentarze ksiąg archiwów grodzkich i ziemskich wielkopolskich XIV-XVIII wieku*, Poznań 1965, pp. 9–10.

45 Ibidem, *passim*, does not observe any changes in the court books in the wake of the Statute of Nieszawa. Books such as *Decreta* began to function as separate ledgers in the courts of Greater Poland much later (e.g. as of 1592 in the land courts of Poznań. Ibidem,



1454 article concerning precedents remained a dead letter, were it not for the fact that it is very tangible in the later compilations of land law and works focusing on that law.

The first to interpret the Nieszawa article was Jan Łaski, who in a note on the margin of the text wrote: *Sententie inscribantur libris iudiciorum, ut in futurum pari modo casus similes iudicentur*.<sup>46</sup> In a chronological sense, Łaski was closest to the provision; admittedly, it had been formulated in 1454 but it became universally applicable (throughout the Crown lands) only after 1496. His opinion is thus extremely valuable, not to mention that it is quite unequivocal: judgments are to be entered into court ledgers so that in the future similar cases may be judged in the same manner (*pari modo*).<sup>47</sup>

Relatively soon, a provision recognizing precedent as a source of law found its way into the grand project of the ultimately rejected Correction of Laws of 1532, but it stipulated that precedent applies only where there is no pertinent provision in the statutes, C. 2, *in fine*: *Nisi casus novus in iudiciis emergerit, qui in statutis non esset expressus, talis enim aliorum statutorum et sententiarum authenticarum similitudine* [emphasis added] *erit iudicandus*.<sup>48</sup> It may be conjectured that the regulation was inspired by the substance of the Nieszawa article<sup>49</sup> but

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pp. 418, 422), and therefore in a manner unrelated to the Nieszawa article. Kraków ledgers of that type were created in 1525 (land courts) and 1562 (municipal courts), which again shows no association with the Statute of Nieszawa (on the introduction of separate ledgers. Cf. S. Kutrzeba, *Katalog krajowego archiwum aktów grodzkich i ziemskich w Krakowie*, with copies from: *Teka grona konserwatorów z Galicji Zachodniej*, vol. III, Kraków 1907, pp. 15, 35, 138.

46 J. Łaski, op.cit.

47 Naturally, the expression *pari modo* is assumed to refer to identity in the material sense (identity of the ruling) as opposed to the identity of the lawsuit. If the latter had been meant, the citing of the judgment would not have sufficed.

48 *Correctura statutorum et consuetudinum Regni Poloniae...*, ed. M. Bobrzyński, "Starodawne Prawa Polskiego Pomniki", Kraków 1874, p. 10. Cf. remarks by W. Uruszczak, *Próba kodyfikacji prawa polskiego w pierwszej połowie XVI wieku*, Warszawa 1979, pp. 220, 222. also idem, W. Uruszczak, *Korektura praw z 1592 roku. Studium historycznoprawne*, vol. I, Warszawa–Kraków 1990, p. 62.

49 In his notes to C. 12 of the Correction, M. Bobrzyński does not mention Art. 15 of the Nieszawa charter as a source.

the limitation of scope to *casus novi* set it apart from the latter, which did not contain such a stipulation.

Jakub Przyłuski cited the text after Łaski, and remarked on the note which Łaski added on the margin. As for the Nieszawa article, he focused solely on the second directive, omitting the fragment concerning the establishment of a ledger of rulings in each district.<sup>50</sup> More importantly, however, Przyłuski provided the section containing the Nieszawa article with a brief yet significant commentary: *Uno iure, unis etiam consuetudinibus ac similibus praeiudicatis* [emphasis added] *omnes terrae totius Regni iudicentur*.<sup>51</sup> Thus Przyłuski mentions three principal sources of law: statutes<sup>52</sup>, custom, and precedent (in similar cases). The description could not have been at odds with the realities at the time, because one can hardly imagine such an experienced jurist as Przyłuski—who envisioned his work to be a compilation that would become binding<sup>53</sup>—con-fabulated and falsely asserted the fundamental principles of the validity of law.

Jan Sierakowski, Przyłuski's contemporary, states in his *Układ* (Art. 7) that: *Novus casus non expressus in statutis regni similitudine aliarum sententiarum autenticarum in simili promulgatorum iudicandus est. Casim. in Niesh*.<sup>54</sup> Sierakowski thus ascribed the Nieszawa article a sense it clearly had not had (limitation of precedents to *casus novi*), although it coincided with the aforementioned provision in the unenacted Correction of Law and—perhaps—with the customary law at the time.

We do not learn anything special from the work by J. Herburt. In the Latin abecedary, the excerpt from the Nieszawa article (from *Et dum* — —) was included in the entry for *Decretum*, under the title

50 J. Przyłuski, *Leges seu statuta ac privilegia Regni Poloniae omnia*, Kraków 1553, p. 589.

51 Ibidem, p. 588.

52 Przyłuski understood *ius* to mean *leges, constitutiones*, just as S. Sarnicki, cf. note 57.

53 C. H. Grajewski, op.cit., pp. 117–118.

54 *Jana Sierakowskiego Układ systematyczny prawa polskiego z r. 1554*, ed. B. Ulanowski, AKP, p. 105, Art. 7 Sierakowski refers once again to the Nieszawa article in Art. 94 p. 114: *Sententiae per iudicem latae debent in librum actorum inscribí, ut postea in simili articulo similis sententia proferatur*.

*Similia simili decreto decernentur*.<sup>55</sup> J. Łączyński did not mention the Nieszawa article at all, yet he observed that when grounds for judgment are lacking in the written Crown law, one should adjudge: — — *pursuant to the custom that is in concord with justice, which from the decrees of the first kings should be taken*.<sup>56</sup> The works of Stanisław Sarnicki and Tomasz Drezner offer more in this respect.

Sarnicki quotes the Nieszawa article in Polish: “An when in such a case that is brought before the court the matter is judged there having heard the complaint and the response, that sentence shall be entered into a book of records, so that later such a matter or one that is similar may receive a similar judgment.”<sup>57</sup> However, what Sarnicki observes elsewhere is the most important. Further on in his work, the author returns to the Nieszawa article in the section entitled *Decreta in simili sequi iudices debent*, writing that: *Casimiri statutum in Nieszowa mandat decreta, quae feruntur, in unum librum conscribere, ut postea in simili super eodem articulo decernantur. Verum enim vero consentire debet*. He then offers the following piece of advice: *The wise judge needs to be indulged so that through him all is duly satisfied: the law<sup>58</sup>, consuetudinibus, decretis in simili. Yet the sacred justice should be satisfied first and foremost*.<sup>59</sup> Sarnicki thus recommends that judges treat statutes, custom and precedent equally, but emphasized that—as a fundamental element of judgment—justice (*aequitas*) takes first place.<sup>60</sup> To Sarnicki, precedents (*decreta in simili*) are therefore one of the essential sources

55 J. Herburt, *Statuta Regni Poloniae in ordinem alphabeti digesta*, Kraków 1503, p. 72.

56 Z. Kolankowski, *Zapomniany prawnik XVI wieku – Jan Łączyński i jego “Kompendium sądów Króla Jegomości”*, Toruń 1960, p. 103.

57 S. Sarnicki, *Statuta i metryka przywilejów koronnych*, Kraków 1594, p. 790. Further on, on p. 974, Sarnicki adds: *There should be separate books to enter the judicial sentence*—invoking the Nieszawa article. Sarnicki was therefore of the opinion that the Nieszawa article provided for special ledgers to record judgments, as already noted above.

58 For Sarnicki this meant *leges, constitutiones*.

59 *Ibidem*, p. 1293.

60 Sarnicki was very sensitive about adherence to the principle of justice (or equity, one might guess) and often returned to the issue in his work: pp. 783–789. *Aequitas. As the judges rule, they should first take heed of justice*. Cf. also p. 1287 where he criticizes the fact that judges pay more attention to the letter of the law than to justice, pp. 1291, 1292.

of law, just as they were for Przyłuski. What is more, by offering judges advice, he situates them in the domain of practice, as something that is actually employed.

Drezner approaches the issue in a similar way in his *Institutiones*, stating that one of the sources of law in Poland—other than *constitutiones*—was the judges' consistency (*constantia*) of adjudication in judicial matters. This used to be called “similar rulings” which were subsequently applied in similar cases.<sup>61</sup> In another one of his works, Drezner also states that precedents (*decreta in similibus causis*) were considered law, meaning that in the same cases their legal force was on a par with statutes.<sup>62</sup>

The awareness of the applicability of precedents survived among legal writers until the end of the Commonwealth. Andrzej Lisiecki, author of a 1638 work on the Crown Tribunal, referred to the knowledge and use of law among its deputies, stating: *And where there are praeiudicata, those must not be ignored, for this law clearly provides* — — (here Lisiecki cites the Nieszawa article).<sup>63</sup> Stanisław Ochocki, a seventeenth-century jurist whom our scholarly literature unfairly fails to appreciate<sup>64</sup>, wrote that *similia simili decreto seu praeiudicato decernantur*.<sup>65</sup> In the eighteenth century, Michał Słoński asserted the same, invoking the Nieszawa article<sup>66</sup>, and adding elsewhere that under that statute a special

61 T. Drezner, *Institutiones...*, pp. 10–11: *Sunt etiam nonnulli iuris constituendi modi apud Polonos, nempe magistratus qui iurisdictioni praesunt, constantia de rebus iudicata; quae similia decreta appellantur et ad similes postea causas trahuntur*. Cf. K. Bukowska, op.cit., pp. 103–104.

62 T. Drezner, *Processus iudiciarius Regni Poloniae*, in: *Proces sądowy ziemskiego prawa koronnego*, ed. G. Czaradzki, Warszawa 1640, p. D2: *De re iudicata: Appendix. Decreta in similibus caussis alegata pro legibus habentur, ubi est rerum iudicatarum constantia*. Drezner also mentions precedents in *Similium iuris Poloni cum iure Romano centuria una*, Paris 1602, p. 39, erroneously ascribing the Nieszawa article to Kazimierz Wielki, which was not corrected by K. Bukowska, op.cit.

63 A. Lisiecki, *Trybunał Główny Koronny siedmią splendorów oświecony*, Kraków 1638. Cf. J. Makarewicz, *Polskie prawo karne*, Lvov—Warszawa 1910, p. 13.

64 S. Kutrzeba, *Historia źródeł...*, vol. I, p. 281; Kutrzeba assumed Łochowski to have been an eighteenth-century author, and found the latter's *Regulae iuris* to be a work of minor value.

65 S. Łochowski, *Regulae iuris et loci communes forenses...*, Kraków 1644, p. 110.

66 M. Słoński, *Accessoria, statut i konstytucje*, Lvov 1765, p. 38.

ledger should exist in which rulings could be recorded.<sup>67</sup> In his renowned treaty, Teodor Ostrowski complained of the absence of a book of Polish laws (*a civil law of the crown provinces thus far separately enacted we do not possess — —*), and noted that — — *its knowledge* [i.e. of the law – B.L.] *must be gained by great labour from massive volumes, and even from precedents* [emphasis added] *and customs.*<sup>68</sup> A little further on, describing the shortcomings of the then civil law (the law applied at courts, in other words), the author observed as follows: “in the afore-said and in similar deficiencies of our law the statute of 1454 provides that one should be guided by *praeiudicatis vel similibus decretis*. In our country, they constitute the law of custom whose authority was sacred in all civil societies.”<sup>69</sup>

The works and the compendia written by historical Polish jurists do not yield much information about precedents. This is not surprising, because early Polish jurisprudence of land law was exceedingly meagre and suffered from lack of reflection on almost every issue. With few exceptions, this was a pursuit resembling collectorship (compendiarism) rather than science. Even so, one does obtain some information. Almost all of the jurists cited here (Łaski, Przyłuski, Sierakowski, Herbert, Sarnicki, Drezner, Lisiecki, Łochowski, Słoński, Ostrowski) either referred to the Nieszawa article or relied on it, subscribing to the view that in land law the principle of precedent could be applied when making a judgment, in other words that a previous ruling offered grounds for another judicial decision in an identical or similar case. Even codifiers (Correction of Laws) adopted a similar approach.

Some authors went as far as to state that precedents were a fundamental source (besides custom and statutes) of land law (Przyłuski, Sarnicki, Drezner, and to some extent Ostrowski). It was also stressed that precedents are to be created for *casus novi*, thus rectifying legal gaps

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67 Ibidem p. 73.

68 T. Ostrowski, *Prawo cywilne narodu polskiego*, 2nd edition, vol. I, Warszawa 1787, pp. 8–9.

69 Ibidem, p. 13.

(for which the Nieszawa article did not provide). Such a view was expressed by the codifiers of 1532, Sierakowski, as well as Ostrowski. Few authors (Łączyński, Ostrowski) classified precedents among the sources of customary law, an opinion which might seem debatable today<sup>70</sup>, but which does not bear significantly on these deliberations. Most importantly, however, the writings of past jurists decidedly corroborate the existence and application of precedents in Polish land law. They also attest to the operation of precedents in yet another way, which will be discussed later on (see V, VIII below).

### **Precedents in Constitutiones et Iura Terrae Lanciencis**

According to the Nieszawa article, special books for judicial rulings were to be kept in each district. Thus in the mid-fifteenth century it was presumed that even the judgments of the lowest-level nobles' courts could become precedents that would be applicable later. Still, court books show no evidence of such practice. At any rate, there are no mentions of such a mode of adjudication, where the judge invoked an earlier ruling in a similar case.<sup>71</sup> It was not uncommon that the bench did not know how to resolve a case and resorted to *ad interrogandum* (i.e. solicited a solution with higher-ranking land officials) yet no information can be found that they ever fell back on a previously passed judgment. If so, were there any grounds for the Nieszawa article and was it associated with an existing (or perhaps only postulated) practice, whereby a verdict could become a law?

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<sup>70</sup> It is much the same problem as the question of whether English common law should be considered customary law, which one could hardly agree with given that law deriving from precedents developed in an altogether different way than customary or enacted law. On that subject cf. M. Sczaniecki, *Powszechna historia państwa i prawa*, Warszawa 1973, pp. 217–218.

<sup>71</sup> This applies to court records prior to 1454 and later ones. V. the selection of records by Helcel titled *Starodawne Prawa Polskiego Pomniki* and the collection of records in AGZ.

Although court books cannot corroborate the practice, the question should be answered in the affirmative, meaning that land (or municipal) courts did shape law through their decisions even prior to the Nieszawa charter. Here, one cannot rely on the so-called precedents in the statutes of Kazimierz Wielki, as all indications seem to suggest that they had nothing to do with actual rulings and represent fabricated cases.<sup>72</sup> However, the significance of precedents is validated by the provisions of *Constitutiones et tura terrae Lanciciensis*, a compilation from the first half of the fifteenth century.<sup>73</sup>

Already R. Hube, in a paper delivered at Biblioteka Warszawska (1853, I), found that *Constitutiones* consist largely of precedents.<sup>74</sup> The matter was investigated in greater detail by S. Kutrzeba. Nevertheless, his disquisitions on the subject lack clarity at times and do contain occasional errors. At one point, Kutrzeba stated that *Constitutiones* contain four precedents, namely Art. 18, 23, 29, and 30<sup>75</sup>, whereas later he argues that there are only three: Art. 18, 23, 39<sup>76</sup>. In fact, five articles in that compilation are based on judicial rulings<sup>77</sup>, which for the purposes of this text will be designated with numbers according to the edition of the manuscript Ptrb. III published by R. Ulanowski<sup>78</sup>. The numbering of respective articles is as follows: 16(18), 21(23), 27(29), 28(30),

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72 Cf. p. 2. Admittedly, some researchers believed that precedents in the statutes originated from judicial practice, but they were unable to prove it reliably. Sufficient arguments against judicial provenance of the precedents in the statutes were advanced by A. Winiaż, *Prejudykaty w Statutach Kazimierza Wielkiego*, "Kwartalnik Historyczny" 1895, IX, pp. 195–206; S. Roman, *Geneza statutów...*, pp. 98–107.

73 S. Kutrzeba, *Historia źródeł...*, vol. I, op. Cit., pp. 102–103, 268–270.

74 R. Hube, *Przyczynek...*, op.cit., p. 277. Hube also states there that the later (1505) *Consuetudines terrae Cracoviensis* were based on precedents, but there is no evidence to support this, cf. S. Roman, *Geneza statutów...*, p. 100/115.

75 S. Kutrzeba, *Introduction to Cautelae...*, p. 200.

76 S. Kutrzeba, *Historia źródeł*, vol. I, pp. 268–269.

77 Five precedents were also identified by S. Roman, *Geneza statutów*, p.100, notes 114 and 115.

78 AKP IV, p. 435 - 492 (in the notes, Ulanowski provided modified versions of the text according to Sier. IV). The volume also includes the compilation of Łęczycza from another manuscript (Jag. II) where the articles are designated with different numbers (pp. 619–628).

41(42).<sup>79</sup> As it appears, Kutrzeba was closer to the truth in the first, earlier assertion, than in what he stated later, where in addition article (39) was erroneously classified as a precedent.

A more detailed analysis of the above five articles may shed some light on how precedents were formulated and employed.

Art. 16(18): *Domina — — Drogochna de Birzwyenna nomine sui kmethonis acquisiva in Iacussio de Slupcza pro medietate genitalium quinque marcas, sicut pro medio homine.*<sup>80</sup> By repeating the ruling of the court, the article demonstrates convincingly that an adjudication had set a precedent which was subsequently adopted in a compilation of customary law. It must have been included there because it was in effect in practice, while the compilation was to ensure that it remained in force in the future. Let us add that in Art. 16 (and very likely in the articles quoted below) there are no fictitious elements: the parties to the action actually lived and were involved in a suit towards the end of the sixteenth century (which means that the verdict was delivered at that time), therefore the judicial ruling originates from a proceeding which did in fact take place.<sup>81</sup>

Perhaps the precedent gave rise to doubt or required subjective and objective extension, because the following article, 17 (19), essentially a continuation of the previous one, states that

*Statutum est igitur per omnes dominos in colloquio generali, quando aliquis alteri abscidit testiculos, alias mąda, sicut pro capite iudicamus, seu ipsa genitalia extrahet qualiscunque violenter, solvat cum pena septuaginta et actori quinquaginta.*<sup>82</sup>

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<sup>79</sup> Given that Kutrzeba referred to the articles of the Łęczyca compilation following the numbering in J. W. Bandtkie, *Ius Polonicum*, Warszawa 1831, pp. 194–200, the convention he used is provided here in parentheses. S. Kutrzeba, *Historia źródeł...*, I, p. 270, reports that Bandtkie relied on the text in the manuscript Sier. IV, but the numbering deviates from the published version of Sier. IV. Cf. AKP II, p. XXXVII and AKP IV, pp. 433–452. and the synoptic table by A. Kłodziński, Tab. VIII. Cf. also AKP II, p. LXXI. How then did Bandtkie arrive at such a different numbering?

<sup>80</sup> AKP, IV, p. 438.

<sup>81</sup> As demonstrated by S. Kutrzeba, who studied the court books of Łęczyca published by A. Pawiński.

<sup>82</sup> AKP, IV, p. 438.



Thus the dignitaries at the colloquium (or in a court of that nature) confirmed the precedent of “Drogochna vs Jakusz” but was that the point? The ruling of the precedent (i.e. that the removal of the genitals of a peasant entails a fine in the amount of wergeld) was clearly made more general, because without doubt the resolution of the dignitaries pertained to the nobility, and furthermore provided for additional public (*spetuaginta*) and private (*actori quinquaginta*) penalties in the event of a violent or rather intentional (*violenter!*) criminal act. Hence the colloquial decision—which might be conjectured in view of the two articles being connected—does not mean that precedents had to be endorsed by land authority; it only proves that in a specific case judicial precedent inspired a norm with a wider scope of application.

2) Art. 21(23): *Citavit Malsky fratres pro porcione hereditatis post mortem fratris ipsorum in Lythwania sine prole mortui, quem evaserunt prescripcione unius anni et sex septimanis, ideo pro bonis derelictis pusczina servatur prescripcio unius anni cum sex septimanis; et hoc intelligas de illis hominibus, qui simul trahunt in una terra.*<sup>83</sup> Here, one first quoted the ruling in the case of the Malksi brothers concerning the prescription of claims to succession after persons who died without issue, which certainly functioned as a precedent (otherwise it would not have been taken into consideration); subsequently, a general rule was derived which for editorial reasons of was better suited to a compilation of laws.

3) Art. 27(29): beginning with: *De prescripcione nota, Slavantha conquestus est contra Raphaelem de B. — —*, and ending with: *diudicatum existit: ex quo litteras non habuit super caucione fideiussoria, ob prescripcionem annorum trium causam huiusmodi amisisse.*<sup>84</sup> Here, only the content of the ruling in a particular dispute is provided; having been included in the compilation it became one of its provisions (namely: an undocumented guaranty for a woman receiving dowry that she would not make any claims against the family estate was effective only for three years).

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<sup>83</sup> Ibidem, p. 439.

<sup>84</sup> Ibidem, p. 441.

4) Art. 28(30) *Statutum est, quod omnis spoliatus de quacunquere sive hereditaria sive alia quacunqua ipse spoliatus fuerit, in possessionem idem spoliatus debet restitui vel tenetur ad possessionem ante omnia, et postea agat, qui vult, contra ipsum possessorem.* This apparently statutory provision (*statutum est*) pertaining to restoration of ownership had in fact been based on a precedent: *Et hoc contingit Dorothee relicte de R. contra suam socram Stachnam* — — (followed by the description of the case).<sup>85</sup>

5) Art. 41(42) is structured similarly to Art. 28: first, the provision is stated using abstract wording, only to observe that such had been the verdict in a particular lawsuit: *Quando frater germanus sorori vendit hereditatem, et postea alter frater conclenodialis illam hereditatem vellet aquirere, dicendo: ego sum proximor quam soror habens maritum de clenodio alio, iudicatum exstitit, quod talis sorrar est proximior; et hoc fuit inter Katherinam Hunslay et Otham de D., et multi domini iudicaverunt causam istam.* The latter passage (*multi domini*) seems to underscore that it was no ordinary ruling in a suit where proximity to estate was argued, but a judgment of more momentous significance.<sup>86</sup>

The unknown author (or perhaps authors) of the compilation entitled *Constitutiones et iura terrae Lanciensis* took a twofold advantage of judicial rulings: either they incorporated the content of the ruling in the compilation, thus making it a binding regulation (Art. 16, 27) or drew on the judgment but used it to formulate a general principle, a provision of abstract nature (Art. 21, 28, 41).<sup>87</sup>

The above articles of the compilation of Łęczyca are proof that certain decisions of the courts were particularly well remembered. Those may have been judgments which created something new, a novel *ius*. They were remembered (and most likely recorded in writing) while stating the parties involved and providing description of the case, as verdicts

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85 Ibidem.

86 Ibidem, p. 444.

87 Cf. S. Roman, *Geneza statutów...*, p. 100, notes 114, 115.

that were to be relied on in judicial practice and as rulings which became the basis for more refined legal provisions befitting a compilation.

Consequently, judgments of land courts had law-making significance even before the Nieszawa article was issued. The latter only confirmed the existing state of affairs and sought to safeguard it by statutory means. Still, the judgments of the various local land and municipals courts did not become precedents that had a major impact on the shape of law. Royal courts (during the sejm or *in curia*) as well as the later Crown Tribunal played a much greater role in this respect.

### **The Creation of Precedents in the Royal Courts In Curia and In Conventu**

When M. Bobrzyński published the judgments of the royal court and demanded that conclusive judicial rulings be delivered, he primarily meant those “which possessed the authority of precedents for all other courts, that is judgments of the royal court delivered *in curia* or at the Sejm, as well as the judgments of the tribunal.”<sup>88</sup> Bobrzyński had therefore no hesitation in attributing the power of precedent to the rulings of the royal courts and the Tribunal. P. Dąbkowski did likewise later on, stating that the decisions of the royal Sejm courts in the first place gained the authority of precedent.<sup>89</sup> Similarly, S. Kutrzeba argued that the verdicts of royal courts, in particular its Sejm sessions, had the power of precedent.<sup>90</sup>

The above authors were thoroughly conversant with the sources of Polish law, while two jurists worked on precedents directly: M. Bobrzyński edited and published a compilation of royal judgments,

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<sup>88</sup> M. Bobrzyński, *Introduction to Decreta...*, op.cit., p. 11.

<sup>89</sup> P. Dąbkowski, *Prawo prywatne...*, I, op.cit., p. 44.

<sup>90</sup> S. Kutrzeba, *Historia źródeł...*, I, op.cit., p. 157 “Among judgments those of the royal courts were the most important, the superior of which were those pronounced at the Sejm, given that the king was a source of law. Hence such rulings had the nature of precedents.”

which he provided with an entry for ‘*praeiudicata*’ in the index<sup>91</sup>, whereas S. Kutrzeba studied legal norms which had their origins in the judicial rulings contained in *Constitutiones (Lancicienses)* and *Cautelae*.<sup>92</sup> However, both writers—not to mention Dąbkowski—failed to provide any conclusive source evidence to support their assertions. Only S. Kutrzeba founded his reasoning on the premise that royal judgments had the power of precedents because the king was a source of law.<sup>93</sup> The authors thus formulated their observations based on the general impression gained from the knowledge of sources rather than on specific evidence.

On the other hand, finding incontrovertible proof that judgments delivered by the royal courts had the power of precedents is extremely difficult. We do not know any provision which would affirm the precedential force and significance of the royal court rulings. It is possible that no such provision had ever existed, which means that the matter is likely to have been governed by custom. In a project of judicial procedure from 1611, J. Swoszowski concluded that the jurisdiction of royal courts was based primarily on custom, examples and the authority of the rulings.<sup>94</sup> The “examples” and “authority of the decrees” are probably the elements we are looking for, since they relate to precedents. However, these are only conjectures, therefore other sources have to be drawn upon.

A certain amount of material—which is decisive in my opinion—may be found in *Decreta*, published by Bobrzyński, and the aforementioned index with which they are supplied. Several acts contained in the volume were also determined by B. Gruzewski to have been sources attesting to the creation of precedents.<sup>95</sup> For various reasons, the infor-

91 M. Bobrzyński, *Decreta*..., op.cit., p. 460.

92 S. Kutrzeba, *Cautelae*..., op.cit., pp. 200, 207–209.

93 Cf. footnote 89 above.

94 VL III, p. 35, f. 67: *The first jurisdiction of ours is the royal one at the sejm or in curia. 3. Great though it is and governed by various statutes and constitutions, its judgments take greater heed of the custom, the example and the authority of the decrees.*

95 B. Gruzewski, *Sądownictwo*..., op.cit., p. 788.

mation cited by both authors cannot be accepted without reservations<sup>96</sup>, but it offers valuable hints nonetheless. It would therefore be worthwhile to examine the volume edited by Bobrzyński from this standpoint.

There was a practice in the royal courts that the monarch suspended the proceedings in the assessorial court or referred it from that court to the Sejm court where, aided by advisors, he would arrive at a decision of a broader significance, because it would have the force of statute in the future.

(D. 81 – 1515 – p. 83) – J. I. sues J. B, as according to the plaintiff the latter unfairly brought action against the former before the ecclesiastical court alleging usury. The king with his assessors (*consiliarii*), probably unable to settle the case straight away, suspends it — — *ad conventionem generalem proximam* — —. *Et quicquid Maiestas regia cum consiliariis in eadem conventione laudaverit seu adinvenit in eadem causa, hoc pro statuto* [emphasis added] *perpetuo firmiter tenere debent*. If the two final words referred only to the parties to the action (as is argued by B. Gruzewski, who in a sense deprives the decision of a more general import)<sup>97</sup>, then one can hardly understand why efforts were made to establish a norm with the virtue of perpetual statute solely for the benefit of the parties. The intention therefore was to formulate a provision which in the future would be binding for others as well.

(D. 244 — 1523 — p. 227) — J. B. accuses K. G., land clerk of Chełm, that the latter made an erroneous entry concerning the adjournment of a court-decreed period, as a result of which J.B. incurred losses. J. B. solicits mainly—it would seem—a *restitutio in integrum*. *Et sacra Maiestas regia, volens ne quisquam circa iudicia in suis causis opprimere et etiam cupiens, ut quilibet suam causam custodiret, et attendens hoc negotium non fore parvi momenti, volensque desuper statutum condere* [emphasis added] *qualiter postea tales actiones et negotia iudicari*

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96 B. Gruzewski took only one of the precedents in the index into account, but at the same time cited another two which Bobrzyński did not include in the index. D. 244

97 B. Gruzewski, op.cit.

*et conservari in toto regno habebunt, hanc causam ad conventionem generalem — — remisit — —* (and appointed a date of hearing for the parties). There can be no doubt here that the king anticipated, through the issuance of the proper ruling in the Sejm court, the establishment of a universally binding norm (in land law) in the future.

The referral of ongoing proceedings from *curia* to *conventio*, as it was briefly and somewhat inaccurately recorded in those acts, did not of course mean that the cases were debated at the Sejm but that they were heard by the Sejm court.<sup>98</sup> After all, the king resolved the matter *cum consiliaris* (with the senators) as opposed to *cum conventu*. In any case the question was elucidated sufficiently by B. Grużewski.<sup>99</sup>

The decisive factor for the resolution of a dispute and the substance of the judgment—both in the courts *in curia* and *in conventu*—was the person of the king (at least during the reign of Zygmunt Stary).<sup>100</sup> Still, why did the king not content himself with delivering a fitting judgment in the assessorial court (*in curia*)? One can justifiably presume, as B. Grużewski did, that the cases referred to the Sejm court were chiefly new ones (*casus novi*) which thus far had not been regulated by law.<sup>101</sup> In such circumstances, law-making (*statutum condere*) through judicial ruling was safer for the king in view of the authority of the Sejm court and less blatant when viewed from the standpoint of the *nihil novi* principle. A later constitution (from 1607) quite clearly affirmed the exclusive competence of the Sejm court with respect to *casus novi*, stating that *nova emergentia shall however be decided at the Sejm*.<sup>102</sup>

98 In this case, the phrase *ad conventionem* meant “for the duration of the Sejm” on that subject cf. W. Uruszczak, *Sejm walny koronny w latach 1506–1540*, 1981 “SHPP” XVI, p. 141.

99 B. Grużewski, *op.cit.*, p. 798.

100 *Ibidem*, pp. 78–79. Regarding the decline of the position of the monarch in the Sejm court during the reign of subsequent kings cf. remarks by Bobrzyński in the *Introduction to Deregata*, p. 141.

101 B. Grużewski, *op.cit.*, pp. 77–78.

102 VL II, p. 439, f. 1609. Cf. Z. Szczańska, *Sąd sejmowy w Polsce od końca XVI do końca XVIII wieku*, “Czasopismo Prawo-Historyczne” 1968, XX, fasc. II, p. 104 and W. Uruszczak, *Sejm walny...*, p. 142.

The information which the above sources provide concerns only the king's intention to establish a new law by way of a judicial ruling. We do not learn anything about the content of the expected precedents though we do have an idea of what that content pertained to in general. However, *Decreta* also offer sources from which one finds out about precedents already created.

Occasionally, the king created precedents concomitantly, as it were, to an ongoing proceeding.

(D. 385 — 1527 — p. 348) — acting as an appellate instance, the king confirmed the judgment of the assessorial court *in curia* and — — *preterea* — — *dignata est* [i.e. *Maiestas* – B.L.] *decemere: si et in quantum pars aliqua appellationem suam coram Maiestate sua infra spatium trium dierum attentare noluerit seu tardaverit, iam ipsa sententia, a qua appellaverit, transit in rem iudicatam*. Admittedly, the excerpt does not state that the king established a new law, but there is no doubt<sup>103</sup> that a new precedent-like norm emerged, at least in the sense that it was incorporated into the royal adjudication. The norm imposed a limitation of three days for appeals from the judgment of the assessorial court (*in curia*) to the king.

At times, precedent developed in a manner of ordinance: it was not associated with a particular case but rather with an issue which recurred repeatedly in numerous cases. Consequently, the court, acting upon special instruction from the king (*ex informatione et interrogatione sacrae Maiestatis regiae*), who had been solicited for advice, formulated a suitable decision in the nature of a precedent.

(D. — 1527 — p. 340) – The act, relating to enforcement of court rulings, does not mention the names of the parties to litigation, nevertheless — — *iudicium regium assesorium ad informationem Maiestatis regiae decrevit* — —, it states when the earlier provisions on enforcement should be applied and when the new ones (most likely specified in *Formula processus* of 1523) should take effect.

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103 Both Bobrzyński and Gruzewski failed to take note of that ruling.

Naturally, the creation of a precedent was most often associated with the substance of an individual, particular case heard before the royal court.

(D. 458 — 1530 — p. 407) — Andrzej Lipski accused Jan of Ocieszyn, land clerk of Kraków, that the latter refused to issue a copy of the document relating to the division of an estate without a special, additional fee. The clerk responded that certain irregular entries into the registers were involved, i.e. other than provided for in the applicable formularies (most likely in *Formula processus*). (*Maiestas*) — — *decernere dignata est, prout praesentibus decernit, quod quicumque* [emphasis added] *voluerit alio modo et forma inscriptiones facere, vel inductiones earundem tam in acta regalia quam etiam terrestria Cracoviensia a notario inscribi et induci optare preter eum modum et formam, quae in statuto est descripta, extunc — — quantitas salarii percipiendi in arbitrio ipsius notarii dependebit, vel prout tales personae cum dicto notario conductamen facere potuerint*. Here, we find a precedent (to which *quicumque* attests)<sup>104</sup>, which is to apply in identical cases in the future.

(D. 470 — 1530 — p. 415) — In a contention between brothers Paweł and Mikołaj K., and Adam Cz., the question of whether a court-decreed deadline was correctly adjourned proved crucial for the dispute. The king decided that — — *suspensio et prorogatio termini per suam Maiestatem absque consensu partium nulla est, nec fieri potuit* — —. The ruling does not bear any distinct traits of a precedent, yet it is formulated in such general terms that it most likely functioned as one.<sup>105</sup>

(D. 478 — 1530 — p. 419) — Jan of Ocieszyn, land clerk of Kraków, sues Stanisław L. for alleging unjustly that the clerk entered into the register a non-existent pledge on the estate of Stanisław L. to

104 A precedent with identical content is quoted by T. Zawacki, *Processus iudiciarius Regni Poloniae*, Kraków 1619, p. 3. It was nevertheless established in 1539 at the Sejm court in Piotrków.

105 M. Bobrzyński in the index to *Decreta* defines the quoted act as a precedent, but for a different reason: it allegedly contained a clause stating that the ruling should be applied in similar cases. On that issue cf. further in this text.



the benefit of A.L. Having proved falsehood of the allegation, the clerk turned to the king: — — *ut sua Maiestas contra ipsum S. L. extenderet statutum regni de inordinatis citationibus editum et ut ipsum iuxta hoc idem statutum punire dignaretur* — —. The king's adjudication was directed not only against the defendant: — — *preterea sua Maiestas eidem S. L. et omnibus aliis severiter mandare dignata est, ne amplius quispiam post hoc in futurum [emphases added] audeat officiales suae Maiestatis terrestres talibus inordinatibus querimoniis lacessere, et si aliquis in contrarium huic decreto et mandato suae Maiestatis fecerit, iuxta dispositionem statuti de inordinatis citationibus per suam Maiestatem irremissibiliter punietur.*

One could argue that the king did not create a precedent in this case, but merely substantiated his ruling by citing a statutory provision (most likely the Statute of Nowy Korczyn from 1465, which concerned persons who levelled false accusations).<sup>106</sup> That, however, would be an oversimplified explanation. The very fact of recognizing the binding force of the statute was precedential, for instance because one might have been unaware that the statute was still in effect or, even more importantly, whether the protection it provided for also applied to situations in which unfounded complaints were made against officials (after all, the clerk requested that the scope of the statute be extended to include the aforementioned cases as well). At any rate, the ruling of the king was not only a judgment but also formulated a general norm that was to apply in the future.

It follows from certain acts contained in Bobrzyński's publication that the adjudication of a case involved the practice of invoking previous rulings, which thus operated as precedents.

(D. 370 — 1527— p. 336) — At an appellate hearing: *Iudicium itaque regium assessorium ex interrogatione ac informatione Maiestatis regiae* — — *praesertim eo attento, quia pars citata* [here: the party bringing the appeal] *se defendebat contra actores praescriptione ter-*

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106 VL I, p. 72, f. 1158: *De falsariis citationum puniendis.*

*restri, atque etiam inhaerendo decreto Maiestatis regiae* [emphasis added] *in conventione Pyotrковиensi inter nobiles — — lato ac facto — —* (rules that the appellants shall continue to hold the estate against which their adversaries made claims by virtue of the right of proximity).

Grużewski and Bobrzyński (in the index) note other information of that kind. Grużewski<sup>107</sup> mentions an act (D. 323 — 1523 — p. 293) which contains the following decision — — *aliae autem controversiae huius similes, ut — —* [relevant judicial disputes are enumerated here] — — *iuxta nostrae Maiestatis informationem in causa superiore fiendam sic pariformiter conservabunt et sic eidem conformabuntur*. In turn, Bobrzyński counts it as a precedent that someone (D. 470 — 1530 — p. 415) quotes a similar dispute (— — *parte actorea paratam controversiam ex actis — — in simili causa factam reproducente — —*). However, in both instances the *causae similes* were limited to the circle of persons associated with litigation, or even those involved in it (in the latter case, the party invokes a dispute in which the plaintiffs were the same, the substance of the case was identical and only the defendant was different, probably an accomplice in the committed crime). Consequently, a ruling neither acquired the power of precedent (in the first case), nor did one invoke a ruling which already had the power of precedent (the second case). After all, judgments which function as precedents are expected to apply not only to all entities engaged in the same disputes, but they should be binding in cases where the subjects involved are altogether different. It would therefore be difficult to recognize the above as instances of precedents.

Leaving Bobrzyński's publication aside, one can observe that other, albeit regrettably rare sources, corroborate the practice of quoting previous royal judgments. One such example is provided by H. Grajewski, who reports that in a lawsuit taking place in 1585 (Jakub Niemojewski vs Krzysztof Zborowski) invoked a very well-known ruling of 1537—more on which below—that pertained to *inordinata citatio*. It may be

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107 B. Grużewski, *op.cit.*, p. 783.

noted that we owe our knowledge of the ruling to J. Przyłuski.<sup>108</sup> Another example of invoking precedent—this time in the domain of municipal law—is supplied by Z. Rymaszewski.<sup>109</sup>

The above source material from the volume published by M. Bobrzyński to some degree contributes to understanding the mechanism behind the emergence of precedents. First and foremost, they show that the monarch and the Sejm court (alternatively the court *in curia*) endowed a ruling with a distinctly precedential character by virtue of asserting that they aim to make law (*statutum condere*) or by providing it with a clause that in the future it would apply to everyone who acts contrary to its provision. This was in fact a deliberate legislative activity, with the exception that it was pursued by the Sejm court. Ultimately, it gave rise to *decreta regia in vim statuti*, as they were called in the sixteenth century.<sup>110</sup>

As it follows from the cited sources, they would apply to cases as yet unresolved by law or to doubtful ones; to put in the most general terms, they pertained to *casus novi* (which arose chiefly in the course of lawsuits). In any case, one can hardly imagine the creation of a precedent without the element of novelty; therefore, an adjudication of the royal court which did not possess that component would probably have not qualified as a precedent. Novelties were remembered and recorded,<sup>111</sup> to be taken advantage of in other cases, i.e. by citing a ruling delivered earlier, a measure to which Bobrzyński's publication explicitly refers.

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108 H. Grajewski, *op.cit.*, p. 14017.

109 Z. Rymaszewski, *Sprawy gdańskie...*, pp. 156–157.

110 Cf. below.

111 A later example, dating from 1690: the Sejm court held that persons staying outside the country may take an oath in writing, which they are to sign; the clerk noted that this ensued *vi praeiudicati iudiciorum comitalium*, J. Rafacz, *Z dziejów prawa rzymskiego w Polsce. Księga pamiątkowa ku czci Leona Pinińskiego*, Lvov 1936, p. 200. Cf. J. Michalski, *op.cit.*, pp. 180–287, who also takes note of and comments on that precedent.

### Precedents in sixteenth-century legal compilations

The significance of precedents as sources of law is validated—albeit to a varying degree—by the numerous legal compilations written in the sixteenth century, whose authors (with the probable exception of J. Sierakowski and his *Układy*) expected that they would be adopted as binding. Those are works by J. Przyłuski, J. Sierakowski, J. Herburt, S. Sarnicki and J. Januszowski. Among the diverse provisions of land law, the jurists also cite those which originated with the adjudications of the royal courts.

Przyłuski's compilation is particularly important as far as the matter discussed here is concerned; by and large, the remaining jurists followed his example with respect to the selection of material.<sup>112</sup> The four precedents which Przyłuski incorporated into his compilation<sup>113</sup> pertained to distinct legal issues: *inordinata citatio* (precedent from 1537),<sup>114</sup> abolition of the penalty of two oxen for failure to appear for trial (also from 1537),<sup>115</sup> proof of nobility of a deceased (killed) noble (date unknown)<sup>116</sup>, and court prosecutors (1548).<sup>117</sup> We shall discuss the two first precedents, as they offer some insight into how judicial rulings came to acquire the force of statute.

The first precedent is associated with *citatio inordinata*, a petition which employed defamatory language to describe the defendant. The king prohibited such suits under the penalty of a week's incarceration in

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112 For example, J. Herburt's *Statuta Regni Poloniae* plagiarizes Przyłuski's compilation, cf. H. Grajewski, *op.cit.*, pp. 123–129.

113 Likewise, H. Grajewski, *op.cit.*, p. 122, who also identified four precedents in the work by Przyłuski.

114 J. Przyłuski, *op.cit.*, pp. 48, 647. Cf. H. Grajewski, *op.cit.*, pp. 122, 14017. H. Grajewski meticulously lists all the writers who cited that precedent as well as others after Przyłuski.

115 J. Przyłuski, *op.cit.*, p. 637. Cf. H. Grajewski, *op.cit.*, pp. 122, 14430.

116 J. Przyłuski, *op.cit.*, p. 287; cf. H. Grajewski, *op.cit.*, pp. 122, 15248.

117 J. Przyłuski, *op.cit.*, p. 598. One may doubt whether the regulation stemmed from a royal judgment, but this is very probable. H. Grajewski found a mention that the act was referred to as *edictum iudicarium*, *op.cit.*, pp. 12238, 13915.

the tower.<sup>118</sup> The ruling features a technical term denoting precedent: *decretum (regium) in vim statuti*. Naturally, the word *decretum* refers to the judgment rather than any legislative act of the monarch.<sup>119</sup> In an addendum in the margin, Przyłuski even provides the names of parties to the litigation (*Sigismundus. Decretum inter Strzałkowski et Kołaczkowski*),<sup>120</sup> while S. Sarnicki reported later that the judgment followed a dispute *between two nobles of Ruthenia*.<sup>121</sup> The regulation was to apply in the future (*perpetuis temporibus*) in all land law courts; thus it pertained not only to the aforementioned dispute but also to all prospective contentions of that kind. It was formulated in the refined form of an abstract provision, without any case-related details of the lawsuit; this, however, is a matter of minor importance, as we may be certain that this piece of

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118 J. Przyłuski, op.cit., p. 48: *Maiestas Regia decereto suo in vim statuti perpetuis temporibus duraturi, omnibus passim tam procuratoribus quam etiam aliis personis cuiuscumque status et conditionibus existentibus mandare et inhibere dignata est, ne quispiam citationem inordinatam et verba in eadem quae alicuius honorem et bonam famam tangerent descripta, et ad praesentiam Maiestatis Regiae et iudicium suae Maiestatis et ad quodlibet iudicium terrestre sive castrense deferre, et de eadem proponere audeat, sub poena sessionis unius septimanae in turri, per omnes in contrarium decreti suae Maiestatis praesentis facientes sustinendae*. Przyłuski quotes the ruling yet again on p. 647. S. Sarnicki, op.cit., p. 750, provides it in Polish translation, and mentions it on p. 1304 as well.

119 For instance, in his *Corpus Iuris Polonici* O. Balzer employs the term *decretum* to denote various royal ordinances and even Sejm constitutions, cf. vol. II no. 3, 12, 22, 44, 242 and passim as well as vol. IV, no. 21, 40, 83. The criteria governing the use of *decretum* in the titles of particular acts are unclear; Balzer does not explain it in the preface to CIP, while concerning the selection of legislation for that volume he refers the reader to p. XXI of another work of his, *Corpus Iuris Polonici medii aevi*, “Kwartalnik Historyczny” 1801, vol. V, pp. 49–82, 314–358, where no information on decrees can be found. Even acts whose contents are virtually identical are called either *decretum* or *edictum*. However, in several cases the acts Balzer defines as *decreta* are indeed royal adjudications in disputes, but those are disputes of the administrative kind, as we would say today. CIP III, no. 4, 5, 43, 105; CIP IV, no. 3, 6, 79. On the other hand, decrees (rulings) pertaining to court law are lacking in Balzer’s compilation.

120 J. Przyłuski, op.cit., p. 48 ; J. Herbut, op.cit., p. 37 v. Let us note that when quoting the *inordinata citatio* for the second time, Przyłuski attached an addendum typically used by sixteenth-century writers to designate constitutions of the Sejm. Had it not been for the addendum on p. 48, we would not know that the regulation is based on precedent. This only shows how difficult it may be to ascertain the basis of a regulation.

121 S. Sarnicki, op.cit., p. 1304.

land law found its source in precedent which, incidentally, enjoyed great popularity among contemporary jurists.<sup>122</sup>

The second of Przyłuski's precedents demonstrates how problematic it is for a researcher to determine the provenance of a regulation. The provision which ultimately revokes the penalty of two oxen for failing to appear in court, dating as far back as the statutes of Kazimierz Wielki, is indeed called a ruling,<sup>123</sup> but since no further details are stated<sup>124</sup> the source should be approached with caution. Fortunately, the act is cited with a description of the case in Jan Sierakowski's *Układ*, from which we learn that the provision originated with the verdict in a litigation between Stanisław Słupski and Jan Dębiński,<sup>125</sup> thus lending credibility to the information in Przyłuski.<sup>126</sup>

Thus, the sixteenth-century compendia, most of which aspired to become official compilations of laws, confirm that the royal courts turned out *decreta in vim statuti*. They also confirm that jurists at the time found the *decreta* to be a source of applicable law; otherwise, they would not have included them in their compilations. Nonetheless, there were only few: the four aforementioned authors (Przyłuski, Herburt, Sarnicki, Januszowski) did not go beyond the four cited precedents, while some of them did not even take all four into account.<sup>127</sup> Those precedents can

122 It was cited not only by J. Przyłuski, but also Sierakowski, Herburt, Sarnicki, Łączyński, Januszowski, as well as seventeenth- and eighteenth-century compendiarists. Cf. H. Grajewski, op.cit., p. 14017.

123 J. Przyłuski, op.cit., p. 637; *Decretum Sigism Cracov 1537*. The essential text of the provision reads as follows: *Sacra M. R. decernere dignata est, quia prefatae poenae a condemnatione in contumacia, a nulla parte citata, in nullis iudiciis, tarn regalibus quam terrestribus etiam castrensibus per iudicium necque per partem actoream, necque pecuniis, necque pignorationibus exigij, nec quovis modo recipi deberunt, nunc et in posterum decreto praesenti mediante.*

124 For instance J. Herburt, op.cit., p. 62 v, did not remark that the act was a judicial ruling.

125 B. Ulanowski ed., *Jana Sierakowskiego Układ...*, Art. 934, p. 223. Cf. H. Grajewski, op.cit., p. 14430.

126 The provision in question was also found to have been a ruling by M. Zalasowski, *Ius Regni Poloniae*, vol. II, Poznań 1702, p. 503.

127 For instance, the proof of the nobility of a murdered noble was taken into consideration as a precedent only by Przyłuski, cf. H. Grajewski, op.cit., p. 15248.

also be found in Sierakowski's *Układ*, although it is possible that the latter volume also includes another one.<sup>128</sup>

### The Creation of Precedents in the Crown Tribunal

The end of the sixteenth century saw precedents established by a new court, namely the Crown Tribunal. The fact that the Tribunal created precedents does not seem to have had any explicit legislative foundation in the acts relating to that court. The aforementioned A. Lisiecki argued that relevant grounds had been provided by the Nieszawa article<sup>129</sup>, but they may also be sought in a statement in the Sejm enactment of 1578 which established the Tribunal. It was declared at the time that the rulings of the Tribunal *are to carry such weight as those of the Sejm*.<sup>130</sup> The formula most likely sufficed to make the Tribunal feel competent to deliver precedential judgments. If there was a rule that royal courts (especially Sejm ones) were able to create precedents, then, by virtue of that formula, the Tribunal could be invested with the same powers. O. Balzer observes that the act of 1578 set forth that the judges were to adjudicate following written law; however, the same author finds that the directive operated only when such law existed.<sup>131</sup> What is more, Balzer writes that the 1578 enactment does not include the provision from the initial drafts of the Tribunal act from 1574, which stipulated that a matter unregulated by law (*novum emergens*) was to be referred from the Tribunal to the Sejm. According to Balzer, that was a deliberate measure aiming to extend the competence of the Tribunal to cases that were

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128 J. Sierakowski, *Układ*, Art. 168, 188, 412, 475, 934. It is possible that art. 269, on the perpetuity of entries executed in Cuiavia before a *starosta*, is based on precedent (the provision relies on *litterae regiae in conventu generali in vim statuti obtentae*). M. Bobrzyński, *O nieznanym układzie prawa polskiego przez Jana Sierakowskiego z r. 1554*, "Rozprawy Akademii Umiejętności. Wydział historyczno-filozoficzny" 1877, vol. VI, Kraków 1877, pp. 274–275, writes that Sierakowski quoted 3 precedents.

129 Cf. page above.

130 VL II, p. 183, f. 964.

131 O. Balzer, *Geneza Trybunału...*, p. 327.

beyond the scope of statute and custom, thus granting the Tribunal powers to deliver judgments *in vim statuti*. Let us also note that the later constitution of 1607 ensured exclusive jurisdiction of the Sejm court over *nova emergentia*,<sup>132</sup> but its effectiveness seems doubtful given that the Tribunal—which is further discussed below—continued to establish precedents.

A number of facts demonstrate that the Crown Tribunal made rulings which had the force of statute.

In his work on the tribunal, A. Lisiecki wrote that next to written law, members of the Tribunal — — *shall observe the praeiudicata of their antecessors as well, for also iuris scripti auctoritatem obtinent et sunt iuris scripti vivae voces*.<sup>133</sup> Lisiecki thus attributed the force of the written (statutory) law to the precedents issuing from the Tribunal and concluded that they are the living voice (i.e. interpretation as I understand it) of that law. He wrote that in 1638, three decades after the constitution of 1607 had been passed and some years after the 1627 constitution prohibiting creation of precedents,<sup>134</sup> which shows that despite proscription the Tribunal continued to establish precedents.

A number of other facts offer further evidence that precedents were both created at the Tribunal and used. Its rulings were quoted by various authors (chiefly seventeenth-century ones), whose disquisitions about the applicability of a given norm relied on the substance of judgments delivered by the Tribunal (cf. below, VIII). Finally, let us note that seventeenth-century references to the rulings of the Tribunal mention that they had a “legislative taste”,<sup>135</sup> or—as some happened to put it—“exuded the force of statute” (*vim legis sapiunt*). Efforts were undertaken to curb them and, from 1627, they were pronounced invalid, but the campaign against such decrees of the Tribunal—waged to little effect in any case (cf. IX below)—confirms that for a long time after its establish-

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132 Cf. page above.

133 A. Lisiecki, op.cit., p. 179.

134 Cf. page below.

135 The expression comes from W. Maisel, op.cit., p. 91.



ment in 1578 that judicial body continued to deliver judgments that had the force of precedent.

### **Compendia of Judgments and Use of Judgments in Private Collections of Law**

The significance of judicial rulings as sources of law is eloquently attested by two practices witnessed chiefly in the seventeenth century: 1) the creation of special compilations of judgments and legal rules based on such verdicts<sup>136</sup>, 2) the inclusion of rulings in private collections of land law.

When publishing the 1544 *Puncta*, M. Bobrzyński drew attention to the existence of several sixteenth-century manuscripts four of which (labelled by the publisher as B, C, D, E) contain an assortment of judgments and, occasionally, legal rules based on verdicts from that century.<sup>137</sup> Most of those are *decreta* of the court *in curia* or the Sejm court held in Kraków, but a number of rulings and rules originate from outside that town. While discussing the contents of those manuscripts, for which he also collated a synoptic table, Bobrzyński speaks of a collection (as opposed to collections) of judgments, as if he meant only one work which was modified as the body of relevant material increased. This probably warranted S. Kutrzeba's conclusion that "the compilation was subsequently revised and expanded, so that several redactions exist as a result" (further on Kutrzeba mentions four, as there were four manuscripts).<sup>138</sup> The fifth text has been discovered only recently.<sup>139</sup> In a valuable paper devoted to the issue, the authors presume—just as Kutrzeba did—that the original collection was mechanically expanded in the successive redactions.<sup>140</sup> Moreover, the authors consider the newly discovered text to have been linked

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136 As already observed, the provisions which established a legal rule assumed a more abstract and refined form in comparison with the ruling on which it was based.

137 M. Bobrzyński, *Puncta...*, op.cit., pp. 195–203.

138 S. Kutrzeba, *Historia źródeł...*, op.cit., p. 157.

139 I. Dwornicka, W. Uruszczak, op.cit., p. 186.

140 Ibidem, p. 185.

to the previously mentioned and provide a diagram—though not a very clear one—showing how they are interrelated.<sup>141</sup> And yet, it follows from Bobrzyński’s argument and the table he collated that only manuscripts B and C are closely interconnected (C is an expanded version of B, in that it includes other, chiefly later rulings), but that no particular cohesion can be observed in other relationships between the four texts (which indeed display marked differences).

The issue certainly requires expert source studies, but even at this point it would seem more appropriate to state that in the sixteenth century there was no one uniform collection but that diverse (and numerous) compilations of rulings were in fact made.<sup>142</sup> Similarities between them are understandable, given that they relied on a homogenous body of material (the judgments of the royal courts) and the technique employed in their making (the compilers are likely to have copied the text from one another).

Clearly, the rulings of the royal courts were an object of interest in the sixteenth century and, as may be inferred from the numerous surviving manuscripts, lists of such judgments were compiled for practical reasons. As J. Rafacz observes, “a number of examples demonstrate that jurists-practitioners strove to have such collections of contemporary and earlier decrees, so as to be able to substantiate pleas as patrons [attorneys], judges, or instigators [prosecutors].”<sup>143</sup>

Later on, however, making compilations of rulings of the royal courts did not become a more widespread practice. No seventeenth- or eighteenth-century collections of that kind are known to date. If, therefore, J. Makarewicz writes that “in order to record precedential rulings, they were promulgated in print”,<sup>144</sup> the assertion carries little relevance as it refers only to a minor brochure from 1689 published in Lublin by

141 The diagram lacks a detailed description and explanation, *ibidem*, p. 191.

142 Cf. also J. Rafacz, *Dawne prawo sądowe polskie w zarysie*, Warszawa 1936, p. 29.

143 *Ibidem*. Cf. also S. Sarnicki’s views on the usefulness of compilations of rulings in educating legal professionals.

144 J. Makarewicz, *op.cit.*, p. 13.

the Jesuits. It merely contained three decrees of the tribunal of Lublin from 1687–1688, issued in diverse cases against religious dissenters and Jews. Admittedly, its title<sup>145</sup> endorses the significance and usefulness of Tribunal judgments for prospective cases of the same kind, but its publication does not attest to a broader publishing activity dedicated to the rulings of the highest courts.

Another fact suggesting that judgments became sources of law is that they were used for private compilations of applicable law. This has already been noted with respect to the fifteenth century compendium of laws and customs of Łęczyca, which comprised a range of judgments delivered by land and municipal courts (see III). The trend continues in the sixteenth century: norms deriving from the decrees of the royal courts are integrated into legal compilations, as exemplified by two Lesser Polish compendia: *Cautelae*, created in the first half of the sixteenth century (between 1521 and 1550)<sup>146</sup> and *Puncta* from 1544.<sup>147</sup>

Two (out of 22) articles in *Cautelae* are based on judicial rulings, namely articles 18 and 21. The first of those draws on the judgment of the royal court of June 13 1521,<sup>148</sup> according to which royal confirmation cannot render an invalid act in law valid and, specifically, a royal decision cannot convalidate the testamentary appointment of a guardian when such an appointment has not been executed before the king or land court.<sup>149</sup> The second case (Art. 21) is formulated into a legal rule which stipulates that a widow with an assured dower has to accept money from relatives wishing to recover the dower by purchase not in the first but only in the second court-decreed period. The rule was supplemented with the typically phrased justification, worded as follows: *inter con-*

145 *Ad perpetuam rei memoriam trina decreta tribunalitia Ecclesiae Romanae viris ecclesiasticis et praesertim curam animarum administratibus, religionem catholicam zelore promotibus, haeresim calvinisticam et scandala iudaica prosequentibus utilia*, Lublin 1689.

146 AKP IX, pp. 199–216.

147 For the full title of the compilation v. footnote 14.

148 The exact date is known thanks to M. Bobrzyński, *Decreta...*, p. 179.

149 The description of the case in S. Kutrzeba, *Zastępcy stron w dawnym procesie polskim*, Kraków–Warszawa 1923.

*sortem Pauli Mruk et Iohannem Zabawski Regia Maiestas iudiciumque decrevit sic.*<sup>150</sup>

Even more regulations deriving from judgments are found interspersed throughout the *Puncta*. This is a collection of provisions taken from diverse sources and laws: land law rulings, customary law, canon and Magdeburg law, from the 1532 Correction of Laws and constitutions of the Sejm.<sup>151</sup>

The compilation comprises 169 articles, but upon examination only several can be qualified as having originated with judicial rulings. The articles in question contain more or less precise information that they had been derived from judgments. The information, provided as a kind of rationale which sanctions the binding force of a given provision, is formulated in a variety of manners. The most frequently used phrase is *ut est (or fuit) decretum inter* (after which the names of parties to the respective lawsuit are supplied).<sup>152</sup> One also encounters other justifications, such as *quod hoc fuit practicatum in conventionione* — — (which refers to the Sejm court)<sup>153</sup> or phrases which in a sense highlight the exemplary nature of the ruling: — — *ut est exemplaris probation*,<sup>154</sup> or *exempli gratia ut est factum*.<sup>155</sup> Based on such indications, fourteen out of 169 articles can be identified as regulations conveying legal norms derived from judgments.<sup>156</sup> Apart from that, there are five articles which consist of rulings incorporated into the compilation.<sup>157</sup>

150 Ibidem.

151 M. Bobrzyński, *Introduction to Puncta*, p. 199. However, the author does not mention constitutions of the sejm.

152 *Puncta*, Art. 19, 40, 87, 88, 94, 112, 166. On this subject cf. I. Dwornicka, W. Uruszczak, op.cit., p. 189.

153 *Puncta*, Art. 22.

154 Ibidem, Art. 24.

155 Ibidem, Art. 48.

156 Art. 12, 13, 19, 22, 24, 40, 48 (the rules they contain are also to be found in the source discovered by I. Dwornicka, W. Uruszczak, op.cit., pp. 194–195; note: unlike the aforesaid authors, I believe that the *Puncta* proper do not go beyond Art. 169; Cf. also M. Bobrzyński, *Introduction to the Puncta...*, p. 195) and further: Art. 87, 88, 92, 94, 111, 112, 166.

157 Art. 150–154, all in one column: *Decreta quaedam per dominum olim Lyubomirski protunc iudicem Cracoviensem pro informatione tenenda. Anno Domini 1509*. M. Bobrzyński in

The table drawn up by I. Dwornicka and W. Uruszczak for the source they discovered (BJ, Cim. F. 8048) enables broader identification, as it demonstrates that further nineteen articles in the *Puncta* originated with precedents.<sup>158</sup> This is a splendid example of how a newly discovered source offers better insights into the already known ones. Thanks to a comparison of both sources, one can conclude beyond any doubt that at least thirty eight articles (22%) in the compilation known the *Puncta* had their origins in precedent. There is another observation that this situation occasions, namely that many provisions of law very swiftly—as the example of the nineteen articles demonstrates—became detached from the foundation which rendered them binding, i.e. from the judicial ruling.

We are not going to delve here into the contents of particular judgment-based articles in the *Puncta*. The substance of most can be inferred from the aforementioned table collated by the Kraków authors and in this reference.<sup>159</sup>

### **Precedents in the Commentaries of Historical Polish Jurists**

As a basis for Polish land law, precedents were also used by the commentators on that law. Discussing the latter, they would not infrequently cite the judgments of the royal courts and tribunals, thus treating them as

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*Puncta* identifies them as rulings of the municipal court. It may therefore be conjectured that judgments of the lower courts were able to become precedents in the early sixteenth century as well.

158 Art. 10, 14, 15, 16, 20, 21, 23, 31, 32, 33, 35, 36, 41, 44, 51, 56, 57, 59, 106. Cf. I. Dwornicka, W. Uruszczak, op.cit., pp. 194–195.

159 I. Dwornicka, W. Uruszczak, op.cit. I provide table locations for the precedent-containing articles which are not found in the newly discovered manuscript, BJ, Cim. F. 8048. Art. 87—*De summa excedente decem marcas*; Art. 88 — *De citationibus indivise factis*; Art. 92—*De praescriptione dominae dotalitalis*; Art. 94 — *De probatione vulnerum*; Art. 111—*De poena koc in indicio commissariali*; Art. 112—*De exemptione dominae dotalitalis*; Art. 166—*De termini concitati dilatione in indicio petenda*. As already observed, Art. 150—154, being copies of judicial rulings, are entered into one column. Cf. footnote 156.

a source of law. This approach is evident in the writings of S. Sarnicki, T. Zawacki, G. Czaradzki and M. Zalasowski.

Sarnicki (in the commentary following his compilation of laws) quotes only five precedents, including one discussed in greater detail above,<sup>160</sup> as well as a decree stating that a petition for the payment of dower is not subject to prescription, a decree on the division of immovable property and two precedents taken from the statutes of Kazimierz Wielki.<sup>161</sup> This is not an extensive set and, given its contents, not a very significant one either. It could be omitted in these deliberations, were it not for the remark of Sarnicki's regarding the importance of precedents. Sarnicki describes the training of a beginner legal practitioner whom he calls a novice at law (*novitius iuris*). The author writes thus: *The second method of practicing. They divide it [i.e. that method – B.L.] into four. First, the forms of various records are gathered by those who wish to proficere expeditiously. Then the forms of diverse pleas and suits, the munimenta maiora et interlocutoria come third, and fourth, the decrees before the royal court, the tribunal, as well as land and municipal courts — —.*<sup>162</sup> It follows that the study of rulings delivered at the various courts of nobility was one of the fundamental methods (next to other three) in the education of a legal professional. This is stressed by Sarnicki himself in connection with the precedents he cited: *It would have been fitting to supply more such decrees here, for they may be a source of ample knowledge for the novitius, yet it is odiosum to mention persons by name, which is why one should refrain therefrom. However, the novitius may sit with the land judges and municipal ones, at royal courts and the tribunals and there take note, in especial when a singular casus happens to occur — —.*<sup>163</sup>

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160 Precedent relating to inappropriate petition, cf. p. 18 above.

161 S. Sarnicki, op.cit., p. 1304.

162 Ibidem, p. 1301.

163 Ibidem, pp. 1304–1305. Sarnicki justifies the meagre assortment of decrees by explaining that one should not cite more for fear of disclosing the names of persons involved in the disputes, which would be *odiosum*. Other authors, such as Zawacki as well as Czaradzki

The use of precedents in legal education indicates that they were indeed employed in legal practice. After all, one can hardly imagine a situation where “novices” were required to learn something that was irrelevant to the application of law at the time.

The works of Teodor Zawacki deserve particular attention. As we know, he published a volume based primarily on judicial practice and the rulings of the Crown Tribunal, encompassing rules within land law which the author provided in alphabetical order.<sup>164</sup> The author discussed Polish law whilst relying on judgments but the entire material was supplied in a spruced-up form, without citing the original source. Hence we do not learn about the actual substance of rulings nor the time when the Tribunal delivered them, but this does not undermine Zawacki’s credibility. We do believe that he took advantage of *sententiae seu praeiudicata* to which he refers in the title. The fact is evinced in his thorough knowledge of numerous verdicts of royal courts and tribunals, a splendid sample of which may be found in his chief work on the judicial process. Even in the preface to the work, dedicated to Feliks Kryski, the author remarked that he used royal judgments as well as adjudications and precedents of the Tribunal.<sup>165</sup> Although subsequent editions feature no such mentions, the fact that judgments are so frequently quoted proves that Zawacki did see them as the mainstay of land law, alongside custom and statutes. Let us illustrate this assertion with the material in the most comprehensive (and the most convenient to cite) edition of *Processus* from 1619.<sup>166</sup>

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and Zalasowski did not have such scruples and provided numerous precedents along with the names of the litigating parties.

164 T. Zawacki, *Flosculi practici ex communi praxi et forma ac consuetudine iudiciorum frequentibusque summi Tribunalis Regni Poloniae sententiis seu praeiudicatis decerpti*, Kraków 1623; Cf. M. Bobrzyński, *Introduction to Puncta...*, p. 203; S. Kutrzeba, *Historia źródeł...*, I, op.cit., p. 158.

165 T. Zawacki, *Processus iudiciarius Regni Poloniae*, Kraków 1612: *Adhibitis itaque statutorum et constitutionum Regni Poloniae libris, regum decretis, summiq[ue] R. P. Tribunalis sententiis et praeiudicatis, tractatum collegi et collustravi*.

166 Contrary to the truth, S. Kutrzeba, *Historia źródeł...*, I, p. 280 states that Zawacki revised and expanded his work with each successive edition, “until it reached very substantial vol-

The latter edition includes as many as ninety two references to the rulings of the nobility courts, i.e. the royal courts and the Tribunal.<sup>167</sup> Predominant among the decrees of the royal courts are those delivered by the Sejm court (*in conventu*) while judgments of the assessorial (*in curia*)<sup>168</sup> or relational court (*in relationibus*) occur only sporadically.<sup>169</sup> Certain mentions do not specify which type of court was involved.<sup>170</sup> In total, there are seventy two references to particular rulings of the royal courts dating from 1519–1599.<sup>171</sup> The remaining mentions refer to the judgments of the Tribunal. There are twenty of those, including four delivered by the Tribunal in Piotrków<sup>172</sup>, and nine by the Tribunal in Lublin<sup>173</sup>, while the remainder (seven mentions) do not indicate the seat of the Tribunal.<sup>174</sup> The Tribunal decrees quoted by Zawacki were made between 1579 and 1596.<sup>175</sup> The names of the parties are provided with a portion of the decrees (twenty two in total), but for

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ume”. For instance, the fourth edition of 1637 is less extensive than the edition of 1619; it is similar to the 1612 edition, both of which are the abridged versions of *Processus*. The editions of 1619 and 1647 represent the extended versions (I have not seen the 1616 edition). The volume published in 1619 is more convenient, because—unlike the one from 1647—it features numerical pagination. The extended version differs from the abridged in that it includes twelve titles (as opposed to ten in the shorter editions). The additional titles are: *De iuramentis* VIII, *De poenis* XI. Title II *De actionibus* was supplemented with material entitled *De citationibus*.

167 *Processus iudiciarius Regni Poloniae*, Kraków 1619: pp. 3(2), 4(3), 503, 6(1), 7(2), 8(2), 9(1), 10(2), 11(3), 16(2), 23(1), 24(2), 30(1), 32(1), 30(3), 34(1), 38(3), 42(2), 43(1), 44(1), 45(2), 50(3), 51(2), 52(2), 53(2), 54(1), 55(5), 56(2), 57(4), 58(5), 59(1), 60(1), 61(2), 66(1), 67(2), 69(2), 71(1), 85(2), 123(2), 126(1), 131(1), 132(1), 144(1), 157(11), 161(1), 172(1), 184(1), 187(3), 190(1), 191(1). The ruling of Zygmunt August cited on p. 211 is concerned with a distinct jurisdiction, i.e. municipal. The numbers in parentheses above indicate the quantity of decrees on the respective pages.

168 *Ibidem*, p. 4.

169 *Ibidem*, p. 32.

170 *Ibidem*, pp. 5, 55.

171 Cf. *ibidem*, pp. 4, 56, 67.

172 *Ibidem*, pp. 50, 59, 123.

173 *Ibidem*, pp. 4, 16, 24, 33, 50, 91, 53, 144, 190.

174 *Ibidem*, pp. 10, 16, 24, 44, 59, 66, 161.

175 Cf. *ibidem*, pp. 59, 161.



the most part Zawacki kept the judgments anonymous and chose not to disclose the parties.

A fair number of decrees (thirty nine) were included in Title I of the work: *De obligationibus et eas sequentibus inscripcionibus* (pp. 1–46). Despite what the heading may suggest, the title is concerned with both obligations and related entries into court ledgers, as well as cases which, according to the current systematics, would belong elsewhere. Besides that, the only area that Zawacki's work does not cover are matters of litigation; in the present-day classification, many of those are recognized as part of substantive law. For this reason, the aforementioned title (as well as others) the precedent-based material is quite diverse. In Title I, court decrees resolve such issues as: the form of entries into court records (books), so-called personal entries, the legal capacity of wards and unmarried girls, the legal capacity of married women, the disposal of immovable property, dower and dowry, or security (*vadium*) in obligations.

The majority of decrees (forty one in total) were included in Title II, *De actionibus et citationibus* (pp. 47–127), with judgments pertaining to succession, forcible ejectment from estate (*violenta expulsio*), domestic invasion, buyout of property (in the broadest sense, i.e. under various legal titles), fugitive peasantry, actions and their filing, or the legal status of the wife of an outlaw. Title III, *De processu* (pp. 128–148), contains only three judgments, concerning the *lucrum* of the plaintiff, the purchase of minor liabilities on the estate of the debtor by a major creditor, and the procedure with *citatio ad banniendum*. Three further rulings are cited in Title V, *De dilationibus* (pp. 153–183); two pertain to trial adjournments and one to warranty. Another judgment, this time on the contestation of suit, is found in the title dedicated to that very issue (*De litis contestatione*, pp. 183–184). Three decrees are quoted in Title VIII, *De iuramentis* (pp. 185–189), two of which are connected with oath and one with the liability of the depositary. Two final decrees

were included in Title IX, *De appellationibus* (pp. 189–196); both focus on appellate instruments of *mocja* [recusal] and *gravamen*.

This brief overview of the decrees cited by Zawacki demonstrates the importance that the author attached to the yield of adjudication,<sup>176</sup> as the substantial part of his foremost work relies precisely on judicial rulings. Clearly, that outstanding jurist<sup>177</sup> was thoroughly convinced that judgements of the royal courts and the tribunals establish law, that those are *decreta in vim legis*. The fact that Zawacki acknowledged rulings as sources of law is a cogent argument in favour of recognizing the precedential import of verdicts delivered by the royal courts and the Tribunal.

A number of decrees, fifteen to be precise, were quoted by Grzegorz Czaradzki. The rulings may also be found in Zawacki's *Processus*, which is probably where Czaradzki took them from.<sup>178</sup> Thus, while appreciating the value of precedents for the law at the time, Czaradzki—unlike Zawacki—did not contribute anything new in that respect.

A considerable number of precedents established by the royal courts and the Crown Tribunal were used by Mikołaj Zalasowski: seventy-six according to my calculation. However, the majority are rulings associated with municipal law, usually quoted after Lipski,<sup>179</sup> although in some instances it is difficult to determine whether a given precedent

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176 And, in a broader sense, to practice and custom, to which he conspicuously referred using phrases such as *secundum stylum practitorum, talis est praxis, usus et praxis, sic intelligunt practici, consuetudo*.

177 In the field of land law, Teodor Zawacki was arguably the best jurist of pre-partition Poland in view of his ingenuity and independent juridical thought, many examples of which may be found in his writings. These are also highly regarded by S. Kutrzeba as well as earlier authors, such as K. B. Steiner. Cf. S. Salmonowicz, *Krystian Bogumił Steiner (1746–1814), toruński prawnik i historyk*, Toruń 1962, p. 110103.

178 G. Czaradzki, *Proces sądowy ziemskiego prawa koronnego...*, op.cit., Warszawa 1640. Three rulings on p. 4 (pp. 4, 5 in Zawacki, edition of 1619), six rulings on p. F1 (Zawacki, pp. 5, 6, 8, 9, 10), three rulings on p. F1v (Zawacki, pp. 10, 16, 33) and three rulings on p. F2 (Zawacki, pp. 33 and 38). Czaradzki had already borrowed precedents for the first edition of his work (1614) from the abridged version (Cf. footnote 165 above) of Zawacki's volume, i.e. from the 1612 edition, which is evinced in how the former cites the dates of judgments and the names of the involved parties.

179 On that issue cf. also remarks by I. Malinowska, *Mikołaj Zalasowski*, Kraków 1960, p. 81.

pertains to municipal or land law. It seems that thirty four precedents are linked to land law, but again most of those were sourced from Zawacki's work, whom Zalasowski credits in half (seventeen) of the cited judgments.<sup>180</sup> In one case, Zalasowski drew on J. Przyłuski,<sup>181</sup> whereas for the remainder the author most likely availed himself of the papers left by his uncle, the royal notary Jan Oktawian Waclawowicz, to which he alludes quite explicitly.<sup>182</sup>

As a result, the judgments quoted by Zalasowski do not offer as much material as Zawacki's work. Taken largely from the latter and other authors, they date back to the sixteenth century, while only a few originate from the seventeenth century. Their informative value is modest, yet they attest that Zalasowski, a late seventeenth century jurist, considered them a part of the land law in force.

### Prohibition on the Creation of Tribunal Precedents

The assault on the decrees *in vim legis* began in the seventeenth century. It is likely to have been directed against the Tribunal decrees, because neither local diets (*sejmiki*) nor the Sejm ever turned openly against the decrees of the royal courts, i.e. the Sejm and the assessorial court.

The first attack followed in the wake of a case which in 1627 incensed—to judge by the response of the *sejmiki*—a substantial part of

180 Here are the pages in the work by M. Zalasowski, *Ius Regni Poloniae*, vol. II, Poznań 1702, where one can find the land law precedents; information in the parentheses indicates where those precedents are cited in T. Zawacki *Processus* from 1619, pp. 79, 113, 236 (two precedents), 354 (Zawacki, p. 51), 362 (Zawacki, p. 50), 363 (Zawacki, p. 51), 389, 404, 410 (Zawacki, p. 33), 425 (Zawacki, p. 33), 431 (two precedents), 433 (two precedents), 441 (two precedents — in Zawacki both on p. 3), 444 (Zawacki, p. 9), 446 (Zawacki, p. 5), 448 (Zawacki, p. 11), 450 (two precedents — in Zawacki both on p. 16), 458, 481, 496, 499, 503, 536 (three precedents — one allegedly after Zawacki), 661 (Zawacki, p. 24), 670, 677 (Zawacki, p. 69), 679 (Zawacki, p. 66).

181 M. Zalasowski, *op.cit.*, p. 503 (decree of King Zygmunt of 1537, on the abolishment of oxen penalty for contumacy (cf. pp. 18–19 above); this one is indeed cited in Przyłuski's work, *op.cit.*, p. 637.

182 M. Zalasowski, *op.cit.*, pp. 489–490: *ex cuius connotatis plurima decreta in curia regali lata passim hic adferro*. Cf. I. Malinowska, *op.cit.*, p. 82.

the nobility. That year, the Calvinist Samuel Świętopełk Bolestraszycki was sentenced by the Tribunal in Lublin to six months of incarceration and four hundred *grzywna* for publishing a Polish translation of Pierre du Moulin's work on the papacy.<sup>183</sup> The sentence was vehemently opposed in the instructions for the Sejm deputies issued by the sejmiki of the following provinces and regions: Poznań and Kalisz in Środa (August 31st)<sup>184</sup>, Kraków in Proszowice (August 31st)<sup>185</sup>, Ruthenia in Wisznia (August 31st),<sup>186</sup> Zator and Oświęcim in Zator (August 28th).<sup>187</sup>

As one can infer from the protests of the local assemblies, the Tribunal in Lublin appended the future effect clause (*in vim legis*) to the decree in Bolestraszycki's case, as a measure intended against Protestants.<sup>188</sup> The instructions for the voivodeships of Poznań and Kalisz suggest that the provision prohibited the prospective establishment of dissident associations.<sup>189</sup> The opinion of the sejmiki was unequivocal: the decree against Bolestraszycki, or rather that fact that it had been granted the force of statute, was condemned, using a variety of justifications, such as the need for internal peace<sup>190</sup> or the Tribunal's groundless usurpation of the power to deliver rulings *in vim legis*, which it did not possess.<sup>191</sup>

183 V. *Akta sejmikowe województwa krakowskiego*, ed. A. Przyboś Hereinafter: ASWK. Cf. W. Sobociński, *O historii sądownictwa w Polsce magnackiej XVIII w.*, "Czasopismo Prawno-Historyczne" 1901, XIII, fasc. 1, p. 145.

184 *Akta sejmikowe województwa poznańskiego i kaliskiego*, ed. W. Dworzaczek — hereinafter ASWPKJ, I, 2, no. 311, p. 249; cf. W. Maisel, *op.cit.*, p. 91.

185 ASWK, vol. II, 1, p. 89; cf. W. Maisel, *op.cit.*

186 *Akta grodzkie i ziemskie* Hereinafte: AGZ.

187 ASWK, vol. II, 1, p. 74.

188 The addition of the clause stating that the judgment has the force of statute is mentioned in the resolution of the sejmik of Wisznia and the Sejm constitution of 1627, also cited below.

189 ASWPKJ: *Hence the decrees in vim legis abolishing associations inter dissidentes de religione in futurum must not be introduced, for so much depends on having internal peace undisturbed.*

190 Instructions of Poznań and Kalisz cf. preceding footnote. W. Maisel, *op.cit.*, observes somewhat exaggeratedly that the position of the Greater Polish diet was presented "in a splendidly substantiated legal argument". Meanwhile, the rationale was limited to keeping internal peace.

191 The Instruction of Zator: "and since the tribunal court usurps greater autoritatis that the written law permits, and creates new actions that lie outside it purview;" instruction of

However, the demands went further than revoking the future statutory effect of Bolestraszycki's decree. The postulations of the nobles were more general: the Tribunal should no longer deliver judgments with the force of statute or adjudicate in matters beyond its competence. This was clearly what the instruction of the Kraków voivodeship aimed for;<sup>192</sup> Greater Polish<sup>193</sup> and Ruthenian<sup>194</sup> instructions were formulated along similar lines.

The Sejm of 1627 took those demands into account. In the constitution dated November 23rd (*On the tribunal decrees*), it held as follows: "The Tribunal, having no potestatem condendarum legum, should judge in pursuance of the laws enacted by the whole of the Commonwealth, whereas matters that are not described in law must not be admitted for adjudication, nor poenas irrogare and aggravare anyone with those beyond that which is laid down in universal law; and where there should be such decrees or clauses which vim legis saperent or interfere with popular peace, as did happen with some additamenta in certain decrees of the past Tribunal of Lublin, then none shall be liable under those, for they are to be nullitati subesse instead."<sup>195</sup>

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the Kraków voivodeship: "by which [i.e. the decree in Bolestraszycki's case – B.L.] the tribunal supra concessam sibi it is granted by R. P. potestatem and the powers described in law, sinned contra maiestatem publicam in that it condendo a law, which is the exclusive prerogative of R. P.;" instruction of the voivodeship of Ruthenia: "may a constitution prescribe that the Tribunal courts and its decrees be germane only to those cases that they were delegated under the late lamented His Majesty King Stefan and which were laid down for them in later constitutions, so that the gentlemen deputies may not make the decrees into laws to be used conveniently against us, who are not in lite; which is what they now usurparunt in appendice of the decree with Right Honourable Mr Samuel Bolestraszycki, for these maiestatem et potestatem are held exclusively by the Commonwealth in the assembly of three estates at the sejm."

192 ASWK: "If in time to come any tribunal dares to make and issue such decrees that vim leges saperent, may they have no consequence."

193 ASWPK: *The decrees of the tribunals, whose focus is on the litigantes partes themselves yet to other honori may prove detrimental, it shall be restricted that they may solely be valid inter partes litigantes.*

194 Cf. footnote 190.

195 VL III, p. 263, f. 547; Cf. M. Goyski, op.cit., pp. 307–308.

Thus the Sejm took three important decisions: 1) the Tribunal has no legislative powers; 2) the jurisdiction of the Tribunal extends as far as the existing law, but it cannot hear new cases (“not described” in law); 3) if the Tribunal delivers judgements “exuding” the force of statute or provided with the clause *vim legis*, then such rulings shall be ineffective.

The constitution of 1627 was to put an end to the Tribunal’s practice of passing judgments *in vim legis*, and simultaneously resolved—to the disadvantage of the Tribunal—with respect to new cases (or “new actions” as they were called at the time).<sup>196</sup> The effect, however, must have been quite exiguous because in a constitution of 1638 (*On the tribunal decrees in the Crown and the Grand Duchy of Lithuania*) the Sejm observed that: — — *since in that [i.e. the matter of decrees regulated by the 1627 enactment – B.L.] popular law is not satisfactorily obeyed* — —, and pronounced that: — — *the Tribunal must in all adhere to the aforesaid law [of 1627]*.<sup>197</sup>

It would appear that reaffirming that provision did not achieve the results that the nobility wished to see. In an instruction for deputies dated January 11th, 1645, the nobles of the Ruthenian voivodeship demanded as follows: — — *the decrees in genera whereas under the constitutional 1627 ferre the tribunal does not possess iura legis sapientia*.<sup>198</sup> The nobles of the Wołyń voivodeship called for strict observance of the constitution of 1627 in as many as three instructions (in 1632, 1645 and 1646).<sup>199</sup> The instruction which the sejmik of Kraków issued on November 29th, 1678, stated that the Tribunals abuse their powers so much that — — *not only do they dare to pass decrees in vim legis sapientia, which contravene the strict laws and constitutions, but also go against brevia Sedis Apostolicae* — —.<sup>200</sup> This suggests that the Tribunals continued to resolve in the aforesaid new cases and—in the opinion

196 Cf. the instruction of Zator in the footnote 190.

197 VL III, p. 444, f. 935; Cf. W. Maisel, op.cit., p. 92.

198 AGZ XX, no. 223, 28.

199 M. Goyski, op.cit., p. 3082.

200 ASWK IV, p. 98; Cf. W. Maisel, op.cit., p. 92.

of the sejmik—violated the law in force by delivering judgments which contradicted that law.

Such inference is also corroborated by the royal instruction of the sejmik of Kraków of 1680. The king, promising to abolish conflict between the Sejm court and the Tribunal in certain criminal cases, stated as follows: “Bearing in mind that tribunals are wont to engage in cognitionem of the sejm constitutions, through which *suprema iurisdictio et potestas* of the sejm convellitur, this needs to be submitted *ad censuram R. P. and et ad correcturam*, for if it is unbecoming to pass such judgements which *vim legis sapiunt*, then it is even less fitting to revoke public laws and constitutions through one’s decrees.”<sup>201</sup> It may be worthwhile to add that the royal instruction refers to the fact that both courts employed precedents in the criminal cases which were the object of contention (*ex utraque parte there are constitutions and praeiudicata invoked*), demonstrating that tribunal precedents were still established and used in the late seventeenth century, despite having been prohibited by the constitutions of 1627 and 1638.

Consequently, non-compliance with both constitutions—at least in the seventeenth century and perhaps later as well—is evident. This is supported to some degree by another constitution relating to decrees *in vim legis*, which was enacted almost on the centenary of the first, in 1726, with the aim of reforming the Crown Tribunal. The constitution stated that: “The decrees which *vim legis sapiunt*, must not be adopted at Tribunals to be in effect in *futurum* as earlier laws dictated, and indeed *reassumendo constitutiones annorum 1627 et 1638* they shall not be enforced, but at the future Tribunal shall be annulled with the exception of those which in *parte, satisfactione aliqua*, have already been accepted.”<sup>202</sup> Thus the constitution, drawing on the two previous ones, held the decrees *in vim legis* to be invalid, and laid down that they should be revoked during the next

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201 ASWK IV, p. 132; Cf. W. Maisel, *op.cit.*, p. 92.

202 VL VI, p. 224, f. 435; Cf. J. Michalski, *op.cit.*, p. 83.

session of the Tribunal. The only exception was made for the judgments which had already been accepted by being fulfilled.<sup>203</sup>

The constitution of 1726 is the final act with respect to precedential rulings of the Tribunal. The question of the decrees “exuding the force of statute” (*vim legis sapientia*)<sup>204</sup> returned in the constitution of 1768, but the underlying reasons were different. Perhaps already in the seventeenth century, particularly after the promulgation of the Constitution of 1726, the allegation that a tribunal verdict “exudes the force of statute” began to be used to overturn verdicts. It was from that very standpoint that the Constitution of 1768 regulated the efficacy of the novel legal measure which had been unknown before the seventeenth century, but which tended to be abused by the litigating parties and exacerbated barratry.<sup>205</sup> However, that is an altogether different story of the judicial process in the declining Commonwealth, discussed exhaustively in the scholarly literature.<sup>206</sup> As for the history of precedents, use of that measure meant weakening the legislative role of the Tribunal and, most likely, the end of its precedential contribution.

## Conclusions

Finally, some remarks are due by way of recapitulation, and perhaps a few general reflections need be made regarding the sources of land law.

Precedents had already been established in the fourteenth and fifteenth century, as suggested by *Constitutiones et iura terrae Lancien-sis*. There was also a statutory basis which sanctioned creation and application of precedents (the provision in the Statute of Nieszawa of

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203 W. Maisel, op.cit., seems to interpret the text similarly, stating that one made: “exception for the rulings which were sanctioned by their execution.”

204 Polish translation of the expression taken from S. Estreicher, who nevertheless uses “laws” instead of “statutes”. Estreicher, *Kultura prawnicza...*, p. 79.

205 The constitution of 1768, VL VII, p. 330, f. 706, regulated the validity of those tribunal decrees which were alleged to *vim legis sapiunt*, in that it upheld the validity of the accepted rulings, as in the constitution of 1726, and those which were pronounced twice in the same case and were consistent in their content.

206 V. J. Michalski, op.cit., pp. 83, 200–211; Cf. also W. Sobociński, op.cit., pp. 145–146.



1454), corroborated later—until the eighteenth century—by various Polish legal writers. One can also find direct evidence that judicial rulings became a source of law, as they established new norms that would be binding in the future. This activity was particularly tangible in the area of *casus novi*, issues unregulated by law, in which a major contribution should be credited to the Sejm court. Courts delivered judgments which possessed the force of statute, called *decreta in vim statuti*, *decreta in vim legis*,<sup>207</sup> *decreta vim legis sapientia* or simply *praeiudicata*.<sup>208</sup> Also, it was an established practice to invoke earlier rulings in court.

Precedents also served to formulate respective provisions in legal compilations. Moreover, the judgments of the royal courts were collected in special compendia (sixteenth century), while numerous Polish jurists (Teodor Zawacki in particular) considered rulings equal to constitutions, citing the provisions deriving from the former as applicable law. Given the available sources, the sixteenth century was particularly propitious for precedents, quite likely marking the peak development of court law in Poland. It was then that a leading jurist of the century observed: *uno iure, unis etiam consuetudinibus ac similibus praeiudicatis omnes terrae totius Regni iudicentur*.

The late sixteenth century saw the creation of the Crown Tribunal, a judicial body which also pronounced judgments that had the force of law. Soon enough, in the seventeenth century, such rulings began to be fiercely opposed, but the constantly reiterated demands of the nobility that the tribunal precedents be considered invalid shows that they continued to be a source of law in the seventeenth century as well. The

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207 Cf. footnote 188. Precedents in seventeenth-century Spain were referred to in a similar manner: *sententiae Tribunalium supremorum vim legis habent*. V. J. M. Scholz, *Spanien. Rechtssprechungs—und Konsilien Sammlungen*, in: *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, ed. H. Coing, Munich 1976, pp. 1287–1288; cf. W. Uruszczak, *Europejskie kodeksy prawa doby renesansu*, “Czasopismo Prawo-Historyczne” 1988, XL, fasc. 1, p. 79.

208 Cf. footnote 164 and page above, as well as Przyłuski’s statement cited below.

view expressed by T. Ostrowski<sup>209</sup> suggests that the practice of establishing precedents in other courts lasted until the end of the Commonwealth.

The material presented in this paper suffices to confirm that the rulings of land courts as well as the highest courts (court *in curia*, the sejm court, and tribunals) were a source of land law. It may be presumed that they filled a tremendous gap in that law. After all, each researcher studying land law is all too well aware of the very minor role that legislative acts played in its development. Following some sweeping undertakings in the fourteenth (the statutes of Kazimierz Wielki) and the fifteenth century (the Statute of Warka of 1423 and others), legislative activity in the area of court law, especially where civil law was concerned, began to wane and die down. It had never been intense, nor was it dogmatic; it failed to regulate all elements of particular legal institutions in an exhaustive and accurate fashion.

In the sixteenth century, legislation in the domain of court law is nothing short of negligible. “A highly negative phenomenon that one observes”, Stanisław Estreicher noted, “is stagnation in the field of litigation, criminal, and private law. Constitutions of the Sejm say virtually nothing about this area of law.”<sup>210</sup> Estreicher refers to the sixteenth century, when such constitutions were concerned with law more often. What would he have said about the seventeenth century in that case? An examination of *Volumina Legum* for the period from 1601 to 1668 (the subsequent years are unlikely to improve the picture) yields only several acts pertaining to civil law, all of which carry little importance from the standpoint of legal dogmatics.<sup>211</sup> Seventeenth-century Poland—though

209 Cf. p. 8 above.

210 S. Estreicher, *op.cit.*, p. 117.

211 I have counted 12 in total: 1. *Cudzoziemcy dóbr ziemskich kupować nie mają*, VL II, p. 304, f. 1510, 1601; 2. *Ordynacja Jaśnie Wielmożnych Myszkowskich*, VL II, p. 396. f. 1515–1516, 1601; 3. *Ordynacja J. W. Janusza księcia Ostrońskiego, kasztelana krakowskiego*, VL II, p. 466, f. 1668, 1609; 4. *Miasta, aby dóbr ziemskich nie kupowały*, VL III, p. 11, f. 4, 1611; 5. *Indemnitas ludzi młodych w województwie sandomierskim*, VL III, p. 141, f. 289, 1616; 6. *O dobrach ziemskich dziedzicznych*, VL III, p. 319, f. 666. 1631; 7. *O preskrypcji dóbr szlacheckich przeciw duchownym*, VL III, p. 378, f. 797 - 798, 1633; 8. *De prole illegitima*, VL III, p. 385, f. 812, 1633; 9. *Ordynacja Rzeczypospolitej dóbr ziemskich dziedzic-*

not exclusively—was a legislative wasteland, deprived almost entirely of legislative regulation in the domain of civil law (and, in a broader approach, court law).<sup>212</sup> There were no new developments and everything relied on custom and *communis praxis*, as Jan Łączyński stated towards the end of the sixteenth century in the observation cited at the beginning of this paper. By and large, *communis praxis* meant a judicature whose precedents served to rectify the deficiencies of the law, and offered solutions to *casus novi* (*nova emergentia*).

A hundred years ago Oswald Balzer wrote that between the sixteenth and the eighteenth century “the provisions pertaining to court law are [...] exceptional and can be easily counted, including those which are concerned with minor details.”<sup>213</sup> We seem to have forgotten recently about that legislative drought in Poland of the past centuries<sup>214</sup> which, besides custom, paved the way for a broad application of legal rules established by courts, whose contribution to past Polish law was significant and by no means insubstantial.<sup>215</sup>

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znych, VL III, p. 405, f. 854–856, 1635; 10. *O widerkauffach*, VL III, p. 406, f. 856–857, 1635; 11. *Declaratio preskrypcji w dobrach duchownych* (VL III, p. 443, f. 933, 1638); 12. *O kuratoriach*, VL III, p. 452, f. 002, 1638.

212 The researcher of historical land law in Poland will not find a single institution of civil law which owed its existence solely to normative acts.

213 O. Balzer, *Uwagi o prawie*, p. 106, similarly in the study entitled *O obecnym stanie nauki prawa polskiego i jej potrzebach*, in: *Studia nad prawem polskim*, Poznań 1889, p. 58.

214 Z. Kaczmarczyk, *Historia państwa i prawa Polski*, 2nd edition, vol. II, Warszawa 1966, pp. 17, 185, argued that constitutions played a major role in the development of court law in the Nobles’ Commonwealth, but his assessment, presuming constitutions to be the fundamental source of law is exaggerated. J. Bardach followed in his footsteps, claiming that enacted law predominated in that respect. J. Bardach, B. Leśnodorski, M. Pietrzak, *Historia państwa i prawa polskiego*, Warszawa 1976, p. 193.

215 A similar view was espoused by O. Balzer, *Uwagi o prawie*, op.cit., pp. 106–107 110–111. In contrast, S. Estreicher attributed a minimal role to precedents, op.cit., pp. 68, 79, 101, 116.

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