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LOST IN TRANSLATION: THE VERBAL CHANGE FROM *PERSONA* TO PERSON²⁸

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Abstract: This paper challenges the modern legal concept of "person" by analyzing the translation problems of some Roman law fragments. It shows why the Latin word "*persona*" cannot be the etymon of the vernacular "person," and argues that the modern use of "person" stems from the nineteenth-century German juridical literature, especially that of F. C. von Savigny. This paper shows that "*persona*" forms a phrase with verbs like *gerere*, *tenere* and *sustinere* (bear, carry, hold, etc.) and has no meaning by itself. Such phrases require a noun complement in genitive form, as their synonym "represent," which is transitive, needs a direct object. On the other hand, the modern literature attributes a sense to "person," taking it as equivalent to "human individual" and using it word with the verb "be." This use is a modern invention and cannot be re-translated into Latin without semantic confusion.

Compte-rendu: Cet article met en cause le concept juridique moderne de « personne » en analysant les problèmes de traduction de quelques fragments de droit romain. L'article explique pourquoi le mot latin « *persona* » ne peut pas être l'étymon du mot vernaculaire « personne », et que l'emploi moderne de « personne » remonte à la littérature juridique allemande de XIX^e siècle, en particulier des écrits de F. C. von Savigny. Cet article constate que « *persona* » fait partie des expressions idiomatiques construites avec des verbes tels que *gerere*, *tenere* et *sustinere* (porter, tenir, supporter, etc.) et n'a pas de signification en lui-même. Ce genre d'expression a besoin d'un substantif en génitif comme complément, tout comme leur synonyme « représenter », qui est transitif, nécessite un complément d'objet direct. De l'autre côté, la littérature moderne attribue un sens au « personne », le traitant comme équivalent de l'« individu humain » et l'employant avec le verbe « être ». Cet emploi est une invention moderne et ne peut se retraduire en latin sans perplexité sémantique.

In April 2005, Joseph Cardinal Ratzinger was elected by the conclave as successor to John Paul II. Ratzinger was said to be the late pope's major advisor on doctrinal issues, and thus portrayed as a conservative theologian, even caricatured as "God's Rottweiler" for his supposedly traditionalism regarding issues such as the ordination of women, homosexuality and contraception. After the conclave, Theodore Cardinal McCarrick from the United States defended the new pope in a press conference. Benedict XVI, he said, "has this perceived persona which in many cases is not true."

²⁸ I am grateful to the sponsorship of the Marie Curie Actions of the European Commission in the framework of the Early-Stage Research Training program (sixth framework program) and my host institute, *Istituto italiano di scienze umane*.

While the English word “persona” enunciated in this anecdote remains clearly different from the word “person”, the Latin word “*persona*” seems ambiguous, especially for legal scholars. Contemporary legal literature acknowledges that the Latin *persona* is the etymon of the modern legal concept “person.” Some believed that the concept already existed in the classical Roman law, and that there was a long scholarly debate in the nineteenth-century Europe over the concept of person and the so-called legal personality of corporations in particular (Runciman, Ryan, and Maitland 2003; Saleilles 2003; Michoud 1998; Flume 1983; Duve 2003; Bär 2003; Pennitz 2003). Major participants of this debate were German civil law scholars, and the debate concerned the interpretation of certain fragments contained in the *Corpus iuris civilis*, that is, the compilation of Roman legal texts. These debates were said to have lost their practical signification, as the German and the Swiss civil codes came into effect respectively in 1900 and 1912. Both codes laid down their own principles for the corporations and foundations, and substituted systematized statutes to the scholarly interpretation of dispersed Roman legal texts. These two codes influenced the legislation of many other countries, took the old debate away from the lawyers’ hands and left the unanswered questions to the academics. Little progress has been made since then. Only two books that were published in the 1930’s addressed specifically the issue of person in the classical Roman law.

The term “person” in the legal language seemed disambiguated after the Second World War. In 1945, the Charter of the United Nations invoked in its preamble “the dignity and worth of the human person.” The Universal Declaration of Human Rights quoted this phrase three years later. They inspired many other later instruments of international law (Schachter 1983, 848-49). In addition to the international aspect, the German Basic Law (*Grundgesetz*) promulgated in 1949, which later produced a worldwide influence, also articulated the idea of “dignity of Man” (*Würde des Menschen*) with its very first article.²⁹ Along with the more famous word “dignity,” the term “human person” was anchored in the post-war terminology of human rights. There seemed to be a consensus on the signification of “human person.” It is often taken as synonymous with “Man” or “human being” (art. 1, Universal Declaration of Human Rights).³⁰ As Menke (2009, para. 3) observed, the scholarly tradition of human rights highlights the “normative character” of the predicate “Man,” which is the only condition to enjoy the “dignity.” It goes without saying that the consensus on the signification of “human person” was part of the reaction to all the racist and eugenic atrocities that had not been

²⁹ Sometimes rephrased as “human dignity” (*Menschenwürde*) in the enormous literature of constitutional law and law of human rights. It is interesting to note the way in which the preamble and the art. 1 of the Charter of the Fundamental Rights of the European Union were translated. While we read “human dignity” in the second paragraph of the English version, the term became “*Würde des Menschen*” in the German one, and, additionally, “*dignité humaine*” in the French one. Whereas the “*Würde des Menschen*” complies with the official expression in German law because the first sentence of the art. 1 reproduced the first sentence of the art. 1, sec. 1 of the German Basic Law, the “*dignité humaine*” could have been replaced by “*dignité de l’Homme*” or “*dignité de la personne humaine*” as the art. 16 of the French Civil Code, since “Human rights” in English may not be translated literally with “*droits humains*,” but “*droits de l’Homme*” in French (European Union 2000).

³⁰ Ohlin (2005) discusses many other examples.

fully disclosed until the end of the war. Undoubtedly, the intention of the peoples of the United Nations was to condemn, among other crimes, all the cruel, inhuman and degrading treatments. Even though the words like dignity, cruel, inhuman and degrading are not well defined, there can be no misunderstanding that the only thing that matters is being human.

Nevertheless, the lawyers' consensus is linguistically intriguing. Why is the "human person" deemed equal to "human being," as "person" is apparently different from "being"? If "person" alone is enough to denote a "human being," is the term "human person" not a useless repetition? Moreover, if the modern word "person" stemmed from the Latin word "*persona*," literally a mask used in a theatrical play, how did this mask become mixed up with the person that wears it? It was the difference between the two words that allowed Cardinal McCarrick to make his comment about Benedict XVI's character. The cardinal did not think the public persona, be it English or Latin, depicted correctly the person he knew. McCarrick's comment could not make sense without this semantic and ontological difference.

For those who believe that the modern "person" stems from the *persona* of Roman law, the Institutes and the Digest of Justinian provides solid proves. "First," said the Emperor, "let us speak of persons: for it is useless to know the law without knowing the persons for whose sake it was established." (*Inst.* 1, 2, 12; Moyle 1913) This statement may have paraphrased that of Hermogenian included in the Digest: "since all law is established for man's sake, we should speak first of the status of persons ..." (*D.* 1, 5, 2; Watson 1998).³¹ Yet no reference has noticed that these two quotations employ the plural form of *persona* which is rare in the whole *Corpus iuris civilis*. That is to say, this form seems unproductive. On the other hand, D. Deroussin (2001, 80) challenged this anthropocentric view in a brilliant article. He argued that the "person" as a legal term did not appear until the nineteenth century, that the *persona* of Roman law was an abstract category instituted by the law *ex nihilo*. His remark echoed the Romanist Y. Thomas's opinion that challenged what he called in the title of the co-authored book: "the right not to be born" (Cayla and Thomas 2002). Thomas delivered this opinion in the midst of controversies around the decision in which the French highest jurisdiction, the Court of cassation, upheld a baby's claim for damages against the doctor who had diagnosed trisomy disorder of the infant itself without advising the mother to abort.³²

This paper agrees to the general orientation of Deroussin's article and disagrees to its diagnostic. Indeed, the nineteenth century deserves more attention than it receives in the legal historical scholarship. However, this paper argues that it is useless to focus on *persona*, which, instead of denoting anything incongruent with the modern legal concept, refers to nothing at all. However, it is not the logical-semiotic approach of Wróblewski (1982/83) that is taken here. This paper maintains that nineteenth-century literature isolated *persona* from an idiomatic expression in which *persona* was the object

³¹ Corcoran (2000, 87-90) indicates that Hermogenian's activities were dated between 293 and 302 AD.

³² The decision is known as "the Perruche case" (Court of Cassation 2000). Spurred by this decision, the French Parliament later passed two acts against it, respectively the law no. 2002-303 of March 4, 2002 (a.k.a. *loi Kouchner*), and the law no. 2002-1577 of December 30, 2002 (a.k.a. *loi About*).

complement of a set of transitive verbs, and denatured the word by employing it with the verb “be.” This verbal change has impeded most authors from disentangling the civil law reasoning from the human right discourse, and thus misled most of the studies addressing the protection of the human person in the age of life sciences.

Translation as a core question of legal history

Although the legal historical literature admits that no Roman jurist has ever written “someone was a person,” it is widely believed that the “concept” existed in the ancient world. In 1840, the renowned German scholar, F. C. von Savigny (1779-1861), wrote in his influential treatise on modern Roman law that the idea of person, or, in the German fashion of natural right philosophy, “subject of law” or “subject of rights” (*Rechtssubjekt*) concurred necessarily the notion of Man, and every individual, and only a human individual is capable in law, that is to say, able to own, to acquire or dispose of properties, and so on (1840, 2). In addition to the individual that he called “natural person,” there were also “juristic persons,” such as associations and foundations. He conceded that there was no common denomination for all the various kinds of juristic persons in the Roman law. “When they want to address this character of such subjects [of law] in general,” said Savigny, “they only say that they take the place of persons,” that “they are feigned persons” (1840, 241).

It is Savigny that coined the words and formulas that the modern textbooks of civil law still repeat today, though he also continued the legacy of some predecessors (Flume 1983, 1). Yet neither was he the first author to associate the word “person” to “man,” nor did he invent alone the concept divided into the subcategories of natural persons and of juristic ones. The association of person and man had a much longer history which I will explain after the second point: The binary framework of natural and legal persons can be traced back easily to the eighteenth century. In fact, it appeared originally in the works of D. Nettelbladt (1719-1791), disciple of the famous natural right philosopher, Christian Wolff (1679-1754).³³ As to the overlapping “person” and “man,” there are at least two reasons for it, one remoter and the other closer chronologically to Savigny. On the one hand, there seemed to be a lasting uncertainty regarding the meaning of *persona* mentioned in the *corpus iuris civilis*. For centuries, Justinian and Hermogenian’s quotes that I mentioned above have been read in accordance with the Christian teachings. The gospel story on the different understanding of Jesus and Pharisees with respect to Sabbath gave rise to the following maxim: “Law is made for man, not man for law” (Mark 2:23-27). Though Hermogenian’s biography still remains unclear, Justinian prefaced the Institutes with the following phrase, “in the name of our Lord, Jesus Christ.” Thus, it has appeared plausible since the rediscovery of the manuscripts that both Roman law fragments also paraphrased Christ’s words. On the other hand, the natural right philosopher Wolff’s influential and representative language of philosophy could have

³³ Nettelbladt (1767, 31, §45) addresses the dichotomy of “physical persons” and “moral persons.” Savigny (1840, 240) rejected explicitly these terms by using “moral” in the sense of morality and ethics and by replacing “physical” (of Greek origin, *physis*) with “natural” (of Latin origin, *natura*), while the term “moral” also denotes “intangible.” On the transition from Nettelbladt to Savigny, see Lipp (1982/83).

accustomed his readership to the definitional style “X is Y” or “P is called Q.” This amateur jurist wrote in 1740 that “a *moral man* is a subject of obligations and rights” (Wolff 1972, 43, §70). He modified substantially this definition ten years later in a summarized version of his natural right philosophy. “Man is,” Wolff said, “a moral person to the extent that it is deemed the subject of certain obligations and rights” (1969, 50, §96).

However influential Savigny’s conception of “person” has been, the correctness issue of the translation from Latin to vernacular languages is worth highlighting. The pro-gospel interpretation I invoked above already exemplifies that all the Roman law fragments in question were not properly translated. Reading the quotes in question in its contexts shows that it is oversimplifying and misleading to single out the part that all law exists for man’s sake. Because, first of all, the sentences referred, not to “persons” as such, but to the laws and rights related to different persons. Both quotes of Justinian and Hermogenian textually follow the principle that Gaius of the second century laid down: “All our law concerns [either] persons or things or actions.” (*Inst.* 1, 2, 12; *D.* 1, 5, 1; Watson 1998) Moreover, the title that comes up right after Justinian’s quote is “of the law of persons.” In other words, it was not “persons” but “law” on which the Institutes and the Digest focus. In fact, the whole Book I of the Institutes consists of the juridical consequences differing in accordance with a *persona* and does not find it necessary to define *persona* in spite of its presumed importance. Hence, it seems safer to translate the preposition *causa* with its ordinary sense “because of” instead of the teleological “for.”

The jurists’ reading of “person” played a leading role in the nineteenth century. It was rather the legal historiography rather than the lexicography that brought the new meaning of person to the major dictionaries. A telling example is Jacob Grimm (1785-1863), Savigny’s disciple in Marburg and a close friend, best known for the fairy tales published along with his brother Wilhelm (1786-1859). He devoted himself to the medieval history of law under his master’s inspiration, and applied his legal historical methods and knowledge in the monumental dictionary *Das Deutsche Wörterbuch* (DWB) that the brothers co-edited. The entry “Person” of this dictionary begins with a citation of Jacob’s etymological study. He explained *persona* by breaking it down into the intensifying prefix implying and the verb *sonare*, to sound, arguing that a *persona* was used to make the voice louder (“Person” 1854-1960, column 1561; Grimm 1965, 370). The DWB did not forget to mention that a person is “in the legal science, a man capable of certain rights” like a moral or juridical person (“Person” 1854-1960, column 1564). By comparison, such a definition did not exist in the entry “*personne*” of *Académie française*’s dictionary, at least up to the sixth edition of 1835. Curiously, Littré’s dictionary (1872-77) said that a *personne* is someone who “has some rights” by quoting a great theologian, J.-B. Bossuet (1627-1704), whereas Diderot and d’Alembert’s Encyclopedia, certainly one of the most significant French publications in the eighteenth century, ignored the influential Bossuet and only mentioned briefly in the entry “*personne* (*théologie*)” that scholars called a “person” a “dignity,” that is, rank, office or position, such as father, husband, judge, magistrate, and the like (“Personne” 2008). The Encyclopedia’s wording was similar to that of its contemporary publication, du Cange’s glossary of medieval and late Latin. The author, Charles du Fresne (1610-1688), also known as *sieur du Cange*, posed *dignitas* as the first definition of *persona*. (Fresne 1883-

1887). Neither did the *Lexicon totius latinitatis* published in 1771 include any particular legal usage of *persona*. Its editors cited as an occurrence the fragment “all our law ...” that we discussed above without highlighting any particularity (*Persona* 1965). By the way, it was then still falsely attributed to Paul, since its true origin, Institutes of Gaius, was lost until a copy of it was discovered in Verona, Italy, by B. G. Niebuhr (1776-1831) in 1816.

Misread phrases and detached *persona*

Another problem caused by the jurists’ writings is whether or not the Roman text literally said “take the place of persons.” Certainly, the word *persona* exists in the Roman legal sources, and the legal scholars found occurrences to support their claims. Yet the existence of a word does not necessarily give birth to a concept, and it is implausible to extract words regardless of their grammatical role in the whole sentence. When words form idioms and phrases, they no longer function alone, but as a unit in a sentence. This is the key to disentangle the complicated scholarly discussions on the juridical term “person.”

Among the Roman law materials utilized to conceptualize “person,” a great amount concerns so-called *hereditas iacens*, literally a heredity which is lying down. This concept refers to an intermediate situation of a heritage awaiting the entry of an heir.³⁴ In some scenarios of the Roman law of inheritance, as soon as one dies, his heritage, the rights, properties, estates, debts and actions altogether, falls automatically upon the categories of heirs called *heres suus* or *heres suus et necessarius*. In default of an heir of either category, he who is willing to overtake all the rights and obligations has to enter into the heritage voluntarily, and this act is called *aditio*. Such a heritage thus “lies down” (*iacet*) chronologically between the death and the *aditio*, and arouses mountains of questions for the lack of property owner. For instance, are the properties of an *hereditas iacens* legally ownerless and can they be taken away by anyone, since the ex-owner has died and the new one has not shown up yet? To whom belong the fruit and animals harvested and bred during this interval? Who is entitled to the payment done by a decedent’s debtor? One of the solutions to the legal questions relating to the *hereditas iacens* is the so-called “personification,” which means for the modern scholarship that the *hereditas* is deemed to represent a person.³⁵ The occurrences quoted by Savigny deal exactly with this question.

The translation problem here is whether or not Romans said that an *hereditas* “took the place of a person” or “represented a person.” It is useful to specify in advance that the following discussions are still to be placed on the linguistic level instead of the doctrinal one. It is not the legal concept “person,” but the word from which the concept allegedly derived that is at stake. Certainly there would be no room to contest the proposition that

³⁴ For a short explanation in English, see Buckland (1963, 306-310) and Duff (1938, 162-167). Some of Duff’s points seem to have echoed in Lübtow (1968). For Italian and Spanish literature, see Robbe (1975) and Castro Sáenz (1998).

³⁵ Recent literature shows a wider variety of wording. Instead of “personification,” some authors use “personation” or “impersonation.” “Personality” also tends to leave its place for “personhood.”

“an *hereditas* represents a person” if “person” were to be defined in the fashion that each scholar would prefer. This is not the case here. *Persona* was more than an etymon in the literature. It was deemed equivalent to the modern word “person.”

The phrase “to take the place of a person” or “to represent a person” stems from the Latin phrase “*hereditas personae vicem sustinet*” and the like.³⁶ The literature seems unanimous on this point. Even those who have contested the soundness of the legal personality theories found a corresponding word for *persona*. P. W. Duff, ex-Regius Professor of Civil Law in Cambridge, maintained that *persona* is not a person, yet still translated the above-mentioned “*personae vicem sustinet*” by “is treated as, functions as a person,” even though, said Duff, “*heredis* and *defuncti* are no doubt dependent on, not apposition to, *personae*” (1938, 1-22, 162). Thus he put the quote of the Institutes in English as follows: “The Estate takes the place of a person, the person, that is to say, not of the heir, but of the decedent” (1938, 166). In other words, Duff found it syntactically acceptable to read “*personae vicem sustinet*” alone and assumed that *persona* should have a meaning whether or not it was a person, a subject of rights and obligations, or a human being. Duff was not alone. Countless scholars, including learned Savigny, read it in the same way and shared the same assumption. Despite all the disagreements among them, they all granted a sense to “*persona*” and recognized its grammatical independence. This is where the translation problem lies.

In order to detect this problem, it takes no particular knowledge or competence but simply a shared experience among foreign language learners. When one builds up one’s vocabulary, attention is not only paid to the sense of the words, but also to the way in which these words ought to be used. A random arrangement of words might become a good poem, but can hardly result in any meaningful phrase and sentence. Even if such an arrangement is both logical and grammatical, it can still sound incomprehensible, perplexing, incongruent, or at least unusual. To use one word correctly, it is necessary to learn at the same time other words that goes with it. Take the word “perfume” for instance. Conventionally we say that someone “wears” perfume, instead of “uses” perfume. In this example, “to use perfume” makes sense since it is grammatical, but it is not a conventional use and thus not recommendable to those who learn English as a second language.

The same experience is also relevant to the discussions on *persona*. Would the Roman understand the nineteenth-century doctrinal elaborations in Latin? The answer is no. As a matter of fact, the nineteenth-century theories become totally incomprehensible when they are translated into Latin. This is simply because when *persona* goes with the Latin verb “be,” *essere* in its infinitive form, *persona* conveys the meanings we already know, that is, a mask, or figuratively a role or a character. Propositions like “*persona est*” or “*aliquis persona est*” turn out to mean “there is a mask (a role, or a character)” and “someone is a mask”. Such propositions not only have little to do with the legal scholarship, but are also close to nonsense. Instead of “be,” *persona* goes much more often with verbs like *gerere*, *tenere*, *sustinere*, *suscipere*, etc. which render “wear,” “bear,” “carry,” “hold” and so on. Since all these verbs are transitive in Latin, they all require a direct object, and thus *persona* has to decline into the accusative form,

³⁶ *Inst.* 2, 14, 2.

personam. Indeed, a verb of this kind followed by its direct object constructs a grammatical sentence, yet “*personam sustinet*” or “*personam gerit*” mean nothing but “someone or something carries a mask” or “plays a role.”

Here comes the vital question: How are we going to obtain a concept of “person” from the combination of *persona* and a proper transitive verb when the meaning that such a combination conveys remains far from what we call a person in our time?

The occurrences that legal scholars have at hands may suggest two different readings, but the scholarly tradition prefers constantly what I call the positive one. This reading consists in taking “*persona*” as a word and thus attributing a sense to it. The alternative is a negative reading of *persona*. This reading takes “*personam sustinere*” as a phrase, even an idiomatic expression and thus eliminate the question on *persona*’s denotation. Instead of *persona*, it is its complement in genitive form that deserves our attention. Because this reading equalizes “*personam sustinere*” to the transitive verb “represent,” which needs a direct object, and this object determines what on earth the subject of the sentence represents.

If we focus on the *hereditas iacens* regardless of the chronological order of the fragments and all the authenticity problems, the diversity of wording lays before the eyes. There was not just one single way to name this juridical scenario. The fragments can be sorted into three different kinds. The *hereditas* is said to take the place either of the decedent or of a future heir, or is taken as its own master. In other words, the idea of “taking place” or “representing” repeats itself, yet all of them do not invoke *persona*. In respect to the *Lex Aquilia*, a Roman law which concerned the compensation of damage caused on properties, it is said that “the *hereditas* is deemed the master (*dominum ... habebitur*), for which reason the *heres* will be able to undertake (the lawsuit against the one who has killed a slave of the *hereditas*) after his entry” (Ulpian, *D.* 9, 2, 13, 2; Duff 1938, 163). Philological critiques corrected this sentence later with no semantic alteration: “*domini autem loco hereditas habebitur*,” the *hereditas* is deemed “in place of the master” (Lübtow 1968, 598) In another context, the *hereditas* “holds the master’s position” (Ulpian, *D.* 43, 24, 13, 5; Duff 1938, 163). Still another occurrence runs: “the *hereditas* plays the role, not of the heirs, but of the decedent, as it is confirmed by many civil law arguments” (Ulpian, *D.* 41, 1, 34). As to the future heir, Pomponius of the second century said that the process to conclude a contract of *stipulatio* would not be terminated even if the requested party had not replied before he died, because the process could go on with the heir, who “in the meantime would be represented by the *hereditas*” (Pomponius, *D.* 46, 2, 24). Other ways of wording like “*vice*,” “by virtue of,” should convey the same idea. An early one occurred in a fragment attributed to Iavolenus of the first century: “*hereditas personae defuncti vice fungitur*” (*D.* 41, 3, 22). This form passed since then from little known Florentinus to the Justinian’s Institute of the sixth century: “*hereditas personae defuncti vicem sustinet*” (*Inst.* 2, 14, 2; 3, 17, pr.; Florentinus, *D.* 46, 1, 22; *D.* 30, 116, 3). Note that the word *vicis* in genitive form denotes position, place, room, etc. The sentence literally renders: “the *hereditas* holds the position of the decedent’s *persona*.” Indeed, this occurrence could imply that “*persona*” acquired a particular meaning in the sixth century. Yet it may also be deemed an awkward wordplay to combine in one phrase the two classical expressions, namely “*vice fungi*” and “*personam sustinere*.” Both expressions convey the same meaning when completed by a

noun in the genitive form, and can be translated simply by “to represent” in modern English. As a transitive verb, “to represent” requires a noun as its direct object. To sum up, the Roman jurists focused on the noun complement of “*vice fungi*” and “*personam sustinere*” rather than the words “*vicis*” and “*persona*.” There is no ground to single out “*persona*” from the expression in which it is embedded.

From this point of view – and so I conclude – no theory of juristic *persona*, at least not when the reasoning is done in Latin, can be deduced from the Roman legal texts without committing neologism. It is in the detachment of “person” from an idiomatic expression that the problem lies. Due to this linguistic manipulation, the verbs that used to go with “person” have been forgotten and replaced, and the Roman fragments in question were overloaded with significations. While in modern English “*persona*” and “*person*” remain two distinct words, “*personne*” and “*Person*” seem to occupy both seats respectively in French and German, and the Latin expression “*personam gerere (tenere, sustinere, etc.)*” has lost its sense in translation for good.

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