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ROMAN LAW AND ITS INFLUENCE ON WESTERN CIVILIZATION¹

HESSEL E. YNTEMA*

I

There have been, in the Western world, two dominant legal systems, the Roman and the English. Both are functions of empire, the products of peoples gifted to rule. Undoubtedly, the historic influence of Roman law has been dependent in the last analysis upon the predominant position occupied by Rome in the ancient world and the enormous prestige that the Eternal City for centuries thereafter enjoyed. Likewise with the law of England; its reception in North America and in other parts of the world attended the expansion of British colonization and influence in modern times. It is not surprising, therefore, that, despite certain differences, for example in technical skill and sea-faring instinct which have characterized the inhabitants of Great Britain, they should possess basic traits analogous to those exhibited by the Roman citizenry, who, after establishing the hegemony of Rome in the Italian peninsula, within the brief space of less than two centuries brought the entire Mediterranean world under its control. The qualities which Mommsen attributes to the Roman also typify the British character: reverence for authority and tradition, hostility to exotic individualism, insistence on useful occupation, on Victorian modesty, on frugality, and above all loyalty, again and again demonstrated in steadfast resistance to the public enemy, in unshaken fidelity to their native land and its institutions, and in persevering courage under the severest trials.² In their days of glory, the government of both peoples exhibited beneath democratic forms the assurance of a tireless aristocracy, conscious of its mission, jealous of its liberties, contemptuously liberal to subject races, as shrewd in mercantile trading as it was gifted in the arts of command. In philosophy and science, however, the Romans were but moderately gifted; as Ortega has remarked of the English too, they were provided with intellectual capacities sufficient, but not too much, for their role in history.³

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¹ In substance, this paper reproduces a lecture given August 2, 1949, at Ann Arbor, in the series on the "Civilizations of Ancient Greece and Rome."

² For Mommsen's analysis of the pristine Roman, as contrasted with the Hellenic, character, see *RÖMISCHE GESCHICHTE*, Vol. I, Book I, Chapter 2 (Translation by W. P. Dickson, *The History of Rome*, Vol. I, pp. 23 *et seq.* in the Everyman edition).

³ In *El Tema de Nuestro Tiempo* (Espasa-Calpe Edition, 1947, Buenos Aires, p. 146), Ortega y Gasset remarks:

"No se puede decir que el pueblo inglés sea muy inteligente. Y no es que le falte inteligencia; es que no sobra. Posee la justa, la que estrictamente hace falta para vivir.

In the legal systems of these two peoples, accordingly appear significant analogies. In each case, a sharp division was soon made between sacred and secular justice; in each the power of the state was developed at a relatively early stage, the administration of justice was professionalized, and a system of private law, articulated in specific forms of action, superseded the blood-feud and other institutions of the prior communal custom. In each system, the scheme of rights thus elaborated became rigidly formalized and had to be supplemented, corrected, and eventually superseded by a parallel system of equitable remedies, introduced by the authority of a magistrate—the praetor in Rome, the chancellor in London. This palliative in time became stereotyped, and legislation, which in England as in Rome at the outset was sporadically employed on critical occasions to impose constitutional limits on executive power to remove social abuses, ultimately became the chief method of legal development. Most noteworthy is the fact that both are essentially systems of case-law, evolved by specialists, generally indifferent to history and with little theory and less philosophy. Even today the law of England and the United States is dominantly casuistic; that the same was true of the law of Rome, even as late as Justinian, will appear on casual inspection of the *Corpus Juris*, the principal source of our knowledge of the Roman legal literature. The theoretical refinement of the modern civil law, however deeply indebted for its inspiration to the Roman sources, is largely post-Roman, and its symmetrical organization in the Code Napoléon and succeeding modern codifications is the product of scholastic attainments or at least interest in synthetic analysis, that neither the Roman jurists nor the English judges customarily displayed.

Doubtless, to this practical interest in the solution of specific problems is due also the even less systematic evolution of public law in both the Roman and the English schemes of government. The constitution of Rome, at least until the late Empire, concerning which we are not too well informed, like that of England, was a flexible tradition, embodying time-honored usages, conventions shifting with the incidence of political power, and statutory accretions of revolutionary reform or compromise. This was its chief virtue, it seemed to the austere Cato as reported by Cicero, namely, that it was the product, not of one genius but of many, established not during the lifetime of one man but by various men in

Por esto mismo, su era revolucionaria ha sido la más moderada y teñida siempre de un matiz conservador.

“Lo propio aconteció en Roma. Otro pueblo de hombres sanos y fuertes, con gran apetito de vivir y de mandar pero poco inteligentes. Su despertar intelectual es tardío y se produce en contacto con la cultura griega.”

various generations.⁴

Of the two systems of justice, the Roman has undoubtedly wider historic significance. This, it may be believed, is more to be attributed to circumstance than to intrinsic superiority, as was once thought. In the first place, the history of the law of Rome stretches back from Justinian for thirteen centuries, and by its reception in the medieval and modern civil law has survived for more than thirteen additional centuries as a fluctuating body of doctrine, constantly reproduced and re-adapted to new periods and peoples, much of which has evolved from the classical era of Roman law into the modern codes, being in the process refined, reformed, discarded, or revived as needs have required until the residue has become an international *ius gentium*. In the second place, the fact that the Roman jurists were the first to study the problems of justice in detail as presented in the rich experience of a cosmopolitan empire gave their work an originality and freshness, a freedom from theoretical preconceptions, necessarily denied to subsequent generations of jurists. The third and indeed vital source of the decisive influence of Roman law in Western culture is the fact that it was, once for all, embodied by the Emperor Justinian in the Corpus Juris, the authoritative form in which, like the Bible in things spiritual and the works of Aristotle for philosophy, it was received as the epitome of justice in later times. These factors, the length of its experience, its cosmopolitan viewpoint, and the effective form in which it was codified, explain the unique position of Roman law in history. In the opinion of Buckland, one of the greatest Romanists of our time, next to Christianity, it "was the greatest factor in the creation of modern civilization, and it is the greatest intellectual legacy of Rome."⁵

II

The sources of our knowledge of Roman law in the ancient world include, in addition to the codification of Justinian, the literature of the ancient world that has survived, the inscriptions and other remains from Roman times, including particularly the papyri discovered in the Eastern provinces, and various more specifically legal writings, of which easily the most important for our knowledge of the evolution of law in the Roman world are the Institutes of Gaius, apparently an unfinished manuscript of lectures, dating from the second century A.D., or shortly after the death of the Emperor Pius, by a law teacher, of whose

⁴ DE RE PUB., II, 1, where Cicero states that "nostra autem res publica non unius esset ingenio, sed multorum, nec una hominis vita, sed aliquot constituta saeculis et aetatibus."

⁵ (Page 5, end of 1st paragraph, line 14): (1931) J. Soc. PUB. TEACH. LAW 25.

career we are otherwise ignorant. This is the only classical treatise on Roman law which has come down to us substantially intact. In all respects, however, the most important source of information is the *Corpus Juris Civilis* itself.

Justinian became co-regent with his uncle, Justinus, in 527 and on the latter's death later in the year, sole emperor. In his plans to revive the ancient grandeur of the Roman empire, the project of reforming and restating the law must have had an important place, for the enterprise was initiated almost immediately upon his accession to the throne, and the codification was completed in 529. It included the Institutes, the Digest, the Code, and the Novels, or constitutions, enacted after 529. Except for the Novels, this great work, reproduced in some 2300 closely printed quarto pages in the stereotyped edition, was accomplished by the joint efforts of four law professors and a handful of practitioners, under the direction of Tribonian, a learned and leading member of the Digest, the Code, and the Novels, or constitutions enacted after 529. a commission to prepare a new collection of the imperial constitutions or enactments; this was completed in a year, and the collection published April 7, 529. This was followed by a series of fifty decisions in which Justinian undertook to reform aspects of the existing law and possibly to control its citation, presumably in 530 or 531, before the plan for the Digest had been settled and its difficulties had been grasped. Neither these decisions nor the Code of 529 have been preserved, since in the preparation of the Digest it became clear that a revised Code would be necessary. This was completed in 529 and published on November 16 of that year as the *Codex repetitae praelectionis*. In effect, this was a reproduction of earlier collections, the *Codices Gregorianus* and *Hermogenianus* and the *Codex Theodosianus* of 438, with the addition of later constitutions, including only those that remained in force, drastically edited, abridged, and interpolated.

Important as the Code is for the law from the time of the Emperor Hadrian, the central and most significant part of Justinian's codification is the Digest, in which the earlier legal literature was excerpted in fifty books, divided into titles according to subject matter. Justinian states in the *C. Tanta* of December 16, 529, by which the Digest was given the force of law that nearly 2000 *libri* (actually about 1625) by thirty-nine authors, containing 3,000,000 lines, were read and reduced to 150,000.⁶ This compilation was authorized by a constitution of Decem-

⁶ The *Constitutio Tanta* may conveniently be found in the Mommsen-Krueger stereotyped twelfth edition of the Digest, Berlin, 1911, at pp. 13 *et seq.* The statement is in the first paragraph at p. 14.

ber 15, 530, addressed to Tribonian and empowering him to select a commission to assist him, with full authority to revise and cut down the texts of the writings of the ancient jurists who had authority to interpret the laws and with instructions to choose what the commissioners thought best, eliminating all that was superfluous, obsolete, contradictory, repetitious, or already contained in the Code (except as clarity required). All abbreviations were prohibited, so that the *inscriptions*, giving the author, title, and book of the work for each fragment, have been well preserved and have been of the greatest value in reconstituting the original writings.

The method followed was discovered by Bluhme in a brilliant study, published in 1820 and except for corrections in detail generally accepted.⁷ After establishing the general scheme, following that of the Code and the commentaries on the Edict, the materials were divided into four groups, the Sabinus, covering the *ius civile*, the basic civil law; the Edict, including the commentaries on the law introduced on equitable principles by the praetor; the Papinian, including works of a practical or specialist nature, so named since the excerpts from this group begin with the *Quaestiones* and the *Responsa* of Papinian, the most celebrated of the Roman jurists, and finally the Appendix, believed to include works discovered in the process of compilation. After the materials in each group had been read by individual members or assistants of the commission, the resulting excerpts were assembled under the various titles and books and then so combined as to form a coherent text, in which the largest group of excerpts was normally placed first. The compilation of the juristic materials in the Digest was supplemented by the Institutes, a textbook for students which was in effect a revised official edition of the Institutes of Gaius, including excerpts from other sources.

There is sufficient evidence by comparison of texts incorporated in the Corpus Juris with versions preserved in other sources that this process involved substantial editing of the originals. For this reason, one of the most important types of inquiry in the efforts of modern scholarship to trace the historical evolution of the doctrines of Roman law has been the study of interpolations, a study which involves not merely ascertaining the *emblemata Triboniani*, viz., the changes made by Justinian's commission, but also, as has been recently accepted, the delicate task of determining what alterations may have been made in the classical texts before Justinian's time in the process of harmonizing the *ius civile* with the *ius honorarium*.

⁷ F. Bluhme, *Die Ordnung der Fragmente in den Pandectentiteln*, 4 ZEITSCHRIFT FÜR GESCHICHTLICHE RECHTSWISSENSCHAFT, 257 et seq (1820). Cf. F. Schulz, HISTORY OF ROMAN LEGAL SCIENCE, 319-322 (1946).

III

It is appropriate at this juncture to pause for a summary reference to the story incompletely revealed by these problematical sources. They do not go back to the beginnings; the Roman people enter upon the scene of history relatively advanced in culture and with remarkably few vestiges of more primitive antecedents. For practical purposes, the known history of Roman law commences with the Twelve Tables, customarily dated at 451 B.C., when the Roman state was already firmly constituted as a republic. Even though the tradition of a prior period of monarchy be admitted, the reconstruction of its legal institutions is possible only by inference from later times. Indeed, although the Twelve Tables were venerated as the basic constitution of the Republic and were memorized by schoolboys in Cicero's time, the occasion for their enactment is disputed, and the existing knowledge of their contents is fragmentary. Even so, the remains enable us to discern the lineaments of what has been termed the archaic epoch of Roman law. This continued until the second Punic war; in the last two centuries of the Republic, which may be described as the creative period, contemporaneous with the spread of Hellenistic influences, occurred those remarkable developments in both the administration and substance of the law, which were consolidated during the succeeding and more conservative classical era of the Principate. The epilogue was the bureaucratic period from Diocletian to Justinian. Our concern here is not to depict in detail the law of Rome as it evolved through these stages, but rather to endeavor to identify elements which for the present purpose seem of more than circumstantial significance in this long evolution.

In the first place, we must be impressed by the definite organization of the Roman state from the outset and the recognition of its supreme authority. Basically, it included three elements, the Roman citizens, the magistrates whom they elected in the comitia or popular assemblies, and the senate appointed by the consuls, the chief magistrates, to advise them in their office. This arrangement involved certain to us striking features. Thus, although the basic laws were enacted by the comitia, the voting was always by groups, not individuals, and the assembly could meet only when summoned by the appropriate magistrate and could only vote, without discussion, upon the business laid before it by the magistrate who summoned it. Subject to the legislation—the *leges*—thus laid down by the burgesses, the Romans vested in their principal magistrates a general *imperium*, which included the power to seize and condemn individual citizens, to command the military, to administer justice, and to convene the assembly. The limitations upon this essen-

tially absolute conception of authority were practical rather than constitutional in the modern sense. For example, the chief office was divided between two consuls, elected for a year; the brevity of the term and the power to veto the acts of each other long interposed a practical obstacle to the establishment of a monarchy. In addition, the creation of other offices, such as the tribunate, and in particular the political necessity of consulting the senate provided additional limitations and control. Moreover, in capital cases the condemned citizen had the right of *provocatio* to the assembly, and from the beginning the sphere of religion was separate from the secular government.

Thus, from the founding of the Republic at least, the Romans had separated the secular jurisdiction from the spiritual, as they had also laid the basis for the fundamental distinction in their system between public and private rights. These for their time were extraordinary achievements, the former of which is presumably related to the social, political, and economic struggle between the patricians and the plebeians and the creditor and debtor classes. This struggle, which occasioned important reforms in the law, including probably the enactment of the Twelve Tables, and the establishment of the praetorship, did not terminate except when the Principate of Divus Augustus arose from the ashes of protracted revolution.

In this polity, the nascent body of law which was eventually epitomized in the *Corpus Iuris Civilis* was limited in scope. Not only were the sacral law and the law governing the Roman state as such excluded, but a sharp line was early drawn between customary morals and law. The Roman demand for liberty required wide areas free from legal rules because of the number and effectiveness of nonlegal restrictions. This may be illustrated by the character of the Roman family law, which expressed in an extreme form the patriarchal principle. Theoretically, the power of the *pater-familias*, like that of the magistrate, was general and absolute; not only the slaves, the chattels, and the estate, but also the wife and the children and their progeny, which had not by marriage or emancipation passed into the power of another *pater-familias*, were at his disposition. But this power, later alleviated somewhat by more humane conceptions, was from the first restrained in practice by the family council to which the head of the family was by custom required to resort before making an important decision regarding a member of the family.

In the development of the law by the classical jurists, this principle of specialization was carried even further. They ignored the teleological aspects of law, those elements of policy which are today regarded as of

fundamental concern. They left to the advocates the facts of legal disputes, which our law students are instructed to regard as the grounds of decision. They left almost entirely out of account the social practices regulated by law, the elaborate Roman marriage customs, the normal contents of wills, the forms used in business transactions. And they were equally disdainful of the legal institutions of other places than Rome. They were as little concerned with comparative law as they were indifferent to legal history. In short, the classical jurists sought to ascertain, within the framework of the system of actions, the natural rules regarding legal rights and duties. As a result of this economy in the materials considered, the classical law assumes an almost logical precision and definiteness. Roman legal science was the product of specialization.

To explain how this was possible requires brief reference to the formal sources of Roman law and to the Roman system of judicial procedure as it developed in the classical period.

The books tell us that the methods by which legal rules might become effective in Rome were: first, positive enactments, the *leges* voted by the popular assemblies during the Republic, supplemented by *senatus consulta* and imperial constitutions in various forms during the Empire; second, edicts of the magistrates; and, third, interpretations, with which are to be included the so-called *responsa* or opinions of the jurisconsults. Custom is also mentioned but as of distinctly minor importance. Of these, during the formative republican period, the comitial enactments were few and brief. As Schulz has pointed out,⁸ until the energies of the jurisconsults were definitely and anonymously absorbed into the bureaucracy of the later Empire, the Romans apparently were averse to formal legislation as a means of elaborating the law. The Twelve Tables indeed were a codification of a sort, but limited to the terse enunciation of the basic principles of justice that the exigencies of the plebs in the early Republic could obtain. There was no further codification until the fifth century after Christ, and this, the Codex Theodosianus, was abortive. For the rest, the *lex* was occasionally employed to abolish social evils, to enact specific rules such as the state alone could prescribe, or to make administrative provisions. The main fields of civil law, contract, property, pledge, succession, family relations, were relatively untouched.

On the other hand, the edicts of the magistrates, and especially of the urban and peregrine praetors, the first inaugurated in 367 B.C. to ad-

⁸ Schulz, PRINCIPLES OF ROMAN LAW, Chapter II, *Statutes and the Law*, pp. 6-18 (1936).

minister civil justice within the City and the second about 242 B.C. to superintend the jurisdiction in cases involving foreigners, proved of the greatest importance in the development of the law. As is commonly known, it was by this means that the *ius honorarium*, the system of remedies supplementing the earlier *ius civile* was created. The fact that this could be accomplished by magistrates, elected for a year who sought the office on political grounds, can be explained only by the early development in Rome of specialists in private law by whom the magistrates were advised and instructed.

For this reason, the *interpretatio* and the later *responsa prudentum*, the applications of the law by the college of pontiffs at the outset and by the juriconsults after the pontifical monopoly of legal knowledge was broken, formed the center of gravity in the technical development of the law of Rome. This leads us to refer briefly to the Roman system of private justice or, more specifically, to certain features of the system that made the interpretation and application of the law by experts essential.

In the Roman system of civil procedure, which like that of the Common Law was in classical times a contest of the parties, supervised by the magistrate, rather than an officially directed inquisition, a distinction was from the beginning drawn between the proceedings *in iure*, viz., the pleadings leading to the formulations of the issue, and those *apud iudicem*, the actual trial of the case. In the formalistic period of the early *legis actiones*, or actions based upon the Twelve Tables, it was necessary for the parties to recite their claims or defenses in literally exact terms, the formulae for which were for a time at least the exclusive property of the college of pontiffs. In the formulary procedure, by which the ancient actions were superseded and which was employed throughout the classical period, the proceedings *in iure* involved the issuance of a formula by the praetor, instructing the *iudex* to adjudge as the facts should appear in favor of the plaintiff or the defendant on the conditions stated in the formula and approved by the magistrate as representing the law.

On the other hand, the actual trial took place before a *iudex*, usually agreed to by the parties, who was selected from a panel of leading citizens-laymen.

This procedure, it need scarcely be pointed out, had the result of placing the administration of justice in the hands of magistrates, typically political figures, and the trials themselves under individuals who might or might not be learned in the law. Both the magistrate and the *iudex*, as well as the parties themselves, required the advice of experts who by their studies had acquired authority in law. The consequence was

not merely that in its detailed application the law was chiefly developed by juriconsults who had no recognized part in the procedure itself but acted in an advisory capacity, but even more important, that their attention was necessarily focused upon the very practical problems of law presented in specific cases. The actual position of the juriconsults in the formulation and development of law was consequently comparable to that of the judges in the English courts, with the advantages that they did not have to justify their opinions immediately to disputatious litigants and that, relieved of the tedium of presiding over the trials themselves, they were able to concentrate their attention on the specific problems of justice. In consequence, although Rome did not develop a professional bar such as that of England and other European countries, the interpretation and application of law was from the beginning specialized in the hands of a relatively limited group of experts, who were happily enabled by the very scheme of the administration of justice to deal with the practical problems of law on an objective, scientific basis. This, it would seem, is the underlying explanation of the logical precision that characterized the method and the product of the great Roman jurists.

IV

It remains in conclusion to allude all too briefly to the reception of Roman law as crystallized in the *Corpus Juris* in later Europe. After Justinian, this system of law continued to develop in the Eastern Empire, rapidly diminishing in vitality until it was submerged with the fall of Constantinople to the Turks in the Fifteenth Century. The real resurrection of Roman law, however, occurred in the West. There it maintained a precarious, diluted, subordinate existence as the personal law of the subject peoples in the chief former Roman provinces, until the Eleventh Century, when the serious study of Roman law was revived in the universities of northern Italy and thereafter in other parts of Europe. As the pupils of the glossators and the long procession of their academic successors, who taught them the law of Rome as the universal law, were increasingly taken into official positions in the emerging national governments, they inevitably brought to bear upon the duties of their offices as administrators, judges, and advocates the conceptions of the Roman jurists in which they had been schooled. By this means particularly, the system created by the Roman juriconsults was perpetuated, centuries after the dissolution of the Empire, in the medieval and modern civil law. This is undoubtedly the conclusive proof of its historical and scientific significance.

This is not to suggest that the so-called reception of the Roman law in Western Europe during the Renaissance simply or completely revived the principles embodied in the *Corpus Iuris Civilis*. Even in countries where formal enactments recognized Justinian's codification as the source of a subsidiary "common law," its assimilation was partial and biased; the classical doctrines were inevitably construed, perverted, or ignored in the light of current necessities and in varying measure amalgamated with indigenous institutions and conceptions. Moreover, in this complex process, a number of factors, in addition to the refinement of the Roman legal conceptions as compared with the local laws, were operative in the reception; the fact that the law of Rome had been systematized in a written codification carrying the prestige of the Empire and consequently appeared to incorporate universal principles of justice, was supported, in its claim to superiority over the cruder local customs, by political considerations. Most important, doubtless, was the circumstance that Roman law was taught in the universities, where the future leaders of the legal profession and of the bureaucracy were being trained. As Maitland has observed, "Law schools make tough law."⁹ Even on the background of the remarkable interest in classical culture that characterized the Renaissance, the reception of Roman law forms a complex, panoramic problem in the history of European culture. In the process, an extensive body of conceptions, both ancient and alien, was absorbed in a number of countries under conditions sufficiently diverse and over so long a period of time, as to form a unique case of cultural imitation. However the event be explained, it is to be supposed that, for the times and places in which the reception occurred, the legal conceptions evolved by the Roman jurists possessed certain qualities that made them superior to the available alternatives. The central fact is the reception.

It should not be supposed that formal adoption of the Roman law as a *ius commune* was indispensable to reception of the Roman ideas. Even in the area of the Anglo-American common law, where the law of Justinian has never been recognized as an authoritative source of law (except in jurisdictions such as Scotland, Quebec, and Louisiana), it is noteworthy that the Roman conceptions have had pervasive, if unacknowledged, influence; indeed, there were two creative epochs in the development of English law when the civil law was all but formally received. The relationship between these, the two outstanding legal systems in the western world, the Anglo-American common law and the civil law derived from that of Rome, is a moot question, yet to be

⁹ ENGLISH LAW AND THE RENAISSANCE 25 (1901).

comprehensively explored. Even so, it is clear that the basic ideas respecting legal classification and terminology and the common legal conceptions, particularly in the law governing ordinary human relations, only less obviously in England and North America than in Continental Europe, lead back to Rome. There has been, in other words, in the common law itself a largely unconscious and silent utilization of the legal notions prevalent in Western culture, which in a degree justifies Chief Justice Tindall's encomium to the civil law as "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."¹⁰

In conclusion, it may be said that the significance of Roman law in Western civilization, understood in a broad sense, implies first, the development of a fundamental body of legal doctrine, which, with the feudal law, the canon law, and the law merchant, has been a central common element in the individual legal systems of much of Continental Europe, and its colonies; second, the even wider dissemination of a basic stock of systematic legal conceptions and principles not merely in the civil law systems but also in the Anglo-American common law; third, the further extension of this stock of conceptions by virtue of its acceptance in the system of international law developed by Hugo Grotius and his successors; and fourth, the even more important fact that the language of Roman law has become a *lingua franca* of universal jurisprudence, as evolved in the dusty tomes of medieval civilians and canonists and their successors, the writers on natural law and legal philosophy and the more modern pandectists, whose works are the chief source of technical legal theory. The significance of Roman law in the modern world is thus historical; it rests, as Sir Henry Maine reminded us, in "the immensity of the ignorance to which we are condemned by ignorance of Roman Law."¹¹

¹⁰ *Acton v. Blundell*, 12 M. & W. 324, 353 (1843).

¹¹ *Roman Law and Legal Education* in VILLAGE COMMUNITIES IN THE EAST AND WEST, 330 at 333 (7th ed. 1913).