ROMAN LAW AND COMMON LAW

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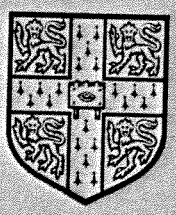

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INTRODUCTION

As stated in the Preface, the purpose of this book is a comparison of some of the leading rules and institutions of Roman law and English law. This is in no way new. Apart from earlier work, Professor Pringsheim, some years ago, dealt with the matter at Cambridge.[1] Professor Schulz's *Principles of Roman Law* contains much on the topic.[2] But these writers are mainly concerned with striking resemblances which they find. Dean Roscoe Pound, however, in his brilliant *Spirit of the Common Law*, is concerned to point out differences between the Roman conceptions and ours. In fact, however, his comparison is in the main not between the common law and the law of the Romans but between the common law and the law of the Civilians.[3] The central notion of the developed Romanist system, he says, is to secure and effectuate the will. The Romanist thinks in terms of willed transactions, the common lawyer in terms of legal relations. But this 'Willenstheorie' is not Roman. It was developed by the nineteenth-century Pandectists,[4] under the influence of Kant, who makes it clear that he is not dealing with any actual system of law. For the view that the Romanist thinks in terms of willed transactions rather than of relations Dean Pound gives terminological evidence, but it would not be difficult to find evidence of the same character for the contrary proposition. The point need not be pressed, for Dean Pound is well aware of the distinction between the ancient and

[1] See *Cambridge Law Journal*, v. p. 347.

[2] It is dealt with in some contributions to the Congresso Internazionale di Diritto Romano, Bologna, 1933.

[3] Much the same is true of Lord Macmillan's stimulating lecture, *Two Ways of Thinking*, 1934, Cambridge.

[4] Adumbrated in the seventeenth and eighteenth centuries, but everything exists before it is born.

the modern Roman law.[1] It may be a paradox, but it seems to be the truth that there is more affinity between the Roman jurist and the common lawyer than there is between the Roman jurist and his modern civilian successor. Both the common lawyer and the Roman jurist avoid generalisations and, so far as possible, definitions. Their method is intensely casuistic. They proceed from case to case, being more anxious to establish a good working set of rules, even at the risk of some logical incoherence which may, sooner or later, create a difficulty, than to set up anything like a logical system. That is not the method of the Pandectist. For him the law is a set of rules to be deduced from a group of primary principles, the statement of which constitutes the 'Allgemeiner Teil' of his structure. It is true that he has to make concessions to popular needs and that the superstructure is not quite so securely based on these fundamental principles as might have been expected. But the point of interest is that his method is not that of the Roman or of the common lawyer.

In spite of this affinity of the Roman jurist and the common lawyer the two systems present a number of outstanding differences, which are discussed in some detail in the succeeding chapters. The notion of the family is entirely different. For the Romans it is a civil conception. Strangers in blood could become members of the family by adoption from the earliest times. With us it may be called a natural conception, resting on marriage and the blood tie. For though we have recently introduced into our law what we call adoption, it was until still more recently adoption only in name and had no effect in the law of succession. The clear-cut Roman conception of *dominium* and the sharp distinction between possession and ownership are not found in our system. Indeed the fact that wrongful withholding of another person's property is regarded by our Courts as an attack on the 'right of

[1] See, e.g., his *Interpretations of Legal History*, pp. 35, 55.

possession' and handled as a tort, with the result that in some branches of the law certain cases of possession are called 'special property', might almost lead an incautious observer to think that our common law had managed to dispense with the notion of property.

The Roman law gives us a conception of *hereditas* as an entity, almost a person. It 'sustinet personam defuncti'. The rights and obligations of the deceased person vest in it, and it in turn transmits them to the *heres*, who in turn is a universal successor. How far these notions are 'classical' need not be here considered: they are plain in the sources. Our law knows nothing of *hereditas* as an entity, or of the *heres* as universal successor, though the executor or administrator under the property legislation of 1925 bears a superficial resemblance to him. The primary function of the Roman Will is the appointment of a successor: that of our Will is to regulate the devolution of property. But a large degree of freedom of testation is a feature of both systems. Both peoples exhibit the same dislike of intestacy and the same desire to do what one likes with one's own after death. Our power of post-mortem disposition disappeared as regards land for some centuries, but the instinct of the people reasserted itself by means of the Use, and later the power of testamentary disposition was extended to such property by legislation. In both systems testators have much power in controlling the destination of their property, in spite of restrictions dictated by public policy and imposed either by legislation or by judicial decision. In Roman law this power was very small at first, suddenly and immensely expanded under Augustus by means of the *fideicommissum*, restricted in the following centuries, but not brought back to its original limits, immensely expanded again by Justinian, and finally subjected by him to a slight restriction. It is to be noted that both the great expansions were due to imperial intervention and it is quite probable that neither of them was really

intended by its author. The matter has little to do with juridical ways of thinking.

To the Roman lawyer limitation of actions was one thing and acquisition of ownership by lapse of time quite another. We are not so logical. We seem to have stumbled into the latter as a by-product of the former, and for no apparent reason have confined this mode of acquiring ownership to certain interests in land, easements and the like. In other cases where limitation of actions has seemed to be inadequate, we have chosen to make lapse of time extinguish title rather than transfer it from one person to another. Our present periods for the limitation of actions are much shorter than those eventually reached by the Romans, who seem to have attached more importance to the right of the individual and less to the principle 'interest reipublicae ut sit finis litium' than we do, an attitude which also accounts for their lack of any system of bankruptcy: till a man had paid his debt in full, he owed it. In many cases, till the fifth century there was no prescription, and even then the period (thirty years) was extremely long.

Again, in regard to contracts our law comes much nearer to a general theory of contract than the Roman law did. We have a law of contract, while theirs was a law of contracts. In the Roman law no agreement was a contract unless the law made it binding. In our law every agreement purporting to affect legal relations is a contract unless the law for some reason, such as illegality or lack of consideration, rejects it. In the main we can say that our particular contracts are special varieties of a general type, whereas in Roman law the process was the reverse and most of the particular contracts had entirely independent origins and histories. We owe much to *assumpsit*. The Romans had no such general conception of the *prima facie* enforceability of an undertaking.

This is not the place, and we are not competent, to enter into the controversy between Sir Frederick Pollock on the

one hand and Sir John Salmond on the other upon the question whether our law of civil wrongs is 'based on the principle that (1) all injuries done to another person are torts, unless there be some justification recognised by law; or on the principle that (2) there is a definite number of torts outside which liability in tort does not exist'.[1] Although the movement of opinion in favour of the former principle seems to have recently been checked, there can be no doubt that the encroaching power of the tort of negligence tends to impart generality into large parts of the law of torts; to that extent the common law presents another contrast to the Roman law. The latter recognised a definite number of categories of liability, increasing in the course of its history, but no general principle of liability for wrongful acts and omissions (for the famous 'alterum non laedere' is moral rather than legal), though *iniuria* and *dolus* exhibit in a minor degree the fecundity of our 'fertile mother of actions', Trespass. There are other points of contrast and comparison. Delictal liability is more primitive, more criminal, than our liability in tort, and closer to the idea of vengeance. Although the action of trespass emerged from the semi-criminal appeal of felony and both it and its progeny for a long time carried the marks of their criminal ancestry,[2] our law of tort is now mainly compensatory in its object, while delict remained definitely penal. If we turn to specific delicts and torts, there is one noticeable difference. The rule that fraud causing loss was an actionable wrong appeared early in Roman law, in what may perhaps be reckoned as corresponding to the Year Book age; but in our law it did not appear, at least as a general rubric in common law courts,

[1] In the words of Professor Winfield's lucid summary of the controversy in chapter iii of his *Province of the Law of Tort*. He adopts Sir Frederick Pollock's vic *v*, and Dr Stallybrass was moving in that direction. But see Dr Glanville Williams in (1939) *Cambridge Law Journal*, vol. VII, pp. 111–135.

[2] The criminal ancestry of trespass is no longer generally accepted: see Fifoot, *History and Sources of the Common Law*, ch. 3.

till relatively modern times. The same thing may perhaps be said of negligence as a tort, for negligence causing damage was a delict in Rome from very early times, while with us its specific emergence is late. But this is probably only apparent, as the majority of negligent acts causing damage would probably have been remediable either by Trespass or by Case.

In another respect there seems to be a marked difference in the evolution of the two systems. In all systems of law, at all stages except the most primitive, there is a constant conflict between two methods of interpretation, the strict and the 'equitable', sometimes expressed as being between *verba* and *voluntas*, which is not quite the same. There is both in Roman and in English law a steady tendency towards the triumph of the 'equitable' doctrine. But in our system equity has passed from the vague to the precise, 'from a sort of arbitrary fairness into a legal system of ameliorated law'.[1] In Roman law, though equity did not first appear in, and was very far indeed from being confined to, the Praetor's Edict, a great part of it very early took form in the Edict as a set of strict concrete rules administered by the same Courts as dealt with the ordinary law; that is, it was of much the same nature as our modern equity since the Judicature Acts,[2] though it came into existence by what was practically legislation. There had, however, always been equitable interpretations quite independent of the Edict. The Edict became fixed early in the second century, but juristic *interpretatio* went on and was applied to edictal rules as to all others. However, as time went on, and the great jurists were succeeded by men of a much lower calibre, and the influence of an oriental environment made itself felt, equitable notions became laxer

[1] A. V. Dicey: see *Cambridge Law Journal*, iv (1932), p. 303.

[2] The state of things was not unlike that in our early law when there were no equity courts, but the common law courts held themselves free to apply equitable principles. See Hazeltine, 'Early History of English Equity', in *Essays in Legal History*, ed. Vinogradoff, 1913.

and less clearly conceived, and the fairness and justice which were the ideal of the classical lawyer tend to be replaced by a *benignitas* which has no stable measure. From clearness and precision Roman equity passed to indeterminate vagueness. It is like the history of Gothic architecture. Our equity passed into the stiffness and rigidity of the Perpendicular style: Roman equity passed into the weak indecisiveness of the Flamboyant.

The law of a nation expresses, in the long run, the character of the nation, and similarity of legal method corresponds to similarity in other aspects of social life. Both races seem to have had special gifts both for administering and for being administered. Both races have been given to action, rather than reflexion. Both made not only laws, but roads, and not only made laws, but in the main obeyed them, all rather in contrast with the Greeks, but not, it seems, with the Babylonians and Assyrians; indeed gifts and habits of this kind are necessary for any great and durable empire. Both have had a keen eye to practical needs, with rather inadequate theory. Both have had a profound respect for the plighted word, evidenced by their early acceptance of consensual executory contracts, which the Greeks do not seem to have reached at all, and by the rarity of any requirement of writing, unlike the practice of the Greeks. Both were in their earlier stages intensely individualistic, with a clear conception of *meum* and *tuum*, but perhaps no very exact analysis of the notion. Both systems reveal a high degree of inventiveness and capacity for adaptation. The Roman Will with its free *institutio heredis* was a thing unknown to the other Mediterranean systems. Our Trust, which in the words of Maitland[1] 'perhaps forms the most distinctive achievement of English lawyers', is an instrument of great utility and flexibility. In both systems, in the most formative period, express legislation played a minor part.

[1] *Equity*, p. 23.

For in Rome legislation by *Comitia* and Senate accounts for but little of the private law, and even the Edict, important as it was, did little after the fall of the Republic. In both, expansion and improvement were gradual, 'from precedent to precedent', though the precedents were not established in the same way. In both, it seems to be true, as Maine puts it for the Roman law,[1] that 'substantive law has the look of being gradually secreted in the interstices of procedure'. In both, in the later stages (*absit omen*) the earlier freedom of contract was checked by a great mass of restrictive legislation, so that the progress of society 'from status to contract' was interrupted.

It seems to follow from what has been said that the English lawyer, proud of his almost unique success in Western Europe in averting a reception of Roman law, has been inclined to exaggerate the differences between himself and his Roman brother. While the fundamental conceptions upon which the Roman law was built show but little similarity to the corresponding notions of the common law, which is not surprising, since one is of a Germanic stock and the other of a Mediterranean, the practical rules of the two systems show an astonishing amount of similarity. It is reasonable to attribute this to a certain similarity in the habits, the morale, the 'Anschauungen' of the two nations, though this has been obscured by the subsequent developments of Roman law in the countries which it invaded and which now form the home of the only serious rival to the English common law.

[1] *Early Law and Custom*, p. 389.

ABBREVIATIONS

Holdsworth = Holdsworth, *History of English Law* (12 volumes).

P. and M. = Pollock and Maitland, *History of English Law*, second edition.

Halsbury = Halsbury, *Laws of England*, third edition edited by Lord Simonds.

Buckland,

Text-book = Buckland, *Text-book of Roman Law*, third edition, revised by Peter Stein.

H.L.R. = *Harvard Law Review.*

L.Q.R. = *Law Quarterly Review.*

B.G.B. = Bürgerliches Gesetzbuch (German Civil Code).

C.C. = Code Civil (French Civil Code).

C.Com. = Code de Commerce (French Commercial Code).