

The Influence of Roman Law in English Courts*

Damien Freeman

Despite the prevailing Common law suspicion of the Civil law, the latter has enjoyed a long and distinguished history in England. It would seem, however, that there is no evidence for asserting that such law survived from the time of the Roman occupation in antiquity in any meaningful way. The better interpretation is to acknowledge a distinct break with the Roman law for some seven centuries until the arrival of the Lombard glossator, Vacarius, in the retinue of Theobald, Archbishop of Canterbury in c.1139 during the resurgence of interest in the *Corpus Iuris Civilis* after its rediscovery in Italy at the end of the eleventh century.¹

While the influence of this law in the Church and the Universities was most profound, and perhaps greater than in the law courts, our present examination is limited to the penetration of Roman law into the administration of justice in England. For historical reasons, the Reception of Roman law into English law was of a more limited nature than was the case on the Continent. Such reasons include the early emergence of a central judiciary applying a uniform law throughout the realm and the influence of the Inns of Court on the development of a specialised legal profession.

Nevertheless, it is apparent from a study of the great text-writers and the jurisprudence of the Chancery, Ecclesiastical courts and the Admiralty that the Civil law assumes a greater significance than the Common law tradition would have us generally believe to be the case. Moreover, when attention turns to the courts of Common law, it is apparent that even their jurisprudence owes a debt - albeit a more limited one - to the civilians.

TEXT-WRITERS

The first of the great English text writers was Glanvil. His writing does not betray any significant Roman influence. While it is apparent that the author was acquainted with the Civil law,² and occasionally adopts the terminology thereof, the work demonstrates the essential purity of English law from Roman influence in the twelfth century.³ In Bracton, however, a more profound influence may be observed. Although the number of express references to Roman law is not great, many passages are incorporated without any reference to their origin and altered where appropriate to reflect variations in the English law - a technique described by Scrutton as "intelligent copying".⁴ The influence of Bracton on the Common law has been considerable in the absence of relevant judicial precedent and thus his use of Roman sources assumes some significance. His incorporation of Roman texts is "reproduced by *Fleta*, and in a less intelligent way by *Britton*".⁵ Incorporations were of much interest to the Cambridge civilian Cowell, who

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¹ Windeyer, W.J.V., *Lectures on Legal History* (2nd ed, Sydney: 1949).

² Scrutton, T.E., *The Influence of the Roman Law on the Law of England* (Cambridge 1885), p 74.

³ *Id.*, p 77.

⁴ *Op. cit.*, pp 120-1. See generally Scrutton's chapter on Bracton for an extended survey of the various contributions to the scholarly debate as to the extent to which Bracton borrows from Roman law.

⁵ *Op. cit.*, p 150.

sought to show the great similarity between the Common and Civil laws while conceding that the latter carried no authority in Common law courts.

After Coke the influence of Bracton as a primary source waned. Although Coke cites many of Bracton's incorporations, in Coke these are not explicitly recognised, and he emphasises that the Roman law itself is of no authority in England.⁶ In Hale, and Blackstone who follows him, the general tendency is to acknowledge the Roman influence on English law - via Bracton - but to simultaneously distinguish the source of influence from the source of authority which is always regarded as the Common law's acceptance of the particular Roman principle.⁷

Aside from substantive borrowings, Bracton exhibits a structural similarity to Justinian's *Institutes* in that Books I, II and III to folio 104a are divided into the law of persons, things and actions.⁸ Later, Hale drew on his knowledge of the Civil law when improving the method and order of the Common law.⁹ Blackstone himself admits to using Hale's model which was in turn based upon the Justinianic model.¹⁰ The division of the *Commentaries* is testimony to the fact. Lewis maintains that it is in the method of analysis which the Common law derives from the Gaian contribution of the Roman law in order to understand its own structure that the greatest influence of the Civil law in England is found.¹¹

The civilian influence has also continually nourished English jurisprudence. This influence may be seen as late as Austin, in whose views on the nature of law, especially law as the command of a sovereign, Borkowski identifies a strong Roman influence which he attributes to Austin's time in Bonn.¹²

CASES DECIDED AT COMMON LAW

While the Common law has refused to admit of the Civil law as a source of law in England, there have been numerous occasions on which reference has been made to Roman writers in the absence of any Common law precedent. It has been noted by Oliver that the early acceptance of the principle of *stare decisis* in the courts of Common law means that it is hard to trace Roman ancestry of Common law rules, for once a principle is accepted, whatever its origins, the decision becomes authoritative rather than the basis of the decision.¹³ Where Roman law has been cited in Common law courts, it

⁶ *Id.*, p 150.

⁷ *Ibid.*

⁸ *Id.*, p 80.

⁹ Borkowski, A., *Textbook on Roman Law* (London: Blackstone Press 1994), p 344.

¹⁰ Lewis, A.D.E., "'What Marcellus says is against you': Roman law and Common law" in Lewis A.D.E. & Ibbetson, D.J. (eds), *The Roman Law Tradition* (Cambridge: Cambridge University Press 1994), p 206.

¹¹ *Op. cit.*, p 208.

¹² *Op. cit.*, p 344.

¹³ Oliver, D.T., "Roman Law in Modern Cases in English Courts" in Winfield, P.H. and McNair, A.D. (eds), *Cambridge Legal Essays* (Cambridge 1926) 243, p 245. Comparing the later dates at which this phenomenon occurred in the Chancery and Ecclesiastical and Admiralty courts, Oliver continues to observe that "the difficulty of ascertaining the original foundation of any particular doctrine in English Courts may be said generally to be in direct ratio to the antiquity of the series of authoritative reports."

has been on the basis of its persuasive value. As Tidal CJ explained in *Acton v Blundell*¹⁴ in the Court of Exchequer Chamber:

The Roman Law forms no rule, binding in itself upon the subject of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruits of the researches of the most learned men, the collective wisdom of ages and the groundwork of the municipal law of most of the countries in Europe.

The instances in which reference has is made to the Civil law is not likely to increase significantly over time. As Pollock explains,¹⁵ the opposite is the natural development:

It is obvious that, as our modern authorities become fuller, cases where it is needful or desirable to recur to the *Corpus Juris* are less and less likely to present themselves.

This tendency is also, no doubt, referable to the willingness of the House of Lords to consider the persuasive authority of judgments of other Common law courts of ultimate appeal when its own reports are silent.

The Civil law has been cited in various real property cases. In *Acton v Blundell*,¹⁶ the first reported case on rights of landowners to percolating waters, various passages were cited from the *Digest* and the Court found Marcellus decisive. *Dalton v Angus*¹⁷ sees Lord Selborne LC refer to the *Institutes* (2.3) and the *Digest* (8.2.24,25 and 33) on the right to lateral support for buildings. In *Dashwood v Magniac*¹⁸ Bowen LJ refers to the law of usufruct in the *Digest* from which his Lordship explains the right of a life tenant to cut timber under the English law of waste is derived. There have also been numerous cases in contract in which the Civil law has been considered. Examples include *Taylor v Caldwell*,¹⁹ in which *obligation de certo corpore* was considered, *Kennedy v Panama & Mail Co*,²⁰ which addressed error arising from innocent misrepresentation and *Durant & Co v Roberts & Keighley, Maxsted & Co*,²¹ where subsequent ratification by contemplated principal is discussed.

That the English law of bailments now has a strong Roman influence is apparent from *Coggs v Bernard*.²² In this case Lord Holt relies on Bracton who in turn had adopted the substance of the Roman law virtually word for word from the *Institutes*.²³ What is not clear, however, is whether this accurately reflected the law either in the time of Bracton or Holt. Theories abound as to whether the English law is Roman, Teutonic or

¹⁴ (1843) 12 M & W 324, at 353.

¹⁵ Pollock, F., *First Book of Jurisprudence* (London: Macmillan 1896), p 326.

¹⁶ *Supra*.

¹⁷ (1881) LR 6 App Ca 740; 50 LJQB 689.

¹⁸ [1891] 3 Ch 306, 362; 60 LJ Ch 809.

¹⁹ (1863 32 LJ (NS) QB 164, at 166.

²⁰ (1867) LR 2 QB 580.

²¹ [1900] 1 QB 629. On appeal to the House of Lords, *sub nom Keighley, Maxsted & Co v Durant* [1901] AC 240.

²² 2 Ld Raymond 909.

²³ *Institutes* 3.14.2.

indigenous in origin.²⁴ Whatever the origin, it is apparent that the accepted analysis of this law is now Roman in structure.

CHANCERY

In contrast to the Common law, the Chancery proved more willing to directly embrace the Civil law. This may be explained primarily in terms of its personnel. By 1530, 160 ecclesiastics had served as chancellor whereas there had only been a few lay appointments.²⁵ Consequently, the training and experience of the chancellors encouraged the employment of the Civil law in the resolution of matters arising in Chancery. Furthermore, the Clerks *de prima forma* and Masters of the Chancery who advised the Chancellor until the time of Lord Bacon were themselves civilians.²⁶ Similarly, the ecclesiastical composition of prerogative courts resulted in a similar Roman influence, especially in Star Chamber during Wolsey's tenure.²⁷

While much has been written about the similarities between the functions of the praetor and the chancellor, merely comparative studies are of no interest to us. In many cases similarities have been identified but with no conclusive evidence available on the question of influence. Thus while similarities exist between *fideicommissa* and uses and trusts, praetorian supervision of guardians and Chancery's jurisdiction over infants, the respective jurisdictions of the Praetor and Chancellor over idiots and lunatics, partnership law and fraud, any direct influence must either be rejected or uncertain for lack of evidence.²⁸ A direct influence can be traced from the Civil law in areas of mortgage, foreclosure and the equity of redemption.²⁹ In the construction of wills the Chancery followed Ecclesiastical courts in adopting the rules of the Civil law as the Chancery had no original jurisdiction in such matters.³⁰ In some areas, however, the Chancellor showed a high degree of originality. According to both Spence and Fry there is no Roman doctrine comparable with specific performance for instance.³¹

ECCLESIASTICAL COURTS

Prior to nineteenth century statutory reform,³² jurisdiction in matrimonial and testamentary matters was vested in the Ecclesiastical courts. Our present concern is to understand the influence that the Civil law exerted over these branches of law while they were administered by the Ecclesiastical courts. The Ecclesiastical jurisdiction proceeded

²⁴ Scrutton, *op. cit.*, pp 187-193.

²⁵ Spence, G., *Equitable Jurisdiction of the Court of Chancery* (London 1849), I. pp 340-7.

²⁶ Scrutton, *op. cit.*, p 153.

²⁷ Borkowski, *op. cit.*, p 343.

²⁸ See generally Scrutton, *op. cit.*, pp 152-62 for a survey of the principal writers in this area.

²⁹ *Id.*, p 157.

³⁰ Eg *Hurst v Beach* 5 Mad 351.

³¹ Spence, *op. cit.*, I. p 645; Fry, *Specific Performance* (2nd ed London 1881), pp 3-8.

³² In 1857 matrimonial matters were removed to the Court for Divorce and Matrimonial Causes by 20 and 21 Vic c 85 and subsequently from this Court to the Probate, Admiralty and Divorce Division of the High Court of Justice by 36 and 37 Vic c 66. In both cases it was specified that the substantive and adjectival law was to be preserved as far as possible and appropriate unless explicitly altered. Similarly, the power to grant probate of wills was transferred from the Prerogative Court of Canterbury to the newly created Court of Probate by 20 and 21 Vic c 77 and subsequently from this Court to the Probate, Admiralty and Divorce Division of the High Court of Justice by 36 and 37 Vic c 66 and 38 and 39 Vic c 77.

according to Canon law.³³ Our interest is not in the Canon law *per se*, but how it introduced aspects of Roman law into the law of England. Hale explains the *modus operandi* of these courts thus:³⁴

[W]here the Canon law is silent, the Civil law is taken in as a director, especially in points of exposition and determination touching wills and legacies.

The matrimonial jurisdiction was founded on the conception of marriage as a religious sacrament. Although Blackstone recognises that the procedure was regulated largely by Civil and Canon laws,³⁵ the substantive law of the former can only have been of limited value. As Jolowicz explains, Christian ideas had only penetrated into the *Corpus Iuris* to a limited extent and as such the origins of modern law are to be found in the later corpus of the Canon law.³⁶

The influence of the Civil law on succession law in England has left a significant mark because this subject matter is not inherently religious. The distribution of deceased estates on intestacy in the Ecclesiastical courts substantially followed the scheme of distribution found in the Civil law. This civilian influence survived the codification of intestate succession by the Statute of Distribution 1670³⁷ so that the present law of England bares a striking resemblance to that set down by Justinian - the one significant difference being the position of spouses. In the case of testate succession these courts had jurisdiction in probate and their use of Roman laws in the construction of wills was followed by the Chancery when it assumed such jurisdiction. In addition to their work in probate and intestacy, the Ecclesiastical courts gave the Common law the *donatio mortis causa* - a non-testamentary gift in contemplation of death - taken directly from the Civil law,³⁸ but which represents

an anomaly in English Law, since it is neither consistent with the law relating to the making of a gift nor with that relating to the passing of property by way of testamentary disposition.³⁹

While the influence of the Civil law on these branches of law has been significant, it must be remembered that at no time did it ever form part of the law of England. Its status was only ever one of influence, and then only in the absence of any pertinent Canon law.

ADMIRALTY & THE LAW MERCHANT

The Court of Admiralty was a royal court with jurisdiction over the seas. The long and interesting history of this court - the procedure and practice of which was transferred to the Probate, Admiralty and Divorce Division of the High Court of Justice along with the

³³ See *R v Millis* (1844) 10 Cl and Fin 534 per Tindall LCJ where his Lordship explains that the authority of the canon law is to be found in its recognition by the Common law of England and the authority of the same is limited by the Common law to the extent to which it is observed in England. In English law the Canon law is not the general Canon law of Europe but a variant of this which was in usage in England and recognised as such by the Common law.

³⁴ Hale, M., *History of the Common Law* (1713, 5th ed London 1820), p 158.

³⁵ Blackstone, W., *Commentaries on the Law of England* (1st ed Oxford 1765), III p 100.

³⁶ Jolowicz, H.F., *Roman Foundations of Modern Law* (Oxford: Clarendon Press 1957), p 141ff.

³⁷ 22 & 23 Car II, c 10.

³⁸ *Institutes*, 2.7.1.

³⁹ *Public Trustee v Bussell* (1993) 30 NSWLR 111, per Cohen J at 116.

Ecclesiastical jurisdictions by the Judicature Acts - cannot be charted here. Our discussion must be limited to the influence of the Civil law on this jurisdiction. Scrutton classifies the foundations of Admiralty law into two categories: the Civil law and subsequent written and customary rules adopted to keep up with commercial developments.⁴⁰ The Civilian influence is attributed to two sources. Scrutton maintains that Roman influence over the Court's procedure resulted from the clerics who were appointed judges of the Court early in its history.⁴¹ The greater influence, however, was to be found in the Roman content in the Law Merchant which the Court applied.⁴²

The Law Merchant consisted of the customs of the merchants of the sea faring nations who required a uniform law which could govern commercial transactions irrespective of variations in local laws. As the Law Merchant developed among the coastal nations of the Mediterranean, in which there was a common legal history of Roman rule, a modified version of the Civil law continued to govern mercantile activities in the form of codes such as the Laws of Oleron.⁴³ A survey of the great text-writers suggests that the extent to which the Civil law ought be regarded as part of the law of England depends largely on extent of the particular author's aversion to the Civil law.⁴⁴ That the influence of the Civil law on the criminal jurisdiction of the Admiralty was not enduring. Blackstone notes that the Civil procedure was displaced by the Common law system of trial by jury at an early stage.⁴⁵

The Law Merchant was the conduit for the flow of numerous important Roman concepts into Admiralty. These include average (*Contribution*), bottomry (*pecunia trajectitia vel nauticum foenus*), probably charter parties and notably the procedure *in rem* against a ship (*Noxa caput sequitur*).⁴⁶ The Law Merchant also made many valuable contributions to the Common law. Particularly under the influence of Lord Mansfield many new innovations found their way into the Common law from the Law Merchant. One must be careful however to distinguish the contribution of the Law Merchant to the Common law generally from the narrower class of such contributions where the contribution is of Roman origin. While the action for money had and received⁴⁷ and recovery of general average contributions⁴⁸ are of Roman origin, other developments, such as Lord Mansfield's greatest work in insurance and the law of bills of exchange, though introduced via the Law Merchant, appear to have evolved in the Law Merchant

⁴⁰ *Op. cit.*, p 173.

⁴¹ *Id.*, pp 172-3.

⁴² *Id.*, p 173.

⁴³ *Id.*, pp 170-1.

⁴⁴ See generally *id.*, pp 174-5: writers such as Godolphin regard the Civil law as the established sea laws of England whereas the great champions of the Common law such as Hale emphasis that the Civil law has no authority of itself in England even in the Admiralty, where it is usage is the source of its authority. It is Scrutton's conclusion that the various views are not irreconcilable. Ultimately, however, the legal justification for the influence, whatever it be, does not detract from the reality that the law administered in Admiralty has a substantial Roman influence.

⁴⁵ *Op. cit.*, IV, p 268.

⁴⁶ Scrutton, *op. cit.*, p 176.

⁴⁷ See *Moses v McFerlane* 2 Burr 1005 1 W Bl 219.

⁴⁸ See *Birkley v Presgrave* 1 East 228.

independently of Roman influence.⁴⁹ Thus Scrutton concludes that the Law Merchant is best described as

a probable source of Roman influence on the English law, while the lack of evidence does not allow us to estimate the amount of that influence.⁵⁰

CASES DECIDED IN
ENGLAND NOT
FORMING PART OF
ENGLISH LAW

For the sake of completeness it is appropriate to mention in passing that numerous cases involving Roman law have been decided in England by English judges on appeal from jurisdictions where the Civil law is an original source of law. This includes appeals to the House of Lords from Scotch courts, eg *Cantiare San Rocco S.A. v Clyde Shipbuilding and Engineering Co*,⁵¹ in which it was held that the *condictio causa data causa non secuta* formed part of the law of Scotland, and appeals to the Judicial Committee of the Privy Council from countries such as Malta,⁵² where the local common law includes Roman law, and jurisdictions such as South Africa where Roman-Dutch Law applies.⁵³ Writing in 1926, Oliver regarded this as the most prolific class of cases in which questions of Roman law arose in modern cases.⁵⁴

INFLUENCE OF THE
CIVIL LAW ON
ENGLISH LAW

That the Civil law has enjoyed a continuous influence in England since its rediscovery in the eleventh century cannot seriously be denied. Yet it is equally clear that it has never constituted a source of law in England. Its contribution is to be found in the influence of Roman structures on the great text-writers, the influence of the Civil law on the Law Merchant and thereby the Admiralty, on the Ecclesiastical courts in the absence of Canon law and on Common law jurisprudence through text-writers such as Bracton in the absence of precedent. It has been a subtle and indirect influence, but nevertheless a vital one. It is a product of the dialogue between the wisdom of generations that constitutes civilisation.

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⁴⁹ Scrutton, *op. cit.*, pp 182-4.

⁵⁰ *Id.*, p 185.

⁵¹ [1924] AC 226.

⁵² Eg *Strickland v Strickland* [1908] AC 551.

⁵³ The Privy Council has heard appeals concerning some aspect of the Civil law from a wide variety of jurisdictions including Quebec, Mauritius, St Lucia, Malta, Ceylon and South Africa. Such appeals are distinct from English cases in which questions of conflict of laws involving Roman law arise.

⁵⁴ *Op. cit.*, p 252.

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