THE VALUE AND PLACE OF ROMAN LAW IN THE TECHNICAL CURRICULUM

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There have been many national systems of law which have grown and declined with the nations that produced them, never extending beyond. But there have been only three world legal systems,[1] i. e., those which have been adopted by the other than the originating nations and countries. In order of time these are (I) the Roman, (II) the Mohammedan and (III) the Anglo-American. Of these the first is not only the oldest; it is also to a considerable extent a source of the others as well as of some which cannot be called systems.

II

The Arabian conquerors who succeeded in spreading the law as well as the faith of Islam over a large portion of the globe came in contact with the Roman law of the eastern empire and were compelled to borrow from it because their own system was too crude and primitive to meet the new conditions which their conquests produced. The amount of real Roman law which has found its way into the Muslim is rather surprising to those who have not specially investigated the subject.

> "What the Mohammedan conquerors insisted upon in all cases was either tribute or conversion, and both the one and the other meant plenary and ostentatious submission. But it meant no more. There were no attempts to organize and administer the conquered countries like those of the Romans and English in respect of their successively annexed dominions. It will shortly be seen that the Koran only professed to legislate broadly on a few characteristic practices and institutions interesting to the natives of Arabia. There was neither in the Koran nor elsewhere during the first few caliphates any attempt to interfere with the complex details of civil life in the richly civilized communities brought under Arab sway.

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1. See Bryce, The Roman and the British Empires, (1914) 79.

There were neither the leisure for this, nor the requisite intellectual capacity, nor the sort of men needed for the task.

"It was only when in Bagdad, in the cities of Spain, and in Cairo, there was repose and opportunity for study and reflection, that medicine, mathematics, logic, and the fine arts were studied and made to flit with a meteoric radiance across the midnight of Western thought. If Aristotle supplied the Arabians with their logic, it was Basil, Leo and their Greek commentators who supplied them with their law. The question only was how to weave these Greek and Roman ideas, which were at the root of the national habits, were the basis of a long established system of academic learning, and were expressed in treatises of the highest and widest celebrity, into the language of the Koran, and to amalgamate the institutions familiar to the Greek world with those which had become characteristic of the Mohammedan rule.

"This task has been achieved not without success, and the result is a system which, if not quite homogeneous, is yet practically uniform for all Mohammedan populations in the world * * *

"Out of these sources of Mohammedan law it has been seen how much and how little the Koran contributes expressly. It has also been seen (excluding from consideration the direct pontifical legislation of the Ottoman Sultans) how complex and exact a structure of law has been erected on the original foundations, and yet that tradition and learned treatises or opinions have been the only recognized instrument of legal reform. When it is found, then, that it was in countries in which schools of Roman law, textbooks of Roman law, Roman law courts, and magistrates and officials imbued with Roman law from their early college days existed, that all this elaborate system of rules and ideas grew up,—reproducing, with a curious mixture of sameness and variation, the essential principles of the latest phase of Roman law,—the conclusion is irresistible that the system is nothing else than Roman law itself very slightly transformed. Indeed, if, as Emanuel Deutsch said and seemed to establish, the Mohammedan religion is nothing but Hebraism adapted to an Arabian soil, it seems also true that Mohammedan law is nothing but the Roman law of the Eastern Empire adapted to the political conditions of the Arab dominions." [2]

III

The relation of the Roman Law to the third of these world systems is a subject upon which there is a difference of opinion, due doubtless to the varying degrees of attention given thereto. On the one hand we find the assertion

2. Amos, Roman Civil Law (1883), 408-9, 415.

> "That few rules of law, consciously and avowedly taken from the more highly developed system of Roman jurisprudence, have been successfully introduced into the English system." [3]

> "It is a mistake to call the Koran either the theological compendium or the *corpus legis* of Islam. It is neither the one nor the other. Those who turn over the pages of the Hedeya, or Khalil's 'Code Musalman,' of which M. Seignette has recently published a French translation in Algiers, will easily see how little help the Koran is to the Mohammedan legist, and how few of Khalil's two thousand clauses can be traced to the supposed Book of the Law. * * * It is not a code of law, nor yet a theological system; but it is something better than these. It is the broken utterance of human heart wholly incapable of disguise; and the heart was that of a man who has influenced the world as only One other has ever moved it." Lane-Poole, Studies in a Mosque, (2nd ed. 1893) 167, 168.

On the other hand one who have devoted many years to the study of both systems declared:

> "That the Roman law exercised considerable influence on the law of England cannot be doubted; for Bracton and other early writers who contributed much to the formation of the English law borrowed many rules and principles from the civilians. Though the old English common lawyers showed great aversion to the Roman law, the crown and the church were generally arrayed in its favor. Everywhere the churchmen combined the study of the civil law with their own canons, and degrees in both laws were given in the universities. The English system of equity and the ecclesiastical law have been formed more or less extensively on the Roman law, or on the Roman through the Canon law.[4]

As the Roman contributions through Bracton, Lord McKenzie's view is supported by no less an authority than Sir Henry Maine [5] while the one English author who has devoted an entire treatise to this general subject states his conclusion regarding Bracton as follows:

> English Law was reduced to order on a Roman framework, furnished with many Roman terms, its gaps filled up with actual Roman matter, so long as this was not inconsistent with English

3. Emlin McLain. The Civil and the Common Law, Proceedings Neb. State Bar Association, II, 164.
4. Roman Law, 41.
5. That the English writer of the time of Henry III. should have been able to put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the Corpus Juris, and that he should have ventured on this experiment in a country where the systematic study of the Roman law was formally proscribed, will always be among the most hopeless enigmas in the history of jurisprudence." Ancient Law, 82.

> Law. * * * To him English law is undoubtedly indebted for an extensive Roman terminology which survives to the present day; the Roman form of his first three books has been less fortunate, though Blackstone's Commentaries show some traces of its influences. But I do not think that Bracton himself is responsible for many material alterations based on the Roman law, though he records some important ones which have been made by his predecessors and contemporaries under civilian influences."[6]

But in order to arrive at correct results in our inquiry let us not rely entirely upon the opinions of others, no matter how well qualified they may be. Let us determine, if possible, by a brief analysis of the Anglo-American legal system itself how far it is indebted to Roman sources. We may survey that system under the following heads: (1) Persons, (2) Obligations, (3) Property, (4) Crimes, (5) Procedure.

(1) In the law of Persons let us consider first that of Marriage. Here we find the rules prescribed in Justinian's Institutes[7] mainly reproduced in the modern law. Even Justinian's definition[8] of marriage would not be far out of the way in any common law jurisdiction. So the restrictions arising from relationship, non-age, etc., are almost identical. And the mode and grounds of annulling a marriage at Rome were the same as those in England because the latter adopted the Canon Law which as regards these matters, coincide with the Roman. Nor was this merely true in the so-called "Courts Christian." According to Chancellor Kent,

> "Whatever civil authority existed in the Ecclesiastical Courts, touching this point, exists in this Court, or it exists nowhere, and all *direct* judicial power over the case is extinguished; but that is hardly to be presumed. For the more full examination of this very interesting point of jurisdiction, let us suppose the abominable case of a marriage between parent and children or other persons in the lineal or ascending and descending line,—is there no Court that can listen to the voice of nature and reason, and sustain a suit *instituted purposely* to declare such a marriage void? If a man marry his mother, or his sister, they are husband and wife, say the old cases, until a divorce, and the marriage be judicially dissolved. Are the principles of natural law, and of Christian duty, to be left unheeded, and inoperative, because we have no ecclesiastical Courts recognized by law, as specially charged with the

6. Scrutton, Influence of Roman Law on the Law of England (Cambridge, 1885) 120, 121.
7. Lib. I, tit. IX, X.
8. Nuptiae actum sive matrimonium, est, viri et mulieris conjunctio, individuam vitae consetudinam continens." Id. IX (1).

> cognizance of such matters? All matrimonial, and other causes of ecclesiastical cognizance, belonged originally to the temporal Courts; and when the Spiritual Courts cease, the cognizance of such causes would seem, as of course, to revert back to the lay tribunals.[9]

"A striking case of Roman influence," observes Mr. Scrutton,[10] "is to be seen in the prohibition of donations from husband to wife during coverture."

In the law of parent and child we are indebted to the Roman law for the very important not to say humane practices of legitimation [11] and adoption [12] so far as we have them. True these were borrowed by legislative, instead of judicial, enactments, but we are here considering a source of the Anglo-American law as a whole and not any special form or stage thereof.

Mr. Scrutton [13] says:

> "A part of English law which can in all probability be traced back in a joint growth from Roman and German originals is the gradual development of the liability of a man for the acts of his children, servants, or agents, as to which I can only refer to Mr. Holmes' interesting work."

The law of guardianship (*tutela*) was worked out very fully among the Romans.[14] Just how much of this has come into our own law it might be difficult to say. But the Chancellor's jurisdiction in such matters was very similar to the Praetor's and the Corpus Juris "has been occasionally

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9. Wightman v. Wightman, 4 Johns. Ch. 343 (1820) citing (39 Edw. III. 31 b. 9 Hen. VI. 34. 18 Hen. VI. 32. Bro. tit. Bastardy, pl. 23. 1 Roll. Abr. 340. A. 1. 4.357. A. 3.) case of Legitimation and Bastardy, Sir J. Daviees' Rep. 140, and his argument in the case of Praemunire, ib. 273.

10. Influence of Roman Law on Law of England, 90. Cf. Kenny, Effects of Marriage on Property, 43, 75, 110; Breton v. Woolven, L. R. 17 Ch. Div. 416: Spanish Civil Code, art. 1334.

11. "By the rule of the common law, which is the law of England to this day, and formerly prevailed throughout the United States, a child not born in lawful matrimony is not deemed the child of his father, although the parents subsequently intermarry, but is indelibly a bastard. By the rule of the civil law, on the other hand, which has been adopted in Scotland, as well as in France, Germany, and other parts of Europe, and more recently in many States of the Union, such a child may become legitimate upon the subsequent marriage of his parents." Gray, C. J., in Ross v. Ross, 129 Mass. 243, 37 Am. St. Rep. 321.

12. "The legal adoption by one person of the offspring of another, giving him the status of a child and heir of the parent by adoption, was unknown to the law of England or of Scotland, but was recognized by the Roman law, and exists in many countries on the continent of Europe which derive their jurisprudence from that law. Co. Lit. 7 b, 237 b.; 4 Philim., sec. 531; Mack. R. L. 120-124; Whart. Confl., sec. 251. It was long ago introduced, from the law of France or of Spain, into Louisiana and Texas, and more recently, at various times and by different statutes, throughout New England, and in New York, New Jersey, Pennsylvania, and a large proportion of the other States of the Union." Id. 337.

13. Influence of the Roman Law on the Law of England, 193.

14. See Phillimore, Private Law of the Romans, 293-6, 303.

consulted, if not resorted to, as an authority[15] thereon. As to the remaining one of the "domestic relations we have this statement from a recognized authority: [16]

> "So far as concerns the influence of the Roman law upon our own, especially the Roman law of master and servant, the evidence of it is to be found in every book which has been written for the last five hundred years. It has been stated already that we still repeat the reasoning of the Roman lawyers, empty as it is, to the present day. It will be seen directly whether the German folk-laws can also be followed into England."

(**2**) Coming now to obligations we find it everywhere conceded that "the idea of 'earnest,'" in connection with contracts, was taken from the civil law." [17] Thus the rule [18] that a party who fails to proceed with his contract forfeits earnest money which he has deposited was first positively stated in terms of the English law by Bracton who, in turn, follows Justinian.[19]

There is not, indeed, such general agreement regarding our indebtedness to Roman sources for the law of bailment. But in 1803 a case [20] was decided which was deemed of sufficient importance to justify its inclusion among the first collection of leading English Cases whose learned editor pronounces it "one of the most celebrated ever decided in Westminster Hall," [21] and of which Mr. Schouler [22] says:

> "If any case deserves to be styled a leading one it is this; for Bailments as a recognized topic of our common law here historically began."

Lord and Chief Justice Holt there said:

> "In order to show the grounds upon which a man shall be charged with goods put into his custody, I must show the several

15. Spence, Equity Jurisdiction I, 606 *et seq.*
16. Holmes, Common Law, 18.
17. Chapman, C. J., in Howe v. Hayward, 108 Mass. 54, 11 Am. Rep. 306, citing Gulerbook, Bracton and his Relation to the Roman Law (Phil. 1866).
18. This appears now to have expanded into the doctrine that (in the language of Nelson, J., in Hansbrough v. Peck, 5 Wall. (U. S.) 506, 18 Law Ed. 523) "the party who has advanced money, or done an act in part performance of (507) the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfil all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done. Green v. Green, 9 Cow. 46; Ketchum v. Everston, 13 Johns, 364; Leonard v. Morgan, 6 Gray, 412; Haynes v. Hart, 42 Barb. 58."
19. Howe v. Smith; L. R. 27 Ch. Div. 102 (1884). Scrutton, Influence of Roman Law on the Law of England, 93.
20. Coggs v .Bernard, 2 Ld. Raym. 909, 1 Smith Leading Cas. (8th Am. ed.) Pt. I, 369.
21. Id. 382.
22. Bailments (3d ed.) sec. 10.

sorts of bailments. And there are six sorts of bailments. The first sort of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a *depositum,* and it is that sort of bailment which is mentioned in Southcote's case. The second sort is, when goods or chattels that are useful are lent to a friend *gratis,* to be used by him; and this is called *commodatum,* because the thing is to be restored in *specie.* The third sort is, when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio,* and the lender is called *locator,* and the borrower *conductor.* The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin, *vadium,* and in English, a pawn or a pledge. The fifth sort is, when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivered them to the bailee, who is to do the thing about them. The sixth sort is, when there is a delivery of goods or chattels to somebody who is to carry them, or do something about them *gratis,* without any reward for such his work or carriage, which is this present case." * * *

"In Bracton, lib. 3, 100, it is called *mandatum.* It is an obligation which arises *ex mandato.* It is what we call in English an acting by commission." [23]

In this passage, it will be seen, are grouped three of the Roman "real" Contracts and two of the consensual, along with a third which belongs to neither. "All parties are agreed" says Mr. Scrutton,[24] "that Lord Holt in *Coggs v. Bernard* systematized and amplified Bracton, who in turn had copied the Institutes almost word for word."*

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There is another branch of the Anglo-American law of contracts which is even more indebted to the Roman law, viz., the "law merchant." Mr. Mitchell, in his treatise on that subject, [33] expresses the conclusion that "in no small measure Roman law was the raw material of the law merchant, but that material the mediaeval merchant fashioned and framed as seemed good to him.

So Mr. Scrutton [34] says:

"Now this Law Merchant, thus recognized by the laws of England, drew part of its matter from the Civil law. Being 'part of the law of nations,' in that it was composed of the customs of merchants of all nations, it included a number of usages which were relics of the Civil law, continuing the practice of the coasts of the Mediterranean. Again, the Written laws of the sea, the *Consolato* and the laws of Oleron,

23. Smith's Leading Cases (8th Am. ed.) I pt. I, 373-4, 380.
24. Influence of Roman Law on the Law of England, 188.
33. The Law Merchant (Cambridge, 1904) 161.
34. Influence of Roman Law on law of England, 179-86, 181, 183.
* A missing page in the manuscript has made a break at this juncture unavoidable.

which formed part of the Law Merchant, and the latter of which was expressly embodied in the laws of England, were based on the Civil law, with such additions as were necessary to meet the needs of the time. Thus Duck is justified in speaking of the *'Curia Mercatorum, in qua lites de contractibus mercatorum ex aequo et bono secundum jus civile Romanorum terminandae sunt.'* Indeed even at that time the Civil law was recognized as an authority, where usage was uncertain. Malyness records a case with which he was personally acquainted, where an unfortunate merchant unintentionally guaranteed the solvency of another, and 'the opinion of merchants was demanded, whereon there was grand diversity, so that the Civil law was to decide the same,' and it was decided by the Digest.

This *Lex Mercatoria* had therefore a Roman foundation; and the importance of this will be seen when we remember that Lord Mansfield, the father of modern Mercantile law, during the 32 years in which he was Lord Chief Justice of the King's Bench, constructed his system of Commercial law by moulding the findings of his special juries as to the usages of merchants (which had often a Roman origin) on principles frequently derived from the Civil law and the law of nations.

Thus the law of General Average, as developed by the Courts, appears to rest upon a Roman foundation.

The Roman *pecunia trajectitia* was a loan of money with which merchandise was bought and shipped, being at the risk of the lender until the goods reached their destination. The interest on the loan was originally unlimited but was restricted by Justinian to 12 per cent. And though the Roman law fell into oblivion, the institution appears to have survived in the Bottomry and Respondentia of the Law Merchant."

"The English law of partnership," adds the same author,[35] "is derived from three sources, the Common Law, the *Lex Mercatoria,* and the Roman Law. Of the *Lex Mercatoria* we need only say here that it appears in itself to have been at least partly based on the Roman law. And he finds "a sufficient agreement between the two systems to justify the assertion that while the method of the introduction of so much Roman law in early times is not clear, in later times most of its leading principles have become incorporated into the Common law of Partnership." [36]

(3) The Anglo-American law of property would doubtless be thought of as least affected by Roman influence. Our real property law, we are often reminded, is feudal in its origin. True but the feudal tenure itself, according to an eminent authority, derives from the *emphyteusis.*

"The truth is," observes Maine,[37] "that the Emphyteusis, not probably

35. Id. 159.
36. Id. 161.
37. Ancient Law, 299, 302-3.

as yet known by its Greek designation, marks one stage in a current of ideas which led ultimately to faudalism.

We have clear evidence that between the great fortresses which, disposed along the line of the Rhine and Danube, long secured their frontier of the Empire against its babarian neighbours, there extended a succession of strips of land, the *agri limitrophi,* which were occupied by veteran soldiers of the Roman army on the terms of an Emphyteusis. There was a double ownership. The Roman States was landlord of the soil, but the soldiers cultivated it without disturbance so long as they held themselves ready to be called out on military service whenever the state of the border should require it. In fact, a sort of garrison-duty, under a system closely resembling that of the military colonies on the Austro-Turkish border, had taken the place of the quit-rent which was the service of the ordinary Emphyteuta. It seems impossible to doubt that this was the precedent copied by the barbarian monarchs who founded feudalism. It has been within their view for some hundred years, and many of the veterans who guarded the border were, it is to be remembered, themselves of barbarian extraction, who probably spoke the Germanic tongues. Not only does the proximity of so easily followed a model explain whence the Frankish and Lombard Sovereigns got the idea of securing the military service of their followers by granting away portions of their public domain; but it perhaps explains the tendency which immediately showed itself in the Benefices to become hereditary, for an Emphyteusis, though capable of being moulded to the terms of the original contract, nevertheless descended as a general rule to the heirs of the grantee. It is true that the holder of a benefice, and more recently the lord of one of those fiefs into which the benefices were transformd, appears to have owed certain services which were not likely to have been rendered by the military colonist, and were certainly not rendered by the Emphyteuta. The duty of respect and gratitude to the feudae superior, the obligation to assist in endowing his daughter and equipping his son, the liability to his guardianship in minority, and many other similar incidents of tenure, must have been literally borrowed from the relations of Patron and Freedman under Roman law, that is, of quondam-master and quondam-slave."

An important branch of the law of property which has been much influenced by Roman sources is that relating to the mortgage which the leading English authority [38] on the subject defines as "a security founded on the common law, and perfected by a judicious and wise application

38. Coote, Mortgages (4th ed), 1,

of the principles of redemption of the Civil law." To this source may be traced the progress of the English conception of the mortgage from a conditional estate to a mere lien, the consequent rise of the "equity of redemption" and the necessity of its extinguishment by foreclosure proceedings.[39]

The supposedly common law estate of curtesy has been ascribed to Roman origin. Says Mr. Scrutton:

> "A curious incident of the marital relation, probably derived from the Roman law, is the life-tenancy of the husband in his wife's lands of inheritance, if issue has been born alive, a tenure known as *'per legen Angliae,'* or 'by the curtesy of England.' * * * Sir M. Wright, following Sir T. Craig, suggests that it is an application of Constantine's rule as to the *peculium adventitium,* which gave the father a life interest in all property coming to the son, through the mother. This would account for the necessity of issue born alive, and also for the fact that the husband had no such right in a life-estate of his wife's, or in property to which his son succeeded not in right of his mother, but as remainder man." [40]

Justinian's "canons of descent" have modified the common law rules in many Anglo-American jurisdictions and the harsh exclusion of, or discrimination against illegitimates [41] and the issue of the half blood [42] has largely given way to the juster conception of the Roman law.

(**4**) Sir Henry Maine [43] regarded Crimes as the least scientific part of Roman jurisprudence. Naturally then we would look for fewer contributions therefrom. "The influence of the Roman law" (of crimes), said Sir James F. Stephen,[44] "is clearly traceable in all the definitions, though it was in all cases adopted with modifications peculiar to England." As regards criminal responsibility the civil law [45] rule that all participants

39. See Scrutton, Influence of Roman Law on the Law of England, 157.
40. Influence of Roman Law on Law of England, 98,99, citing Kenny, Effects of Marriage on Property, 73-82; Wright, Municipal Privileges under the Anglo-Saxon, 196.
41. Kent's Commentaries, IV, 416 *et seq.*
42. Id. 403-6.
43. Ancient Law, C. X.
44. History of Criminal Law (London, 1883) II, 202.
Scrutton (112) thinks this "too wide."
45. *Roman Law Dig.*, XLVIII, VIII, XVII.
Cannon Law Pope Alexander's Decretal to Beckett, Twiss II, Pref. 60.
Spain. Sentence, Supr. Trib., Nov. 3, 887, 39 Jur. Cr. 609; Sentence, Supr. Trib. Feb. 9, 1885, 34 Jur. Cr. 216; Sentence, Supr. Trib., Nov. 26, 1875, 13 Jur. Cr. 360; Sentence, Supr. Trib., May 12, 1886, 36 Jur. Cr. 772.
In its Sentence, of April 6, 1877, Jur. Cr. 418, the Supreme Tribunal held liable for *lesiones* (wounds) all of the victim's assailants though but one had actually caused an open wound.
So in the Sentence of April 30, 1872, 6 Jur. Cr. 195, the Supreme Tribunal held as *autores* of the complex crime of *robo con homicidio* (robbery with homicide) those who had actually participated in the robbery only.
Philippines. U. S. v. Ramos, 2 Philippine, 434, 1 Off. Gaz. 958 (665); U. S. v. Asilo, 4 Philippine, 175, 3 Off. Gaz. 144.

in a crime are treated as equally guilty has been carried into the English law.[46] The latter has also borrowed at least one of the important crimes in its category from the Canon and civil law system. For "adultery as a crime was unknown to the common law.[47]

(5) One who compares carefully the remedies devised and employed by the Roman *praetor* in the exercise of his *imperium extra ordinem* with those afterward developed in the English court of chancery can have little doubt that the latter find their source in the former. Thus the *interdictum* was clearly the parent of the modern injunction.[48] Its *ex parte* and emergency character, its preventive (*prohibitorium*) or restorative (restitutorium) mandatory purpose and the situations each was designed to meet, all testify to a common origin. Obviously too, the *restitutio in integrum* furnished the model[49] for bills for cancellation or rescission, to set aside conveyances, contracts, etc. So the libellary procedure supplied the form of proceedings in the ecclesiastical,[50] and afterward the chancery, courts, from the *libellus* (whence "bill," "libel") to the *decretum.*

One very important feature of Roman procedure seems to have been followed in the English law to a much greater extent than is commonly supposed. Evidence is usually thought of as a pecualiarly common law subject and it surprises many to find in the Roman law books a statement of its fundamental principles in much the same form as they are expressed now. The present Chief Justice of the Federal Supreme Court has shown[51] how unfounded is the very prevalent notion that the presumption of innocence is an ex-indigenous and English doctrine. "There can be no question," he says, "that the Roman law was pervaded with 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.'[52]
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> 'The noble (*divus*) Trajan wrote to Julius Frontonus that no man should be condemned on a criminal charge in his absence, because it was better to let the crime of a guilty person go unpunished than to condemn the innocent.'[53]

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46. Stephen, History of Criminal Law, III, 3.
47. I Cyc. 952.
48. Spence, Equity Jurisdiction, I, 669.
49. Id. I, 622.
50. See Langdell, Equity Pleading, secs. 3, 23 *et seq.*
51. Coffin v. United States, 156 U. S. 432, 39 Law Ed. 481. 491.
52. Id. 491. Code L. IV., T. XX. 1, 25.
53. Id. 491. Dig. L. XLVIII., tit. 19. 1. 5.

> 'In all cases of doubt, the most merciful construction of facts should be preferred.' [54]
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> 'In criminal cases the milder construction shall always be preserved.' [55]
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> 'In cases of doubt it is no less just than it is safe to adopt the milder construction.' [56]

Ammianus Marcellinus relates an anecdote of the Emperor Julian which illustrates the enforcement of this principle in the Roman law. Numerius, the governor of Narbonensis, was on trial before the Emperor, and, contrary to the usage in criminal cases, the trial was public. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, 'a passionate man,' seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed, 'Oh, illustrious Caesar,' if it is sufficient to deny, what hereafter will become of the guilty?' to which Julian replied, 'If it suffices to accuse, what will become of the innocent?' [57] The rule thus found in the Roman law, was along with many other fundamental and humane maxims of that system preserved for mankind by the canon law.[58]

Very different however was the real—*i. e.* the original—English law.

> England. "If a farcoming man or a stranger journey through a wood out of the highway, and neither shout nor blow his horn, he is to be held for a thief, either to be slain or redeemed." Laws of Ine, King of Wessex, (A. D. 688-725).[59]
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> In the tenth century the fact that a chapman who could not bring his witnesses was considered little better than a thief is of a piece with the gradual development of frankpledge or bail security, the law supposing the accused guilty until proved innocent.[60]
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> The old modes of trial—the ordeal, the oath, wager of law, battle—differed radically from ours. In a criminal case, when a man was charged with an offence, he might be punished unless he cleared himself. He was offered a certain test, the oath or the ordeal, and if he came out of it well he was cleared; if not, he was punished. With us, if a man be arraigned, he must be proved guilty. If we say that now, in trying a man regularly charged with crime, he is presumed innocent, we should correctly intimate the old system by saying that he was presumed guilty." [61]

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54. Id. 491. Dig. L. L. tit. XVII., l. 56.
55. Dig. L. L. tit. XVII., l. 155, s. 2.
56. Id. 491. Dig. L. L. tit. XVII., l. 192, s. 1.
57. Id. 491. *Rerum Gestarum*, lib. XVIII., c. l.
58. Id. 491. *Decretum Gratiani de Presumptionibus*, *L.* II., T. XXIII, c. XIV., A. D. 1198.
59. Thorpe, Ancient Laws and Institutes of England, I, 115, c. 20.
60. Thrail, Social England, I, 221.
61. Thayer, Preliminary Treatise on Ev., 329.

Here is an excellent illustration of a time-honored Roman rule creeping into our law unobserved (there seems to have been no express announcement of it therein prior to the last century)[62] and so effectually displacing the native doctrine that the latter is forgotten and soon repudiated. Is it not fair to assume that other principles, not only of evidence but in various important branches have a similar history?

The Roman law of presumptions was very fully worked out and undoubtedly forms the basis of our own on the same subject. There was the presumption of the regularity of legal proceedings,[63] the presumption of *bona* fides,[64] the presumption that one in possession of personality (*mobiles*) has title thereto,[65] the presumption of payment arising from the debtor's possession of the credit instrument[66] and the presumption that money moving from a debtor to a creditor is intended as a payment and not a gift.[67]

In the Roman Law, as in our own, facts and not opinions were usually sought from witnesses,[68] and signatures were provable by a comparison of handwriting.[69] Evidence was required to be pertinent and relevant[70] as well as the most original which could be obtained. Copies of documents were admitted only in the exceptional cases now provided for[71] and hearsay was generally excluded[72] though the supposedly modern exceptions as to ancient facts[73] and dying declarations[74] were recognized. The method of perpetuating testimony by examining witnesses *de bene esse* is plainly of Roman origin.[75]

The foregoing is not an attempt to exhaust the subject of Roman influence on the Anglo-American law but merely to present pertinent examples of such influence upon the various branches of that law. But the influence has not been direct only; hardly less important have been the indirect results. "The Roman law," said Chief Justice Tindall,[76]

> "Forms no rule binding in itself upon the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion to which we have come, if it

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62. See North American Review, January 1851, cited by Chief Justice White, *supra*.
63. Hunter, Roman Law (3d Ed.) 059.
64. Grueber, *Lex Aquilia*, 2 *note*.
65. McKenzie, Roman Law, 385.
66. Id.
67. Id.
68. Hunter, Roman Law, 1055.
69. Id.
70. Id. 1053; Code, lib. IV, tit. XIX, 10.
71. Hunter, Roman Law, 1054; Code, lib. IV, tit. XXI, 167.
72. Hunter, 1055.
73. Id.; Digest, lib. XXII. tit. III. 28.
74. Mascardus, De Probationibus, concl. 108L.
75. Digest, lib. IX, tit. II, 40.
76. Acton v. Blundall, 12 M. & W. 353 (1844) where Justinian's *Digest* was cited *arguendo*. See Warren's Law Studies, 732.

proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries in Europe. The authority of one at least of the learned Roman lawyers appears decisive upon the point in favour of the defendants."

Lord Thurlow, in deciding a case [77] involving two legacies and whether they were cumulative or substitutive, said:

> "No argument can be drawn in the present case from internal evidence; we must therefore refer to the rules of the Civil law."

So is has been said [78] of Lord Mansfield that "he made ample use of the compilations of Justinian, but only for a supply of *principles* to guide him upon questions unsettled by prior decisions in England."

Recently a well known American text-writer [79] subsequently a member of the French bar, expressed as follows the results of his observations on this point:

> "In the case of doctrine after doctrine and rule after rule—is it not written in the book of the history of the Common law?—our judges have floundered about for a few centuries, shutting their eyes to the light, shooting wide of the mark, guessing as best they could, conning their precedents and trying through the interpretation of one man's nonsese by another man's nonsense to reconcile the decisions more than to decide the cause, doing wrong by rote, working injustice to an uncounted multitude of unhappy litigants, doing, however, only what they were compelled to do in the administration of the judicial system imposed upon them, and then, when quite out of breath in the mad chase after a case in point, finally fetching up in the clearness and justice of the Civil law rule on the subject."

The truth is that this process of borrowing from the Roman Law has been carried on for many centuries and has been effected not only by text writers and judges but by legislatures as well. At certain times it has been more extensive than at others. Leaving out Vacarious, who first formally introduced the study of Roman Law in England, the most prolific single borrower was Bracton and if his famous treatise *"De Legibus et Consuetudinibus Angliae"* had, like its even more celebrated Spanish contemporary, *"Las Siete Partidas,"* been actively supported by the reigning monarch, England, like Spain, might have become a civil law country. But although that result did not follow, neither did Roman contributions to the English law end with Bracton. They have continued, though one

77. Hooley v. Hatton, cited in Ridges v. Morrison, 1 Brown, C. C. 389.
78. Cambell, Lives of the Chief Justices, II, 438, 439.
79. Beach, The Civil Law in America, 17.

or more of these agencies down to our own day and bid fair to continue through at least the legislative agency, for an indefinite period in the future. Surely then no student or practitioner of the Anglo-American legal system who hopes to be well equipped ignore the Roman Law. For the modern methods of legal study are mostly the application of a maxim emphasized by one of the framers [80] of the common law and selected as the motto of the first case book [81] *melius petere fontes quam sectari rivulos.* I shall have accomplished my purpose if I have shown that Roman law is one of our *fontes.*

IV

But even if its contributions to our own system were less extensive than they are, the Roman Law would still claim our attention as the mother of other legal systems which have profoundly influenced the civilized world. For no one denies to the Modern Civil Law lineal descent from the Roman, and the former governs most of continental Europe,[82] all of the western hemisphere south of the Rio Grande and our gulf coast line, considerable portions of Asia and Africa and even parts of Anglo-American territory—that stronghold of the common.

The Canon Law—that other daughter of the Roman—was once the common heritage of all Christian countries notwithstanding the shock of the Reformation it still survives in England, as regards the affairs of the establishment Church, while but recently (1908) the Canon Law was extended to full operation over the Roman Church in America. Generally in Catholic countries it supplies the rules for important subjects, like matrimonial causes, which are elsewhere dealt with by the civil courts and Chief Justice White has pointed out,[83] as we have already seen, how many "fundamental and humane maxims" of the Roman law have been "preserved for mankind by the canon law."

Still another system claims, if not direct descent, at least close relationship with the Roman. Austin long ago pointed out the indebtedness to the latter of International Law.

> "Nor," he says,[84] "has the influence of the Roman Law been limited to the positive law of the modern European nations. For

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80. Coke, Institutes, I, 305 b.
81. Smith's Leading Cases.
82. A written jurisprudence, identical through five-sixths of its tenor, regulates at the present moment a community monarchial, and in some parts deeply feudalized, like Austria, and a community dependent for its existence on commerce, like Holland—a society so near the pinnacle of civilization as France, and one as primitive and as little cultivated as that of Sicily and Southern Italy." Maine, Village Communities, 358-359.
83. Coffin v. United States, 156 U. S. 455, 39 Law Ed. 491.
84. Jurisprudence (1832) I, sec. 378.

the technical language of this all-reaching system has deeply tinctured the language of the international law or morality which those nations affect to observe. by drawing, then, largely for examples on the Roman or Civil Law, an expositor of General Jurisprudence (whilst illustrating his appropriate subject) might present an idea of a system which is a key to the international morality, the diplomacy, and to much of the positive law, of modern civilized communities."

Sir Henry Maine is even more pronounced on this point.

"We cannot possibly," he declares,[85] "overstate the value of Roman Jurisprudence as a key to International Law, and particularly to its important department, knowledge of the system and knowledge of the history of the system are equally essential to the comprehension of the Public Law of Nations. It is true that inadequate views of the relation in which Roman law stands to the International scheme are not confined to Englishmen. Many contemporary publicists, writing in languages other than ours, have neglected to place themselves at the point of view from which the originators of Public Law regarded it; and to this omission we must attribute much of the arbitrary assertion and of the fallacious reasoning with which the modern literature of the Law of Nations is unfortunately rife. If International Law be not studied historically—if we fail to comprehend, first, the influence of certain theories of the Roman jurisconsults on the mind of Hugo Grotius, and, next, the influence of the great book of Grotius on International Jurisprudence,—we lose at once all chance of comprehending that body of rules which alone protects the European commonwealth from permanent monarchy, we blind ourselves to the principles by conforming to which it coheres, we can understand neither its strength nor its weakness, nor can we separate these arrangements which can safely be modified from those which cannot be touched without shaking the whole fabric to pieces. The authors of recent International treatises have brought into such light prominence the true principles of their subject, or for those principles have substituted assumptions so untenable as to render it a matter of no surprise that a particular school of politicians should stigmatize International Law as a haphazard collection of arbitrary rules resting on a fanciful basis and fortified by a wordy rhetoric. Englishmen, however,—and the critics alluded to are mostly Englishmen,—will always be more signally at fault than the rest of the world in attempting to gain a clear view of the Law of Nations. They are met at every point by a vein of thought and illustration which their education renders strange to them; many of the technicalities delude them by consonance with familiar expressions, while to the meaning of others they

85. Village Communities, (1890) 351-3.

have two most sufficient guides in the Latin etymology and the usage of the equivalent term in the non-legal literature of Rome."

It seems clear, then, that the value of Roman law to the modern lawyer is far from depending wholly upon its relation to the Anglo-American law.

Thus far the discussion has been limited to the claims of Roman Law as a source of other systems. But its cultural or study value is by no means thus limited. Indeed there are some, well qualified to speak, who consider such claims among the least of its merits. An eminent American teacher [86] of Roman Law has observed:

> "A careful study of Roman legal history will be of great service to the English or American student who desire to comprehend his own legal history. I lay little stress on the point that we may thus recognize what has been borrowed; I desire chiefly to insist upon the point that we may thus better appreciate the true character of English legal history as an independent development. Furnished with a knowledge of the Roman law and of its development, the English investigator will more accurately gauge by comparison the excellencies and the defects of the English law. He may not find that the Roman law is more scientific—a statement which I take to mean that its broader generalizations are thought to be more correct—but he will certainly find that the Roman law is more artistic. The sense of relations, of proportion, of harmony, which the Greeks possessed and what they utilized in shaping matter into forms of beauty, the Romans possessed also, but the material in which they wrought, was the whole social life of man. There was profound self-knowledge in the saying of the Roman jurist that jurisprudence was "the art of life * * * It has long been the hope of some of the greatest modern jurists, both in English-speaking countries and in Europe, that by strictly inductive study it may be possible to discover a real instead of an imaginary natural law. The corresponding hope of the legal historians, that it will in time be possible to formulate the great laws that govern legal development, is not, I believe, an idle drahm; and I am sure that the minute comparative study of Roman and Anglo-American legal developments will carry us further towards such a goal than any other possible comparison."

Another has epitomized as follows the results of his investigations:

> "The true interest of the study of the history of Roman law lies in this, that the Romans, through their national practical intelligence, stimulated by external circumstances, and also ultimately by the philosophical theory of a 'law of nature' as they

86. Munroe Smith, Problems of Roman Legal History, 4 Columbia Law Review, 539, 540.

conceived it, developed a system of private law which did in fact answer to the true nature of private law, and that thew were the first people who did develop such a system. If this be so, then in the history of Roman law we have an important chapter of the history of human development; the history of the growth to maturity of a conception of the utmost value to the welfare of mankind; the history of a great step onward in the growth of the human mind, yet one which has been strangely neglected in professed histories of civilization." [87]

The truth is that the Roman legal system is the only one in all history which has completed the full normal stages of development—infancy, maturity, and decline. Others, like the two remaining world systems mentioned above, may be on the same road but they have not yet reached even the second stage. If we are ever, as Professor Smith says, "to formulate the great laws that govern legal development" a study of the Roman law—that one system to which it has been given to finish his course,—will be essential. And this may serve to explain what Sir Henry Maine meant when he said:

> "It is not because our own jurisprudence and that of Rome were *once* alike that they ought to be studied together; it is because they *will* be alike. It is because all laws, however dissimilar in their infancy, tend to resemble each other in their maturity; and because we in England are slowly, and perhaps unconsciously and unwillingly, but still steadily and certainly, accustoming ourselves to the same modes of legal thought, and to the same conceptions of legal principle, to which the Roman jurisconsults had attained after centuries of accumulated experience and unwearied cultivation." [88]

If we are to elevate the practice of law above the plane of a trade—if we are to train for the bar students who shall be jurists as well as practitioners—we cannot ignore this phase of legal study.

VI

Finally, regardless what concrete rules and doctrines in our own law hark back to the Roman, there is no dispute among those competent to judge that the latter is the source of those fundamental legal conceptions which have most influenced the modern world.

> "The Roman law," says Maine,[89] "is a system of rules rigorously adjusted to principles, and of cases illustrating those rules; and unless the practitioner can guide himself by the clue of principle,

87. Lefroy, Rome and Law, Harvard Law Rev. XX, 606.
88. Village Communities, 332 *et seq.*
89. Id., 377-8, 361.

he will almost infallibly imagine parallels where they have no existence, and as certainly miss them when they are there. No one, in short, should read his Digest without having mastered his Institutes. When, however, the fundamental conceptions of Roman law are thoroughly realized, the rest is mastered with surprising facility—with an ease, indeed, which makes the study, to one habitualed to the enormous difficulty of English law, little more than child's play.

* * *

The Roman law is, therefore, fast becoming the *lingua franca* of universal jurisprudence; and even now its study, imperfectly as the present state of English feeling will permit it to be prosecuted, may nevertheless be fairly expected to familiarize the English lawyer with the technicalities which pervade, and the jural conceptions which underlie, the legal systems of nearly all Europe and of a great part of America. If these propositions are true, it seems scarcely necessary to carry further the advocacy of the improvements in legal education which are here contended for. The idle labour which the most dexterous practitioner is compelled to bestow on the simplest question of foreign law is the measure of the usefulness of the knowledge which would be conferred by an Institutional course of Roman jurisprudence."

More apparent, though not more real is the utility of Roman Law as a mine of legal terminalogy. Here again Maine[90] furnishes a suggestive passage:

"Though the decay of the technical element in our legal dialect is probably beyond help, a far greater amount of definiteness, distinctness, and consistency might assuredly be given to the popular ingredient. Legal terminalogy might be made a distinct department of legal education; and there is no question that, with the help of the Roman law, its improvement might be carried on almost indefinitely. The uses of the Roman jurisprudence to the student of Legislative and Legal Expression are easily indicated. First, it serves him as a great model, not only because a rigorous consistency of usage pervades its whole texture, but because it shows, by the history of the Institutional Treatises, in what way an undergrowth of new technical language may be constantly reared to furnish the means of expression to new legal conceptions, and to supply the place of older technicalities as they fall into desuetude. Next, it is the actual source of what has been here called the popular part of our legal dialect; a host of words and phrases, of which 'Obligation,' 'Convention,' 'Contract,' 'Consent,' 'Possession,' and 'Prescription,' are only a few samples, are employed in it with as much precision as are, or were, 'Estate Tail' and 'Remainder' in English law. Lastly, the Roman jurisprudence

90. Village Communities, 349, 350.

throws into a definite and concise form of words a variety of legal conceptions which are necessarily realised by English lawyers, but which at present are expressed differently by different authorities, and always in vague and general language. Nor is it over-presumptious to assert that laymen would benefit as much as lawyers by the study of this great system. The whole philosophical vocabulary of the country might be improved by it, an most certainly that region of thought which connects Law with other branches of speculative inquiry, would obtain new facilities for progress. Perhaps the greatest of all the advantages which would flow from the cultivation of the Roman jurisprudence would be the acquisition of a phraseology not too rigid for employment upon points of the philosophy of law, nor too lax and elastic for their lucid and accurate discussion.

* * *

"It may be confidently asserted that if the English lawyer only attached himself to the study of Roman law long enough to master the technical phraseology and to realize the leading legal conceptions of the *Corpus Juris,* he would approach those questions of foreign law to which our Court have repeatedly to address themselves with an advantage which no mere professional acumen by the exclusive practice of our own jurisprudence could ever confer on him."

VII

If the foregoing be a correct analysis of the study value of Roman Law what position should be given it in the order of studies prescribed for admission to the bar? The analysis itself answers the question. If the Roman Law is a source of fundamental juridical conceptions, as well as of specific doctrines, now found in every legal system of the civilized world, if it is a mine of legal terminology and a model for studying legal development it would seem that its greatest service to the modern student is to prepare and equip him for the study of his own law and is, therefore, chiefly valuable to him as an introduction to the latter. The time to study sources would seem to be at the beginning and not at the end of a course.

One of the most revered and experienced [91] of Roman Law teachers in America has stated as follows his conclusions as to the place which that subject should occupy in the law school curriculum:

"There are two chief faults that I would ascribe to the American law school. It is neither extensive nor intensive enough. It does not, on the one hand, lay a broad foundation in the history and

91. Dean William Carey Jones, of the University of California School of Jurisprudence, "The Problem of the Law School," Univ. of California Chronicle, XIII, 8.

theory of law, the rationale of legal institutions; nor, on the other hand, does it prepare with precision and definiteness the student with the technique and special squipment for the practice of his profession. Harvard Law School has recently taken steps which seem to admit in a partial way the former deficiency, but in doing so it has come dangerously near to inverting the pyramid. I would place in the first, or in a preliminary year, such subjects as Roman law and the theory and history of the common law, which Harvard places in a fourth year, and would distribute the remainder of Harvard's fourth year subjects through the several years of the course. And the last year, whether that be a third or a fourth year of legal study is open to other consideration, should, so far as the great majority of students is concerned, the prospective attorneys, be devoted especially to preparing such students for the efficient practice of the profession. The mere adding of one year, either at the top or at the bottom, without reviewing and revising and readjusting the whole scheme, is vain and illusory. The addition of Harvard's fourth year can serve, properly, the purposes of only one small class, the intending teacher of law. For the practitioner, it would usually be almost the worst thing he could do, after he had completed his preparation for the bar, to stay on at college attending lectures on the history and philosophy of law. Reverse the process, however, with the proper modifications, and you will tend to produce lawyers on the one hand with intellect broadened by a view of the history of legal institutions, by acquaintance with the development of legal principles, and by a comprehensive survey of the whole scope of their splendid profession, and on the other hand with faculties refined and sharpened, by a course of gradually increased intensiveness, for the immediate and practical discharge of their duties as attorneys."

The foregoing, so far as it relates to Roman Law is amply confirmed by my own experience in the College of Law of the University of the Philippines, where, since the opening I have had charge of the course in that subject. I have found not only that, after taking Roman Law, the students are better equipped for the subjects that follow (that would be only natural in a civil law jurisdiction) but that Academic students,—*i. e.,* those who have taken the studies leading to the A. B. degrees,—take hold of Roman Law better than any other subject. This I attribute to the fact that it is more closely related to other studies in the arts course, —*e. g.* Roman Latin and Classical themes generally,—and is taught in much the same way. But the various branches of modern law are so remote from any subject studied in the ordinary undergraduate course, and are usually presented in such a totally different manner, that the student at once finds himself on strange ground and considerable time is needed to adjust himself to the situation.

My own personal experience comes back to me vividly, the classical undergraduate course with electives mainly in history. When I came, however to take up the technical study of American law I could see no connection whatever between it and any subject which I had pursued in the university. So different, indeed, seemed my new field of investigation that I became convinced, and long actually believed, that my earlier studies were of no practical value from a professional standpoint.

Now I am very sure that this unpleasant situation would have been relieved, it not wholly prevented, by a thorough course in Roman Law following immediately upon my undergraduate work and preceding any considerable advance into the technical field of modern law. The gulf between these two, both externally and internally is very wide, but Roman Law supplies the bridge which renders passage comparatively easy. The bridge however is of little value if it is not to be used until the passage has been accomplished by some other method, however laborious and fatiguing. My own personal and professional experience have left me no room for doubt that, for the academic student, at least, Roman Law should be the first subject in the technical curriculum.