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THE COMMON LAW—ITS DEBT TO ROME.

I.

Modern historians have abandoned Blackstone's complacent assumption that the ancient collection of unwritten maxims, which is called the Common Law, has subsisted immemorially in England, and although somewhat altered and impaired by the violence of the times, in great measure, weathered the rude shock of the Norman Conquest.

There is a definite limit to the memory of the English Law, and it is now generally admitted that we must transcend it if we are to understand the material at the disposal of the Judges of the King's Courts, who, in the Twelfth and Thirteenth Centuries laid the foundation of the Common Law.

Blackstone himself, although without the abundant fruits of historical research that are now available, materially qualified Fortescue's claim that the ancient customs, old as the primitive Britons, had been continued down through several mutations of Government and inhabitants to his time unchanged and unadulterated. He admits that the intermixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes and the Normans must have insensibly introduced and incorporated many of their own customs with those before established, thereby in all probability improving the texture and wisdom of the whole. He concludes in the words of Lord Bacon :—

> Our laws are mixed as our language, and as our language is so much the richer, the laws are more complete. (B.I. p. 64).

It is now recognized that our information about the Anglo-Saxon laws and customs is so fragmentary and obscure that the only hope of understanding them is to work back from the fuller evidence of Norman and even later times.[1]

In so far as we can trust the written laws the only topics of general importance were manslaying, wounding and cattle stealing[2] and the modern observer might be apt to think that a long time before, and some time after, the Norman Conquest, our ancestors occupied such leisure as they had in cattle-stealing by night, and manslaughter and perjury in varying proportions by day. As to some parts of the country he would not be very far wrong. He will certainly think that their justice was always crude, often barbarous, and very commonly inefficient.[3]

Although the Roman law had been administered in Britain for fully four hundred years before the Saxon invasions, and from the days of Ethelbert onwards, say from the year 600, English law was under the influence of so much Roman law as had worked itself into the traditions of the Catholic Church; although throughout the last centuries of the Saxon regime the justiciars and judges were for the most part ecclesiastics, conversant with the Roman law; although the Normans introduced a latin civilisation and a latin language driving out Scandinavian ideas and civilisation;[4] and although during the great formative period Vacarius taught Roman law in Oxford, and English Judges applied the rules of Roman law in Court, nevertheless, says Sir Frederick Pollock, "our modern Common Law has grown and been fashioned, or has in some way come out of those 'crude, barbarous and inefficient' rudiments of Saxon Law, unpromising as they are at first sight.[5]

Few English historians will admit that there was any 'reception' of the Roman Law in England; and if we restrict the meaning of the word within the narrow sense of formal legislation, they are doubtless correct, although Dr. Grueber of Oxford, in his introduction to Sohm's Institutes, declares that the view commonly held that Roman law was never received in England, whilst it was received on the Continent, is clearly wrong. But that the ideas, the rules, the maxims, the very letter of the Roman law was introduced and incorporated in the English Common Law, in its ordinary growth and development, every page of the modern law reports attests.

[1] P. & M. p. 25.
[2] P. & M. 38.
[3] Pollock, Exp. C.L. p. 28.
[4] Trel. p. 121.
[5] Pollock, Exp. C.L. p. 30.

So far as equity jurisprudence is concerned, there is, of course, no possible doubt, and Sir Henry Maine's statement is unchallengable:

> The Roman law, more fertile than the Common law, in rules applicable to secular disputes, was not seldom resorted to by a later generation of Chancery Judges, amid whose recorded dicta we often find entire texts from the Corpus Juris imbedded, with their terms unaltered, though their origin is never acknowledged.[6]

But in the Common Law, as well, we find ideas, which could not have been of Saxon origin, and which were maxims long reverenced by the Romans, embedded in the very heart of the most ancient English jurisprudence. For instance the presumption of innocence in favor of the accused, has been one of the most beneficient principles of English Criminal Law from the earliest time, but it certainly could not have come from Anglo-Saxon procedure which had not the faintest conception of the most elementary ideas of proof. Under the system of 'ordeals' the accused was guilty unless he could exculpate himself by suborning a greater volume of perjury than that offered by the accuser. The oath of "compurgatores" swearing to a man's innocence, or to his character, even if they did not know the facts of the case at issue, held the place which the examination of evidence holds today in criminal justice. It was the oath more than the evidence that was valued.[7]

Greenleaf traces the presumption of innocence to Deuteronomy, but whether he be correct or not, there can be no question but that the Roman Law was prevaded with the results of this maxim of criminal administration, as the following extracts show :—

> Let all accusers understand that they are not to prefer charges unless they can be proven by proper witnesses, or by conclusive documents, or by circumstantial evidence, which amounts to indubitable proof and is clearer than day.
>
> In all cases of doubt, the most merciful construction of facts should be preferred.

When a disappointed prosecutor exclaimed, "Oh, illustrious Caesar! if it be sufficient to deny, what hereafter will become of the guilty?" the Emperor Julian replied: "If it suffices to accuse, what will become of the innocent?"

And when Lord Hale, in 1678, declared that it is better five guilty persons should escape unpunished than one innocent person should die, he was merely echoing the words addressed by Trajan to his friend Julius Frontonus.

[6] Anc. L. p. 48.
[7] Trev. 114 f.n.

Again the fundamental principle of English criminal law, that great body of rules that is the envy and admiration of the world, is "that to constitute a crime against human laws, there must be, first, a vitious will."[8]

Whence came this idea, so utterly foreign to Anglo-Saxon doctrine, according to which "to hold a man responsible for killing was to hold him liable for murder?" Professor Holdsworth continues :—

> Bracton lays stress upon this element of moral guilt. He would hold that homicide is not committed unless the will to injure be present, for it is the will and intent which create the offence; and thus neither the infant nor the madmen can be held criminally liable.[9]

Referring to Bracton (Twiss II, p. 298) we read :—

> *Quia crimen non contrahitur nisi voluntas nocendi intercedat, et voluntas et propositum distinguant maleficium et furtum omnimo non committitur sine affectu furandi.*

Bracton refers to the Digest I. ix t. ii, s. 111, *"Requiri damnum datum esse injuria."*

Instancing the killing of a slave, the fragment proceeds :—

> *Injuria occisum merito adjicitur; non enin sufficit occisum, sed oportet injuria id esse factum.*

That is, the law justly adds, "with intention to injure;" for it is not sufficient that he merely killed him, it is also necessary that the deed be done with intention to injure.

These rules, then, thus found in the Roman Law, were, along with other fundamental humane maxims, of that system preserved for mankind by the Canon Law, and thence introduced into the Common Law.[10]

Nevertheless they are claimed as characteristic features of the Common Law, and Sir Fred. Pollock writes :—

> The ideals of the Common Law triumphed, and the rule that the burden of proof is on the plaintiff was carried over from the civil to the criminal side of judicature.[11]

Then there is that great Writ, so peculiarly English, the Writ of Habeas Corpus. The date of its origin is not known, but it is supposed to have been in use before Magna Carta. Although in

[8] Blackstone, IV, p. 21.
[9] Hist. Eng. L. II, p. 203.
[10] White J. in *Coffin* v. *United States* 156 U.S. Rep. pp. 432-1894.
[11] Exp. C.L. p. 42.

England and America it has been rendered a more complete and efficacious remedy for illegal imprisonment in all cases than any similar process in any other country, its origin is neither English nor Saxon, but Roman, and it is altogether reasonable to assume that, after the revival of legal studies in England, the Judges who were clerics, or even trained under Vacarius or Azo, introduced these general rules into the English law.

The presence in the Digest of every important doctrine of Habeas Corpus is an interesting fact. There is no evidence, so far as I have been able to discover, that the process was of British or Teutonic origin. It is fully described in the forty-third book of the Digest. The first text is the line from the "Perpetual Edict," *"Ait prætor; quem liberum dolo malo retines, exhibeas."* The prætor declares: "produce the freeman whom you unlawfully detain." The Writ was called the interdict or order *"de homine libero exhibendo."* After quoting this article of the Edict, the compilers of the Digest introduce the commentary of Ulpian to the extent of perhaps two pages of a modern law book, and the leading rules which he derives from the text are law to-day in England and America.

Then consider for a moment the very important and fundamental distinction between possession and ownership. Early law does not trouble itself about complicated theories as to the nature and meaning of those respective rights. Normally and regularly the person in possession is the owner; and it is such a person that the rules of the oldest part of the law—the law as to theft and robbery—are designed to protect. But the smallest degree of civilisation will produce the phenomenon of ownership divorced from possession.[11a] Even that small degree of civilisation was wanting in Saxon times, and we search in vain for any trace of the idea of ownership in Anglo-Saxon, or any Germanic customs. What modern lawyers call ownership of property, the *dominium*, of the Roman system is not recognized in early Germanic ideas.[12]

But the distinction between possession and ownership was recognized in the Common Law when Bracton wrote in 1257. As he could not have got it from Saxon sources, there can be no doubt of the Roman character of the doctrine as expounded by him, and that it is to be regarded not merely as the law of England at that time, but as the basis of subsequent legal development on that

[11a] Holdsworth, p. 69.
[12] P. & M. p. 56.

subject. The English doctrine of possession is then, in fact, based and developed upon Roman notions and ideas.[13]

So also with regard to contracts, of which no trace is found in Anglo-Saxon law. The Common Law as stated by Bracton has a fully-developed law of contract, and the four great contracts of Sale, Lease, Loan and Deposit are described under latin names, in the very language of the Roman law. For instance, the determining factor in a contract of sale is the price in money. Bracton says :— *"Nulla enim emptio esse potest sine certo precio."* The Institutes: *"Nam nulla emptio sine pretio esse potest."*

The whole of the Common Law of Sale is clearly based on the Roman Law. Some writers suggest the possibility that the Saxons may have had some crude bargains, represented by the giving of earnest. Whether the supposition be correct or not, the "earnest" recognised by the Common Law is nothing but the Roman *"arrae."* In the words of Bracton :— *"Item cum arrarum nomine aliquid datum feurit ante traditionem, si emptorem emptionis poenituerit et à contractu resilire voluerit, perdat quod dedit; si autem venditorem, qui arrarum nomine receperit, emptori restituat duplicatum."* The Institutes :— *"Is qui recusat adimplere contractum, si quidem est emptor perdit quod dedit; si vero venditor duplum restituere compellitur."*

And if one has the patience to read Bracton's endless pages on Donations, it becomes apparent that the Roman Law on this head had struck deep roots into the English system in his time.

In spite of all this, and scores of other maxims, the adulators of the Common Law insist that such borrowings and such references as these, while they show an acquaintance with the Roman Law, do not testify to any important reception of its principles.[14] The English Law shows itself strong enough to assimilate foreign ideas and convert them to its own use without running the risk of any wholesale 'reception.'[15]

That, in truth, appears to the civilian a very casual dismissal of whole pages of verbatim citations, from the Digest, and the Institutes.

But assuming for the moment that the spirit of the Common Law was not weakened by these extensive borrowings, let us see just what are the distinctive features of that great system.

[13] Sir Travers Twiss—Bracton 1878 p. XXXVIII.
[14] Holdsworth VII, p. 162.
[15] P. & M. Vol. I, 135.

Sir Frederick Pollock, in his most interesting lectures on "The Expansion of the Common Law" points in particular to the following characteristics which he suggests distinguish the English law from other systems:

> Courts of justice are public; they judge between parties, and do not undertake an official inquiry, not even in criminal cases or affairs of State; the Court itself is the only authorised interpreter of the law which it adminsters. (p. 51).

Although the Anglo-Saxon or Anglo-Norman County Court was probably rather like an ill-managed public meeting, the great virtue which it transmitted to the Common Law was the love of publicity, "one tradition that has persisted through all changes." (p. 31).

One is prompted to ask with all deference, in what way that feature differs from the same idea in the Roman Law. What was the Forum but the public market, where the Magistrate sat in the full light of day, and on days specially appointed by the Pontifex Maximus, so that all the citizens might watch the administration of justice.

> *Le principe que la juridiction et la justice s'administrent publiquement, est un principe de tous les temps dans le droit romain. Mais sous le système des actions de la loi, cette publicité est largement organisee; c'est auforum; en plein jour, que s'exerce la juridiction, et le coucher du soleil est le terme supème (suprema tempestas) de toute procédure.* (Ortolan II. 427.)

Continuing Sir Frederick Pollock says:—

> Another point of Germanic procedure must seem very strange to learned persons bred in the civilian tradition, and so far as we can tell it is immemorial; namely, the parties before the Court are wholly answerable for the conduct of their own cases—We call this the rule of neutrality. (ib. p. 33-4).

If there is one feature of Roman procedure more striking than any other from the earliest of the *legis actiones* down to the latest *extra ordinaria judicia*, it is that the parties chose at their own risk the phrasing of their *"sacramentum,"* or *"intentio."* If they varied so much as "the division of the twentieth part of one poor scruple, nay, if the scale do turn but in the estimation of a hair," the case was lost without hope of amendment or retrial. The Court was an umpire, nothing more. This was the logical sequence of the archaic form of a fictitious battle. The Prætor ordered the combat to cease, and the parties proceeded to the constitution of the sacramentum, but if either party erred in the choice of a word, he was cast in his suit, and neither the prætor nor the judge could offer him any help.

"It was indispensable that the facts of the case should tally precisely with those indicated by the *verba legis*, and that, therefore, in setting forth these facts the exact *verba legis* should be employed."[16] Gaius cites as an example the *"legis actio de arboribus succisis,"* which was extended by interpretation to the case of *"vites succisae."* While, however, a legal fiction authorised a party to take action for the cutting of his vines, he was still bound to state it in the terms of the original rule *"de arboribus succisis"* only, and having used *"vites"* instead of *"arbores"* his action was dismissed.

Since also the *legis actio* was an act of religious solemnity, once taken, it could not be retracted, repeated or amended, and it completely exhausted the parties statutory right of action.

When the *Lex Aebutia* (150 B.C.) extended to all the citizens, the more elastic procedure, known as *"ordinaria judicia,"* there was, it is true, more latitude in drafting and settling the formulæ. But here too the parties themselves had to assume full responsibility for the form of the action or of the defense. It was in this connection that litigants retained to assist them the most famous jurisconsults.[17] Ultimately the formula, the decisive part of which was the *"intentio,"* was settled by the prætor, before the case was referred to the judex. But once before the judge the parties were bound by their pleadings, no amendment could be made, and the judge was confined to a decision of the definite question submitted to him.

By the time of Justinian the older forms of procedure had long been obsolete, and all proceedings were instituted under the rules of the *extra ordinaria judicia* which is virtually our procedure to-day. The offices of Magistrate and Judex were combined, there was no longer any distinction between the *jus and judicium.* In questions of procedure the genius of the Romans had full scope, and their theories and methods have never been surpassed. They are indeed the foundations of the Common Law procedure itself, and it was from the Roman Law that the early English Jurists learned and adapted to their own uses 'exceptions.'

In the time of Bracton the older rigid rules of pleading were being extensively modified by the introduction, under the influence of the Roman Law, of various defenses (exceptions) which were allowed to be pleaded.[18]

In all this pleading and counter-pleading, the judge was not an administrative officer; he was and remained a simple umpire be-

[16] Sohm p. 244.
[17] Ortolan II, p. 454.
[18] Holdsworth II, p. 196.

tween the parties. He had no authority to suggest to a plaintiff a form of action other than the one chosen, and if that unfortunately happened to be the wrong one, he had nothing to do but to dismiss it.

Holdsworth, describing the procedure of the royal court writes:—

> If a plaintiff had several alternative forms of action he must take them in their proper order. The plaintiff who tries to sue again by the same form of action on the same facts will be met by the plea of *res judicata*. The plaintiff whose statement of claim (narratio) departs in even the smallest degree from his writ will at once lose his action. (Hist. E.L. p. 195).

It is idle to attempt to make a civilian believe that all this is anything but Roman law.

How then can it be claimed that the 'rule of neutrality' is a distinctive feature of the Common Law?

The peculiar boast of the Common Law is that "the court has no external authority to look to. For every case it must find its own law, for there is no other than that which is declared to be law by the court."[19] That is, the Common Law is judge-made law, as distinguished from Statute or Code Law. Such undoubtedly was the Common Law in its origin, but to-day very great and important bodies of law have been codified; the Criminal Law, the Law of Sales, Bills of Exchange, and many others, and it must be remembered that the Common Law to-day is not yet as old as was the Roman Law when Justinian promulgated his great Code and Digest.

In its early days, the Roman Law was as much judge-made law as ever has been the Common Law. It is true that the Law of the Twelve Tables, was an immemorial Statute of archaic rules, but it was expounded, enlarged, and interpreted by the prætor and jurisconsults to meet the ever-growing needs of a higher standard of civilisation.

It was the prætors who extended to the citizens the convenience of the formulary procedure which in early days was restricted to actions between foreigners. In the original stages of its development the law of Rome, like that of other nations was of the nature of customary law, but the Magistrate in administering justice was not absolutely bound by the rules of customary law as such—so far, that is, as the rules in question lacked the force of ancient primal law—and in dealing with such rules he was justified in exercising a free discretion.[20]

[19] Pollock. Exp. C.L. p. 44.
[20] See Sohm p. 55.

In the earliest days the business of interpreting the subsisting law, and thereby developing the civil law, fell under the control of the Pontiffs. In consequence more particularly of the knowledge they possessed, and also of their general scientific learning, it became their office to assist with legal advice, not only Magistrates in regard to the exercise of the jurisdiction vested in them, but also private parties in concluding contracts and carrying on lawsuits.

Then the prætor officiating in Court was his own master; he was the supreme judicial authority. His administration of justice, therefore, was not merely an application of existing law, but was fitted to become an instrument for the creating of new law.[21]

A third, and still more important class of men who helped to make the civil law were the great jurisconsults who enjoyed the *'jus respondendi'*, the privilege of delivering opinions, which, if they were unanimous, were binding on the judge. If, however, there were a difference of opinion, the prætor might adopt whichever view he himself preferred.

Responsa prudentium sunt sententiae et opiniones eorum quibus permissim est jura condere. Quorum omnium si in unum sententiae concurrent, id quod uti sentiunt legis vicem obtinet; si vero dissentiunt judici licet quam velit sententiam sequi.[22]

One might very well imagine that Sir Frederick Pollock was speaking of ancient Rome, instead of medieval England, when he said:—

> There was always some man, or a small group of men, whose opinion about a disputed point of custom did in fact carry great weight. The legal independence of the doomsmen—is well attested. Only in the case of divided opinion, it seems, the Sheriff, as the King's executive officer had a discretion to act on the opinion of the majority. (Exp. C.L. p. 45).

Papinian, who held Court at York, and who was murdered 212 A.D., was the brightest luminary of Roman jurisprudence, and his pupil Ulpian contributes one-third of the total bulk of the Digest.

They, and their colleagues, formed the "group of men whose opinion about a disputed point of custom did in fact carry great weight," and make the law.

During the millenium that intervened between the Twelve Tables and Justinian, many statutes were passed, many edicts issued, but the great growth and development of the civil law was stimulated by the precedents established by prætors and jurisconsults; in other words, the Roman law is in its origin judge-made law.

[21] Sohm p. 76.
[22] Sohm p. 97; cf Orlotan I. p. 149.

The English judges were, therefore, merely following the example set them by Roman jurists. No less an authority than Prof. Holdsworth, says:—

> The English judges were exhibiting the substance of those qualities which have made Roman law eternal; like the Roman prætor and jurisconsult, they were developing from the customary law of small districts the general rules, which could serve not only for a State, but also for an Empire, comprising many nations and languages. (Hist. E.L. II., p. 171).

(*To be Continued.*)

A. RIVES HALL.

MONTREAL.

JUDICIAL ENNUI.

"A Counsel's position is one of the utmost difficulty." Per Brett, M.R., in *Munster* v. *Lamb*.[1]

High on the Bench, in the Court of Appeal,
Stifling the yawns that he fain would reveal.
Wistfully nodding, as though every word
If not quite accepted, at least had been heard,
ROUNDFELLOW, J., from eleven to four,
Is fully convinced that life is a bore.
The counsel appearing, though different in name,
Have facial features most sadly the same.
From pillar to post their argument goes,
And quite a proportion talk through the nose.
Whatever they say, in whisper or roar,
ROUNDFELLOW, J., has heard it before.
Judicial brethren, sitting in Court,
Are seemingly partial to views of this sort —
Dismissing appeals is dreadfully slow—
And adding "with costs both here and below"
May bring to the counsel elation or shame,
But up on the Bench it's all in the game.

Toronto. WILFRID HEIGHINGTON.

[1] (1883) L.R. 11 Q.B. 603.