

THE VALUE OF ROMAN LAW TO THE AMERICAN LAWYER OF TODAY

By CHARLES P. SHERMAN

IN spite of the progress of legal education in the last decade there still lingers in some places that now time-worn belief that a knowledge of Roman law is of no use at all in the legal profession.

This view of the present value of Roman law is obviously superficial. It is based on the assumption that because the Roman state and tribunals perished centuries ago, therefore Roman law itself has long been dead also. But this conception of the fate of Roman law is historically inaccurate and false. The spirit of Roman law did not die—on the contrary it is still very much alive in our midst. It was the majestic and beneficent Roman law which more than any other single element brought civilization back to Europe following the barbaric deluge of the Dark Ages.

From Rome we have inherited the conception of Law itself, of the State, and of the Family. The high, firm, secure, legal position of women in European and American civilization, which makes our civilization superior to all other types, is a legacy from the Roman law. The Civil Law was the first to work out and recognize the equality of woman with man.

The inability of the superficial observer to discern the living Roman law of today is on account of its modern dress: instead of its ancient sixth century Latin garb, Roman law is now clothed in twentieth century dresses of various patterns, such as the Roman-German law, the Roman-French law, and the Roman-English law. The past and present in law are inextricably woven together.

But it may be argued that, admitting the survival of Roman law into all modern legal systems, what actual concrete, present or future professional advantages can now be derived from the study of Roman law? The answer is that Roman law should be studied fervently with a view to the betterment of our American law, which sadly needs improvement and which in so many respects—particularly by its lack of codification—is greatly inferior to other modern legal systems. Our system of precedents and case-reports is breaking down from its own weight and is becoming decadent: how soon must codification take its place? We must study Roman law with this aim in view, as have the French and Germans, if we wish our law to attain foremost rank—its proper station—in the modern world.

1.—*The Ethical Value of Roman Law.*—Of inestimable educational advantage is the ethical value of Roman law study. An acquaintance with the loftiest system of jurisprudence the world has ever seen cannot fail to give first of all an enormous uplift to character. The Roman jurists breathed deeply the pure air of ethics: they taught the never to be forgotten truth that law and ethics are very closely related.

What the world needs today is not more law, but more justice. The great danger to our profession is that its ideals are in peril of becoming commercialized. In other words the practice of law is in danger of becoming a mere trade and losing its professional nobility thus accurately described by the Roman jurist Ulpian: "When a man means to give his attention to law he ought first to know whence the term 'law' is derived. Now law is so called from justice: in fact * * * it is the art of what is good

and fair. Of this art we may deservedly be called the priests; we cherish justice and profess the knowledge of what is good and fair, we separate what is fair from what is unfair, we discriminate between what is allowed and what is forbidden, we desire to make men good, not only by putting them in fear of penalties, but also by appealing to them through rewards, proceeding, if I am not mistaken, on a real and not a pretended philosophy."

To conceive of the value of knowledge as based upon its utility for the acquisition of wealth or material success is to completely overlook the chief purpose in all education—namely, the development of character as well as intellect. Or as Plato said: "The curriculum should be adapted in the most perfect manner for the promotion of virtue,"—a truth which Milton re-stated twenty centuries later when he defined education as "that which fits a man to perform justly and magnanimously as well as skilfully all the offices of life, both public and private." How pertinent all this is when we turn to legal education! The ideal lawyer is not one who has obtained the best legal equipment for the practice of his profession, if that professional training has not developed his character along the lines of what is just and right.

2.—*The Intellectual Value of Roman Law.*—The educational advantages of Roman law study is of almost incalculable intellectual value because that value is so many-sided. It is a fact that the beginner in the law will make as rapid progress by starting with Roman as he would if he began with our modern law; for in learning Roman law, one learns the elements of law in general and therefore of English law in particular. The Institutes of Justinian are to be best explained as a common source of the fundamental ideas of Anglo-American as well as Continental European jurisprudence.

England and the United States, although not so strongly as the countries of Continental Europe and Latin America, are today under the dominion of Roman jurisprudence. Anglo-American law, like French or German, is Roman law of the twentieth century. "It must be owned," said Lord Chief Justice Holt, "that the principles of our law are borrowed from the Civil Law and therefore grounded on the same reason in many things."

A cursory study of Roman law reveals the great extent of the debt of our law to it. The American law of Admiralty, of Wills and Probate, can show a direct descent from the imperial jurisprudence of Rome. From the Civil Law, Lord Mansfield introduced into English Common Law our Law Merchant or mercantile law. The basic principles of Equity are of Civil Law origin. The fundamental doctrines of our law of Persons (including Corporations), and of Property (especially Obligations, Contracts and Successions) came from the Roman law. Hence it is true that knowledge of Roman law is knowledge of our own law, for the Civil Law is a constituent part of our jurisprudence.

The intellectual value of Roman law is rapidly being recognized by American law schools. Roman law is now studied in such leading law schools as Harvard, Yale, Columbia, Chicago, Pennsylvania, Stanford. And the Institutes of Justinian, as in England, are now a required study for admission to

the Bar in the American States of Louisiana and Kansas.

Moreover Roman law not only throws a great light upon, but has answered for all time that vexed question of *the right method of law study*. The wonderful acumen and thorough training of the Roman lawyer were thus acquired. He began and spent nearly all of his first year of work by study on elementary legal treatises. The Institutes of Gaius and of Justinian are models of precision and lucidity with which we have nothing to compare in English law. In his second and third years the Roman law student devoted himself to the study of leading, illustrative cases in all branches of the law. The Digest and Code of Justinian are replete with reported decisions of cases. The Yale method of law study closely resembles the Roman: first the study of legal treatises, and then the study of cases. To study law by cases did not originate in the United States in recent times.

There is also a very practical side to the intellectual value of Roman law study in that it greatly assists the *acquisition of a correct style of legal expression*. Does not the possession of a correct style help a lawyer? The style of the Roman jurist is simple, clear, brief, terse, nervous and precise. In the matter of legal expression Roman jurisprudence is far superior to the Anglo-American, and is worthy of imitation in this respect. It should not be forgotten that "Law," as Sir Henry Maine says, "is the chief branch of Latin literature; it was the only literature of the Romans which has any claim to originality; it was the only part of their literature in which the Romans themselves took any strong interest and it is the one part which has profoundly influenced modern thought."

There is another educational benefit of great intellectual value derivable from Roman law study,—the *complete comprehension of the true nature of private law*. The Romans were the first "to perfect a completed system of private law;"—a jurisprudence which has best approximated the conception of what private law would be if the legislator were perfectly wise.

But the intellectual value of Roman law study offers another liberalizing opportunity: it leads to the *comparison of Roman and Anglo-American law*. It is a great privilege which we have of placing Roman and our law side by side for parallel comparison in order to cultivate the philosophical spirit of inquiry. This results in stamping upon the memory that law is the subject of a science. For instance, it is truly scientific to study the centralizing movements of the Roman law in order to throw light upon the question of how to behave with regard to the tendency in the United States to centralize the constitutional power of the Federal Union.

Again, in dealing with rules of private law, if the American and Roman rules as to a doctrine of law differ, the student is led to ask why: this gives him a better view of the origin and range of the American rule by perceiving wherein it varies from the Roman, or perhaps the Roman rule will seem the more just. Moreover, there is a most useful field for comparative study of Roman and Anglo-American law along this line,—to observe the effects upon each jurisprudence of the different conditions of society under which the Roman and English systems developed. For Roman law was the product of a highly civilized people secure for centuries in the enjoyment of peace within their borders; while the English Common Law is the product of a people emerging from barbaric conditions of society, fond

of strife—it is non-philosophical and ethically harsh, the very opposite of Roman law.

Perhaps the crowning feature of the intellectual benefit of Roman law study is a *perception of the historical value of Roman law*. In his Valedictory Lecture Professor James Bryce most lucidly remarks that "the Roman law is indeed worldwide, for it represents the whilom unity of civilized mankind. There is not a problem of jurisprudence it does not touch; there is scarcely a corner of political science on which its light has not fallen."

With this great truth should be carried the fact that the Roman social system more nearly resembled our own of today than ours does that of England two hundred years ago. Notice some of the resemblances of Rome to us: At Rome the free man constituted the State; there were no distinctions of rank except such as tenure of office temporarily gives; ownership of land was allodial or absolute; land was freely transferable; intercourse between the Roman provinces was easy and frequent; and the face of the Roman Empire was dotted with rich and populous towns and cities.

And Roman life and the fall of Rome are and have been an object of comparative study to the modern world. Authors, teachers, preachers, lawyers and even rulers constantly draw upon Rome to substantiate a position taken as to some doctrine or theory of an economic, political, social, legal or moral nature; the evidence of this is enormous and shows no diminution of bulk or interest.

For instance, the English Professor Petrie, in attacking trade-unionism, declares and offers much evidence to prove that it, and not slavery and vice, wrecked the Roman Empire, and will wreck the modern world if it is not careful. Says another publicist: "Rome again can teach us . . . that socialism in many of its forms has actually been tried, and that it drained the state of industry, energy and vitality; that it is dangerous and disastrous to encourage the unfit at the expense of the fit and thrifty; that it is a very false economy to pillage the rich in the supposed interests of the poor; and that finally a bureaucracy is the worst of human plagues . . . the tax gatherer was more destructive to the Roman Empire than all the barbarians together." If our civilization is indifferent to the ideals and warnings of past civilizations, especially those of Rome, it can never reach a very high type.

3. *Other Professional Advantages*.—For a twentieth century lawyer who wishes to reach the front rank of his profession an acquaintance with the Civil Law forms today a highly important element of his necessary legal equipment, and will have to be obtained either before or after admission to the bar. We have already noticed the great debt of Anglo-American law to the law of Rome, and that knowledge of the Roman law is knowledge of our own law. More than this, as a country we are now repeating the activity of Rome in legislation. The development of our American law into jurisprudence has been, especially during the last century and a half, most usually by a return to the Civil Law of Rome. And this returning is still in progress.

The most striking illustrations—and there are many—are these three: (1) The feudal Common Law ideal that husband and wife are one and that that one is the husband, has been repudiated in nearly all American States. Married women have now restored to them the power to control their separate property independently of their husbands. And this is simply the re-enactment of the doctrine

of Roman law as to the freedom of married women. (2) Every American State has laws of inheritance similar to those of Rome. (3) The most pressing terrible necessity of our times is how to frame out of the gigantic mass of our reported case law an organized body of rules,—in other words how to codify our law. All civilized countries of the world, except Great Britain and the United States, have followed the example of Rome and codified their law,—France, Germany, Spain, Italy, Austria, the Latin-American States and Japan have adopted the Roman Emperor Justinian's solution of this problem. Our lawyers are being driven—whether they like it or not—to examine the means and results of codification. In the future—the immediate future—those in the legal profession who can do this work will reap its rewards.

But a knowledge of Roman law is bringing from another direction a professional advantage which is constantly increasing. Speedy and frequent com-

munication makes the world rapidly grow smaller. Law business of an international character is on the increase in our large cities, especially those along the Atlantic seaboard. Not only does Roman law throw light upon many of the doctrines of international law, but it is the key which unlocks the legal systems of the modern continental Europe as embodied in their Modern Codes. These codes have been imitated in the New World and in Asia. The professional benefit arising from a familiarity with the Modern Codes is self-evident.

The very exigencies of our national life are forcing us to take notice that the law of our colonial dependencies of Porto Rico and the Philippines, and of our ex-ward, Cuba, is Spanish (*i. e.*, Roman-Spanish) law. Finally no one can intelligently practice law in the American States of Louisiana, Texas and California, or the Canadian province of Quebec, without a knowledge of Roman law, out of which French and Spanish jurisprudence have been carved. (*U. of P. Law Rev.*)

THE UNITED STATES AS A DEFENDANT

By LINCOLN B. SMITH

THE common law maxim that "The King Can Do No Wrong" was one of wide application and of many apparent exceptions; but there was one phase of it which was inexorable. No suit or action might be maintained against the sovereign. If the subject was wronged in his property rights by actions sanctioned by the Crown, under circumstances not affording an action against the agents or officers of the Crown, he must perforce draw upon his loyalty and subscribe to the pious doctrine that the King can do no wrong.

In his personal capacity, indeed, the King was and is above the law and beyond the law; he cannot be compelled or even permitted to testify, as illustrated in the recent case of *Rex. v. Mylius*. If anyone had reason to complain of the King he met the full force of the doctrine, the legal basis of which is explained by Chitty with charming lucidity:

"The law will, in any such case, presume that the subject cannot have sustained any personal injury from the Crown, because it feels itself incapable of furnishing any adequate remedy—and *want of right and want of remedy are the same thing in the law.*"

The Petition of Right, and the expedient of proceeding against the agent of the Crown for the recovery of property still in his hands relieved to some extent the rigor of the doctrine; but the common law afforded no direct means by which the sovereignty could be brought into court and made to justify its acts before the law.

This disability has, in the United States, been remedied by statute. Theoretically, however, we have escaped only in part from the notion that the King can do no wrong. The United States can, indeed, be sued; can be made defendant in various actions; but it can be brought into court only in respect to matters concerning which it has expressly given its consent to be sued; and the statutes granting that consent to be sued are by the courts construed strictly because in derogation of sovereignty.

The citizen who feels himself aggrieved by any action for which the United States is responsible may, of course, appeal to Congress for redress; and literally thousands of bills are introduced at each session to pay private claims of this character. But

there is little guaranty of justice in this procedure. Even after an overworked committee on claims has passed favorably upon such a bill it is more than likely that it will fail of passage unless powerful friends are sufficiently interested to smooth the way for it in advance and steer it safely among the dangerous rocks and shoals of legislation. Probably the great majority of claims presented to Congress in this manner are without merit; but many of them are just demands; and it is an unfortunate fact that the commanding influence which spells success is wielded at least as often in behalf of the claims that are without foundation. Many an honest claimant has died with a bitter sense of injustice of his country.

It was to remedy in part this situation and to remove from Congress a portion of the burden of deciding the complicated questions of fact and law which often arose, that it was finally decided to establish a court where the United States should be a defendant on a par with the humblest citizen, and where right and law, not political influence, should be the arbiter. By the Act of February 24, 1855, Congress established at Washington the Court of Claims, which has since come to be the great tribunal where the nation and the citizen meet and battle on equal terms.

Before considering more fully the jurisdiction and functions of the court of claims, a word should be said in regard to other tribunals where the United States sometimes appears, nominally at least, as a defendant. One of these is the recently-created Court of Customs Appeals. Under the tariff law all controverted questions of interpretations of the statute, of classification, and of duties imposed, go to the Board of General Appraisers in the city of New York. Before this board the importer and the United States are represented by counsel. If the decision of the board is not satisfactory, either party may appeal to the court of customs appeals, which has all the functions possessed by an appellate court of special jurisdiction. If the claimant be successful in his contention the excess of duty which had been collected when first assessed, must be refunded to the importer by the United States. The court of customs appeals is