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ON THE STUDY OF THE CIVIL LAW.

Our Anglo-Saxon forefathers, as well as their Roman conquerors, placed small estimation upon personal as contradistinguished from real or landed estate. The proprietorship of the latter in many instances secured nobility, in all instances gentility, and that weight of character in society which an immediate personal voice in the legislation of a country never fails to give. Personal property was but of little account. The most valuable of that which existed—the gold and silver plate, the curiously wrought and splendid armor and accoutrements of the warrior as well as the costly wardrobes of the kings and nobles, were most frequently, like the persons of their numerous slaves, heirlooms, annexed to the soil, partaking of its character, subject to the legal principles applicable to it, and in effect therefore a part of the landed estate of the proprietor, held by the same feudal tenure, under the burthens of the same incidents and services. There was even greater encouragement given to trade and industry among the Saxons than under the Normans who succeeded them. It was a provision of the Saxon laws, that a merchant who had crossed the sea three times in his own craft, might become a thane or noble.

But as late as King Henry III., the provision studiously inserted in Magna Charta, c. xxx., in favor of foreign merchants, while it has excited the admiration of Montesquieu that the English should have inserted a provision on the subject of foreign commerce in the Charter of their national liberties, shows, however, that merchants did not occupy that high place, nor commerce itself that regard, which would place them above the necessity of such a regulation. Perhaps no more striking illustration of the slowness of progress on this subject in the accumulations and corresponding legislation of our forefathers can be found than in the fact, that though an act of limitation (that statute of repose absolutely necessary to give security to property in every advanced state of society) was passed in England in respect to real estate in the year 1270, yet no limitation to personal actions was provided till the year 1623, when the statute 21 Jac. 1, c. 10, was enacted. Even then the exception of merchants' accounts was introduced; intended no doubt for the encouragement of honest and fair commerce; which exception still stands, and has been copied in our American statutes, but which, with all other exceptions in that statute, should be swept away, leaving the general principle, that the right to sue should be the sole criterion to determine the commencement and running of the bar.

While all the principles in regard to realty look to the feudal system as their great fountain and source, it is certain that in those cases which related to the enforcement of contracts and the settlement of the personal estate of decedents, the civil law was considered as the rule of action, as shedding at all events that light which would alone guide the judicial mind in all questions not expressly provided for in the written statutes. In the ecclesiastical courts, presided over altogether by men educated in the schools of the civil law, and very commonly too in foreign universities, all questions of guardianship, marriage, divorce, testaments, legacies, and administrations, were most likely to arise; and in the strictly secular courts, by the earliest constitutions, the Bishop sat in judgment with the Count or Ealderman, in the shire-mote and even in the king's superior courts. We have standing evidence

of the fact that the bench and all the inferior offices were filled by the clergy in the names of the English terms, the dresses of the judges, and the denomination of *clerks* given to the scribes of the court. Nay, that even the profession of the law was originally made up of those, who either at the time or originally for the most part had taken orders, we can see in the common appellation given to all outside of the bar as "laymen."

It is a very remarkable fact, that from the reign of Claudius to that of Honorius (a period of about three hundred and sixty years), the judgment seats of England had been filled by some of the most eminent of those lawyers (Papinian, Paulus, and Ulpian), whose opinions were afterwards incorporated into the Justinian compilation. But all germs of such jurisprudence would have perished, with every other trace of civilization, under the rude incursions of the Saxons and Danes, had not the tribunals of the clergy afforded them shelter from the storm. 1 Phill. Inter. Law, Pref. xvi.

We must not be surprised, therefore, to find the civil law taking deep root in our system, to be able to trace its marked footsteps in all those departments of our jurisprudence which are of modern growth. Especially in that part which may be termed mercantile law, that part which relates to the trade of merchandise, foreign or domestic, which includes the great and still growing heads of carriage by land and water, agency, partnership, negotiable paper, shipping, insurance, and debtor and creditor, we may look for abundant traces of the civil law. Look at a well-selected modern law library. Look at the shelves, which are filled with the books specially devoted to these topics, as compared with those which treat of lands and crimes, the two great subjects of the ancient common law. Look at the space in books of Practice, Pleading, Nisi Prius, and Evidence, occupied with the consideration of actions and remedies relating to these topics. Look at the proportion of cases in a modern report book. Consider that all this has been the growth of little more than one century, while its rivals date backwards upwards of eight.

In regard indeed to what is strictly maritime, modern legisla-

tion and modern judicial decisions have built a vast and imposing superstructure, upon what are after all but scanty materials in the Roman law.

The Romans never digested any general code of maritime regulation, notwithstanding they were pre-eminently distinguished for the cultivation, method, and system which they gave to their municipal law. They seem to have been content to adopt as their own the regulations of the republic of Rhodes. The genius of the Roman government was military and not commercial. Mercantile professions were despised; nothing was esteemed honorable but the plough and the sword. They encouraged corn merchants to import provisions from Sardinia, Sicily, Africa, and Spain; but this was necessary for the subsistence of the inhabitants of Rome, as the slaves of Italy (who were almost exclusively the cultivators of the soil) did not afford a sufficient supply for the city. The Romans prohibited commerce to persons of birth, rank, and fortune; and no senator was allowed to own a vessel larger than a boat sufficient to carry his own corn and fruits. Scant, however, as are the titles of the Roman law upon strictly maritime heads, Chancellor KENT has observed that they atone for their brevity by their excellent sense of practical wisdom. They contain the elements of those very rules which have received the greatest expansion and improvement in the maritime codes of modern nations. Whatever came from the pens of such sages as Papinian, Paul, Julian, Labeo, Ulpian, and Scævola, carried with it demonstrative proofs of the wisdom of their philosophy.

But though it may be true that the materials in the Roman law in regard to those particular kinds of contracts, which form the great body of modern maritime law, and which have been enumerated above, are brief and few, yet it is certainly not to be lost sight of, that the great principles of the law of contracts, as to the capacity of the contracting parties, the act of contracting, the construction of the words of the contract, the enforcement of its provisions and the right and mode of disposition, occupy a large space in that law. It is unnecessary to remark how large a part of every modern code of jurisprudence is occupied with these

heads, and how well justified is the observation attributed to Lord HOLT, that the laws of all nations were raised out of the ruins of the civil law, and that the principles of the English law were borrowed from that system and grounded upon the same reason.

Lord MANSFIELD undoubtedly had a much larger share than any other judge or jurist in introducing and naturalizing civil law rules and principles on commercial questions in England. Mr. Burke remarked of him, that his ideas went "to the growing amelioration of the law, by making its liberality keep pace with the demands of justice and the actual concerns of the world; not restricting the infinitely diversified occasions of men, and the rules of natural justice within artificial circumscriptions, but conforming our jurisprudence to the growth of our commerce and of our empire. This enlargement of our concerns he appears in the year 1744 almost to have foreseen, and he lived to behold it." "Within these thirty years," says Mr. Justice BULLER, in giving judgment in the case of *Lickbarrow* vs. *Mason*, 2 T. R. 63, "the commercial law of this country has taken a very different turn from what it did before. We find in *Snee* and *Prescott*, 1 Atkyns 245, that Lord HARDWICKE himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances put together. Before that period, we find that in courts of law, all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no general principle. From that time, we all know the great study has been to find some certain general principle, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged and explained, till we have been lost in admiration at the strength and stretch of the understanding. I should be very sorry to find myself under a necessity of differing from any case upon this subject which has been decided by Lord MANSFIELD, who may be truly said to be the founder of the commercial law of this country."

"To all those who are conversant with those judgments," says

Mr. Welsby, "it would be superfluous, and to those who are not so, impossible (at least within such space as we could here afford), to point out how much of their intrinsic merit and of their extended application is attributable to Lord MANSFIELD'S knowledge of the civil law. This splendid monument of human wisdom was to him a well-filled storehouse of reasoning, from which a ready supply of principles and of rules might always be drawn, to guide him in the decision of cases unprovided for by our own jurisprudence. And it was not only in such cases as these that he derived advantage from it. There are very few departments of our own law on which some light may not be thrown by it in the way of analogical illustration; and with respect to very many, as he has frequently had occasion to show, it is of more direct application, being in fact the source from which they have been either partially or entirely deduced."

In like manner has one of Lord MANSFIELD'S successors, Lord CAMPBELL, done eloquent justice to his high merits in this point of view. "In the reign of George II., England had grown into the greatest manufacturing and commercial country in the world, while her jurisprudence had by no means been expanded or developed in the same proportion. The legislature had literally done nothing to supply the insufficiency of feudal law to regulate the concerns of a trading population; and the common law judges had, generally speaking, been too unenlightened and too timorous to be of much service in improving our code by judicial decisions. Hence when questions necessarily arose respecting the buying and selling of goods, respecting the affreightment of ships, respecting marine insurances, and respecting bills of exchange and promissory notes, no one knew how they were to be determined. Not a treatise had been published upon any of these subjects, and no cases respecting them were to be found in our books of reports, which swarmed with decisions about lords and villeins, about marshalling the champions upon the trial of a writ of right by battle, and about the customs of manors, whereby an unchaste widow might save the forfeiture of her dower by riding on a black ram, and in plain language confessing her offence. Lord HARDWICKE had

done much to improve and systematize equity, but proceedings were still carried on in the courts of common law much in the same style as in the days of Sir ROBERT TRESILIAN and Sir WILLIAM GASCOIGNE. Mercantile questions were so ignorantly treated when they came into Westminster Hall, that they were usually settled by arbitration among the merchants themselves. If an action turning upon a mercantile question was brought into a court of law, the judge submitted it to the jury, who determined it according to their own notions of what was fair, and no general rule was laid down, which could afterwards be referred to, for the purpose of settling similar disputes." "He (Lord MANSFIELD) saw the noble field that lay before him, and he resolved to reap the rich harvest of glory which it presented to him. Instead of proceeding by legislation and attempting to codify, he wisely thought it more according to the genius of our institutions to introduce his improvements gradually, by way of judicial decision. As respected commerce, there were no vicious rules to be overturned; he had only to consider what was just, expedient, and sanctioned by the experience of nations further advanced in the science of jurisprudence. His plan seems to have been, to avail himself, as often as opportunity admitted, of his ample stores of knowledge, acquired from his study of the Roman civil law, and of the juridical writers produced in modern times by France, Germany, Holland, and Italy, not only in doing justice to the parties litigating before him, but in settling with precision and upon sound principles a general rule, afterwards to be quoted and recognised as governing all similar cases. Being still in the prime of life, with a vigorous constitution, he no doubt fondly hoped that he might live to see these decisions, embracing the whole scope of commercial transactions, collected and methodized into a system, which might bear his name."

It has seemed to the writer that in no way could he more effectually recommend the study of the civil law, than by quoting so illustrious an example, and by showing, as in the opinions which have been cited, how largely the principles and rules of the Roman

law have entered into modern decisions upon the diversified and important topics of Commercial Law.

So rich and abundant are the sources of information, that the difficulty lies in making such a selection as may bring the subject within the scope of an American law student. It is possible, however, to lay such a foundation as that the pursuit may be kept up in the occasional interstices of professional life, and such a knowledge attained as will at all times enable the student to know where and how to seek for knowledge upon any given point.

The Twenty-third Lecture of Kent's Commentaries may be recommended as presenting one of the best, because a simple and condensed account of the history and sources of the Roman law. The forty-fourth chapter of Gibbon's Decline and Fall should then be perused. It is a masterly exposition, within a brief compass, as well of the history as of the leading principles of the Roman jurisprudence. He opens it with the eloquent passage: "The vain titles of the victories of Justinian are crumbled into dust; but the name of the legislator is inscribed on a fair and everlasting monument. Under his reign and by his care, the civil jurisprudence was digested in the immortal works of the Code, the Pandects, and the Institute; the public reason of the Romans has been silently or studiously transferred into the domestic institutions of Europe, and the laws of Justinian still command the respect or obedience of independent nations." And after tracing its origin and growth, its abuses and corruption in the different periods of the Republic and the Empire, the complication of its forms, and the expense and delay of its proceedings, he concludes with these observations, equally just and profound: "The experience of an abuse, from which our own age and country are not perfectly exempt, may sometimes provoke a generous indignation and extort the hasty wish of exchanging our elaborate jurisprudence for the simple and summary decrees of a Turkish Cadhi. Our calmer reflection will suggest that such forms and delays are necessary to guard the person and property of the citizen, that the discretion of the judge is the first engine of tyranny, and that the laws of a free people should foresee and determine every question that

may peaceably arise in the exercise of power and the transactions of industry."

The *Horæ Juridicæ* of Charles Butler may then be read with advantage, as throwing much light on the general subject in a pleasing and attractive style.

The Institutes themselves should be then the subject of careful and repeated study. Wherever it is possible, they should be read in the original. "This work must ever be regarded as one of the most perfect specimens of didactic composition which the literature of any age or country has produced. The style of it is admirably adapted to the purposes of an elementary treatise. Perspicuity is its chief merit, but this has not been attained at the expense either of eloquence or of precision; indeed, it would be difficult to find a more happy medium between prolixity and obscurity. The Latinity is, with very few exceptions, of the purest kind; and those passages are extremely rare in which either the idiom or the taste of a bad school can be detected."

Though a late discovery has stripped Tribonian of the honor of its authorship, and shown that in the main it is a servile copy of the Elements of Gaius, a prior writer, it rather adds to than detracts from its real value, that it belongs to a much earlier and purer age of the law and the language than that of Justinian.

Perhaps if these works be perfectly well mastered, it is as much as can be expected in the early periods of a course of legal study. Afterwards, the Manual of Macheldy, of which there is both a French and English translation, may be read with profit. The great work of Domat, as it is presented in Mr. Strahan's translation, and Mr. Cushing's American edition, may then be recommended. But especially to the student, if a proficient in German or French, will Savigny's Treatise on the Roman Law, as well as his history of that law during the Middle Ages, be found of the greatest interest and use. No works can be studied which will more tend to open and enlarge the mind of the student to some thing like an adequate comprehension of the importance of the study of the Civil Law. G. S.