THE PLACE OF ROMAN LAW IN LEGAL EDUCATION.

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Anyone who examines the programmes of study adopted by the Law Schools of Canada cannot fail to notice the small place, if any, assigned to Roman Law. The reason for this is not far to seek. A system of instruction which aims primarily at qualifying students to practice the profession of law in the Province to which they belong is apt to assume a purely practical complexion and to condemn as useless any branch of legal study which cannot be regarded as directly conducing to this end. In the Province of Quebec alone Roman Law occupies an important place in the prescribed course. But it cannot be said that the Quebec student exhibits any peculiar affection for this phase of mental activity. Explain to him the definition of theft in the Criminal Code of Canada, expound the intricacies of a title in his own Civil Code, and he will listen to you with attention; but do not expect to excite the same degree of interest if your subject is the Roman Law of marriage or contract or succession. And if this is the experience of a teacher in a Province which in great part derives its civil law from the law of Rome, he will certainly have no better success in the other Provinces. The fact is that the student of today, no less than those who are responsible for his legal education, does not recognize the use of Roman Law, and therefore approaches its study without enthusiasm. It seems to him too remote from the business of modern life to have a reasonable claim upon his time and attention.

Can anything be said in defence of Roman Law as a part of legal education? I shall state briefly what can be urged in its favour, and consider its place in a scheme of study. The utility of Roman Law studies

occupies a few pages in Professor Girard's Manual of Roman Law. But in Canada the question must be approached from a different angle. While, therefore, I shall partly cover the same ground as Professor Girard, I shall submit some further considerations which apply to Canadian students and especially to those who belong to the Provinces where the Common Law prevails.

One may begin by admitting that the homage which past ages have paid to the *Corpus Juris* of Justinian, and to the genius of the authors, whose works have been partially transmitted to us in the Digest, does not altogether stand the test of modern criticism. We can no longer regard the legislation of this Byzantine Emperor as the very perfection and quintessence of legal science. We are fully conscious today of the inconsistency of its texts, of the marks of hasty workmanship which it exhibits, of the inferior ability of its compilers. Nor can it safely be said that if Tribonian is dethroned, at least Papinian and Paul and Ulpian shine with undiminished lustre. Even this proposition does not pass unchallenged. No work of these jurists has come down to us in its original shape. With unimportant exceptions our knowledge of them is derived from Justinian's Digest, where we have fragments of their writings torn from their context, applied to uses which their authors never intended, and disfigured by excision and interpolation. In these conditions it is not surprising that there is no general agreement among modern writers as to the value of their contributions to legal science. Some place them below the jurists of the Republic and early Empire. In any case they must rank with, not above, the greatest lawyers of later times. We cannot safely base the claims of Roman Law upon the ground that there is something miraculous in the genius of the jurists, whose *disjecta membra* make up the Digest. Seeking, then, for a more satisfactory solution of our problem we may note the following as valid reasons for the study of Roman Law. They are not all equally cogent or universally applicable.

First, the Roman Law may be studied as law in being. Before the promulgation of the Civil Code this was in France a compelling reason within the *pays du droit écrit* and scarcely less in the *pays du droit coutumier.* In many parts of Germany, too, the law of the Pandects, i.e., Roman private law adapted to modern conditions, remained in vigour until superseded by the German Civil Code from 1st January, 1900. Today all this is changed. On the continent of Europe the *Corpus Juris* is no longer appealed to as an authoritative source of law. Of the many systems of modern Roman Law once in force the Roman-Dutch Law is perhaps the only survivor. Where this system obtains an apt citation from the Code or Digest may still determine the decision of the Court.

Secondly. In those countries, which, having once been governed by the Roman Law, have replaced it by a Code, enquiry into the older law may still be useful to explain the meaning or origin of a modern rule or institution. It was with this view that the Civil Law Commission for Quebec was instructed to support each article of the draft Civil Code by a citation of the authorities upon which it was based. To this we owe the references to the texts of the Roman Law which we find in the older editions of the Code. But they are of no value in practice and have been omitted from recent editions. They are not worth much from any point of view. They are often inexact and irrelevant, and sometimes, when the law has been changed, support the exact opposite of the proposition to which they are annexed. To trace the origin of an article in the Code in a rule, or supposed rule, of Roman Law may have some interest for a student of legal history, but cannot be urged as, in itself, a sufficient reason for studying the Roman Law as a whole. The justification for this must be sought elsewhere.

Thirdly. The study of Roman Law is recommended for its incomparable value as a mental discipline, as an exercise in legal thinking, as a palaestra for the

young jurist. Professor Girard admits this as a merit though not as the "primordial or decisive merit" of Roman Law studies. Others may take objection to the word "incomparable." *Vixere fortes post Agamemnona.* Acute and subtle jurists have existed in later ages. Will not the commentaries on the French Civil Code or the decisions of the House of Lords, reported in the Appeal Cases, afford an equally effective training, with the added advantage of teaching the student the very system which he is going to practise? It may no doubt be said that the difficulty of the study of Roman Law is a challenge to the adventurous spirit, applies a keener stimulus, and promises a richer reward. Doubtless; but it is the part of wisdom to observe some relation between a difficulty and the probability of overcoming it. Perhaps we are not likely to make Papinians of our students. Besides, the study of Roman Law is today largely a matter of textual criticism, which they may reasonably agree is not their affair—*non haec in foedera veni.* Upon the whole one is rather forced to the conclusion that if mental gymnastic is what is wanted, it may more profitably be sought in another sphere.

Fourthly. The Roman Law may be regarded (*a*) as a legal propaedeutic, or general introduction to the study of law; (*b*) as a branch of the science of comparative law; (*c*) as a branch, or perhaps one might say a main trunk, of legal history. The usefulness of the study of Roman Law in each of these aspects seems to me to be established. The three points of view are mentioned together because they are closely related and in some respects scarcely distinguishable. The quality of a legal system as a subject of study is compounded of its material, form, history, and literature. In all of these Roman Law excels. Compared with it the Common Law is incomplete, incoherent and, above all, unscientific. The science of the Common Law, such as it is, is a creation of the last half-century, and largely the work of men familiar with the Roman Law. Doubtless the intensive study of an existing

system, the mastery of its rules, however heterogeneous, however illogical, is a task for robust intellects. But it is not thus that great, and, I will venture to say, good lawyers are made. A law student must learn the laws of his country. Granted. But he must approach them with a mind free and unrestrained, not with that of a slave. He must know how to rise above them, to see them in a proper perspective, to take the larger view, to form a rational and critical estimate of their strength and weakness. Now there is no better, perhaps no other, method of fostering the right habit of mind than the comparative study of more than one system. It is just here that Roman Law, the origin of so much of our legal thought and the mother of so many systems, is ready to hand. From it more easily than from any other source the student will learn the rudiments of legal science. This is the propaedeusis of which we spoke above. From it he will acquire the *lingua franca* of all those systems which have appropriated the terms and categories of Roman Law. To a student in the Common Law Provinces in particular this opens avenues which would otherwise be closed to him. Quite an elementary knowledge of Roman Law will admit him to an understanding of the greater part of any one of the principal systems of law of the continents of Europe and South America. Again, International Law cannot be intelligently studied without some knowledge of Roman Law. Then there is the historical point of view, which for Professor Girard is more important than any other. To trace this great system from its rude half-savage beginnings through the successive stages of infancy, adolescence, and maturity to old age and decay is something to excite the imagination and arouse the emotions. Such studies are a rich endowment. One is the poorer for not having followed them. Indeed Roman Law is one of the great things in human history. If it is not to find a place in legal education, then a study of religions may take no account of Christianity, and Greece may mean nothing to the student of philosophy or art or literature.

For these reasons I submit that Roman Law should find a place in any adequate scheme of legal education. Its intellectual value is incontestable. But it must not be supposed that its utility ends there; though indeed rightly considered this is more than enough to establish its claim. But let it not be supposed that the study of Roman Law has no bearing upon the practical interests of the modern lawyer. On the contrary, no professional man whose vision is not limited by the circumference of his native village can afford to be ignorant of it. As observed above it supplies the key to foreign systems of law, and particularly in Canada makes it easy for the Common Law student to understand the legal system of Quebec. This is an age in which young lawyers can aspire to the highest positions in public life. Some of them will in the fullness of time be statesmen and diplomats. They will have relations with statesmen and diplomats of other nations whose mentality is different from their own, and different notably in this particular, that it is a Roman Law mentality. Without the necessary intellectual equipment (which the study of Roman Law can give) they cannot expect to cut more than a poor figure before Commissions of Arbitration and International Courts of Justice. Need I speak of the League of Nations, which will apply to any controverted question calling for a juridical interpretation not the Common Law of England and the United States but the Common Law of Europe, i.e., Roman Law? Consider for a moment the implications of a "Mandate" under the League, which may contain surprises for our home-bred lawyers, who have not had occasion to study the relations of *mandator* and *mandatarius*. Other instances might be given, but enough has been said to show that the study of Roman Law from a practical, no less than from an educational point of view, can make good its claim to recognition by the Law Schools of Canada.

This being so, it remains for us to consider what should be the method of study and what place should

be assigned to Roman Law in the curriculum. There are various ways of studying Roman Law. The most popular seems to be to hurry through a "cram" book, or commit to memory a course of lectures on the eve of an examination. Other methods are more commendable. Personally, I can suggest nothing better than the textual study of Justinian's Institutes, if not in the Latin, at least in the English translation. This, at all events, is to be preferred to learning the subject at one or two removes from the original in the pages of some manual or text-book. When the student has mastered his Institutes he may go on to one or two *titles* of the Digest such as the *title* on the *Lex Aquilia* (IX. 2) or on the Law of Sale (XVIII. 1). Of course it is not pretended that this kind of study will give him a deep knowledge of Roman Law, nor is this intended or desired. But it will, none the less, be a real illumination. It will give him a width of outlook unattainable by other means. As the subject opens out to him he may pursue it further according to his opportunity and inclination. Only he must be taught not to choke his mind with unnecessary detail, not to be diverted by commentaries and manuals from the study of the text. Much of the prevailing distaste for Roman Law is due to the unpalatable form in which the subject is presented to the student by writers who cannot see the wood for the trees. Unhappily no text-book of Roman Law can be recommended without reservation. Perhaps some day we shall have a *short* Introduction to Roman Law from a competent hand. But we have not got it yet. Lord MacKenzie's admirable *Studies in Roman Law* has not been brought up to date.

The question of the place to be assigned to Roman Law in a course of study raises a problem. So long as the Law Schools continue to require their long-suffering students to hear lectures and take examinations in every branch of law, it may be impossible to find a place for Roman Law in a three years' course. The difficulty might be met by extending the course

over four years. But perhaps it may be better to provide for the study of Roman Law, as well as of International Law and some other appropriate subjects, during the last two years of the course for the Arts degree. This would, at least, afford an opportunity of studying Roman Law to those who chose to take advantage of it, and every inducement should be offered them to do so. Co-operation between the Law School and the University (where these are distinct) is, of course, a necessary condition of success in this, as in any other department of legal education.