THE STUDY OF THE CIVIL LAW.

NARROW as is the sea that parts England from the continent of Europe, it has cut her off as effectually from many continental influences as if she lay far out in mid-Atlantic. When it is considered how close are our affinities of blood with the Low-German races, and how intimate during the middle ages were our relations, intellectual as well as political, with the whole of Western Europe, the individuality of the English people and its institutions appears singularly well-marked ; and one is surprised to see in how many points the great nations of the continent resemble one another and understand one another, while all alike differ from us, and are comparatively incomprehensible to us. This strangeness of England is what most strikes the foreigner who comes among us ; be he Frenchman, German, Spaniard, or Italian, he seems less at home in England than anywhere else in Christendom. As in the woodland wealth of our country, as in the architecture of our towns and the structure of our houses, so also in the social usages and mental habits of Englishmen one discovers something peculiar, something bearing witness to a prolonged isolation, to an exemption

from those influences, speculative as well as practical, which have operated on all or nearly all the other members of the European commonwealth.

Such isolation has been in no respect more marked or more fruitful in results than in the case of our law. In spite of the immense power of the mediæval church, in spite of the influence of the universities, and of the strangers who flocked to them from all quarters, the Roman jurisprudence exerted a comparatively slight and fleeting influence upon the technical development of our law and the formation of our habits of thought. Here, where the language, and to a great extent the customs of the people, were of Teutonic origin, it may perhaps have found a less congenial soil than in Italy or France, while there were no such political associations with the Roman name as those which gave the Corpus Juris its authority in Germany. Whatever be the cause, it is clear that Roman law was never thoroughly domesticated in England. True it is that one of the first notices we have of the existence of our University is that which mentions the Lombard Vacarius as lecturing on law (doubtless on the Pandects) at Oxford, under the patronage of Archbishop Theobald, in the days of King Stephen[1]; and there is abundant

[1] 'Oriuntur discordiae graves, lites et appellationes antea inauditae. Tunc leges et causidici in Angliam primo vocati sunt, quorum primus erat magister Vacarius. Hic in Oxenefordia legem docuit, et apud Romam magister Gracianus et Alexander, qui et Rodlandus, in proximo papa futurus, canones compilavit.'—(Gervas. Dorob. ; *Act. Pontif. Cantuar.* ; *Theodbaldus.*)

evidence that the study was regularly pursued here down till the sixteenth century. The statutes of the older colleges make provision for some of the fellows proceeding to degrees therein; and indeed the only law degrees we have given, since those in canon law were abolished, have been degrees in civil law. But the customary or common law, unrecognized in the universities, gained exclusive possession of the seats of legal study in London; that hostility to the pretensions of the foreign laws which had been so forcibly expressed by the barons at Merton in Henry the Third's time, and again by the Parliament of Richard the Second, maintained ever after a watchful and jealous attitude; those who had mastered Roman law at Oxford were obliged, when they practised in the courts at Westminster, to disguise or disclaim any appeal to its authority; and when the Reformation finally broke the link, not only between England and Rome, but between English men of letters and the general movement of European learning and thought, the study of the civil as well as of the canon law virtually expired among us[1]. Its practical utility (except to practitioners in the ecclesiastical courts) was apparently at an end; and in the cloud of dulness and sluggishness that settled down upon Oxford and Cambridge at the end of the seventeenth century, it only shared the fate of other studies which had more

[1] For some time after the breach Englishmen used to resort to continental universities, and there, of course, they found Roman law taught; but this practice died out before very long.

to commend them to an active and curious intellect. A few distinguished publicists and lawyers, such as Duck, Selden, Hale, Holt, and those two brightest ornaments of the English bench, Lord Hardwicke and Lord Mansfield, were well versed in its rules, but the great mass of English lawyers regarded it with suspicion and dislike, and the very praise which Hale bestows testifies to the slight interest felt in it. 'He set himself much,' says Bishop Burnet his biographer, 'to the study of the Romane law, and though he liked the way of judicature in England by juries much better than that of the civil law, where so much was trusted to the judge, yet he often said that the true grounds and reasons of law were so well delivered in the Digests, that a man could never understand law as a science so well as by seeking it there, and lamented much that it was so little studied in England [1].'

The ancient rivalry of the Civil and the Common law proved eventually the cause of mischief to both. Having reigned supreme in the universities, the civil law had never taken root in the Inns of Court, and when it fell in the universities it fell utterly. On the other hand, the common lawyers, originally excluded from Oxford and Cambridge, were well enough content with the position they had obtained for their study in London, and do not seem to have seen how much was to be gained by introducing it into the

[1] Life, by Burnet.

ancient seats of learning. Thus both systems, to the loss as well of the profession as of the universities, came to be neglected in the very places where they might best have been cultivated in a philosophical spirit; and it was not until Mr. Viner's foundation in A.D. 1756 that English law was recognized here as an academical study, while in Cambridge no provision was made for the teaching of it until the beginning of the present century.

That isolation of England to which the neglect of the civil law may be ascribed has of late years perceptibly diminished. Owing partly to the more frequent and easy intercourse which improved means of communication have produced, partly to the removal of old national prejudices, partly to that increased recognition of the power of ideas which comes with the growth of democracy, civilized Europe has within the last eighty or ninety years become much more of a single intellectual commonwealth than it has been at any time since the Reformation, perhaps, indeed, since the fall of the Roman Empire. Our long-standing jealousy of the civil law as a foreign system, associated with the overweening pretensions of emperors and popes, has at last vanished. A century ago this feeling was still so active, that Lord Mansfield's enemies found it worth while to charge him with having, as a Scottish lawyer, an undue partiality for the Roman law, and designing, by means of its despotic principles, to sap the liberties of Englishmen—'corrupting by treacherous arts the noble

simplicity and free spirit of our Saxon laws;' though as a matter of fact, Lord Mansfield left Scotland at the age of three, and it was only to the elucidation of the civil, and indeed of the commercial parts of our system, that he could apply his knowledge of the Roman jurisprudence. Such prejudices seem now to lie far behind: we live in the midst of a general unsettling of respect for whatever exists, which does not spare the laws or even the constitution of England, and welcomes new ideas from every quarter. Thus the influence of the great German civilians begins to tell upon English students, while the rise of a vigorous historical school in England has quickened our curiosity in whatever helps to explain the ancient and the mediæval world. The feeling so awakened has happily coincided with an interest in the formal and scientific amendment of our own law, different from that desire to improve and correct its substance of which Bentham was the first exponent, and which inspired the labours of Romilly and Brougham.

The efforts of these great men were chiefly directed to the removal of harsh enactments, economical errors, and technicalities which defeated the ends of justice; their modern successors, finding the law purged of its grosser faults, are rather concerned with its reduction into a more orderly and systematic shape. The three leading questions of law reform at this moment are questions of form. What are the best means of fusing legal and equitable procedure? How may Acts of Parliament be drawn more concisely and

symmetrically? How are we to frame, out of the vast and chaotic mass of our decisions and statutes, an organized body of rules, a Digest or a Code? Finding themselves thus brought face to face with the problem which Justinian partially solved, and which several modern states, as notably France, Austria, Prussia, and Italy have again had to solve, our lawyers are being driven to examine the means whereby codification was accomplished, and the results that followed it. They feel that for the execution of so great a work men are needed who have had something more than an empirical training, and are disposed to believe that in the systematic course of legal history and philosophy which ought to form the jurist, a chief place should be assigned to the study of the Roman law. Thus, what with our own actual needs, what with the influence of the scientific spirit of the Continent, there is now awakened in England an interest in the civil law and an estimate of its worth which, although still matter rather of faith than of sight, is yet strong enough to give us here in Oxford not merely a motive for endeavouring to revive the study, but a reasonable hope that it may be revived with success, to the substantial benefit as well of the universities themselves as of the legal profession.

To prove that Roman law does deserve in England, and especially from the University, more attention than it now receives may well be thought, at least in Oxford, so long its home, a superfluous labour.

That it fills so large a place in the world's history, that it is the fruit of so great an expenditure of human genius and industry, is of itself a sufficient reason why it should engage the labours of a learned body which has, in Bacon's words, taken all knowledge to be its province. I shall therefore content myself with touching upon some of the purposes which the study may be made to serve, and indicating some of the directions in which it may most usefully be pursued; premising always that academical study has two objects, the furtherance of learning and knowledge in the whole community, and the preparation of young men to be, not merely useful and active in their future occupations, but also, in the widest sense of the word, good citizens. These two objects have sometimes been opposed to one another, and no small controversy has been maintained touching their respective claims. Are they not in truth closely intertwined? since the greater the zeal wherewith a study is pursued, so much the greater is the teacher's influence on the taught; and since experience shews that when the work of education has been neglected by schools and universities, such neglect has not been caused by any absorption in abstract studies, but by mere dulness and self-indulgence, as fatal to study as they can be to education.

The various utilities of a knowledge of the Roman law fall into two classes: those which connect it with the liberal studies of this place, and specially with classical philology, with history, and with ethics;

and those which belong rather to the faculty of law, and entitle it to a place in a strictly professional curriculum.

Taking the former of these heads first, there is no more obvious reason for pursuing the study than the light which it throws upon Roman history, which is, it can hardly be too often repeated, substantially the beginning of all modern European history. No people was ever so thoroughly permeated by legal ideas; none rated the dignity of the profession so high, spent so much pains in the elaboration of legal rules, and formed, let it be added, so worthy a conception of what law ought to be. Hence the whole political history of the nation is so involved with its legal institutions, that it can be understood only when regarded as derived from and conditioned by them. This is signally true not only of the regal and earlier republican period—in all early states of society, law does for a people what a political constitution does in later times, or, in other words, public and private law are substantially the same—it is true also of the republic in the days of Sulla and Caesar, and of the long period of the Empire. Most of the constitutional arrangements of the Roman state depended upon those of private law, and many of the gravest political questions turned upon legal doctrines. The subject of the Agrarian laws, for instance, is intimately involved with the legal conception of possession, as distinct from ownership, and can hardly be mastered without a knowledge of

technical theory. The structure of the *gens*, the nature of the agnatic tie and of the *patria potestas*, the judicial character of the chief administrati e magistrates, the doctrine of adoption—all and each of them exerted a powerful influence on the political fortunes of Rome ; that last named, I mean adoption, became under the Empire the means of working a system of appointment to the sovereign power, which had the merits without the evils of hereditary succession. I forbear to dwell on the number of historical incidents, like that of Virginia and Appius Claudius, or of allusions in poetical and philosophical writers, such as those which every scholar remembers in Horace, Ovid, Juvenal, and most of all in Cicero, which only a knowledge of the civil law can elucidate. A student of the classics need not read the Corpus Juris merely for the sake of understanding these, any more than one is bound to read Coke or Hale for the sake of better seeing the point of the numerous legal phrases in Shakespeare. We should not be disposed to go so far as the enthusiastic civilian who maintained that every divine ought to learn Roman law, because there are several passages in the New Testament which a knowledge of it serves to explain. But, though every scholar need not, some scholars certainly ought; for there is much in the literature, and, indeed, in the literary spirit and feeling of the Romans, which is due to legal influences, and which can be fully apprehended and expounded by those only who have made themselves

familiar with these influences in their source. In particular, such study is necessary in order to appreciate the character of the Empire in its relation to the peoples of the Mediterranean whom it embraced. Rome's great gift to the world was her jurisprudence; and the most interesting chapter in her history is that which traces, coincidently with the gradual extension of Roman citizenship and Roman law to the subject races, the steady amelioration in its positive rules, and its development from a harsh and highly technical system into one grounded on principles of reason and justice, principles which are indeed common to all civilized peoples, but which the Roman jurists were the first to expound and apply. To this great work was devoted, from the time of Augustus onwards, nearly all the genius and labour, not of Rome merely but of the Roman world, which was not expended on abstract speculation; and it is more than an accident that long after the language of Virgil and Cicero had become debased in the hands of servile rhetoricians and soulless versifiers, its purity and its nervous precision were preserved in the hands of men like Papinian and Modestinus.

A second utility which may be claimed for our study, is its capacity for illustrating the history of mediaeval and modern thought. When the Western Empire perished amidst the storms of the fifth century, its law did not perish with it, but remained a chief factor in European history, more widely, although less directly, influential. The barbarian

conquerors, who brought with them only the rude customs by which they had lived in their native forests, soon felt the need of a regular legal system, and were glad to recognize that which they found subsisting. They allowed their subjects, the provincials, to use it; in some countries they came to use it themselves; parts of it were collected and published in such codes as the Breviarium of Alarich the Second and the Lex Romana Burgundionum. At the close of the Dark Ages, the study of the original texts revived; schools of law arose in Italy, France, and Britain; immense pains were spent on the interpretation of the Pandects, and they became thenceforth, for many generations, the foundation of the education and a principal part of the knowledge of every lawyer and publicist. As the mighty fabric of ecclesiastical power grew up, it created out of Roman materials its own body of laws, varied of course by the nature of the subjects, and coloured by religious ideas, but substantially Roman after all. In this, as in so much else, the Papacy was, to use the forcible expression of Hobbes, 'the ghost of the old Empire, sitting on its tomb and ruling in its name.' And thus, in the hands of the very men who forbade its study, as hostile to their own pretensions, and favourable to those of their antagonist, the Emperor, the civil law obtained a wider range than ever before. As its continued existence was one chief cause of the fantastic belief in the continued life of the Roman Empire, so that

very belief became in turn the cause of its reception, in Germany and Italy, as binding law. Being studied by all the educated men, the poets, the philosophers, the administrators of the Middle Ages, it worked itself by degrees into the thought of Christendom, losing the traces of its origin, as it became part of the common property of the world. A knowledge, therefore, of what it was, and of how it influenced mankind, helps to explain much which might otherwise have remained obscure in the literature of the Middle Ages and the Renaissance,–much whose bearing a modern finds it hard to grasp, just because law holds a different place in his conceptions, and because he does not realize the power it exerted over untrained and uncritical minds. Theology is an instance, but by no means the only instance, of a branch of enquiry over which legal notions once exercised a sway they have now lost.

The history of law and of the evolution of legal ideas, although in one aspect a professional subject, may also claim to be regarded as a branch of general academical study. Within the last few years, the application to it of the comparative method has given it a new significance and interest, has enabled it to teach us much respecting the structure of primitive society, and made it the means of illustrating many curious phenomena in the philosophy and politics of more recent times. Now to the student of legal history a knowledge of Roman law is indispensable: firstly, because it was an

independent system, uninfluenced, so far as we know, by any preceding one, whereas all subsequent systems have been influenced by it; and secondly, because it alone presents an uninterrupted continuity of development, stretching over nine centuries from the Twelve Tables to Justinian. No sudden intrusion of a new element, like that caused in England by the Norman Conquest, no internal political change disturbed that equable and self-consistent expansion and amendment of the laws of Rome, which the widening relations of the city, as a commercial, a conquering, a world-embracing community, made necessary. Legislative power passed from the Patres to the Comitia of the nation, from the Comitia to the Senate, from the Senate to the Emperor; but the conduct of legislation remained in the hands of an educated profession, and the harmonious evolution of principles was not interrupted. Nearly all the phenomena which the history of law in other countries presents, find their parallel and explanation in the history of its growth at Rome: nor is the study without a practical value for the modern legislator. The nature and limits of the jurisdiction of our own Court of Chancery are most easily understood when compared and contrasted with the functions exercised by the Praetor as exponent of the Jus Gentium. The codification of Justinian is constantly cited, and occasionally examined, in our present discussions respecting the propriety and the methods of digesting and codifying English law.

After thus indicating, rather than describing, the claims of the civil law to be recognized among the general liberal studies of the University, it remains to examine its special utility to the lawyer, and the reasons for giving it a place among the studies of the legal faculty. Some zeal has of late been shewn for the revival of such studies in England and in Oxford; and it will be generally admitted that young lawyers ought to be more regularly instructed in the science and art of their profession than they are now; that much of this instruction may be, and ought to be, given at the University; and that, apart altogether from the service to be rendered by teaching, it would be a gain to the country if law were cultivated and written upon at the Universities, in the same philosophical spirit, and with the same systematic fulness, as in the schools of Germany. There a great writer is often also a great teacher. Such were Savigny and Thibaut; such was that illustrious man whom Heidelberg lost five months ago[1],—a man whose learning was so vast and well-digested, whose expositions of law were so penetrating and luminous, so philosophical in method, so eloquent in language, so animated in delivery, that to have listened to him was to have gained a new conception of the power of oral teaching.

An obvious ground for cultivating it, and one likely to have weight with the practising lawyer,

[1] Dr. K. A. von Vangerow.

is the immense influence it has exerted on the jurisprudence of modern Europe. As respects England, this influence is matter rather of antiquarian interest than of practical utility. Much of our law, especially of our mercantile law, and of that which is administered in courts of equity, may indeed be traced to a Roman origin; while the Court of Admiralty, and even to some extent the Courts which have replaced our old ecclesiastical tribunals, owe a more direct allegiance to the imperial jurisprudence. In the words of Lord Chief Justice Holt, 'Inasmuch as the laws of all nations are doubtless raised out of the ruins of the civil law, as all governments are sprung out of the Roman Empire, it must be owned that the principles of our law are borrowed from the civil law, and therefore grounded upon the same reason in many things[1].' But the bulk of English law is so vast, requiring so much labour to master it, and what we have borrowed from other systems is now so thoroughly transformed and Anglicized, that one cannot honestly advise the student, on the mere ground that much of it is drawn from Roman sources, to spend time in examining those sources, instead of going straight to English text-books. It is not because English law is like Roman, but because it is unlike, that the study is really to be recommended.

Nevertheless, no accomplished lawyer will be content without knowing something of the rules and

[1] 12 Mod. 482.

doctrines which prevail in other nations; and a man in brisk practice will find many occasions in which a knowledge of foreign or colonial law is of great value to him. Now in the acquisition of almost any foreign system of law, a knowledge of the outlines of the civil law renders much the same service which a knowledge of Latin renders in the acquisition of one of the Romance languages; and just as one would advise a man who desired to learn French Spanish and Italian to begin by learning Latin, so the shortest way to know something of German Dutch and French law is to study the principles of the civil law, which are a master key to that of all these countries. The House of Lords in Scotch appeal cases, the Privy Council in appeals from many of our colonies, as, for instance, from Lower Canada, British Guiana, the Cape, and Mauritius, administer a modified Roman law. And as the doctrines of international law are in their source Roman, they cannot be properly understood or applied by one who is not familiar with them in their original form as parts of the municipal law of that Empire which, when they first sprang up, was still dimly conceived of as embracing all the states of Christendom.

I have placed last what I venture to believe to be the weightiest practical reason for pursuing this study, although, at the same time, that reason which it is most difficult to expound and establish—its educational and scientific worth as forming and strengthening those habits of mind in the possession

of which a lawyer's excellence consists. In proof of this worth it is not sufficient to cite the examples of Germany, France, and Scotland, where the education of a legal practitioner is based upon the civil law; for the Corpus Juris is in all these countries the foundation of their municipal systems, while in Scotland and some parts of Germany, it is to some extent actually still in force. The reason which we in England have for urging that the study of Roman law should precede and accompany that of the law of our own country, must be sought in a perception of the defects, certainly obvious enough, of modern English jurisprudence. Here it is necessary to distinguish what laymen, and even lawyers, have often confounded—defects of substance and defects of form[1]. Now, in point of substance, the English law is, with the possible exception of certain provisions of the law of real property, and of the law relating to married women—provisions which the progress of political change seems likely to remove—no whit inferior to any other body of law; almost always fair and reasonable, conformed to the dictates of good sense, reflecting worthily the free and hearty spirit of our political institutions, and offering as few opportunities as may be to fraud and oppression. Its processes are of course technical, perhaps still too technical;

[1] The nature of this distinction, and its practical importance to law reformers, have lately been set forth with singular force and clearness in a book entitled 'Essays on the Form of the Law,' by Mr. T. E. Holland, of Exeter College.

and they are sometimes needlessly circuitous; but, as a technical hardship may usually be met by a technical remedy, substantial justice seldom fails to be attained. With some cumbrousness, our procedure has the merit of variety and flexibility; and it is our especial honour to have worked out the method of trial by jury with a completeness unrivalled elsewhere, and to have alone (for in this, as in so many other respects, Americans may be reckoned as Englishmen) succeeded in applying it to large classes of civil causes. But when English law is regarded in its formal and scientific aspect, as a system, the opinion formed of it must be very different. It is in fact, no system, but a huge mass of isolated positive rules; some laid down, with little statement of a reason, for the sake of meeting a particular case; some deduced by the judges, though in a most occasional and fragmentary way, from principles dimly and incompletely apprehended; some, again, created by statutes which have, especially of late years, cut across these pre-existing principles and rules in an irregular and reckless way. Just as lines of railway have been driven through modern London without regard to the old arrangement of the thoroughfares, and have crossed and recrossed streets and squares, effacing parts of them till perhaps only a house or two is left standing, so Acts of Parliament, drawn up to meet the exigency of the moment, have paid no respect to the symmetry, such as it was, of the common law, and, instead of attempting to mould and

reconstruct it, have laid down new positive rules which infringe upon, or almost wholly destroy, its ancient principles, by removing from their operation large and heterogeneous classes of cases. The effect of this has been to make the old principle no longer really a principle, but a positive rule in the cases not affected by the statute; and thus, as the number of enactments and positive rules increases, the value of principles declines, and the confusion grows every year worse confounded. So it comes, owing partly to the way they have been produced, and partly to the way they have been amended, that the rules of our law are an aggregate of dicta on points of detail —dicta which cannot be reduced to a reasonable number of leading doctrines. For not only do the exceptions to a rule frequently outnumber the cases which it governs, but it often happens that judicial decisions, or the words of an Act, have provided for many cases which naturally fall under and suggest a general principle, but have never ventured to enunciate the principle itself, which cannot therefore be laid down as being part of the binding law. Hence the tendency of an English practitioner is by no means towards a search for principles: indeed, he becomes absolutely averse to them; and the characteristic type of excellence which the profession has delighted to honour is the so-called 'case lawyer,' who bears in his memory a great stock of particular decisions, from which he can, as occasions arise, select that one whose facts most nearly approach the indi-

vidual case which he is required to argue or advise upon, but who may be quite unable to state the general doctrines on which the solution of a class of cases depends[1].

The strain thus imposed on the memory is such that most men succeed in mastering only some special department of the law; and even our most eminent counsel, men of the greatest powers of mind, may be heard to confess that they do not pretend to know our law as a whole, but must rest content with knowing where to find what they want as they may happen to want it. For the same reason our text-books are, with few exceptions, not systematic expositions of law, but mere heaps of cases from which, by the aid of an index, one must try to pick out a few resembling, or, as lawyers say, 'on all-fours with,' that set of circumstances whose legal character one is called upon to determine. They are, therefore, quite unfit to be put into the hands of a beginner.

The result of all this is to make the process of learning English law very slow and very distasteful. Certain persons indeed there are who, having no feeling for symmetry, are willing to pick up their knowledge by scraps and morsels, and who, so to speak, roll themselves about in cases in the hope that bits of legal knowledge will stick. But minds of

[1] These defects of our law have been so often stated and deplored by the highest authorities, that it is unnecessary to refer to any particular expressions of opinion on the matter.

finer temper, minds trained by their University studies to ask for a reason, seek out a principle, group things together under their natural relations, are disheartened by this chaotic state of matters, make slow progress in the study, find themselves required to unlearn their best mental habits, and often abandon the profession in disgust. I remember having been told by a very distinguished and able member of this University, that when he began to read in a conveyancer's chambers he found his previous classical and philosophical training, so far from helping him, prove a positive hindrance and stumblingblock. This was seen to be an evil so long ago as Sir William Blackstone's time. In his introductory lecture as Vinerian Professor, delivered here in A.D. 1758, he says :—

'We may appeal to the experience of every sensible lawyer whether anything can be more hazardous or discouraging than the usual entrance on the study of the law. A raw and unexperienced youth, in the most dangerous season of life, is transplanted on a sudden into the midst of allurements to pleasure, without any restraint or check but what his own prudence can suggest; with no public direction in what course to pursue his inquiries; no private assistance to remove the distresses and difficulties which will always embarrass a beginner. In this situation he is expected to sequester himself from the world, and by a tedious lonely process to extract the theory of law from a mass of undigested learning; or else, by an assiduous attendance on the courts, to pick up theory and practice together, sufficient to qualify him for the ordinary run of business. How little, therefore, is it to be wondered at, that we hear of so frequent miscarriages; that so many

gentlemen of bright imaginations grow weary of so unpromising a search, and addict themselves wholly to amusements, or other less innocent pursuits; and that so many persons of moderate capacity confuse themselves at first setting out, and continue ever dark and puzzled during the remainder of their lives.

'The evident want of some assistance in the rudiments of legal knowledge has given birth to a practice which, if ever it had grown to be general, must have proved of extremely pernicious consequence. I mean the custom, by some so very warmly recommended, of dropping all liberal education, as of no use to students in the law, and placing them in its stead at the desk of some skilful attorney, in order to initiate them early in all the depths of practice, and render them more dexterous in the mechanical part of business. A lawyer thus educated to the bar will find he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know; if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita lex scripta est* is the utmost his knowledge will arrive at; he must never aspire to prove, and seldom expect to comprehend, any arguments drawn a priori from the spirit of the laws and the natural foundations of justice [1].'

Admitting the fact, it is, as it was intended by Blackstone to be, an argument for beginning with a systematic theoretical study of English law; and

[1] Although it is the custom of placing a youth (untrained in theory) in an office to learn practice which Blackstone is here condemning, the spirit of his concluding remarks is almost equally applicable to the present usage of entering a conveyancer's or pleader's chambers before one has gained any systematic knowledge (or indeed any knowledge whatever) of the law.

it remains to endeavour to shew that the longest way round, through Roman law, is really the shortest way to the scientific mastery of our own.

It is clear that no knowledge of the Roman system can be a substitute for a knowledge of the English; but the difficulties which the English presents to a beginner are such as to call for some preliminary legal training which may render it more comprehensible and less distasteful. Now, the conspicuous merit of Roman law is, that it is clear and intelligible. It is a system instead of a mere congeries of rules and dicta, a system which, although it cannot be exhausted by the labour of a powerful intellect during a long life, may be mastered in its outline and leading principles in six or eight months of properly-directed industry. A philosophical mind is attracted by its symmetry; the taste is pleased by the graceful propriety of its diction; the learner's interest is kept awake by watching the skill and subtlety wherewith its technical rules are manipulated and kept in harmony with the dictates of equity and common sense. The number of dominant conceptions which it is necessary to acquire is so small, and these conceptions themselves so rational and, so to speak, natural, that it does not take long to obtain a general view of the whole, and discern the harmonious relation of its parts. The student finds the psychological and historical knowledge he has already acquired serviceable in this new field. He learns to regard law as a science, closely

related to ethics, and to be dealt with in a philosophical spirit. And thus, when he passes on to the study of our English law, he finds himself the better able to grapple with its bulk and its want of arrangement, since he has already mastered the leading conceptions of jurisprudence in their concrete (which is, after all, their only serviceable) form, and knows how to arrange under appropriate heads the positive rules which it will be his business to remember and apply. So valuable is this experience, that I dare affirm that a youth who spends some eight months in the study of the civil law, and then proceeds to that of English law, will, when at the end of three years he is measured against his contemporary who has given exactly the same amount of time and pains to English law alone, prove to be not only a better jurist, but as good an English lawyer. This is the rather so, as that part of English law which the Roman law least helps to elucidate is now of much slighter importance than formerly —I mean the feudal law of land. A change has passed upon us, somewhat similar to that which Cicero saw passing at Rome. In his youth, he tells us, he like other pupils of the great *prudentes* was required to learn by heart the contents of the Twelve Tables, whereas in his later days it was the Praetor's edict that formed the basis of legal training. So Coke upon Littleton, which thirty years ago was held forth as a sort of Bible to the unfledged lawyer, is now seldom in his hands; his time is given rather to commercial law and to the doctrine of trusts and

powers, subjects to which the principles of the Roman law have much more application.

It is not, however, merely as an introduction to his professional studies that the English lawyer will find the study of Roman law profitable: if rightly used it will be a guide and a help throughout his whole career. More than anything else, it will deliver him from the tendency to deal with law in a desultory method and an empirical spirit, by displaying to him fixed and general principles underlying the multitude of details. It will do for him what the knowledge of some foreign language does for the grammarian and the logician, in the way of freeing him from that bondage of words to which most men are all their lives subject. Setting him to compare the terms and conceptions of another law with those of his own, it will enable him to criticise the latter from an independent point of view, and so deliver him from the danger, so common in all professions and to all systems, of mistaking the accidental for the essential, of exalting mere technical rules and phrases into necessary and permanent distinctions. Further, it may do much to supply, from its choice and abundant stores, the defects in English legal terminology. We are especially ill off for what may be called the metaphysical language of law,—those terms which express the main conceptions of universal jurisprudence; and we find the want a serious impediment, not only to legal exposition and the conduct of legal argument, but also, as has been remarked by

a distinguished jurist[1], in the work of practical legislation. The terminology of the Romans was exact as well as copious; and it has been greatly amplified and improved by the labours of modern civilians. As it is, we often borrow from them, but what we borrow we are apt to use loosely, and in a sense different from that of the Romans or of their modern commentators; whence further confusion.

There are two capacities or mental habits in which the excellence of a lawyer chiefly consists—the power of applying principles, and the power of clearly enunciating a legal proposition. Towards the formation of both of these the writings of the Roman jurists supply far more aid than do those of their modern English rivals. The conspicuous merit of the Roman lawyer was his command of principles, and the skill with which he manipulated the rules of an originally very technical system, so as, without any loss of consistency or 'elegance,' to avoid the inconveniences which an adherence to technical strictness must often produce. As Savigny puts it, 'In our science, all results depend on the possession of leading principles, and it is precisely upon this possession that the greatness of the Roman jurists is based. The conceptions and maxims of their science appear to them not as if created by their own will; they are actual beings, with whose existence and genealogy they have become acquainted from long and familiar intercourse. Hence their whole course of proceeding

[1] Mr. H. S. Maine, in Cambridge Essays for 1856.

has a certainty which is found nowhere else out of mathematics, and it is no exaggeration to say that they calculate with their ideas. This method is nowise the exclusive property of one or a few great authors: rather is it the common inheritance of all; and although the power of applying it is divided among them in very unequal measure, still the method itself is in all of them the same. . . . If they have a case to decide upon, they set out from the most vivid perception of it, and we see before our eyes the origin and development of the whole affair in all its phases. It is as if this particular case was the starting-point whence the whole science was to be explored. Hence with them theory and practice are really not distinct; their theory is so thoroughly worked out as to be fit for immediate application, and their practice is uniformly ennobled by scientific treatment. In every principle they see an instance of its application; in every case, the rule whereby it is determined: and in the facility with which they pass from the universal to the particular, and the particular to the universal, their mastery is incontestable[1].'

Now every legal argument, opinion, and judgment chiefly turns on the application of known principles or rules of law to facts; and this partly by way of fitting the law to the facts—that is, of expounding the nature, meaning, and limits of a principle

[1] Vom Beruf unserer Zeit für die Gesetzgebung und Rechtswissenschaft, c. 4.

in such wise as to make it appear to cover the facts proved; partly of fitting the facts to the law, by assuming the rule or principle, and then so stating the substantial result of the facts as a whole, as to make it appear that the case falls under this rule as already given. In this process the Roman jurists shone preeminent. English judges, certainly from no want of learning or acumen, but rather from a sort of caution, or from a reluctance to exercise the powers committed to them, have always been unwilling to lay down principles, preferring, where they could, to dilate on the special circumstances of the case, and base their decision thereon; and the consequence is to be seen in the prolixity of our reports, and the uncertainty of the law contained in them. The labour of reading English cases is very great, in proportion to the quantity of positive law they embody; and their philosophical worth small in proportion to the genius and industry bestowed upon them by both bar and bench. The cases, if one may so call them, which we find in the Pandects give much more law and much more real intellectual training in a much smaller compass. They are mostly imaginary, invented to shew the application of a rule, and are therefore short and clear, enforcing their principle with a directness which makes it easily apprehended and remembered. In reading them we seem to learn better than anywhere else how principles should be dealt with.

In the matter of legal expression the superiority of the Romans to ourselves is scarcely less marked. The power of stating a proposition of law in comprehensive and exact terms, wide enough to cover all cases contemplated and yet precise enough to exclude cases more or less similar to which the rule is not intended to apply, is valuable to the text-writer and quite indispensable to the framer of statutes. Unfortunately it is one of which our statute-book bears few traces. Now the legal language of the Romans is a model of terseness, perspicuity, and precision, and from a study of it, even allowing for the difference between the structure of the two languages, the English draftsman may derive many valuable suggestions.

Over and above the specific benefits enumerated, it must be added that a study of the Roman law would not merely tend to produce, but must necessarily precede, any extended healthy intercourse between our jurists and those of the rest of Europe, any participation by us in the general advancement of juridical science. 'England,' said an eminent continental jurist, surveying the progress made in his department, 'England sleeps for ever:' and she sleeps because her lawyers have allowed themselves to become as completely isolated as though we were living in and legislating for a planet of our own. Certainly, when one remembers how in other branches of enquiry each country depends upon its neighbours, how meagre would be our scholar-

ship, our ethics, our history, our criticism—never to speak of medicine and the whole circle of the sciences of nature—if in each of these subjects we trusted to our own efforts only,—it does seem strange that in the matter of law we should be content to draw nothing from the labours of other nations. As the facts law deals with are in the main the same in all civilized countries, and its leading conceptions substantially identical, there must clearly be much for us to learn from other highly cultivated systems, and it is only our ignorance of the common legal vocabulary of Europe that keeps us from doing so. The habit, however, has grown so strong that we do not even care to profit by the experience of a country which speaks our own legal language—the United States—where many legislative experiments have been tried which are full of instruction for us.

This argument, being directed to shew that the study of the civil law will help to make English law more of a system and a science than it is now, and to train the individual lawyer in more philosophical habits of mind, proceeds upon the assumption that law ought to be a science and lawyers philosophical. To prove the truth of this assumption would involve a discussion of the relations of theory and practice generally; and here, at least, no such proof can be needed. Science, like wisdom, is justified of all her children; and those who, in the teeth of what we have seen during the last eight months, persist in

holding theory to be necessarily a hindrance to practice, would, quite consistently, refuse to be convinced by any such general considerations as those which determine academical opinion. Without entering, however, on this higher ground, I may be permitted to mention two practical reasons for desiring to see our law treated on an organic and harmonized system of rules. One of these is the direct gain which the whole community would derive from a simplification of its form. Owing to the way in which English statutes are drawn, nearly every amendment of the law makes it more complicated and obscure than it was before. A new Act seldom repeals a preceding Act or Acts on the same subject as a whole: it abolishes some of their provisions, incorporates others, and modifies the rest. In dealing with a rule of the common law, instead of expunging the rule altogether, or laying down a new principle by which it is to be controlled, it usually establishes a series of exceptions in a manner so seemingly arbitrary as to make it very difficult to determine, when a new case arises, whether or no it was within the contemplation of the Act. The Married Women's Property Act of last session is an instance in point. Similarly, vast branches of our law, such as that which relates to public health and to the regulation of mines and manufactures, are suffered to remain in a state of hopeless confusion—Acts fringed with decisions piled upon other Acts and their decisions, till it becomes impossible, without a long and painful research to say

what is law and what is not[1]. This wretched state of things, which makes a resort to the Courts far more costly, and its issue far more uncertain than it need be, though partly due to existing parliamentary arrangements, is also in great measure due to the want of that feeling for the symmetry and simplicity of the law which a scientific conception of it would be certain to produce in the profession. The public, which feels the evil, is powerless to remedy it; the lawyers who alone can, are deterred from doing so, not, as is commonly supposed, by the mean notion that it is their interest to keep their art a mystery, but partly by long habit, which has made them indifferent to the beauty of order, partly by the want of that scientific training on which the success of amending legislation depends.

The second benefit is the reflex effect upon the legal profession of a higher conception of the studies to which it devotes its labours. The complaint is often heard that men of literary culture and polished taste rise more seldom than formerly to the highest places at the bar and on the bench; that it is now private connections rather than the finer gifts of

[1] It ought to be remarked that a considerable improvement has taken place since the establishment of the office of the Parliamentary Counsel a few years ago. Many Bills however, including all those brought in by private members, do not pass through this office, and even those which come from it suffer terribly in point of form in their passage through Parliament.

intellect and character which open the path to professional success. If this be so, it is surely in great measure because our system of legal education gives so little scope to these nobler qualities, and turns them to no account in directing the studies of the aspirant. The life of a lawyer, tedious and painful in so many of its details, would be a happier one if his occupation called out, as it ought to do, the highest faculties of his mind; and the tone of the profession, which will sooner or later be threatened here by the temptations which have begun to threaten it in America, will be best maintained in purity by a sense of the dignity of the subject it deals with as a department of philosophical enquiry. It is scarcely possible that a corrupt administration of justice can coexist with an enthusiasm for the abstract propriety and elegance of law as a science, such as existed among the great jurists of Rome.

I am sensible that in this enumeration of the advantages of the study we have been considering, I may probably have fallen into the common error of those who have a theme allotted them, and have tried to bring more out of it than there is in it. To correct such a mistake, let it be frankly admitted that Roman law, though indispensable to the philosophical jurist, is not so to the practitioner; and that no knowledge of it can make up to him for the neglect of his own law. Let it also be conceded that it is not a subject ever likely to hold a front rank among those which awaken the ardour of our academic

youth. It wants that charm of incompleteness, of unexhausted possibilities of discovery, which fascinates us in the sciences of nature. It does not, like metaphysics, set us face to face with the most stimulating problems of thought and life; nor can it, like history, dazzle the imagination and stir the emotions, by leading us through a long gallery of striking scenes and characters. Yet the study is one which pleases and satisfies, as well as instructs; for it is at once, and that in the healthiest way, theoretical and practical, excellently philosophical in its methods, yet never quitting the firm ground of reality. Its materials are contained in the writings of men, the purity and loftiness of whose ethical tone were scarcely surpassed by the brilliance of their constructive genius. It is perhaps the most perfect example which the range of human effort presents of the application of a body of abstract principles to the complex facts of life and society. To quote once more from the most famous of modern jurists:—'The study of Law,' says Savigny, 'is of its very nature exposed to a double danger: that of soaring through theory unto the empty abstractions of a fancied law of nature, and that of sinking through practice into a soulless unsatisfying handicraft. Roman law, if we use it aright, provides a certain remedy against both dangers. It holds us fast upon the ground of a living reality; it binds our juristic thought on the one side to a magnificent past, on the other, to the legal

life of existing foreign nations, with whom we are thereby brought into a connection wholesome both for them and for ourselves[1].'

Standing midway between those classical and historical studies which belong to a general liberal education, and those purely professional studies which form the first stage of active life, it is especially fitted to lead men from the one to the other, and shew them how to turn to account in the latter the ideas and capacities which the former has given them. But although this is a strong reason why the University should undertake to recognize and promote the study, it is not the only or the chief reason. Even more important than the function of an University in education, is the scarcely separable function of dealing with every department of human activity in the abstract, investigating its principles and developing its rules in their philosophical coherence. We are all too apt, in the hurry of life and the pressure of its trivial necessities, to lose sight of that which is universal and permanent—to forget that what we are pursuing as a trade is the subject of a science, and has, as such, its greatness and its perfectibility. The ideal is not far from us, but we catch only transient glimpses of it; and of those who continue in maturer life to cherish the belief in its worth, the most conceive of it in relation to their inner life only, and look on their action

[1] Preface to vol. vii. of the 'System des heutigen römischen Rechts.'

in the world without as something which belongs to another and a meaner sphere. The University is appointed to correct this failing,—to link the present, in which things seem petty, to the past which clothes them with a mellower light,—to ennoble practice by a constant recurrence to theory,—to shew that intellectually as well as ethically there is nothing common or vulgar, nothing which may not and ought not to be considered as within the domain of Philosophy, who, the more perfect she becomes, sees more clearly what is great in that which is the least. In undertaking, therefore, not only to educate in the ordinary liberal studies, but also to deal in a broad and lofty spirit with such large practical topics as this of law, the English Universities will in a new way justify their possession of that wealth and external splendour which they alone out of the great mediaeval sisterhood have been privileged to retain. They will associate themselves more closely with the life of the nation, and confirm the reverence with which it still regards them; nor is it idle to add that in thus enlarging the scope of their activity, they will be closely following and worthily maintaining the traditions of their glorious past.

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