ROMAN LAW IN AMERICAN LAW SCHOOLS.

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 answer to the third question may be postponed until the first two questions are answered. These every man will answer according to the theory which he holds, consciously or unconsciously, regarding the purpose of legal education.

I.

One tenable theory of the function of a law school—a theory which seems to be held by the majority of American law teachers—is that such a school exists simply for the purpose of training lawyers. By lawyers the adherents of this view mean practitioners in the field of private law, men who are to give advice upon legal questions that affect the persons or the pockets of their clients and who are to fight their clients' battles, if battles there must be, in the courts of justice. The education that is needed is partly informational. The graduate of a law school, the candidate for admission to the bar, cannot be expected to know all the rules obtaining in every department of private law, but he should know the leading and well-settled rules in each department, and he should know where to go for information upon minuter matters. A more important part of his training is that which deals with method. He has to learn how to handle the original matter of the law. He must learn the art of construing statutes, and the degree of possible difference between a broad and a narrow construction. He must learn the deeper mysteries of interpreting decisions, so that he may marshall precedents skilfully upon the side which he represents and may destroy by "distinction" the precedents similarly marshalled by his opponent.

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. In most portions of the Anglo-American private law there is more or less Roman law, ancient or mediæval, civil or canon. In some portions there is a great deal of Roman law. It is interesting to know whence the rules of the English law have been derived, but such knowledge is by no means necessary. Where the exact scope and significance of the English rule is disputed, it may be of practical use to show how the rule was interpreted by the great Roman jurists or by the mediæval civilians or canonists. Once in a while a case may be won in this way, but once in a while a case may be won by a knowledge of chemistry or of mechanics. These are, in practice, *casus rariores*. It may be urged, and with truth, that the process of drawing new rules, where new rules are needed, from the apparently inexhaustible storehouse of Roman jurisprudence has by no means ceased. Even within the last hundred years it has been discovered by English courts that old debts can be extinguished by substituting new ones: *Tatlock* v. *Harris*, 3 Durnford and East, T. R. 174; and that where action is brought against a surety he can set-off a sum owed by the plaintiff not to himself, the surety, but to his principal, the original debtor: *Bechervaise* v. *Lewis*, 7 C. P. 372; and in each case the decision was drawn directly from the Roman law. These, however, are now *casus rarissimi*. As the English law has grown more complete, the tendency to borrow rules from the Roman law has steadily diminished, and the practice is more likely to become extinct than to increase.

In cases involving conflicts of law the informational value of the Roman law is more considerable. With the increasing movement of persons and property across national frontiers, and with the rapid and unprecedented development of international commerce, the cases have greatly multiplied in which foreign law—really foreign law, I mean, not the law of a sister state—determines the decision of the American courts. To the lawyer who has no acquaintance with Roman law, the legal vocabulary of continental Europe and Latin-America is a stum-

bling-block and the text of their laws is a snare. This practical problem, however, is apparently to be solved by a further specialization of law business. A few lawyers will devote themselves to the study of foreign law, and to these the others will turn for help when help is needed. It may be urged that these specialists should have a chance to prepare themselves for their work in our law schools, and this may be regarded as a valid argument for introducing courses in Roman law, at least in the more important law schools of the East. This argument, however, calls for nothing more than elective courses. It does not justify the introduction of Roman law as a required study. It is no more needful to make every graduate an expert in foreign law than to make every graduate an expert in patent law. And if elective courses are introduced for the benefit of the few students who may wish to make a specialty of foreign law, more stress should be laid on the modified Roman law of modern Europe than upon the law of Justinian's days.

A stronger plea may perhaps be made for the study of Roman jurisprudence as a part of the law student's training in method. In the lax or rigid construction of statutes, and in the determination of the exact value of previous rulings as precedents, the Romans were assuredly not inferior to the acutest of the moderns. They handled statutes in particular with more freedom than do our lawyers—with somewhat of the same freedom with which our greatest lawyers have handled our federal and state constitutions. But these arts can also be learned from English and American cases; and from the point of view of the intending practitioner, they can best be learned by studying cases in which are set forth the arguments of counsel. For this element in legal training the Roman law offers no exact equivalent. The greatest jurists of the Empire, whose responses and opinions form the bulk of the Digest, had been drawn into the service of the state, and their responses are not briefs, but decisions. Dissenting opinions have in some cases been preserved, with reasons for the dissent, but not arguments of counsel. In the accepted opinions and in those which were not accepted, the controlling influence

was, of course, the interest of society at large, and not the advantage of any individual; and in so far the Digest furnishes better training for a judge than for a practitioner.

It may, of course, be said that our law schools in educating practitioners educate some who will be judges; and if it be admitted, that a broader training, or a training in any way different from that required by a barrister, is needed by a judge, then it must be admitted, that the theory of legal education upon which our discussion has thus far been based, is an imperfect theory even from the practical point of view. But the advocates of the technical, or trade-school theory, do not concede the necessity of a different training for the judicial office. They take things as they are, and base their theory upon the established Anglo-American custom. It has long been usual, both in England and in America, to take the judges from the bar, and therefore the law school may be content to train good barristers. If special qualifications are needed in the judicial office, they presumably come with the ermine. All this is thoroughly Anglo-Saxon, and in accordance with the old German saying: "To whom God gives an office, to him He gives understanding also."

II.

There is, however, a second possible view of the function of legal education, and of late years there are signs that this view is beginning to gain wider acceptance. The old and sound tradition is reviving that law is not a trade, but a profession; and by a profession is meant not merely a trade that requires more than the average breadth of mental grasp and an uncommon subtlety of discrimination, but something else and something more. By a profession is meant a calling that subserves the interests of society as well as the interests of individuals, and that places, or should place, social welfare above individual advantage. There is no basis for the honor traditionally accorded to the professions as compared with the trades except the recognition and expectation of social service. There is no other reason for the endowment of professional schools, or for the maintenance of professional

schools by an endowed university. If society pays part of the cost of a man's education, it is because it expects to recover its outlay through that man's services. What the services are which society expects from its lawyers, what the duties are which it imposes, is clear enough. The legal profession is custodian of the most important element of social life—the body of rules which are necessary to the existence and progress of society, and to which, accordingly, society constrains obedience through the strong arm of political power. Nor is our profession simply custodian of the law which society has created; it shapes the new law which the constantly changing needs of social life require. This great service, and the duties it entails, cannot be thrown off upon the shoulders of the judges and the legislators. Apart from the fact that the majority of our legislators and all of our higher judges come from the bar, it is impossible that these should do their work in the best way without the sympathy and support of the bar.

From this point of view, the problem of legal education is far less simple than it appears to the advocates of a purely technical training. Private law—the law of family and of property—cannot be divorced from public law. It can be thoroughly comprehended only in its relation to public law. This relation is not one of independent co-existence, but of organic interdependence. Each supplements and modifies the other. Hence the necessity of introducing into the curriculum of our law schools far more international, constitutional and administrative law than has heretofore found place there. Hence the necessity of giving to constitutional law, as taught in our schools, a different and a wider meaning. Constitutional law should not be taken to signify merely the protection of individuals and their property against governmental encroachment; it should be taken in its legitimate sense, as including the organization of our entire political system.

Nor can law be really understood by studying it simply as it is to-day. We really comprehend things only when we know how they have come into existence and how they have grown to their present form. To the lawyer, as a professional

man, some knowledge of the history of our law is absolutely essential. It is one of the great merits of the case system that it gives glimpses of the evolution of legal rules. But general courses in English legal history, which shall show the development not merely of this or that legal institution but of the law as a whole, are greatly needed.

Nor can the law be really understood, as it should be understood by those who are its makers and its guardians, by studying law alone. It can be really understood only in its relation to ethics, politics and economics. Unless the law student has been thoroughly grounded in these subjects before he begins his law studies—and how few of our American law students are thus grounded!—these matters also must find some place in the scheme of legal education.

At present it is only in a few of our larger universities that any attempt is made to meet these needs. At such universities there have been established, side by side with the law schools, schools of political science or graduate courses in the political sciences; and courses in history, public law, economics, etc., have been thrown open to the law students, in some cases as optional courses only, in some cases and to some extent as elective courses leading to the law degree. This solution of the problem is inadequate. In all our law schools, even in those that are associated with our greatest universities, the traditions of the technical school are still dominant among the students themselves. To most of them law means private law; public law is politics. To most of them history, ethics and economics seem matters as remote from law as are geology, theology or *belles-lettres*. At the same time the work of the law schools has been growing more and more minute and intensive in the field of private law; and in spite of the extension of the law course from two years to three, the pace of the work has been quickened. Under the optional system, therefore, hardly any of the law students can make use of the new opportunities extended to them; and even under the elective system the number who strive to broaden their education is comparatively small.

Judging from European tendencies, this method of dealing

with the problem of professional education in law is probably destined to prove a temporary and transitional method. On the continent of Europe public law has long constituted a required part of the legal education, and of recent years courses in economics are beginning to be required.

But what of the Roman law? Are its claims stronger in the professional school than in the technical school? They are certainly stronger, but not even from this point of view are they imperative. When the history of English law is studied, we find the influence of Roman law, civil and canon, increasing as we go backward. To the lawyer who studies English legal history as an investigator, with the intent of increasing our stock of knowledge, a considerable acquaintance with ancient and mediæval Roman law is necessary. But to the lawyer who studies English legal history merely to gain a better comprehension of the existing Anglo-American law, the Roman law, however useful, is not necessary. The same statement must be made as regards the study of public law, and as regards the study of economics and of ethics. To the historical investigator in these fields, some knowledge of Roman law is, I think, necessary. To the ordinary student it is of advantage, but it is not necessary. In public law, in economics, and in ethics, the elements derived from the Roman civilization have been so largely assimilated and transmuted that the ordinary student can get the results of the historical process without going back to its beginnings.

From the point of view of professional education, accordingly, the demand for elective courses in Roman law is stronger than from the point of view of technical education; but it is still a demand for elective courses only, and not for a required course.

III.

A third view of law and of legal education—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 educa-

tion should be scientific. This view is not wholly incompatible with the theory that law schools exist simply to produce practitioners in the field of private law, for the training given in private law may be more or less scientific. Much less is this view incompatible with the theory that law is a profession, and that social duties of the greatest importance rest upon the bar. It has always been felt instinctively that the true professional spirit—the spirit of public service—is most fully developed among men who regard the subject-matter of their profession as a science; and it is the testimony of the world's experience that such men serve society most gladly and most effectively in laboring for the advancement of their chosen sciences. From the scientific point of view, also, there is the strongest reason for including in the legal curriculum legal history, public law, economics, and ethics; for every true science studies and presents its material in the light of its development and in its relations to allied sciences.

But every true science employs a method of which the technical and professional schools make little use. This method is comparison. It is pre-eminently *the* scientific method; without the employment of the comparative method, no body of knowledge regarding the facts of the physical world or the facts of social life can take rank as a science.

In considering law from the technical and professional points of view, we have considered it as a national system. We have considered Anglo-American law alone. But law, though primarily a national product, is also a human product. Social organization is always fundamentally the same among peoples standing on the same plane of social evolution. Many of its basic facts are constant throughout the course of human history. Many of the problems with which English and American lawyers have to deal are problems with which the Roman jurists dealt; all of them are problems with which the jurists of modern Europe are dealing. Nor is law human in this sense only—that the problems confronted and the conditions of their solution are everywhere similar—but also in the sense that its development has been human. There is, and there will some day be written, a history of law; and the

particular development of Roman law and of English law will first be wholly intelligible when each is regarded as a stage in the development of the law of the world.

A professor in one of our university law schools was accustomed, as I have been told, to open his first lecture by declaring that it was not his intention to treat of the law of England, or of the law of the United States, or of the law of his own commonwealth, but of law. This announcement, of course, exaggerated purposely the point which he desired to emphasize; but it will serve to illustrate the point which I am trying to make. A science of English law or of Anglo-American law is as inconceivable as a science of Anglo-American ethics or economics. It is, indeed, as unthinkable as a science of American physics, or mechanics.

It follows that, for the scientific study of law, some knowledge of the Roman law is absolutely necessary; for the civilized world is ruled to-day by two great systems of private law, the English and the Roman, and as soon as the student, who is to employ the comparative method, emerges from the English law, he plunges into Roman law.

From the purely scientific point of view, moreover, the study of the Roman law, ancient and modern, is more important than the study of the English law. The latter, as far as it is an independent product, is the product of a shorter period of conscious, reflective development—a period that covers scarcely one-third of the centuries that have been consumed in the development of the modern Roman law. The English law, again, is the product of the genius of a single highly-gifted race. The Roman law of to-day is the product of the coöperation of all the other races that have helped to make general history. Even in the ancient world the institutions and customs of all the Mediterranean peoples were fused by a process of selection that was partly automatic and partly reflective, into the universal law, the *ius gentium* of the Roman empire; and in the scientific elaboration of this law Romans, Greeks, Semites, Gauls and Spaniards labored side by side. In mediæval Europe a new element was added to this already cosmopolitan law by the introduction of Teutonic institutions

and ideas; and in the further scientific development of this wider *ius gentium* all the modern nations of continental Europe have had a share.

If an example be needed to demonstrate the scientific value of Roman law to the English jurist, it is only necessary to compare the jurisprudence of Bentham and Austin, itself not uninfluenced by the "dust of the Roman jurisprudence" which they had half consciously inhaled, with the jurisprudence of Holland and Pollock, vitalized by a deeper inspiration of living Roman law.

IV.

I have examined the questions proposed in the light of what seems to me the three possible theories of legal education. Which of these theories, now, shall we accept as the true theory? For me, each has its justification, and each should obtain at least partial recognition. The American law school must train practitioners—that is, indeed, its primary purpose—and it should so train them that they may earn a livelihood, for this is the immediate end which nearly all men must set before themselves. But it should not content itself with this. It should strive to make of all its graduates professional men, imbued with the spirit of public service and fitted to discharge the duties which our social organization and our national custom impose upon the legal profession. And it should strive to imbue all of them with the scientific spirit, not merely because the scientific spirit brings with it the professional spirit in its highest and purest form, but for the sake of legal science itself, of which our law schools should be the great and general reservoir. And besides awakening in the minds of all of its students, as far as this is possible, the scientific spirit, the law school should provide special training for the chosen few who are able and willing to devote their lives to the investigation of legal history and jurisprudence. This our university law schools, at least, should do; for a university that contents itself with the preservation of the inherited capital of science, and makes no provision for its increase, is a university only in name.

If this view be accepted, I think 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.

If the preceding discussion be viewed by any reader as a brief for the Roman law, he will wholly mistake the spirit in which it has been written. Had I undertaken to plead, as an advocate, for the study of Roman law in American law schools, I should have claimed far more, and conceded much less. I have striven to take a judicial rather than a partisan view of the claims of the Roman law, and in all doubtful points I have charged rather against than in favor of claims which my prejudices would lead me to support.

V.

The question remains to be considered, how the Roman law should be studied. To answer this question we must consider what are the most valuable portions of that law—the portions that constitute a permanent contribution to legal science.

The most valuable portion of the Roman law is incontestably the private law. The whole doctrine of private rights was first clearly worked out by the Romans, and these rights were formulated with a sharpness of outline which no Teutonic system of law has ever equalled. In the Roman private law special stress 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. Roman succession *ab intestato* deserves little attention. It is of even less scientific value than the order of succession in the Code Napoléon. Both are arbitrary things, but the latter is of more interest *de lege ferenda.*

The Roman law of personal status and of the family relations should be relegated, for the most part, to the limbo of legal antiquities. To the American law student the legal status of the *Latini Iuniani* is of less consequence than that of the German *liti;* and the doctrine of *peculium quasi-castrense* is more remote from our modern life than the matrimonial

property law of the early Suabians. Of all this portion of the Roman law so much only is needed as may be necessary to understand cases in the Digest which deal with property rights or obligations, but which turn in part upon the relation of husband and wife, father and son, or master and slave. And, perhaps, even so much had better be taught incidentally, in discussing the cases, than set forth dogmatically in a course on the Institutes.

It is the great fault of the attempts now making to introduce the study of the Roman law in England and in America that too much time is devoted to the Institutes of Justinian, and too little, if any, to the Digest. The latter is a vast repository of case-law, from which a judicious instructor can select matter of permanent value. The former is an attempt to set forth dogmatically, in brief compass, the legal rules which were of chief importance in the sixth century. It includes, therefore, much that is of purely antiquarian interest. In England, where the Institutes are now a required study, the vice of the system shows itself clearly in the cram-books. In Chamier's *Manual*, for example, the student can learn something about the freedmen who were treated like Latins, and about the *peculium quasi-castrense;* but the law of contractual obligations is condensed into thirty-six small pages of heavily-leaded large type, and, as far as I can discover, no hint is given that obligations were assigned by the Romans, as by Englishmen, by making the assignee an attorney in his own interest.

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 of this time, in my opinion, 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 which we have to deal to-day. 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.

Munroe Smith.

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