ROMAN LAW IN CANADIAN LAW SCHOOLS.

I.

In a collection of essays and articles by Doctor Munroe Smith, late Bryce Professor of European Legal History in Columbia University, a volume which has been posthumously published, and which preserves for us, in permanent form, some of the most characteristic utterances of a distinguished and deeply-mourned jurist, philosopher, and teacher, there appears an essay on Roman Law in American Law Schools.[1] The writer discussed three questions. Should the Roman Law be included in an American scheme of legal education? If so, should it be treated as an optional, an elective, or a required study? And if required, how much should be required. The answers to these questions are of immediate and practical importance to all who are concerned with the problem of legal education in Canada, for here the considerations involved are essentially those that prevail in the United States.

Professor Smith begins his discussion of the subject by assuming, for the sake of argument, that a law school exists simply for the purpose of training legal practitioners, and that the education needed is purely informational. This end is attained by giving the student a knowledge of the leading and well settled rules in each department of private law, training him where to go for information upon minuter matters, and above all, inculcating a perception of legal method. Given this theory of a legal education, it is easy to show that knowledge of the Roman law may be useful, but its study can hardly be shown to be needful. Its purely informational value is not great, for the tendency of Anglo-American judges and lawyers to borrow rules from the Roman law has steadily diminished, and the practice is more likely to become extinct than to increase. However, in cases of public and private international law the informational value of Roman law is more considerable. To the lawyer who has no acquaintance with Roman law the legal vocabulary of continental Europe and Latin-America is a stumbling block, and the text of their laws is a snare. Yet this may perhaps be taken as an argument for the study of the modified Roman law of modern Europe rather than the law of Justinian. A stronger plea may perhaps be made for the study of Roman jurisprudence as a part of the law student's training in method. Professor Smith points out

[1] *A General View of European Legal History, and Other Papers.* By Munroe Smith, Doctor of Laws, Amherst, Columbia, Gottingen, and Louvain. (Columbia University Press) New York, 1927.

that the great jurists whose responses and opinions form the bulk of the Digest were men in the service of the state, whose responses were not briefs but decisions, and that the expository methods of the Digest, on that practical basis, furnish an example of consummate skill and acuteness in the fitting of legal theory to facts; but that, the record of arguments is not preserved, and in so far, the Digest furnishes better training for a judge than a practitioner. It may, of course, be said that the law schools are educating some who will be judges; but Anglo-American practice has never conceded the necessity of a different training for the judicial office.

A second possible view of the function of legal education is slowly winning acceptance. This is the old and sound tradition that law is not a trade, but a profession, a calling which subserves the interests of society as well as the interests of individuals, and which places, or should place, social welfare above individual advantage. The legal profession is custodian of the body of rules by which society exists: but more than that, it shapes the new law which the constantly changing needs of social life require.

The legal profession furnishes the majority of the framers of legislation, but apart from that fact, it is impossible that legislators should do their work in the best way without the sympathy and support of the bar. From this point of view there arises the necessity of introducing into the curriculum of the law schools far more international, constitutional, and administrative law than has heretofore found place there. Not only this, but some knowledge of the history of law, and of law's relation to ethics, politics, and economics, is absolutely essential. In this view of legal education, what is the place of Roman law? Are its claims stronger in the professional school than in the technical school? Professor Smith answers this inquiry by pointing out that in public law, in economics, and in ethics, the essential elements derived from the Roman civilization, and reflected in the Roman jurisprudence, have been so largely assimilated in our modern institutions that the ordinary student can get the results of the historical process without going back to its beginnings: but the importance of Roman law in these fields suggests strong reasons for the provision, wherever possible, in our law schools, of elective courses in this subject.

A third view of law and of legal education, writes Professor Smith, a view which all our teachers of law accept in theory, but which many of them disregard in practice, is that law is not a trade merely, nor a profession merely, but a science; and that legal education should be scientific. The true professional spirit is most fully developed among men who regard the subject matter of their pro-

fession as a science; true progress in the co-ordination of law with the other and multifarious concerns of men lies along the path of science, and along that path alone. But if we consider law as a science, we must look in it for universals; we must consider it not as an Anglo-American product, but as a human product. For this scientific study of law, Professor Smith demands some knowledge of Roman law as absolutely essential. The evaluation of fundamental legal concepts involves the task of comparison; and the civilized world today is ruled by but two great systems of law, the English and the Roman. Indeed, from a purely scientific point of view, the study of the Roman law, ancient and modern is more important than the study of the English law: for the latter, so far as it is an independent product, is the product of a relatively short period and the product of the genius of one race, while the former carries us back to the beginnings of articulated social institutions and into it have been poured the thought and effort of many and varied civilizations throughout twenty-five centuries. It was an English judge who once thanked God that the law of England was not a science. Most of us have out-grown that point of view by now. The perilous state of many of our political and legal institutions has convinced most of us that we shall do well if we turn each to the other, not nationally, but internationally, for what help and co-operation we may find in our present distresses. A narrow national jurisprudence is inadequate: were an example of this needed, it were only necessary, as Munroe Smith remarks, to compare the sterile jurisprudence of Bentham and Austin, itself not uninfluenced by the 'dust of the Roman jurisprudence' which they had half unconsciously inhaled, with the jurisprudence of Holland and Pollock, vitalized by a deeper inspiration of living Roman law; and it is pertinent to add that the contributions made to the American law of today by such men as Roscoe Pound, Judge Cardozo, and Morris Cohen, are deeply informed by a thorough knowledge of the modern Roman law system which is the heir of all the ages.

Seldom have the claims of Roman law received, in modern times, more eloquent expression than in the words of Otto Lenel in the introduction to the Bruns-Lenel *Geschichte und Quellen des romischen Rechts.*[2]

> The power of the Roman Empire had long since sunk into decay when Roman law revived and won dominion over a great part of Europe. This dominion it maintained for centuries, and even now, through the medium of modern legislation, it has its significant effects. How can we explain this astonishing fact? In the first place, certainly, there was the march of histor-

[2] *Holtzendorff's Enzyklopädie der Rechtswissenschaft,* (7th), Vol. I, pp. 305, 306.

ical events which made broad the path before the Roman law, and facilitated its triumph over the old indigenous laws. But it could never have won this victory had it not possessed an essential inner strength which enables it, to be sufficient, in large measure, even for the needs of this modern world of ours, and an inner strength which was in its nature worthy of recognition.

There was a time when men, following Hegel's lead, thought that they could construe the essential of world historical events, and consequently of the law, in accordance with principles. No one today wants to travel on that road.[3] The historical school, then, saw in law a product of the Volksgeist, a part of the national life of a people, and so they postulated for each people, corresponding to its special nationality, peculiar legal institutions, a special national character to its laws. There is, to be sure, a good deal of truth in this; strange, indeed, it would be, if the special natural talents of a people did not find expression in that people's laws. So might, for example, the relative poverty of old Roman law in symbols and symbolical transactions as compared with the rich symbolism of the old German law be ascribed to a certain prudent moderation which lay deep in the Roman national character. But the historical school greatly overestimated the importance of these national elements in law. Far more important than these, for the shaping and development of law by different peoples, are the general cultural relations; this may be considered as a safe conclusion from the new researches into comparative law. In the origin of these, racial elements and the character of peoples play an important role, but an infinitely greater role is played by the general nature of mankind, the geographical circumstances in which a people is placed, and the contacts with other peoples, from which it borrows cultural elements.

Similar cultural relations lead to similar legal structures. Only thus can be explained the surprising unanimity of so many peoples and races in standing in the law on primitive cultural steps, only so the near affinity which has shown itself lately in the main characteristics of legal institutions, not only between Greek and Germanic races, but even between Assyrian-Babylonian, Egyptian, and Græco Roman law. To a similar process of assimilation (*formierungsprozess*) almost all the national elements of the Roman law fell as a sacrifice even in the period of the Empire: what belongs to Europe, as a result of the Reception, was not a national law, but the universal law of the ancient culture-world, a product of the Roman-Greek culture that dominated the Roman Empire. Certainly, only by virtue of this universality was Roman law able to penetrate the closed circles of national law; through its reception many developments were anticipated, which without it, would have had to fulfil themselves autonomously in these legal circles. To a law strongly coloured with nationalism quite another sort of opposition would have been raised. What, however, in the last analysis, determined the pre-eminence of Roman law as against national law, as it happened, and what,

[3] The writer is little disposed to agree with Bruns' dismissal, if dismissal here is implied, of the utility of arguing from first principles, though he is even less inclined to accept the dialectic evolution of Hegel's philosophy. The extreme *Kulturgeschichte* view which appears explicit in the above extract fails of its purpose if it seeks to deny the validity of a logical deductive method. A rational compromise would appear to lie in the method of beginning with hypotheses, deducing conclusions, and the comparing them with the factual lessons that observation and comparison supply. See *Morris Cohen, Law and the Social Order,* (1933) pp. 173-183, 275-278.

even today, secures to its importance, was not that universality which proved equal to the task of making many cultural territories into one, and therefore has its lesson for our heterogeneous modern world: it is, in particular, not the content of the Roman rules, not the substance of the Roman laws, for the Reception furnished us with that; it was the *form* in which that substance was given to us through the Roman jurisprudence. The Roman law was, of all culture laws, the first, and for long the only law, which became the object of cultivation through a highly developed juristic art; its historical role is based upon the unique character of this formal technical exposition.

And here, indeed, we come upon something specifically Roman; the juristic talent which distinguished the Romans from all other peoples, and by virtue of which they became the juristic teachers of the world. Of this superiority the Romans themselves were very well aware. From whence it sprang is a secret, unknown to us. That talent was no Indo-Germanic inheritance; for it is lacking in the other Indo-Germanic peoples. Whether it belonged to the Latins alone, or to them along with the allied Italian stock, whether foreign influences *e.g.*, the Etruscans, whether and what historical destines existing before all records co-operated by their unfolding: all this eludes our knowledge. We must accept this as fact; the fact however, gives to Roman law its signature, its distinguishing mark. Certainly, it stands in close proximity to the superior political capacity of the Roman people. This people, in the midst of whom developed the idea of the State in a way more powerful than in any other ancient people, to this people it belonged to govern, in its great period, both its internal life and its external affairs everywhere with a perception of political necessities; to this people it also first belonged to deal with law as an art and to bestow upon it the firmness and, withal, the flexibility, which are required for the needs of living.[4]

The foregoing hasty, and doubtless, none too accurate translation will have served its purpose if it conveys something of the spirit with which three collaborators, Bruns, Lenel, and Pernice, were animated in the production of their celebrated work, a work which emphatically should be made available to English-speaking students. In their broad study of the history and sources of Roman law, the subject takes its place as broadly cultural, informed with that world-view which lies at the root of all scientific method.

II.

Let it be granted, then, that if law, in Munroe Smith's phrase, is not a trade merely, not a profession merely, but a science; and that, for the study of legal science, some knowledge of Roman law is absolutely essential: the questions which must be asked are, Which of the theories shall we accept as the true theory? What part shall we assign to Roman law in our curricula?

[4] *Cic de orat.* I 44, 197: *incredibile est . . . quam sit omne ius civile praeter hoc nostrum inconditum ac paene ridiculum: de quo multa soleo in sermonibus cotidianis dicere, cum hominum nostrorum prudentiam ceteris omnibus et maxime Graecis antepono.*

For Professor Smith, each of these theories has its justification and should obtain at least partial recognition. The law school must train practitioners, and it should so train them that they may earn a livelihood. But it should not content itself with that. It should strive to make of all its graduates professional men, imbued with the spirit of public service, able to discharge the duties which our social organization imposes upon the members of the legal profession. And more than that,—it should strive to imbue them with the scientific spirit, not merely because the scientific spirit brings with it the professional spirit in its higher and purest form, but for the sake of legal science itself.

If this view be accepted, the author concludes, it must be recognized that some knowledge of Roman law should be required from every candidate for a law degree; and that advanced elective courses should be established in European legal history and modern European law for the few who desire to devote themselves to the widening of the borders of legal science.

The final question which Professor Smith considers is, how the Roman law should be studied. The answer to that question is contained in a consideration as to what are the most valuable portions of that law—the portions that constitute a permanent contribution to legal science.

Here there can be no question but that the most valuable portion of the Roman law is the private law. In that law the doctrine of private rights received a sharpness of definition to which no competing system has ever approached. The emphasis should be laid upon the law of things, and upon that of contractual and quasi-contractual obligations. The law of testaments should be noticed, but with less detail. But the law of personal status and of family relations should, for the most part, be relegated to the limbo of legal antiquities.[5] Too much time has been devoted, in university and law school courses, to the Institutes of Justinian, and too little to the Digest. However brief the time that can be devoted to a required course of Roman law in an American law school—and the minimum that could possibly be of any use would be three hours a week for four months—at least half that time should be devoted to cases from the Digest—cases similar in their nature and, as far as possible, in the conditions given for their decision, to the cases with

[5] It is hardly necessary to point out that some knowledge of the law of personal status and capacity is absolutely essential for an understanding of the Roman system; what the writer is pointing out is that details need not be elaborated. One phase of Roman theory as to capacity demands, however, a detailed treatment, by reason of its paramount importance as influencing subsequent thought, viz., the Roman theory of corporate personality. See *Hallis, Corporate Personality,* 1931 (*Introduction and Chap. I*).

which we have to deal today. Professor Smith concludes, "So taught, Roman law should interest the most narrowly utilitarian of students, and to those who have a spark of the scientific temper it should open new vistas of thought and a wider mental horizon."[6]

Some months ago, the writer prepared a brief questionnaire relative to the problem of Roman law in Canadian Law schools which he submitted to the heads of the various institutions concerned: and he takes this opportunity of publicly thanking his correspondents for their ready willingness and co-operation.

The province of Quebec, as a country of the civil law, occupies a special position. There, the study of Roman law is included in the curriculum of studies required for admission to the bar. The prescribed studies involve a knowledge of the Institutes of Justinian and the contribution of the principal Roman jurisconsults. The student who qualifies by three years' university course with concurrent clerkship has to take 103 lectures in Roman law. The writer is indebted to Dean Corbett of the McGill Law School, who is an acknowledged authority on Roman law, for a comprehensive analysis of all the problems involved. In the McGill school courses in Roman law are given in the first and second years, the first year's course being an elementary treatment of the whole system, the second year being taken up with the study of special topics such as possession, sale, development of the contract, the *Lex Aquilia,* the law of husband and wife, etc. Candidates for the M.C.L. degree who choose Roman law as a major subject must undertake a more penetrating study of a delimited field, including textual criticism, and must write a thesis. The principal English and French text-books are used as manuals, but in class-room instruction, the conclusions set out in these books are supplemented by reference to contemporary German and Italian authors.

In none of the other provinces has the study of Roman law been required for admission to the bar. However, in those professional law schools where a study of jurisprudence is prescribed, a varying

[6] In a recent letter Dean Corbett, of the McGill Law School emphasizes the cultural value of Roman law studies. He writes, "Am I far off when I think that the first business of education in any line is to inculcate the enquiring mind? After that, you proceed to provide it with instruments of precision. The historical and scientific setting and content of Roman law furnish both elements in an unusual degree . . . As for the use of culture in the legal profession, I should say this—that law is not only a way of earning a living or of serving society administratively and scientifically; it is also a mode of life. We suffer much from a separation between our bread-winning work and our lives. The more cultural content you can put into the profession, the easier it becomes to achieve a satisfying identity between the two. Would it not be worth something to breed more lawyers conscious of the age-long unity of development in their particular mystery? That sort of consciousness generates affection."

amount of time will necessarily be devoted to a consideration of the growth of the Roman legal system, and its importance in the field of comparative law.

A considerable number of students in all the provinces approach the work of the professional law schools by the path of university studies in law. (Lack of space prevents a consideration of the various requirements as to university training and exemptions allowed for holders of academic degrees that prevail in the different provinces). For these, in the Universities of Toronto and Dalhousie, undergraduate courses in Roman law are provided; while, in the Law School of the University of New Brunswick, a short comparative treatment of Roman law is made in the course given in Jurisprudence.

A synopsis of the courses in Roman law offered by the University of Toronto may be of interest. In the undergraduate course of the second year the studies prescribed include an outline of Roman law studied historically and as substantive law; an introduction to the study of the modern civil codes, especially that of Quebec, and their comparison with the common law. For the M.A. degree there may be elected the submission of a thesis approved in the field of Roman legal studies. For the LL.B. degree the candidate must satisfy the examiners on the subjects of the B.A. courses and, further, be examined on the Roman law of obligations, and on comparative common law and civil law. For the L.L.M. degree candidates are examined on the *Lex Aquilia* (Dig. IX, 2) and on the Civil Code of Quebec and Roman-Dutch law.

In response to the questionnaire submitted, there appears a clear unanimity of opinion as to the necessity of getting away from the old preoccupation with the Institutes of Justinian. The most desirable method of approach, in the general consensus of opinion, may be expressed in Dean Corbett's words: "We adopt a combination of the historical and comparative methods; that is to say, that the development of institutions is linked up with social and political history and compared with the corresponding development in modern systems." Confessedly, none of the standard text-books is entirely adequate when taken alone. Poste's Gaius and Moyle's Justinian, found in most curricula, show the continuing influence of the Oxford school of jurisprudence: nearly every student is invited to make himself acquainted with that old-fashioned, but still readable, classic, Maine's Ancient Law; and of more modern text-books the one which is most frequently prescribed is Sohm's Institutes of Roman Law in Ledlie's translation. The writer has experimented, during the past academic year, with the plan of putting into the hands of students an outline based on the *Grundriss* of Roman Law

of Schaeffer & Wiefels[7] which is intended to supply the essential notes to cover a systematic study of the field of private law, and, leaving to one side the consideration of the Institutes as text, to develop the system *as system* with a liberal use of historical material and excerpts from the Digest. The results obtained have been most encouraging though in the opinion of Dean Corbett there is somewhat of a danger that a general summary may be so general in its character as to miss that precision and exactness of which Roman legal doctrine furnishes such an outstanding example.

The prime and paramount difficulty is to convince the student of the importance and the utility of Roman law and of comparative legal studies. The historical and comparative study of legal institutions ought, one would think, to be of at least as much utility as the study of economics or the theory of currency, but the student, in his mistrust of what is "academic" is apt to be supported by the practising lawyer, who is not very sure just what comparative law may be, but who frequently has a touching faith in the "practical" character of the dismal science or in the opinions of money-theorists, a faith which perhaps the events of the past summer will do something to dispel.

But a closer acquaintance with the subject of Roman law usually dispels the student's doubts; properly handled, the subject needs small skill of description or illustration on the part of a lecturer to be interesting and thought-provoking. For the story of Roman law couples itself with the story of the growth of our modern civilization, is one with the narrative of man's effort to evolve the ordered social life, is, in a word, for those who will hear it aright, the epitome of a *Weltkulturgeschichte.*

F. C. AULD.

University of Toronto.

[7] *Grundriss des öffentlichen und privaten Rechts sowie der Volkswirtschaftslehre. Herausgegeben von Oberlandesgerichtsrat C. Schaeffer.* 21 *Band. Leipzig: Verlag von C. L. Hirschfeld.* 1929.

This invaluable series of Outlines has been prepared, under the skilled direction of Herr Oberlandesgerichtsrat Schaeffer of Düsseldorff, by teachers and practising jurists who are specialists in their several subjects. It can be unreservedly recommended to students of comparative law, political science, and sociology.