

THE VALUE OF ROMAN LAW.

One of the most significant and encouraging features in connection with present attempts to elevate the training afforded by American Law Schools is the augmenting importance which a few of such institutions are beginning to attach to the study of the civil law. This movement, slight though it may as yet appear to be, seems destined to mark an epoch in the history of legal education in the United States and can scarcely fail to exert a most salutary influence on the whole legal profession. Not that the subject has ever failed to attract attention in this country; for who can be unmindful of the names of such jurists as Kent, Cooper, and Hammond—jurists who never wearied either of emphasizing the value of Roman law or of illustrating the vast treasures contained in its inexhaustible sources? In point of fact, moreover, each period of our history has had its small but earnest band of civilians. But notwithstanding these facts the civil law has never received from us that general attention its importance merits, and the profession has been obliged to pay a very heavy penalty for this neglect. To verify this point one will find abundant evidence, but perhaps one would not have to go further in search of it than to many of our Law Schools with their bread-and-butter courses of instruction. It is this shop-view of education—unfortunately prevalent in too many places—that stands out in such striking contrast with the critical analytical atmosphere pervading all of our large universities and training schools. The Law Schools therefore cannot afford to lag behind the theological, medical, and scientific departments, and the very best antidote for this impending commercialization of legal education and the legal profession is to be found in the study of law as a science. And this is, of course, impossible without a knowledge of Roman law. Another striking illustration of the bad results which flow from the neglect of the civil law is furnished by almost any one of our

numerous codes whose lack of scientific classification and precise expression is so fruitful a source of litigation. The same slovenly characteristics are also to be met with in many of the law books that issue annually from the press of various energetic law firms often to bewilder where they should inform and to increase unnecessarily the already bulky state of law literature. Indeed, the authors of such books seem frequently to be imbued with the notion that the possession of a pair of scissors and a paste-pot is the main prerequisite for writing—and the direful results of such fatuous ideas may easily be imagined; but it is surely matter for regret to experience that notwithstanding the endless multiplication of law books one finds it more and more rare to secure a volume by an American writer that really treats any subject at all in a manner at once brief, accurate, and scholarly. We are speaking in a general way, of course, and without reference to the very high class of work that has so frequently emanated from two or three Law Schools, to say nothing of other notable exceptions which will readily occur to the intelligent reader. Excluding these, therefore, our law books are far too frequently either digests pure and simple that have been compiled by comparatively unknown persons, or mere pirated editions of English works, the theft being thinly veiled by a liberal sprinkling of American cases. Much of this state of things may be ascribed, to be sure, to the materialistic spirit of the age; but that a great deal more of it may be traced directly to ignorance of Roman law and the higher branches of jurisprudence that have been founded on it, is a fact which few can really seriously gainsay.

But, as previously intimated, there has always existed in the United States a small circle of practitioners and instructors interested in the cultivation of the Roman law, and it is earnestly to be hoped that their number may continually increase. The publication, for example, by Judge Howe, of Louisiana, of the lectures he delivered a few years ago to the law students of the University of Pennsylvania and other institutions will always occupy a high place among

American law works. Another well-known civilian is Dr. Munroe Smith, of Columbia University, New York, whose scholarly researches in this field require no commendation at our hands. The names of these two gentlemen will serve also to indicate the two sets of influences which, until quite recently, have permeated most of the instruction given by American lecturers on Roman law. These influences may be designated briefly as French and German. Practicing his profession in a Commonwealth whose laws are in a great measure borrowed from the Napoleonic code, it is natural that Judge Howe should resort to French authorities and, like them, regard the subject of Roman law from a somewhat practical point of view. Dr. Smith, on the other hand, received his juristic training at a German University and he necessarily betrays, at times, the theoretical but always thorough, characteristics of his Teutonic guides. But the one influence is the complement of the other, and we could ill afford to spare either. For notwithstanding the fact that the Germans insist that the Roman law was never adopted by their nation, but only "received," into the country, nowhere else has it been more patiently investigated or more brilliantly elucidated. Nor is it probable that the new code of the empire, which went into effect at the beginning of the present year, will seriously affect their extraordinary activity in this domain. French activity in the same direction is scarcely behind that of the German—a fact that will become sufficiently obvious to any one who takes the trouble to consult a catalogue of law books that may emanate from Paris, not to mention the long line of French jurists of former times. Meanwhile the third influence exerted on American instruction in Roman law has only recently manifested itself in any marked degree. We refer, of course, to that which has come to us from England since the revival, so to speak, of that country's interest in the civil law. This influence, however, is for the most part confined to those who are engaged in teaching the subject of Roman law to the undergraduates of a few colleges and universities. Un-

fortunately, however, such instruction is more often than otherwise of a most elementary nature and appears to lay stress rather on the history of Roman law than on the law itself. In this respect, therefore, lecturers of this type sometimes recall the Italian glossarists of the Middle Ages, whose servile adherence to commentaries caused them to ignore original sources and to teach their pupils a similar fatal habit.

It would be a very grave mistake to fancy from the foregoing observations, however, that nothing is being done by our kinsmen across the Atlantic to foster the cultivation of the civil law. Thanks to the researches of publicists like Maine, Muirhead, Bryce, Markby, and others, to say nothing of the potent result of English social and territorial expansion, much has been accomplished in the way of emancipating the professional mind from many of those illiberal opinions that dwarfed the legal conceptions of earlier writers on law; and systematic courses of lectures in Roman law are now offered not only at Oxford and Cambridge, but also at the Inns of Court—the time-honored seat of common law culture. And it is scarcely necessary to add that in Scotland, whose legal system rests on the civil law, this branch of learning has long received the most careful nurture. In England, however, the progress of the study of Roman law has not been a smooth one; for implicated as the subject has been with the passionate religious dissensions of former times, men either saw, or professed to see, in their own system of jurisprudence the symbol of national freedom and sovereignty and in that of Rome the title of a hated foreign hierarchy. These prejudices were undoubtedly heightened by England's geographical isolation, which became a moral one after the Reformation had cut off the country from the great intellectual movements of western Europe. In the meantime, ignorant or selfish panegyrists of the common law not infrequently appealed to the most ignoble passions of their countrymen in order to further their own views or interests, and along with the body of the

English law which our forefathers brought with them to America, were imported not a few of the prejudices that had gathered around that system.

Blackstone well understood how to appeal to the state of mind we have just been describing when he sought to persuade his complacent readers that they possessed not only the wisest system of jurisprudence ever devised, but one also that had been least contaminated by Roman influences. Now it is very far from our purpose to depreciate either Sir William or the English common law. Like many others, we believe his immortal treatise to be the best and clearest introduction to the study of our law, extant; and no one could seriously advocate the substitution of the civil law for the common. At the same time this does not prevent us from saying that as a historian Blackstone is an unsafe guide, and that as a critic of Roman law he is often too partisan or uninformed for one to follow him. It is impossible, therefore, to escape the conviction that a full and complete knowledge of the English common law can not be gained without an acquaintance with that portion, at least, of the Roman law which has so materially aided in shaping its growth. In the very arrangement of his subjects, for example, Blackstone follows the Institutes of Justinian closely enough to convince any one of the debt he owes a system he often affects to despise, whilst Bracton, on whom he largely relies, took verbatim a large part of his material from the *Corpus Juris Civilis*. Other forerunners of Blackstone exhibit the same plagiarisms. But it ought not to be forgotten that when Blackstone wrote his work the bulk of English wealth was represented by landed interests. Hence the various modes of acquiring title to realty, the canons of descent, the modes of classifying estates, and the various other feudal rules governing interests in land are for the most part of purely indigenous origin. Accordingly, most of the early English law treatises were in large measure devoted to the subject of the law of real estate, whilst disputes in respect to the ownership and possession of this species of property

gave rise, perhaps, to the greatest number of cases tried before the court of common pleas. Trade was despised. Modern inventions and discoveries had not yet inaugurated the present type of industrial society. The age was distinctively an agricultural one. Corporations for business purposes were almost unknown, and, as contrasted with real property, personalty occupied a very inconspicuous position. Nor is it probably necessary to do more than call attention to the fact that the principle of contract was still struggling to free itself from the thralldom of status. Despite his partisan bias, therefore, Blackstone was forced to recognize the manner in which English common law judges had been obliged, at times, to resort to the *Corpus Juris Civilis* as society developed from the agricultural into the industrial stage and questions relating to personal property assumed greater and greater prominence. Nor does he neglect to comment on the influence exerted by the Roman law through the intervention of the clergy, whose long usurpation of jurisdiction over matrimonial and testamentary causes gave to those branches of our law many of those Latin characteristics which they still retain. The canonical impediments to marriage, the various grounds of divorce and separation, the law governing the administration and division of the personal property of an intestate, the perpetuity of corporate existence, the representative character of executors, and the various other principles relating to family law and to the law of personality furnished Sir William with abundant illustrations of Roman influences; but he was able to do a great deal towards practically closing to the English-speaking race, for many years, the whole subject of the civil law.

When we approach the gradual amelioration of the rigid rules of the common law by the principles of the chancery court, we encounter something akin to the triumph at Rome of the *jus gentium* over the narrow *jus civile*. Indeed, equitable titles, equitable rights, and equitable remedies all furnish evidence of the most convincing nature of the presence of Roman influences, and all of us are familiar with the

fact that for a number of years the chancellors were ecclesiastics untrained in the common law, but well acquainted with the principles of the civil and the canon law, to both of which they so frequently resorted. Hence, even where all distinctions have at last been abolished between the two sorts of remedies which for so long a time prevailed in English-speaking courts of justice, it is still extremely difficult, without some knowledge of Roman law, to obtain a clear idea of the inherent differences between two species of rights that are almost sure to arise under any system of procedure.

In view of what has been remarked above it will probably not be very far from the mark to say that of our private substantive law the branches relating to landed interests are those of purest native origin, although even these are not entirely free from Roman influences. Much might be written, for example, of the presence of such influences in the law of easements. On the other hand, so much of the English law as pertains to domestic relations and personal property is drawn, for reasons already sufficiently indicated, largely from Roman sources. The principles that were gradually established by the court of chancery may be traced to a similar source. And even that portion of the law of domestic relations which is commonly regarded as of purest English origin, namely, the law of husband and wife, has been so modified of late by equity and legislation that it is rapidly approaching the Roman type. English adjective law, however, or the law of procedure, is, to a great extent, of native extraction, except in so far as the law of equity procedure is concerned. English public law, including the law of crimes, has also been but slightly modified by the civil law. Here political considerations seem to have outweighed all others, whilst the territorial theory of jurisdiction over crimes aided materially in preserving intact the old system of law. But, as we shall presently see, that portion of public law that concerns external relations has been very much affected by Roman law. Aside, however, from considerations arising from the implication of Roman law with

the common law there are others of scarcely less weight, which are well calculated to arouse an interest in the former among those who study the latter. To the active practitioner, for example, the most valuable part of the civil law is that which is concerned with private rights and of these those arising from contractual and quasi-contractual relations stand pre-eminent.

Now, in this field, the juriconsults are frequently without modern rivals, for their reasoning is often as near perfect as the human mind can possibly approach. Indeed, even in the law of delicts, as Sir Frederick Pollock has so forcibly demonstrated, the civil law may be made to yield a flood of light. Nor need we do more than mention the obligation of admiralty law to Roman law. Following the practice of the old English judges, we still resort therefore to the *Corpus Juris Civilis* whenever precedents cannot be found elsewhere. And it has been claimed that Justice White's elevation to the Supreme Bench of the United States was due largely to his familiarity with the civil law.

Before dismissing the practical aspects of this subject, one or two other points may be briefly referred to. The necessity of codifying laws for the millions who have come under our government by virtue of the recent treaty with Spain becomes more apparent and difficult every day. Here again we may be able to profit by the experience of the old country. Every one knows what that experience has been. It seems that those Englishmen who were entrusted with the delicate and irksome task of framing and interpreting laws for the peoples of India early discerned the wisdom of clear analysis and the possession of a system of procedure less cumbersome than that furnished by the old common law. It was further recognized that those who had been thus called upon to administer the English law in regions far-removed from extensive libraries would be compelled to rely more on positive enactments than on general principles gathered from many and often conflicting sources, and it was accordingly not very long before Parliament took up the subject. Such was

the beginning of that series of great statutes which must eventually recast the greater part of the so-called unwritten law and give to English jurisprudence a simplicity and homogeneity it has never hitherto enjoyed. And while it might perhaps be out of place to discuss in this connection the relative advantages of written and unwritten law, it may be remarked that the study of Roman law appears to lead inevitably towards codification. Judging, therefore, from recent parliamentary enactments, one is inclined to believe that the jurists of the mother country are in many respects far less conservative than are the jurists of the United States. And that this liberalization of the English professional mind may be attributed, in no slight measure, to the recent impetus given the study of Roman law by social and colonial problems, is a fact which will become sufficiently clear to all who examine the subject carefully. May not this experience of England convey to us then a most wholesome lesson in the present conjuncture of our foreign affairs? Congress is already endeavoring to frame systems of private law for the inhabitants of our newly-acquired possessions and in many respects this task is not rendered any the lighter by reason of the federal character of our government and the absence of a national common law. But in several other respects our difficulties may not prove so great as those experienced by the British Government in the Orient; for the very absence of an unwritten system of national law will probably have the effect of hastening action. Then again the Spaniards have already introduced into the island their own legal institutions, which are largely drawn from Roman sources. Hence it will not be wise to leave so vital an interest entirely to the omnipotence of legislators whose misdirected efforts can involve the whole subject in hopeless confusion. Accordingly, it seems very obvious that we shall soon be forced to take up the study of Roman law with an earnestness never before approached, and this step will be found necessary not only for the purpose of aiding proper commissions to understand the legal situation in our island

possessions—for no one would probably be so unwise as to wish to destroy entirely the old Spanish law now there—but also for the purpose of framing for the inhabitants of our recently acquired territory such laws as their altered condition may from time to time demand.

But as suggested already, these aspects of the subject are by no means the most important: for without some knowledge of Roman law it is impossible for one to grasp the principles of those higher branches of jurisprudence whose value becomes more clearly recognized whenever there is a clash between progressive society and existing institutions. New wine cannot be put into old bottles. Nor has it remained for our generation to make this discovery. Men of other times and countries have faced the same baffling difficulties which they attempted to surmount at first by means of the tortuous methods of fictions and then by the more direct intervention of equitable rules. Both in Rome and in England, however, the latter agency having finally overcome the ancient procedure, suffered in some respects from the same evils that had overtaken the older law. Later on, therefore, legislation was invoked to remedy evils that arose from the apotheosis of custom and the inflexibility of positive law in general; but the partial failure, in some quarters, of representative institutions has brought about the inevitable reaction and there is a growing disposition to rely more and more on commissions composed of specialists. Never before, therefore, has there been such a need for thoroughly trained lawyers and they can no more afford to ignore the productions of the juriconsults than modern painters can afford to ignore the masterpieces of ancient and mediæval culture. The Latin language, moreover, is not only the best vehicle for the expression of juristic ideas, but the nomenclature of the Roman law writers is used by all publicists who treat the subjects pertaining to our profession in anything like a scientific manner. And as all the world knows, the genius of the Latin race was above everything else, a legal one. The contributions of this people to jurisprudence caused Von Ihering to remark that the Romans gave to the whole civilized

world its code of laws three different times. There was first the code of Justinian, which was prepared for the world-wide empire of the sixth century; then came the code of Gratian, founded in large measure on the *Corpus Juris Civilis* and patterned after it, which furnished Catholic Christianity with its canon law; and, finally, there was the influence exerted on the positive law of every European country by the universal study of Roman law after the revival of learning. And it was this intermingling of the law of the Romans with that of their Teutonic conquerors that has given rise to modern European legal systems, just as the mixture of the blood of the two peoples formed modern European states. It is true that the Latin strain is more predominant in some countries than in others, but that it is everywhere present is a fact that requires no argument.

Jurists of all schools recognize these facts, and whether we pick up a book on analytical, comparative, or historical jurisprudence we find it filled with the ideas and phraseology of Roman writers. The mere possession, therefore, of such a mass of legal literature as that found in the *Corpus Juris Civilis* is a boon to the human race; for we are thus enabled to trace, step by step, for a thousand years, the progress of the law of the most gifted nation of antiquity. Their experiences were often strikingly like those we have encountered. There was in the beginning the same rigid inflexible body of customary law which was softened at first by means of fictions and eventually by the liberal rules of the curator, or the chancellor, as an English-speaking person would say. And while the conservative nature of the Roman people often prevented them from admitting that alterations had been made in their law even after the most sweeping changes had been effected, they were ordinarily wise enough to yield, in practice, to the vicissitudes of time and adopt their jurisprudence to the changing needs of society. But interest in the study of Roman law is confined to no single profession; for no one can claim to belong to the educated class who does not possess at least an elementary knowledge of the subject. It is not necessary, for example, to

remind any one of the great value of such knowledge to the classical scholar. Then again there is the light which a knowledge of the civil law throws upon the history not only of Rome but that of the entire world. Such questions in Roman history, for example, as the gradual enjoyment by foreigners of all the rights of Roman citizenship; the struggles between the patricians and the plebeians; the extension of the Roman law to the provinces; the results of the separation of law from religion; the consequences of too great a freedom in the matter of divorce; and the effect of substituting the empire for the republic—all these great and eternal questions can only be understood thoroughly by studying them in connection with Roman law. But if a knowledge of Roman law is valuable to students of classical antiquities, it is for many reasons of perhaps even greater value to the student of universal history. No one has made this subject clearer than Savigny, who shows so well how, through the events of the Middle Ages, Roman law has entered like a red thread into the texture of every nation's political life. The Popes were but the successors of the Cæsars; the *Corpus Juris Canonici*, simply the counterpart of the *Corpus Juris Civilis*. One word more. It was the thought and language of the Roman law that crept into almost every branch of mediæval learning and gave to modern ethics and theology some of their most familiar doctrines and expressions—a fact which caused many of our earlier judges no end of trouble by reason of the use of identical words in a twofold sense, namely, a moral and a legal one.

Before indicating more definitely what portion of the civil law might be studied most advantageously in connection with the courses in municipal law which are already offered by American Law Schools, mention should be made of another very important branch of general culture that owes a great deal of its learning to Roman law. We refer to international law, for Grotius, Puffendorf, Vattel, and other fathers of this science were all eminent civilians who constructed the science of international law almost entirely upon the principles of the civil law—a fact too sufficiently well

known to require extended discussion. When we consider, therefore, the entrance of our nation into closer relation with the rest of the world and the practical interest this subject will have for us in the future, we can readily understand the transcendent importance of Roman law from still another point of view. Thus, for a fourth time, has Rome given the law to civilized nations, for international law is nothing more or less than the public law of the world. And as Sir Henry Maine has so forcibly pointed out, the governments of the various western nations may be regarded, in this respect, as so many Roman landlords.

In concluding we may now perceive what branches of civil law may be profitably studied by law students. And while it is true that several of our law schools make provision, in what are called post-graduate departments, for lectures on Roman law and kindred topics, it may be urged that those just taking up the study of the law may derive a great deal of assistance from such courses. Now one of the most difficult matters the average beginner experiences is to comprehend the difference between law and equity. He so often complains that having learned a certain rule he must soon unlearn it because of the magic of this mysterious chancery court; and it is also easy for him to acquire the notion that the law consists of a set of lifeless, inflexible rules instead of being an organism with all the characteristics of other organisms. That these obstacles may, in most instances, be overcome by taking even the novice through an elementary course in Roman law will become patent to all who try the experiment. This is said with a full realization of the already enormous amount of work on the part of Law Schools which has been rendered necessary partly through the multiplicity of branches of law arising from industrial development and partly through the haste of the student to complete an education already unnecessarily prolonged by reason of the stubborn adherence of most colleges to the four years' course for undergraduates. By resorting more frequently to the source we avoid many accretions the current has received during its onward flow and which seem at

times well calculated to deflect it from its course. Accordingly, there seems to be every reason for believing that for the purposes of instruction in Roman law at those schools which make no provision therefor at present, a course might be arranged somewhat as follows, either as an auxiliary to the regular course in positive law or as an introduction to lectures on higher jurisprudence:

1. *A general outline of the subject.*—This ought to be a purely introductory course designed to acquaint the beginner with the concepts and history of Roman law. The basis of instruction might very well be the excellent little manual of the late Professor Hadley or that of Mr. Hunter, with constant references to larger works. Three hours weekly for half a year would prepare the student for the next course, and so far from interfering with his regular work, would be a positive gain for him.

2. *Justinian's Institutes.* Those who have taken this preparatory course are ready to take up the study of the Institutes. It is scarcely necessary to add that this work ought to be studied in the original, which is not difficult reading; but of course those who are ignorant of Latin may find a number of excellent translations. The small compass of the Institutes, compiled as is well known, for the use of law students, will enable one to go through all the books very rapidly. Naturally, however, some parts of the work will require more attention than others. Thrice weekly for the rest of the first year should carry the student through the volume.

3. *The Pandects.* Having mastered the above two courses a student ought to be well enough prepared to take a systematic course in the Pandects, or Digest. The immense size of this part of the *Corpus Juris Civilis* will render its thorough investigation impossible, but three hours weekly for the second year would do much towards familiarizing the student with the ideas of representative jurisconsults and teaching him how to use authorities.

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