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# SPEECH



## THE ROMAN CONTRIBUTION TO THE COMMON LAW\*

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### THE EIGHTH ANNUAL BRENDAN F. BROWN LECTURE

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Loyola University School of Law, New Orleans, Louisiana

#### I. INTRODUCTION

It is a genuine pleasure and privilege to deliver a lecture which honors the memory of a dear friend, an outstanding Catholic scholar who devoted a long life in the service of the law. This is the second occasion on which I have been so singularly honored to give a lecture which bears the name of Dr. Brendan F. Brown. Personally, and on behalf of all of those who had the privilege to know him, I congratulate Loyola University upon its goodness and wisdom to have established the Brendan F. Brown Lectureship at the law school where Dr. Brown taught after his distinguished service as Dean of the Catholic University of America School of Law. Indeed, I believe it is fitting to restate a few of the thoughts that I expressed at The Catholic University on March 25, 1982, when I

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was privileged to deliver the inaugural Brendan F. Brown Distinguished Lecture.

Dr. Brown received his A.B. and LL.B. undergraduate degrees from Creighton University and several graduate degrees from The Catholic University of America. He obtained a Ph.D. in Law from Oxford University under the tutorship of Harold Hanbury, Vinerian Professor of Common Law. He studied Jurisprudence as a special student at the Harvard Law School under Roscoe Pound.

Dr. Brown's remarkable career as a teacher began in 1921 at Creighton University in Omaha, Nebraska, as an instructor of English, History and Latin. These subjects are indicative of his wide-ranging intellectual interests. In a law teaching career that covered half a century, Dr. Brown taught most of the traditional law school courses.

On the campus of The Catholic University, Dr. Brown, who taught Jurisprudence with extraordinary dedication, was and continues to be best remembered as Dean and Professor of Law. Dr. Brown served as dean of the law school at The Catholic University from 1949 to 1954. He then joined the faculty of Loyola University in New Orleans, Louisiana. At Loyola, he continued to teach Jurisprudence, International Law and Comparative Law, subjects which for many years brought us together at a variety of scholarly meetings throughout the country.

My friendship with Dr. Brendan Brown began more than forty years ago with our common efforts to perpetuate the memory of St. Thomas More by furthering the work of the St. Thomas More Society of America. In 1975, Loyola University respectfully dedicated an issue of its law review to Dr. Brown.<sup>1</sup> That issue of the *Loyola Law Review* is of special interest because, in addition to a beautiful tribute by Dean Antonio E. Papale,<sup>2</sup> it contains an inspirational address by Chief Judge Howard T. Markey on the life of St. Thomas More.<sup>3</sup> In publishing Chief Judge Markey's address, the Editor of the law review expressed the following thought that seems most appropriate at a lecture dedicated to the memory of Dr. Brown: "The students and faculty at Loyola University School of Law sincerely believe that the ideals of Saint Thomas More

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1. 21 *Loy. L. Rev.* 803-1050 (1975).

2. Antonio E. Papale, *A Tribute to Dr. Brendan F. Brown*, 21 *Loy. L. Rev.* 803 (1975).

3. Chief Judge Howard T. Markey, *Thomas More—Circa 1975*, 21 *Loy. L. Rev.* 807 (1975).

which Chief Judge Markey has so poignantly expressed have been exemplified in the fruitful life of Dr. Brendan F. Brown."<sup>4</sup>

Most legal educators will remember Dr. Brown for his philosophical contributions to the law and the missionary zeal with which he urged the study and influence of natural law. Dean Papale noted that Dr. Brown "won many converts to the natural law," and that "[t]his accomplishment [which was] a driving force in his life . . . added a new dimension to natural law thinking. . . ."<sup>5</sup>

Many students and scholars will honor him for his *Natural Law Reader*, published in 1960, in which he attempted to present the "causes of the rise, decline and contemporary revival of natural law."<sup>6</sup> In this valuable collection of writings, Dr. Brown referred to the use of natural law "as a criterion for the evaluation of human positive law, and as an ideal by which legal systems should be guided."<sup>7</sup> He expounded a philosophy of law which he was convinced would lead to a just and more perfect legal and political order. In my lecture on *The Roman Contribution to the Common Law*, I hope that I do justice to the ideals and principles which animated Dr. Brown's life and dedicated service to the cause of peace and justice.

## II. THE ROMAN LEGAL HERITAGE

The vastness of the subject of Rome and its contribution to the world reminds me of the words of Montesquieu in his great work, *The Spirit of the Laws*, wherein he stated that if this work has any merit, it is due chiefly to the majesty of the subject.<sup>8</sup> Clearly, there is no need to extol the greatness of the Roman legal system. Its enduring place in the stream of law and civilization is firmly established, and its preeminence is not disputed. The question to be discussed is whether the Roman legal system has been received by or has influenced to any extent the legal system that prevails in the common law world.

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4. *Id.*

5. Papale, *supra* note 2, at 804.

6. BRENDAN F. BROWN, *THE NATURAL LAW READER* at ix (1960).

7. *Id.*

8. These remarks summarize lectures delivered at Philosophy Hall, Columbia University and published in Edward D. Re, *The Roman Contribution to the Common Law*, 29 *FORDHAM L. REV.* 447 (1961).

It is clear to legal historians that the Roman law was not "received" in Britain in the same manner and to the same degree that it was "received" on the European continent. Rather, my inquiry is to ascertain the degree or extent to which Roman law has contributed or influenced the British legal system or the common law. A study of the subject will lead to the inescapable conclusion that to deny the enduring contribution of Roman law would be to deny the universality, terminology, maxims and principles that have been infused and transmitted into the body of the common law.

The purpose of this presentation is not to extol the virtues of the Roman legal system, but rather to summarize its influence "on the English way of looking at the law"<sup>9</sup> and the English common law. Hence, there will be no discussion of the value of the study of Roman law and its language and doctrines. Nonetheless, reference must be made to Dean Pound, who in 1950, in his fifty-first year of teaching law, spoke of the value of having studied Roman law.<sup>10</sup>

In speaking of the role of law teachers, Dean Pound mentioned teachers who had influenced his thinking and career. Speaking of the specific contribution of Professor John Chipman Gray, Dean Pound states:

But what I owe to him chiefly is the interest in Roman law and the civil law in which he set me on the right track at the beginning. What I have been able to do since in comparative law I owe to the good start he gave me.<sup>11</sup>

After noting that Gray's *Cases on Property* contains many extracts from the *Institutes* of Justinian "in connection with subjects where the Roman law had come into the formative English law by way of Bracton,"<sup>12</sup> Pound relates an incident that occurred in the library when he was reading Lord Mackenzie's *Roman Law*:

Professor Gray came in presently and, I suppose, was curious to know what I was doing there. Coming up behind me he saw what I was reading and said in his characteristic somewhat abrupt way, "Don't read *that*." I inquired, "What should I read?" He asked, "Do you read German?" I said I could, and he went into the stacks, took

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9. Munroe Smith, *Elements of Law*, in *STUDYING LAW* 171, 341 (Arthur T. Vanderbilt ed., 2d ed. 1955).

10. Dean Roscoe Pound, *Some Comments on Law Teachers and Law Teaching*, 3 J. LEGAL ED. 519 (1951).

11. *Id.* at 523.

12. *Id.*

out Sohm's *Institutionen des Römischen Rechts*, which had not then been translated, put it down before me at the subject about which I had been trying to read in Lord Mackenzie, said "read that," and went off as abruptly as he had come. Mastering this book was the beginning of years of private reading and study of Roman law and its development in the modern world.<sup>13</sup>

Only one additional sentence will be quoted from Dean Pound's remarks: "But I can never be sufficiently grateful to him for setting me in the straight path in Roman law."<sup>14</sup>

Even beyond the contribution of language and concepts, the undeniable beneficial survival of equity, in itself, would make impossible a denial of the Roman contribution to the common law. Since America has inherited the common law of Britain, to speak of the Roman contribution to the common law is to speak of the Roman contribution to Anglo-American law. This is of special significance because many imperishable phrases and concepts, regarded as uniquely American, as well as many deemed to be exclusively English, have deep Roman roots traceable to great Roman jurists.

For Americans, it is particularly noteworthy that the inspiring statement that "by natural law all men are equal" is the inspiration of the great Ulpian, as is the noble definition that "justice is the constant and perpetual will to allot to every man his due."<sup>15</sup> Although all students of the common law know Latin maxims such as *volenti non fit injuria* and *res ipsa loquitur*, few know that they also, in addition to countless others, represent the survival in modern law of the genius that was Ulpian.<sup>16</sup> In portraying Papinian and Ulpian, Professor John Henry Wigmore, in his instructive and most enjoyable *A Panorama of the World's Legal Systems*, reminds the reader that "for us, these two bear also this sentimental distinction, that (with Paulus) they once dispensed justice in the island of Britain, as Roman magistrates in a Roman basilica."<sup>17</sup>

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13. *Id.*

14. *Id.* at 524.

15. *Re, supra* note 8, at 452.

16. *Id.*

17. JOHN H. WIGMORE, *A PANORAMA OF THE WORLD'S LEGAL SYSTEMS* 428 (1928).

### III. BRITAIN AS A ROMAN PROVINCE: ULPIAN, PAPINIAN, AND PAULUS

Although it is difficult to find a felicitous point of beginning, the following outline may serve to show the various avenues of transmission or influence of the Roman contribution to the English legal system. In 53 B.C., Julius Caesar landed in Britain. In 43 A.D., the systematic conquest of Britain was begun by Agricola, and for the next three and a half centuries Britain was a Roman province. This occupation cannot be minimized because it is clear that Britain was an imperial province of the first order. At one time it had a garrison of about 30,000 Roman soldiers and was regarded as an important Roman governorship.<sup>18</sup> Likewise, it is well to remember that, four centuries later, the Roman legions were withdrawn from Britain because they were needed to defend the Italian peninsula against the invasions from the north. They were not ousted from the island. As Mommsen puts it: "[I]t was not Britain that gave up Rome, but Rome that gave up Britain."<sup>19</sup>

History tells us that the Roman legions were not evacuated until 410 A.D. Since Britain was under Roman rule for such a long period of time, how could it have completely escaped the influence of Roman law? Those that have urged that the feudal system was of Roman origin, that the craft guilds were the descendants of the *collegia opificum*, and that the English village community was derived from the Roman villa have met with the severest attack.<sup>20</sup> Selden, for example, declared that when the Romans left Britain, their law likewise departed.<sup>21</sup> After stating Selden's opinion on the matter, Dr. Winfield comments:

No reasonable man can resist the conclusion that it must have had some effect while he was there. Lawyers like Papinian, Ulpian and Paul, would leave their influence on anyone with whom they came in touch, and Papinian was at one time prefect of York, and may possibly have had Paul and Ulpian as his assessors there. Nor is it credible that Rome, of all empires, should have ruled any dominion for three and a half centuries without making her subjects familiar with some of the principles of law that backed her government.<sup>22</sup>

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18. 1 THEODOR MOMMSEN, *THE PROVINCES OF THE ROMAN EMPIRE* 190 (Dickson trans., 1886).

19. *Id.* at 194.

20. PERCY H. WINFIELD, *THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY* 54 (1925).

21. JOHN SELDEN, *DISSERTATION AD FLETAM*, CH. IV (1685 ed.).

22. WINFIELD, *supra* note 20, at 55.

Mommsen tells us that the Roman law "made rapid strides in Britain during the second and third centuries A.D., as is attested by the writings of the Roman jurists Javolenus and Ulpian, who discussed cases arising in Britain."<sup>23</sup> Reference must again be made to Papinian. He was chief justice at York with Ulpian and Paulus as his associate justices. Commenting upon this galaxy of talent, Dr. Sherman, writing in 1914, states that it was "as if the United States Supreme Court were to hold sessions in Alaska."<sup>24</sup>

#### IV. THE ADVENT OF CHRISTIANITY: THE EARLY KINGS AND A NEW OUTLOOK

The introduction of Christianity into Britain had far-reaching effects both upon the people and the law of the land. Since Constantine had adopted Christianity as the state religion in 325 A.D., this introduction had started in the later years of the Roman occupation of Britain. Assuming, however, that after the Romans left, the Britons had to be converted anew, this reconversion took place within a comparatively short time. The important date in this reconversion is 596 A.D., the date of the arrival of St. Augustine, who established contact between the English tribes and the Roman Church.

St. Augustine, with forty missionary Benedictine monks, in 596 A.D. arrived at Canterbury (hence known as St. Augustine of Canterbury, as distinguished from the great St. Augustine of Hippo, in Africa) where he built a monastery and established his episcopal seat. The most famous of St. Augustine's converts to Christianity was Ethelbert, King of Kent. Ethelbert welcomed St. Augustine and his missionaries and willingly gave them permission to preach everywhere in his kingdom.

St. Augustine was sent to Britain by St. Gregory or Pope Gregory the Great, as he was also called. The fact that the leadership of the Church was under St. Gregory at the time when Augustine was spreading the teachings of Christianity in Britain is of special significance. Gregory had dedicated himself to the task of establishing the spiritual supremacy of the Church over all of Europe. It has been written that he "was a Roman of the Romans,

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23. MOMMSEN, *supra* note 18, at 194.

24. Charles P. Sherman, *The Romanization of English Law*, 23 YALE L.J. 318 (1914).

nurtured on traditions of Rome's imperial greatness, cherishing the memories of pacification and justice, of control and protection."<sup>25</sup>

It is well established that Gregory knew the Digest of Justinian.<sup>26</sup> Likewise, it is well established that Ethelbert of Kent soon revealed Roman influences because, in approximately 600 A.D., on "St. Augustine's day," he compiled or codified the laws of his kingdom in "Roman style" or in "Roman fashion."<sup>27</sup> The latter phrases are translations of the Latin *juxta exempla Romanorum*, found in Bede's *Ecclesiastical History of England*, written about 735 A.D. Hence, Ethelbert committed his laws to writing "according to the example of the Romans" or "according to the Roman mode,"<sup>28</sup> an event which significantly occurred around 600 A.D. It is therefore almost a certainty that Augustine and his missionaries, sent to Britain by Gregory, must have brought to the attention of Ethelbert the "exploits of Justinian, then dead scarcely forty years."<sup>29</sup> Hence, in this pre-Norman period, two dates are crucial. The first is 565 A.D., the date of the Justinian codification, and 596 A.D., the date of the arrival of St. Augustine and the clergy, who brought to the island principles of public administration, as well as notions of individual moral responsibility.<sup>30</sup>

Committing the laws to writing, first accomplished by Ethelbert, set a precedent to be followed by several of the later kings. The first law book of Wessex was compiled by order of King Ina about 700 A.D. In 827, the kingdoms of the Angles and the Saxons united under Egbert and became Angle-land—England. Alfred, who has been called "the Great" by English historians by reason of his literary attainments and because he drove out the Danes, reigned from 871 to 901. In Alfred's youth, he visited Rome and endeavored to import to England the learning of the Continent. He promulgated a code known as *The Laws of King Alfred*, wherein he gathered such laws of Ina and Ethelbert that to him seemed good.<sup>31</sup> The next great king, Canute, ruled in Denmark and also in

25. W.H. Hutton, *Gregory the Great*, in 2 THE CAMBRIDGE MEDIEVAL HISTORY 236, 251 (H.M. Gwatkin & J.P. Whitney eds., 1964).

26. See 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 11 (2d ed. 1898).

27. *Id.* (citing ST. BEDE, THE ECCLESIASTICAL HISTORY OF THE ENGLISH NATION (1910)).

28. See WILLIAM L. BURDICK, PRINCIPLES OF ROMAN LAW 62 (1938); EDWARD JENKS, A SHORT HISTORY OF ENGLISH LAW 4 (1912); Sherman, *supra* note 24, at 319.

29. Sherman, *supra* note 24, at 319.

30. See generally Re, *supra* note 8, at 458-61 and sources cited therein.

31. BENJAMIN THORPE, ANCIENT LAWS AND INSTITUTES OF ENGLAND 20, 27 (1840).

England from 1016 to 1035. He, too, had visited Rome and enacted comprehensive statutes, earning for him the honor of being called "the greatest legislator of the eleventh century."<sup>32</sup>

#### V. THE NORMAN CONQUEST: WILLIAM AND LANFRANC

The most important immediate consequence of the Norman conquest was the introduction into Britain of an orderly system of law and government. William, apparently a gifted administrator, had developed a sound financial organization called the "Camera," or chamber.<sup>33</sup> After nearly twenty years of preparatory work, he accomplished the remarkable feat of successfully invading England by crossing the English Channel. His victory over Harold at the Battle of Hastings and the date, 1066, are matters of common knowledge. However, even those who know of the contribution of William in systematizing the administration of the island may not know of the role played by Lanfranc, the lawyer from Pavia, most often described as "the Conqueror's right-hand man."<sup>34</sup> This distinguished scholar, who in 1070 became Archbishop of Canterbury, was William's "prime minister and chief adviser."<sup>35</sup> Not only was he a great prelate and theologian, but he was also an accomplished lawyer who had studied and taught Roman Law at Pavia, in his native Italy. He was one of the "masters" of the "Longobardistic-Frankish" school of lawyers and was always remembered "with respect" by the great jurists for his knowledge of the law.<sup>36</sup> By training and experience he was uniquely suited for the role of "prime minister."

Lanfranc arrived at Normandy and opened a secular school at Avranches. While in Normandy, he became a monk and taught at the Abbey at Bec.<sup>37</sup> Although there is some doubt, it is probable that, in addition to grammar and rhetoric, Lanfranc also taught Roman law both at Avranches and at Bec.<sup>38</sup> The probability is strengthened by the fact that he was remembered in Normandy as a discoverer of Roman law.<sup>39</sup>

32. 1 POLLOCK & MAITLAND, *supra* note 26, at 20.

33. ROBERTO CALASSO, *MEDIO EVO DEL DIRITTO* 618 (1954).

34. 1 POLLOCK & MAITLAND, *supra* note 26, at 77.

35. BURDICK, *supra* note 28, at 65.

36. CALASSO, *supra* note 33, at 307, 618.

37. *Id.* at 618.

38. *Id.*; 1 POLLOCK & MAITLAND, *supra* note 26, at 78.

39. See 1 POLLOCK & MAITLAND, *supra* note 26, at 78 and sources cited therein.

By virtue of the special confidence reposed in him by William, Lanfranc's influence upon the law at this most crucial period of English legal history cannot be overemphasized. Admittedly he knew Lombard law, Roman law and the canon law. In fact, when he was Archbishop "the *decreta* and *canones* were ever in his mouth."<sup>40</sup>

#### VI. POST-NORMAN DEVELOPMENT: THE EARLY ARCHBISHOPS, VACARIUS AND THE LEGISTS

Lanfranc and the Abbey at Bec had a direct and profound influence upon England for generations to come. Lanfranc was followed as Archbishop of Canterbury by St. Anselm (1033-1109), who had also been a monk and teacher at the Abbey at Bec. St. Anselm was a Piedmontese who, because of his writings, is considered the father of Scholasticism.<sup>41</sup> He is well known in English history for his quarrels with Rufus and Henry II, having thereby precipitated the Investiture contest in England.<sup>42</sup> Under Anselm, not only does one see the independence which soon would cause chancellors to assume jurisdiction and give relief in causes when the ordinary courts would not, but also an inceptive special prominence of the clergy in all matters legal—whether canonical, civil or Anglo-Saxon.

Anselm was succeeded as Archbishop by Theobald, in whose household was trained Thomas à Becket, who was to be Chancellor, Archbishop and martyr. In 1145 [1143?], Theobald brought to England Vacarius, a celebrated "civilian glossator" from Mantua, who taught Roman law at Bologna.<sup>43</sup>

The importance of Vacarius upon the subject can be gleaned from the introductory sentences of Scrutton in his Yorke Prize Essay. Scrutton's dichotomy is indeed a glowing tribute to the influence of Vacarius upon the law of England. He states:

Any discussion of the influence exercised in England by the Roman Law will naturally fall into two divisions separated by the arrival in the year 1143 of Vacarius on our shores in the train of Archbishop

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40. *Id.*

41. *See Re, supra* note 8, at 465 and sources cited therein.

42. *Id.*

43. Gaspare Ambrosino, 2 *Glossatore Vacario Polemista Antiereticale* (nota bibliografica), in *RIVISTA ITALIANA PER LE SCIENZE GIURIDICHE* 415-20 (1950); CALASSO, *supra* note 33, at 618.

Theobald, and his lectures on Roman Law at Oxford in and after 1149; for these events, which in European history form part of the current of Roman influence which sprang from the enthusiastic studies of the Law School at Bologna in the 12th century, begin a new era in the history of English law and of its connexion with the legal system of Rome.<sup>44</sup>

In addition to teaching at the Archbishop's household, Vacarius became the first law professor in England by founding the law school at Oxford. A very successful teacher, "students looked up to him as their *magister* and reverently received his glosses."<sup>45</sup> Students, both rich and poor, flocked to hear Vacarius teach the Roman laws, and because those who were poor could not buy parchment copies of Justinian's Code and the Digest, he made a summary of them. This book, called *A Summary of Law for Poor Students*, written about 1149, is a condensed version of the Code, richly illustrated by extracts from the Digest.<sup>46</sup> We are told that because of Vacarius' *Liber Pauperum*, the law students at Oxford were "for a long time" called "pauperists."<sup>47</sup>

#### VII. THE FORMATIVE LEGAL LITERATURE: GLANVILL, BRACTON, AND MAGNA CARTA

Surely, much more can be said about Vacarius and the influence that he must have exerted upon the minds of the intellectually curious of his time. Suffice it to say that it was a pupil of Vacarius, Ranulf de Glanvill (1130-1190), an ecclesiastic, to whom is attributed the writing of the most ancient work extant on the common law of England. This Latin text, written between 1187 and 1189, is called *A Treatise on the Laws and Customs of England composed in the time of King Henry the Second while the honorable Ranulf Glanvill held the helm of justice*. Glanvill, who enjoyed the complete confidence and respect of Henry II, who might have been a pupil of Vacarius,<sup>48</sup> became Chief Justiciar of England in 1180.

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44. THOMAS E. SCRUTTON, *THE INFLUENCE ON THE ROMAN LAW OF THE LAW OF ENGLAND* 1 (1885) (citations omitted).

45. Burdick, *supra* note 35, at 67; 1 POLLOCK & MAITLAND, *supra* note 26, at 118.

46. Re, *supra* note 8, at 466.

47. J. ORTOLAN, *THE HISTORY OF ROMAN LAW* 530 (Iltudus T. Pritchard & David Nasmith trans., 1871).

48. William Stubbs, *The History of the Canon Law in England*, in 1 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 248, 259 (1907).

Notwithstanding the lasting contributions of Henry II, and even up to the reign of Henry III, who reigned from 1216 to 1272, it could hardly be said that there was in England a "common law." Curiously enough, the words themselves represent a borrowing since they are a translation of the *ius commune* of the canon and Roman law. Although the words were well known to the canonists, they were not yet of frequent usage. The words *ius commune* soon were, quite naturally, borrowed from the canon law that had borrowed them from the Roman law as can be easily seen, for example, from the Code of Theodosius.<sup>49</sup>

The person who gave the greatest impetus to the early development of the common law of England was Henry de Bracton, an ecclesiastic and a royal judge, who for two years, from 1265 to 1267, was Chief Justiciar of England under Henry III. His book, *Tractatus de Legibus et Consuetudinibus Angliae*, has earned such unparalleled tributes as "the crown and flower of English medieval jurisprudence,"<sup>50</sup> "the finest production of the golden age of the common law,"<sup>51</sup> and the "great ornament" of the reign of Henry III.<sup>52</sup> Bracton's work, written in Latin between 1250 and 1258, does more than merely bring up to date the work of Glanvill. Although it bears practically the same title as Glanvill's book, it is not only a book of procedure, but an expository text and commentary. Compared to Glanvill's, Bracton's book is a "voluminous work."<sup>53</sup>

In any discussion of the Roman contribution to the common law, Bracton must hold a unique place of honor worthy of special treatment. The "broad cosmopolitan learning"<sup>54</sup> and use of "foreign materials," that is, the Roman law, which made possible the very format, style and comprehensive treatment for which English law is in Bracton's debt,<sup>55</sup> have made him the source of great controversy. Some historians regard his Romanism so great that they would deny him a place in a discussion of English legal literature.

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49. CODE TH. 2.1.10, 16.5.23.

50. 1 POLLOCK & MAITLAND, *supra* note 26, at 206.

51. JOHN M. ZANE, *The Five Ages of the Bench and Bar of England*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 625, 643 (1907).

52. 2 JOHN REEVES, *HISTORY OF THE ENGLISH LAW* 357 (1880).

53. *Id.*; see ZANE, *supra* note 51, at 644-45.

54. THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 258, 261 (5th ed. 1956).

55. 1 POLLOCK & MAITLAND, *supra* note 26, at 208; see also George E. Woodbine, *The Roman Element in Bracton's De Acquirendo Rerum Dominio*, 31 YALE L.J. 827, 847 (1922).

Perhaps the most forceful critic is Sir Henry Maine, who refers to "the plagiarisms of Bracton"<sup>56</sup> and, with seeming contempt and scorn, writes:

That an English writer of the time of Henry III should have been able to put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the Corpus Juris, and that he should have ventured on this experiment in a country where the systematic study of the Roman law was formally proscribed, will always be among the most hopeless enigmas in the history of jurisprudence. . . .<sup>57</sup>

The "plagiarisms of Bracton" have special reference to Azo, the famous lawyer and Glossator of Bologna, who was called "the master of the masters of the law." There can be no doubt that not only had Bracton "diligently studied"<sup>58</sup> Azo's *Summary of Roman Law*, but he made copious use of the book. As a matter of diversion, it may be added that there was a popular jingle in Bologna about Azo—of particular interest to the lawyer who aspired to judicial office: "Unless on Azzo [sic] you prepare, the jurist's robes you'll never wear."<sup>59</sup>

No remarks concerning the era commencing with Glanvill and ending with Bracton, during the reign of Henry III, could conclude without mentioning King John, from whom "the Army of God and the holy Church" wrested the Great Charter. Magna Carta is the very symbol of freedom, liberty and the rule of law in Anglo-American jurisprudence.<sup>60</sup> Nonetheless, its historical antecedents and its humble origins as a document of human liberty are not too well known, even by the English-speaking lawyer, who relates the glorious achievement of the barons on June 15, 1215 with justifiable pride. A study of the Charter must commence with Thomas à Becket who, refusing to submit to the pretensions of Henry II, was assassinated on the altar of the Cathedral of Canterbury. It has

56. HENRY J.S. MAINE, *ANCIENT LAW* 82 (9th ed. 1883).

57. *Id.*

58. 1 POLLOCK & MAITLAND, *supra* note 26, at 207. For authorities that Bracton "copied from Azo," see 2 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 267-68 (4th ed. 1936).

59. Wigmore, *supra* note 17, at 1008.

60. See FAITH THOMPSON, *MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION 1300-1629* (1948); see also materials cited in Edward D. Re, *Magna Carta: Its Role in the Making of the English Constitution 1300-1629*, 24 ST. JOHN'S L. REV. 185 (1949) (book review).

been said of Thomas that he was "not more a martyr of religion than he was of freedom and justice."<sup>61</sup>

King John's serious difficulties began when Pope Innocent III compelled him to accept Cardinal Stephen Langton as Archbishop of Canterbury, and John retaliated by confiscating Church property. Langton, a truly worthy successor of Thomas à Becket, an exponent of doctrines that all human conduct is subject to law and that "loyalty was devotion, not to a man, but to a system of law and order,"<sup>62</sup> joined with the barons in bringing about, in retrospect, perhaps the most dramatic of all events in English history—the signing of the Magna Carta by King John.<sup>63</sup>

Although the specific author of the Charter is not known with certainty, the most reasonable assumption is that it was drafted by Stephen Langton, a Doctor of Laws from the University of Bologna.<sup>64</sup> The belief that Langton is the author is fortified by the Charter's style and content, and the fact that he was the most prominent among the assemblage of clergy and barons. In this monumental event, it is believed that Langton was assisted by Cardinal Pandolfo, the Papal Legate in England, who upheld Langton's appointment against the protests of King John.

#### VIII. THE GENESIS OF ENGLISH EQUITY: THE CHANCELLOR, THE COURT OF CONSCIENCE, AND A MORE PERFECT REMEDY

Of course, volumes can be, and have been, written on the contribution of equity to the growth, development, and, indeed, the very survival of English law. Without the infusion of the principles and ideals of equity, the common law could not have served a modern highly developed nation. On the vast literature that records the Roman element of English equity, reference will only be made to Lord Bryce.<sup>65</sup>

Bryce introduced the Roman element in English equity as follows:

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61. M.F. MORRIS, *THE HISTORY OF THE DEVELOPMENT OF LAW* 254 (1898).

62. Frederick M. Powicke, *England: Richard I and John*, in 6 *THE CAMBRIDGE MEDIEVAL HISTORY* 205, 219 (J.R. Tanner et al. eds., 1964).

63. For a treatment of the provisions of Magna Carta, see 2 REEVES, *supra* note 52, at 17-30.

64. For a biography of this famous cleric and statesman, see FREDERICK M. POWICKE, *STEPHEN LANGTON* (1928).

65. See 2 JAMES BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* (1901).

Our system of Equity, built up by the Chancellors, the earlier among them ecclesiastics, takes not only its name but its guiding and formative principles, and many of its positive rules, from the Roman *aequitas*, which was in substance identical with the Law of Nature and the *ius gentium*. For obvious reasons the Chancellors and Masters of the Rolls did not talk much about Nature, and still less would they have talked about *ius gentium*. They referred rather to the law of God and to Reason. But the ideas were Roman, drawn either from the Canon Law, or directly from the *Digest* and the *Institutes*, and they were applied to English facts in a manner not dissimilar from that of the Roman jurists. The very name, Courts of Conscience, though the conscience may in the immediate sense have been the King's, suggests that moral element on which the Romans insisted so strongly; and the wide, sometimes almost too wide, discretionary power which Equity judges exercised, finds its prototype in the passages in Roman texts which refer to natural equity as the consideration which guides the judge in qualifying, in special cases, the normal strictness of law.<sup>66</sup>

#### IX. ADDITIONAL INROADS: THE CANON LAW, THE ECCLESIASTICAL COURTS AND THE LAW MERCHANT

It must be obvious that the failure to attribute a separate treatment to the canon law is not because it has not made a monumental contribution. Rather, since the canonical influence has been the sturdy thread that has given body and texture to the entire legal fabric, it has been impossible to separate its influence throughout the discussion of other areas. This feeling of inseparability has also struck Stubbs, who, in his essay on the *History of the Canon Law in England*, said that he "must . . . couple the two Roman systems together, for to all purposes of domestic litigation they were inseparable: the 'canones legesque Romanorum' were classed together, and worked together. . . ."<sup>67</sup> He added that "if you take any well-drawn case of litigation in the middle ages, such as that of the monks of Canterbury against the archbishops, you will find that its citations from the *Code* and *Digest* are at least as numerous as from the *Decretum*."<sup>68</sup> Indeed, if one were asked for a single source which contributed Roman law to English law, the best answer would probably be the canon law. Witness the positive

66. *Id.* at 599-600.

67. Stubbs, *supra* note 48, at 261-62.

68. *Id.* at 262.

statement in Winfield: "It is in the Canon Law which borrowed liberally from Roman Law that we must look for the more abiding influence of Roman Law on our system, rather than in the pure Civil Law."<sup>69</sup>

## X. CONCLUSION

It is hoped that enough has been said to show that the roots of the common law of England are not exclusively Anglo-Saxon. Since there is neither virtue nor greatness in autonomy, and since such a conclusion would do violence to the rules of probability in civilization, the more objective evaluation would acknowledge a Roman influence. Even assuming that the soil was not prepared during the Roman occupation, it is impossible to discount the role of St. Augustine and the missionaries who followed him,<sup>70</sup> and all of this before the Norman invasion with its influx of a host of Roman law scholars commencing with Lanfranc. The story thereafter shows more clearly how the common law was nurtured in an atmosphere of Roman intellectuality—ethical, philosophical and judicial.

It has been said that greatness can only come from participation in the culture of other people. Jhering expressed this thought well when he justified the reception of Roman law in Germany on the broad ground that no nation can attain the highest civilization except by participation in the civilization of the world.<sup>71</sup>

As for the Romans, time has decreed that their most permanent contribution was their law. What can be said of Rome can be said of Justinian. Justinian, like earlier Roman emperors, was a great builder of roads and public buildings. The most splendid of his many churches was the dome-covered Cathedral of St. Sophia. However, history will continue to proclaim his name because he was the Roman Emperor who finally codified the Roman law.<sup>72</sup>

And so, perhaps abruptly, and at a point not as felicitous as desired, our survey comes to an end. It concludes with the hope

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69. Winfield, *supra* note 20, at 57.

70. See CHRISTOPHER DAWSON, *RELIGION AND THE RISE OF WESTERN CULTURE* 64, 81, 126 (1950).

71. See Smith, *Four German Jurists, in A GENERAL VIEW OF EUROPEAN LEGAL HISTORY* 110, 121 (1927).

72. RUDOLPH SOHM, *THE INSTITUTES* 121-25 (Ledlie trans., 3d ed. 1907).

that "insular" patriotism may some day give way to that of "mankind at large."<sup>73</sup> It reaffirms Cicero's profound conviction of the equality of men and the solidarity of mankind.<sup>74</sup> When such a philosophy becomes a rule of daily life, all persons, of whatever heritage, who read of Papinian, Ulpian, Augustine, Lanfranc, Vacarius, Glanvill, Bracton, Langton and countless others, will conclude that they were men worthy of gratitude and commemoration. The greatest debt of gratitude, of course, is owed by those who reap the blessings of the common law.

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73. CICERO, TUSCULAN DISPUTATIONS, I, XXV, 64.

74. See CICERO, DE OFFICIIS and DE REPUBLICA; see also discussion in CHARLES H. McILWAIN, THE GROWTH OF POLITICAL THOUGHT IN THE WEST (1932). For a summary of Cicero's philosophy, see 1 JAMES B. SCOTT, LAW, THE STATE AND THE INTERNATIONAL COMMUNITY 143-57 (1939).

sentative Curtis of Massachusetts, "The fight . . . against unwarranted Federal interference must be a continuous one. . . . The main purpose of interstate compacts is to find a way of avoiding the constant growth and concentration of Federal power, and to make provision for the States to assume responsibilities and act effectively in matters of local concern. . . . This purpose is prejudiced, if not defeated . . ." by the current trend in Congress.<sup>101</sup> That trend must be reversed.

101. 106 Cong. Rec. A7248 (daily ed. Sept. 21, 1960).

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## THE ROMAN CONTRIBUTION TO THE COMMON LAW†

EDWARD D. RE\*

*Although the Roman law was not received in England to the extent that it was received on the Continent, Professor Re submits that its influence was hardly less pervasive. The concepts, the terminology, the universality, and the jurisprudential principles of that vast system were transmitted and infused into the body of English law throughout its development. While the growth of the Anglo-American law still continues, so may the contributions to its development by the Roman law, whose own growth so closely parallels the growth of civilization.*

*"Si cet ouvrage a du succès, je le devrai beaucoup à la majesté de mon sujet."\*\**

### I. PROLOGUE: THE ROMAN LEGAL HERITAGE AND THE LAW OF ENGLAND

**I**N A discussion of any phase of legal history, the difficulty of finding a point of beginning seems obvious. "Such is the unity of all history that any one who endeavours to tell a piece of it must feel that his first sentence tears a seamless web."<sup>1</sup>

This frustrating difficulty has been experienced particularly by those who have attempted to unravel the complex skein of English legal history. Plucknett, for example, in a remarkable one-volume work modestly entitled *A Concise History of the Common Law*, refers to the dependence or indebtedness of later civilizations upon those that preceded in the following way:

The age which saw the first beginnings of English history witnessed also the decline of Roman law which had run a course of a thousand years, making priceless contributions to civilization. But behind the Roman system were others still more ancient—Greek, Semitic, Assyrian, Egyptian—all with long histories of absorbing interest.<sup>2</sup>

† This article is based on lectures delivered at Philosophy Hall, Columbia University, in February 1959 under the auspices of the New York Classical Club, and at the Instituto Italiano di Cultura (of the Italian Embassy), 686 Park Avenue, New York City, in December 1959.

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\*\* "If this work be successful, it shall be due chiefly to the majesty of the subject." Montesquieu, *De L'Esprit des Lois* ii (Nouvelle édition, Paris, Imprimerie E. Capiomont et V. Renault). (Author's translation.)

1. 1 Pollock & Maitland, *The History of English Law* 1 (2d ed. 1898) [hereinafter cited as Pollock & Maitland]. In 1882 Stubbs commenced his essay on *The History of the Canon Law in England*, in 1 *Select Essays in Anglo-American Legal History* 248 (1907), by saying: "It requires no small amount of moral courage to approach a subject of legal history without being either a lawyer or a philosopher." Without commenting for the philosopher, it may be added that it requires no lesser an amount of moral courage for a lawyer!

2. Plucknett, *A Concise History of the Common Law* 3 (5th ed. 1956).

For our purposes, however, it would seem practical that the inquiry begin with the Roman occupation of the British Isles.

It is not the burden of this article to extol the virtues of the Roman legal system, or its judicial precepts and institutions. This has already been done by skilled hands. Nevertheless, since the Roman legal system had "undoubtedly wider historical significance than the common law" even if only because of "circumstances," some passing reference will be made to the prestige enjoyed by the Roman law and how it must have influenced the minds of future generations familiar with its panorama of legal rights and duties.<sup>3</sup> It has been said that far more important than the reception of Roman "rules" of law by the English law "was the influence of the Roman law on the English way of looking at the law, on English jurisprudence and on English law writing."<sup>4</sup>

Clearly, no attempt will be made to trace the Roman law to its sources to determine its indebtedness to prior legal systems and cultures. Nor will the corpus juris of Rome or Roman legal institutions be compared with the common law of England. By and large all of this has been admirably treated by eminent scholars of unquestioned authority.<sup>5</sup>

Rather, what is to be attempted concerns the extent to which the Roman law played a part in the growth and development of the common law of England. Hence, the subject has been entitled *The Roman Contribution to the Common Law*. To the extent that the common law of England supplied the legal fabric for the United States of America, the title might very well have been *The Roman Contribution to Anglo-American Law*.

It is clear to the legal historian that the Roman law was not "received" in England to the degree and in the manner that it was "received" on the Continent. Nevertheless, it is gross error to deny its influence and pervasive impact upon the growing body of English law, particularly during its formative period. Whereas on the Continent the Roman law was utilized to meet the needs of changing social conditions, it is demonstrable that English law borrowed "foreign law" to meet the increasing needs of a developing great nation.

Professor Munroe Smith of the Columbia Law School told his students that in England "equity jurisprudence and legislation served to help bridge the gaps in the law, which, on the Continent, were filled by Roman law."<sup>6</sup>

3. See Yntema, *Roman Law and Its Influence on Western Civilization*, 35 *Cornell L.Q.* 77, 79 (1949).

4. Smith, *Elements of Law*, in *Studying Law* 171, 341 (Vanderbilt 2d ed. 1955).

5. See Buckland & McNair, *Roman Law and Common Law* (2d ed. Lawson 1952); Burdick, *The Principles of Roman Law* (1938); Sherman, *Roman Law in the Modern World* (2d ed. 1922).

6. Smith, *Elements of Law*, in *Studying Law* 171, 339 (Vanderbilt 2d ed. 1955).

Hence, while we may not speak strictly of a "reception" or "acceptance" of Roman law in England, this is not to imply that "Roman law had no influence on English law."<sup>7</sup> The very same scholar who refers to English "equity" as a reason why Roman law was not "received" in England, goes on to say: "In equity there was, of course, more borrowing than elsewhere."<sup>8</sup> Professor Yntema, perhaps wishfully, has also noted that, despite certain differences, the two people whose laws we are discussing possess certain national traits in common.<sup>9</sup>

In presenting the indebtedness of the common law to the Roman law, some remarks concerning the place of Roman law in the general stream of culture are inevitable.

## II. THE STUDY OF ROMAN LAW: THE LANGUAGE, DOCTRINES AND PHILOSOPHY OF LAW

As a threshold inquiry one may very well ask, "Why discuss Roman law at all, and particularly at this late date?"

In this connection, the reader ought to pause for a moment to grasp the full impact of John Maxcy Zane's introductory sentences in his famous essay on *The Five Ages of the Bench and Bar of England*. He wrote:

It is a singular fact that but two races in the history of the world have shown what may be called a genius for law. The systems of jurisprudence, which owe their development to those two races, the Roman and the Norman, now occupy the whole of the civilized world.<sup>10</sup>

7. *Id.* at 340.

8. *Id.* at 341.

9. E.g., "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." Yntema, *supra* note 3, at 77.

10. 1 *Select Essays in Anglo-American Legal History* 625 (1907). See books recommended by d'Entrèves in his *Natural Law; An Introduction to Legal Philosophy* 16, 32 (1951). Professor d'Entrèves, of Oxford and formerly of the University of Turin, says: "Historical and critical study of Roman law has developed in the last hundred years, and particularly in Germany and in Italy, into an immense literature which cannot be referred to in detail. To the English reader the most inspiring approach to Roman Law jurisprudence may perhaps still be provided by Gibbon's *Decline and Fall*, Chapter xlv." *Id.* at 32. The Reverend H. H. Milman in his edition of Gibbon says that "this important chapter [on Roman law] is received as the text-book on Civil Law in some of the foreign universities." 4 Gibbon, *The History of the Decline and Fall of the Roman Empire* 298 (Milman ed. 1852). Gibbon opens that chapter thus: "The vain titles of the victories of Justinian are crumbled into dust. But the name of the legislator is inscribed on a fair and everlasting monument. Under his reign, and by his care, the civil jurisprudence was digested in the immortal works of the Code, the Pandects, and the Institutes: the public reason of the Romans has been silently or studiously transfused into the domestic institu-

To this may be added the words of Dr. James T. Shotwell, found in his most recent masterful work entitled *The Long Way to Freedom*:

Down to our own day the daring achievements of Athenian democracy have remained an inspiration for the thoughtful and studious rather than a model for practical application in world affairs. On the other hand, the Roman experience in government was the largest single influence upon the minds of those who, throughout the long centuries of European history, created the state system of today.<sup>11</sup>

Fully appreciative of the Roman contribution to government—and man's struggle for freedom—Dr. Shotwell notes that Rome's most lasting contribution was the Roman law:

The permanent contribution of Rome to the Western world was not this prodigious structure of empire, however lasting its impression on the minds of statesmen and peoples of succeeding centuries, but the development of a vast and splendid system of law. The history of this great juristic creation runs parallel with that of Rome itself from the days of kingship of the little city state to those of the Emperor Justinian when the barbarians were already ruling in the West and the last citadel of the ancient world was Constantinople.<sup>12</sup>

Is the subject important or useful? Two witnesses will be called to testify on the cultural and practical value of the subject. The first will be a distinguished Englishman, a reader in Roman law in the Inns of Court, who states:

The reasons which justify [the study of Roman law], particularly for students who breathe a Common Law atmosphere, are principally these: —

1. Roman Law is one of the great things which have happened in the world. It is part of a liberal education to know something about it.
2. Roman Law is an introduction to the study of the Science of Law, or, as we call it, Jurisprudence. For many centuries the Science of Law was Roman Law. If in modern times it has widened its outlook and improved its methods its debt to Roman Law remains unquestioned.
3. Roman Law is a key to the terminology and, to a great extent, to the substance of foreign systems.

tions of Europe, and the laws of Justinian still command the respect or obedience of independent nations." *Id.* at 298-99. He also observes that "the laws of a nation form the most instructive portion of its history. . . ." *Id.* at 300.

11. Shotwell, *The Long Way to Freedom* 107-08 (1960).

12. *Id.* at 117. James Brown Scott expressed this thought as follows: "Great empire builders as the Romans were, they were still greater architects of law. And when their empire crumbled and disappeared, the firmly knit structure of their legal system withstood the barbarian avalanche which threatened to sweep away the civilization of the ancient world." 1 Scott, *Law, the State, and the International Community* 241 (1939). "Roman Law as a civilizing influence. . . . The Romans in their law reflected and embodied much of the best that man had been able to devise as the result of thousands of years of experience in social living raised to the level of civilized living." Kinnane, *A First Book on Anglo-American Law* § 77, at 202-03 (2d ed. 1952).

13. Roman Law enlarges the mind. Burke has well said that "the science of law does more to strengthen the mind than to liberalise it . . ." <sup>13</sup>

Its liberalizing influence, however, is not to be overlooked or underestimated.

The second, an American, is Dr. Phineas Sherman, a keen scholar and researcher in Roman law who, writing about forty years ago, had this to say:

The revival in the United States of the study of the Civil Law has already assumed ample proportions which are yearly increasing, and its full fruition with many far-reaching consequences is but a question of time. The greatest contribution of this revival to American law will be a powerful influence operating for the betterment of the private law of the United States, purging it of its present dross of redundancy, prolixity, inconsistency, and lack of uniformity, and crystallizing it into the compact form of a codification.<sup>14</sup>

The foregoing opinion as to the historical and continuing contribution of Roman law is shared by many scholars who declare that the contribution of Roman law to world culture is second only to the advent of Christianity.<sup>15</sup> "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.'" <sup>16</sup>

"Indeed it was the Roman Empire," states Bryce, "and the Church taken together which first created the idea of a law common to all subjects and (later) to all Christians, a law embodying rights enforceable in the courts of every civilized country."<sup>17</sup>

13. Lee, *Elements of Roman Law* viii (4th ed. 1956). French law students are given the reasons for the study of Roman law under the following headings: "practical," "juridical technique," "historical and philosophical." *Nouvelle Collection Foignet, Manuel Elémentaire de Droit Romain* 5-7 (Treizième ed. 1947). (Author's translation.)

14. Sherman, *Preface to First Edition, in 1 Roman Law in the Modern World* at v (2d ed. 1922). Professor Yntema summarizes the significance of Roman law as follows: 1. It is the "fundamental body of legal doctrine" which is the "common element in the individual legal systems of much of Continental Europe, and its colonies"; 2. The "even wider dissemination . . . of systematic legal conceptions and principles not merely in the civil law systems but also in the Anglo-American common law"; 3. The "extension of this stock of conceptions by virtue of its acceptance in the system of international law developed by Hugo Grotius and his successors"; 4. "The language of Roman law has become a lingua franca of universal jurisprudence." Yntema, *supra* note 3, at 88.

15. Sherman, *Foreword to Lawson, A Common Lawyer Looks at the Civil Law* at vii, xvi (1955). Professor Yntema also tells us that "without knowledge of the Roman sources, it is difficult to appreciate readily or accurately the conceptions used not only in the modern civil law, but also in international law, jurisprudence, and even in substantial degree in the law of England." *Id.* at xv. See discussion of Professor Lawson's book in Northrop, *The Complexity of Legal and Ethical Experience* 216-29 (1959); *Re, Book Review*, 30 *St. John's L. Rev.* 144 (1955).

16. Yntema, *supra* note 3, at 79.

17. 2 Bryce, *Studies in History and Jurisprudence* 571 (1901).

Most scholars would probably readily concede the existence of this contribution since it is not difficult to see that many of the beautiful phrases of natural law philosophers embodied the eternal principles of justice of the corpus juris of Rome. The role of the Roman law as a universal law embodying principles of natural law applicable for all time is also generally admitted.<sup>18</sup>

Dr. Sherman indicates that the American Declaration of Independence, a monumental declaration that may be regarded as the crowning achievement of eighteenth century philosophy, "enshrines many a tenet of Roman jurists who confessed the alliance of philosophy with law."<sup>19</sup>

The inspiring statement that "by natural law all men are equal" is the inspiration of the great Ulpian as is the noble definition that "justice is the constant and perpetual will to allot to every man his due." Although all students of the common law know the Latin maxim *volenti non fit injuria*, few know that it also, in addition to countless others, represents the survival in modern law of the genius that was Ulpian. In portraying Papinian and Ulpian, Professor John Henry Wigmore, in his instructive and most enjoyable *A Panorama of the World's Legal Systems*, reminds the reader that "for us, these two bear also this sentimental distinction, that (with Paulus) they once dispensed justice in the island of Britain as Roman magistrates in a Roman basilica."<sup>20</sup>

In mentioning Papinian one cannot refrain from saying that he has been referred to as the greatest name in Roman law. In fact, Justinian calls him "The Illustrious." For it was he who enjoyed the unique distinction that, among the five principal jurisconsults, where they were divided in opinion, his opinion should prevail. But Wigmore points out that his "truest fame should be that he died a martyr to his professional honesty." When the ruthless Caracalla caused the assassination of his own brother, who shared the throne with him, and directed Papinian, then his attorney general, to write a legal opinion in justification, Papinian replied with these immortal words: "I do not find it so easy to justify such a deed as you did to commit it." For this rebuke, Caracalla had Papinian put to death.<sup>21</sup>

But other glowing tributes have not been registered without restraint and reservation. Sir William Blackstone, in his opening Vinerian lecture at Oxford, on the 25th of October, 1758, commended the study of the civil law. He indicated that both on the Continent of Europe and "in

18. See Smith, *A General View of European Legal History* 1, 4-5 (1927).

19. Sherman, *Roman Law in the Modern World* 61 (2d ed. 1922).

20. Wigmore, *A Panorama of the World's Legal Systems* 428 (1936).

21. *Ibid.* See also Howe, *Studies in the Civil Law* 82-83 (2d ed. 1905). "That it was easier to commit than to justify a parricide, was the glorious reply of Papinian; who did not hesitate between the loss of life and that of honor." 1 Gibbon, *The History of the Decline and Fall of the Roman Empire* 159 (Milman ed. 1852).

the northern parts of our own island . . . it is difficult to meet with a person of liberal education, who is destitute of a competent knowledge in that science which is to be the guardian of his natural rights and the rule of his civil conduct."<sup>22</sup>

After stating that the imperial laws of Rome had not been "totally neglected even in the English nation," and that it was not his intent "to derogate from the study of civil law, considered . . . as a collection of written reason,"<sup>23</sup> he hastens to add:

But we must not carry our veneration so far as to sacrifice our Alfred and Edward to the names of Theodosius and Justinian; we must not prefer the edict of the praetor, or the rescript of the Roman emperor to our own immemorial customs, or the sanctions of an English parliament . . .<sup>24</sup>

This is not to be taken to mean, however, that English scholars and jurists have not admired and appreciated the grandeur and beauty of the Roman law. It is on the question of the "reception" or the influence of the Roman law upon the common law that scholars have differed widely. Perhaps Professor Burdick is correct when he states that the various answers depend "in some instances, upon the prejudices or the sympathies of the different writers."<sup>25</sup> He suggests that some of the conclusions are affected by the "great conservatism of some English writers, also pride in the alleged indigenous laws of their own country, and prejudice, perhaps, against foreign influence. . . ."<sup>26</sup> Professor Burdick may perhaps have offered the real explanation of Blackstone's "courteous diplomacy" toward the civil or Roman law. He submits that Blackstone's views were influenced by his political and ecclesiastical environment.

This attitude of "insularity" and religious prejudice has not gone unnoticed. Dr. Sherman, who refers to the use of Roman law "to supply the defects of the common law," adds: "But its use and reception were not always acknowledged by the courts. And this habit and practice

22. 1 Blackstone, *Commentaries* \*4.

23. *Id.* at \*5.

24. *Ibid.*

25. Burdick, *The Principles of Roman Law* 56 (1938).

26. *Ibid.* In his introduction to the initial volume of the *American Journal of Comparative Law*, Dean Roscoe Pound wrote: "The Anglo-American is averse to authorities in a foreign tongue." 1 *Am. J. Comp. L.* 3 (1952). See Professor Yntema's remarks concerning the animating purposes of that journal, 1 *Am. J. Comp. L.* 11 (1952). In that volume can be found a survey of comparative law teaching in the American law schools. *Re, Comparative Law Courses in the Law School Curriculum*, 1 *Am. J. Comp. L.* 233 (1952). "It is submitted that it is perhaps not premature to say that we are entering upon an era comparable to the twelfth century revival in learning. It cannot be doubted that the wealth of comparative law literature that has very recently appeared indicates that we have perhaps really given up our 'parochial attitude' toward foreign institutions." *Re, Book Review*, 30 *St. John's L. Rev.* 144, 149 (1955).

gradually increased proportionately with the rise and increase of English prejudice against whatever bore the name 'Roman.'<sup>27</sup>

The hostility against "foreign laws" was especially aimed at the canon law—"that ecclesiastical offshoot of Roman law"<sup>28</sup>—and soon both came to be regarded with suspicion as "instruments to enslave the English people to popes and emperors."<sup>29</sup> Mr. Ben W. Palmer, writing in the *American Bar Association Journal*, describes this attitude, with remarkable conservatism, as "a certain insular patriotism which may have affected English legal historians."<sup>30</sup>

One more word will be said about this aspect of the subject. It will be remembered that Blackstone attributed the continued teaching of the civil law in the English universities to the influence of "the popish clergy." Blackstone also repeated the fanciful story, perhaps current in his day, that a copy of Justinian's *Digest* was accidentally discovered at the siege of Amalfi in 1135, and this caused a revival of the Roman law. From this story, which is regarded as apocryphal by modern scholars,<sup>31</sup> Blackstone would have the reader believe that up to that time, Roman law had been all but forgotten.<sup>32</sup> This is clearly erroneous, since Roman law was taught at the University of Bologna long before the legendary discovery of the manuscript at Amalfi. Blackstone, however, was accepting or espousing a theory that fit neatly in the then current impression

27. Sherman, *The Romanization of English Law*, 23 *Yale L.J.* 318, 328 (1914).

28. *Ibid.*

29. *Ibid.* Wigmore, in *A Panorama of the World's Legal Systems*, following chapter XV on the "Romanesque Legal System," lists certain excellent works under the heading, "General References." To the listing of Dr. Sherman's two-volume work, *Roman Law in the Modern World*, Wigmore adds: "[T]his author's excessive claims for the wide influence of Roman and Romanesque law must be discounted." It is interesting to compare Wigmore's caveat about Sherman's "excessive claims" with the map of the Roman Empire in chapter VII, "The Roman Legal System," and the "World Map of the Romanesque System." Wigmore, *A Panorama of the World's Legal Systems* 1040, 1046 (1936). In reading the works of those who make "claims" and those who deny them, one is reminded of the French literary critics Charles-Augustin Sainte-Beuve and Hippolyte Taine—particularly of Taine's "trois forces primordiales dans l'histoire: race, milieu, moment" in *L'Introduction à l'Histoire de la Littérature Anglaise*. One is also reminded of Whitehead's statement that "the ideals cherished in the souls of men enter into the character of their actions." Whitehead, *Adventures of Ideas* 49 (1955).

30. Palmer, *An Imperishable System: What the World Owes to Roman Law*, 45 *A.B.A.J.* 1149, 1151 (1959). Mr. Alburn, also writing in the *American Bar Association Journal*, said that "Englishmen are loath to concede any great influence of Roman law upon English law. . . ." Alburn, *Corpus Juris Civilis: A Historical Romance*, 45 *A.B.A.J.* 562, 642 (1959).

31. 1 Pollock & Maitland 23. It has been said that "we may all admit the great ability of Blackstone as a lawyer and a lecturer, but it is manifest that history was not his forte." Howe, *Studies in the Civil Law* 112 (2d ed. 1905).

32. Burdick, *The Principles of Roman Law* 57, 165 (1938).

that, since the canon law had drawn upon the Roman law, and since the Roman Catholic clergy was familiar with it, Roman law was "in some occult or insidious way, being used to propagate popish doctrines."<sup>33</sup> Professor Burdick concludes thus: "The very term 'Roman' Law seemed to connect it with the Church of Rome, and probably many zealous adherents of the English church believed they were prompting a righteous cause by discouraging the spread, or even the retention, of Civil Law doctrines."<sup>34</sup>

In this connection, William Wirt Howe, lecturing at Yale in 1894, observed that those who entertained these prejudices "perhaps forgot that the classical jurists who made the civil law what it was never heard of any pope . . . but were merely poor pagans looking for that justice which is the uniform and enduring endeavor to render to every man that which is his due. . . ."<sup>35</sup> Of course, Howe was paraphrasing Ulpian's definition of justice as enshrined in the *Institutes*.<sup>36</sup>

The reference to Blackstone and the attitudes of the time do not mean that English scholars have not come to appreciate the grandeur of the Roman law. Dr. James Bryce, who for almost a quarter of a century was Regius Professor of Roman Law at Oxford, had this to say in his valedictory address at that great English University:

In . . . [the Roman Law] one may find something of value upon almost every principle and general legal doctrine with which a jurist has to deal. The legal conceptions set forth are those upon which all subsequent law has been based; and nearly all of them find their place in our own system, which they have largely contributed to mould. . . . No rules could better conform to the three canons of good law, that it should be definite, self-consistent, and delicately adapted to the practical needs of society. No study can be better fitted to put a fine edge upon the mind, or to form in it the habit of clear logical thinking.<sup>37</sup>

### III. BRITAIN AS A ROMAN PROVINCE: ULPIAN, PAPINIAN AND PAUL

In 53 B.C., Julius Caesar landed in Britain. In 43 A.D., the systematic conquest of Britain was begun by Agricola, and for the next three and a half centuries Britain was a Roman province.

This occupation cannot be minimized, because it is clear that Britain was an imperial province of the first order. At one time it had a garrison

33. *Id.* at 57.

34. *Ibid.*

35. Howe, *Studies in the Civil Law* 112-13 (2d ed. 1905).

36. *Institutes* 1.1.1. To this may be added what the *Institutes* call the three main principles of justice: "To live honestly, to hurt no one, and to give everyone his due." (Author's translation.) (*Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*) *Institutes* 1.1.3. See note 126 *infra*.

37. 2 Bryce, *Studies in History and Jurisprudence* 894 (1901).

of about 30,000 Roman soldiers and was regarded as an important Roman governorship.<sup>38</sup>

Likewise, it is well to remember that, centuries later, the Roman legions were withdrawn from Britain because they were needed to defend the Italian peninsula against the invasions from the north. They were not ousted from the island. As Mommsen puts it: "[I]t was not Britain that gave up Rome, but Rome that gave up Britain."<sup>39</sup>

What was the nature of this occupation and what influence did it have upon the legal development of the island?

Certain physical facts stand out in bold relief. South of the "Roman Wall," a stone rampart still largely in existence in Northumberland, many townships were planned on the Roman pattern. The largest of these, and of purely Roman foundation, was Londinium. Many others could be mentioned. Suffice it to say that Agricola did much to Romanize the province. He started schools for the sons of the nobles, encouraged the erection of temples, baths and forums, and we are told he even popularized the adoption of the "toga" in lieu of the native breeches. Although there is less certainty as to the extent to which the Latin language was adopted, the following quotation is both relevant and interesting:

It was certainly used in all official documents, in the law courts, and among the more educated classes; but there is also sufficient evidence to show that ordinary workmen knew a smattering at least, for on tiles and bricks have been found such scrawlings as *satis* ("enough") and *puellam* ("the girl"), and even the entertaining inscription "*Austalis dibus XIII vagatur sibi cotidim*," which means "Augustalis has been off on his own every day for a fortnight."<sup>40</sup>

This period may very well be entitled the obscure age of English legal history. Some light on the general nature of the occupation has been shed by Haverfield, but he too tends to minimize the importance of the occupation and its influence. He states:

From the standpoints alike of the ancient Roman statesman and of the modern Roman historian the military posts and their garrisons formed the dominant element in Britain. But they have left little permanent mark on the civilisation and character of the island. The ruins of their forts and fortresses are on our hill-sides. But, Roman as they were, their garrisons did little to spread Roman culture here. Outside their walls, each of them had a small or large settlement of womenfolk, traders, perhaps also of time-expired soldiers wishful to end their days where they had served. But hardly any of these settlements grew up into towns. York may form an exception . . .<sup>41</sup>

Haverfield goes on to say that the "departure of the Romans" from the

38. 1 Mommsen, *The Provinces of the Roman Empire* 190 (Dickson transl. 1886).

39. *Id.* at 194.

40. Robinson, *A History of Rome from 753 B.C. to 410 A.D.*, at 338 (2d ed. 1941).

41. Haverfield, *Roman Britain*, in 1 *The Cambridge Medieval History* 367, 370 (1936).

island did not mean any departure of Romans or other persons. Rather, "it meant that the central government in Italy now ceased to send out the usual governors and other high officials and to organise the supply of troops. No one went: some persons failed to come."<sup>42</sup> The reader is nevertheless told that towns were abandoned, Roman speech and boundaries vanished, and only the massive foundations of the roads survived.<sup>43</sup>

History tells us that the Roman legions were not evacuated until 410 A.D. Since Britain was under Roman rule for such a long period of time, how could she have completely escaped the influence of Roman law? Those that have urged that the feudal system was of Roman origin, and that the craft guilds were the descendants of the *collegia opificum* and that the English village community was derived from the Roman villa, have met with the severest attack.<sup>44</sup> Selden, for example, declared that when the Roman left Britain, his law likewise departed.<sup>45</sup> After stating Selden's opinion on the matter, Dr. Winfield comments:

No reasonable man can resist the conclusion that it must have had some effect while he was there. Lawyers like Papinian, Ulpian and Paul, would leave their influence on anyone with whom they came in touch, and Papinian was at one time prefect of York, and may possibly have had Paul and Ulpian as his assessors there. Nor is it credible that Rome, of all empires, should have ruled any dominion for three and a half centuries without making her subjects familiar with some of the principles of law that backed her government.<sup>46</sup>

Winfield adds, however, that "satisfactory evidence" has not yet been produced showing "any very appreciable or lasting transmission of the Roman law to the rulers who succeeded the Romans."<sup>47</sup> It is, of course, perfectly safe to say that if one seeks proof comparable to the "massive foundations of roads," it is not likely to be found. Nonetheless, Winfield enumerates three "exceptions." One exception deals with the land law. Citing Vinogradoff,<sup>48</sup> he states that grants of land to private individuals, unclogged by the native "folkwright," can be linked up to Roman conceptions of ownership. The second exception relates to the law of wills, which may have had a Roman origin by way of the ecclesiastical law. Citing Scrutton,<sup>49</sup> the other exception concerned Teutonic procedure

42. Haverfield, *supra* note 41, at 379. "The Roman veterans were encouraged to colonize in Britain; they married British women; and they received grants of land which they probably held under condition of military service,—a system in which Mr. Gibbon perceives 'the first rudiments of the feudal tenures.'" Howe, *Studies in the Civil Law* 113 (2d ed. 1905).

43. Plucknett, *A Concise History of the Common Law* 7 (5th ed. 1956).

44. See Winfield, *The Chief Sources of English Legal History* 54 (1925).

45. Selden, *Dissertation ad Fletam*, ch. IV (1685 ed.).

46. Winfield, *The Chief Sources of English Legal History* 55 (1925).

47. *Ibid.*

48. Vinogradoff, *Roman Law in Mediaeval Europe* 26 (1909).

49. Scrutton, *The Influence of the Roman Law on the Law of England* 65 (1885).

which might have been affected by the presence of the bishops in the shire-moots. The shire-moot, also known as the scire-gemote or shire-mot, comes from the Saxon *scyre* or county. It was a court or an assembly. Specifically, it was the principal Saxon county court and it was held twice a year before the aldermen of the shire.

Mommsen tells us that the Roman law "made rapid strides in Britain during the second and third centuries A.D., as is attested by the writings of the Roman jurists Javolenus and Ulpian, who discussed cases arising in Britain."<sup>50</sup> Reference must again be made to Papinian. He was chief justice at York with Ulpian and Paulus as his associate justices. Commenting upon this galaxy of talent, Dr. Sherman, writing in 1914, states that it was "as if the United States Supreme Court were to hold sessions in Alaska."<sup>51</sup>

#### IV. THE ADVENT OF CHRISTIANITY: THE EARLY KINGS AND A NEW OUTLOOK

The introduction of Christianity into Britain had far-reaching effects both upon the people and the law of the land. Since Constantine had adopted Christianity as the state religion in 325 A.D., this introduction had started in the later years of the Roman occupation of Britain. Assuming, however, that after the Romans left, the Britons had to be converted anew, this "reconversion" took place within a comparatively short time. The important date in this "reconversion" is 596 A.D., the date of the arrival of St. Augustine, who established contact between the English tribesmen and the Roman Church.

St. Augustine, with forty missionary Benedictine monks, in 596 A.D. arrived at Canterbury (hence known as St. Augustine of Canterbury as distinguished from the great St. Augustine of Hippo, in Africa), where he built a monastery and established his episcopal seat. The most famous of St. Augustine's converts to Christianity was Ethelbert, King of Kent. Ethelbert welcomed St. Augustine and his missionaries and willingly gave them permission to preach everywhere in his kingdom.

St. Augustine was sent to Britain by St. Gregory, or Pope Gregory the Great, as he is also called. The fact that the leadership of the Church

This work by Thomas Edward Scrutton was the Yorke Prize Essay of the University of Cambridge for the year 1884. The essay bore the motto "Tu regere imperio populos, Romane, memento" from Book VI of Virgil's Aeneid. The "exception" referred to by Winfield reads as follows: "The introduction of written instruments as evidence of the transfer of property, and the adoption of wills, are certainly due to ecclesiastical and probably to Roman influences; and the presence of the bishops in the shiremoots may have affected Teutonic procedure, but the traces of such an influence are very slight." Scrutton, *op. cit. supra*, at 65.

50. 1 Mommsen, *The Provinces of the Roman Empire* 194 (Dickson transl. 1886).

51. Sherman, *The Romanization of English Law*, 23 *Yale L.J.* 318 (1914).

was under St. Gregory at the time when Augustine was spreading the teachings of Christianity in Britain is of especial significance. Gregory had dedicated himself to the task of establishing the spiritual supremacy of the Church over all of Europe. It has been written that he "was a Roman of the Romans, nurtured on traditions of Rome's imperial greatness, cherishing the memories of pacification and justice, of control and protection."<sup>52</sup>

It is well established that Gregory knew the *Digest* of Justinian.<sup>53</sup> Likewise, it is well established that Ethelbert of Kent soon revealed Roman influences because at about 600 A.D., on "St. Augustine's day," he compiled or codified the laws of his kingdom in "Roman style" or in "Roman fashion."<sup>54</sup> The latter phrases are translations of the Latin *juxta exempla Romanorum*, found in Bede's *Ecclesiastical History of England*, written about 735. Hence, Ethelbert committed his laws to writing "according to the example of the Romans" or "according to the Roman mode,"<sup>55</sup> significantly at about 600 A.D. It is therefore almost a certainty that Augustine and his missionaries, sent to Britain by Gregory, must have brought to the attention of Ethelbert the "exploits of Justinian, then dead scarcely forty years."<sup>56</sup>

The presence of the clergy on the island was significant in bringing a knowledge of government to the inefficient tribal organizations. The missionaries who came from well-organized states on the Continent brought with them ideas and notions of public administration. From them, the leaders of the island, for example, learned the Roman method of taxation which divided the land into units ("hides") of equal assessment instead of equal area.<sup>57</sup> At the same time this new class, the clergy, made necessary a new body of law for their protection. This

52. Hutton, *Gregory the Great*, in 2 *The Cambridge Medieval History* 236, 251 (1926).

53. See 1 Pollock & Maitland 11, citing 1 Conrat, *Geschichte der Quellen des römischen Rechts im früheren Mittelalter* 8 (1889). For a specific example of the early Church father who knew Roman law, see Lardone, *Roman Law in the Works of St. Augustine*, 21 *Geo. L.J.* 435 (1933). In his discussion of St. Augustine of Hippo, Fr. Lardone concludes: "1. St. Augustine knew Roman Law. . . . 4. Reading Augustine's writings we realize how Roman Law acquaintance is very useful to understand the Fathers who make free use of legal expressions and conceptions. . . ." *Id.* at 455-56.

54. 1 Pollock & Maitland 11, citing Bede's *Ecclesiastical History of England*.

55. See Burdick, *Principles of Roman Law* 62 (1938); Jenks, *A Short History of English Law* 4 (1912); Sherman, *The Romanization of English Law*, 23 *Yale L.J.* 318, 319 (1914).

56. Sherman, *The Romanization of English Law*, 23 *Yale L.J.* 318, 319 (1914). St. Bede the Venerable (673-735) was a Benedictine monk at the monastery of Jarrow in Northumberland. It was there that he wrote his famous work and trained some 600 scholars.

57. 2 Holdsworth, *A History of English Law* 64-66 (3d ed. 1927) [hereinafter cited as Holdsworth]; Plucknett, *A Concise History of the Common Law* 8 (5th ed. 1956).

gave impetus to the development of the law of status or, as it is known today, the law of persons.

During this pre-Norman period of English legal history, the Roman law was the law of the *Romani*, and in Britain, the *Romani* were the clergy. In such an era of personal laws, the Roman law was a living law as long as there were *Romani*. Although this led to a "vulgarizing" of Roman law, it is equally true that it continued the diffusion and dissemination of Roman law and Roman law concepts. Pollock and Maitland say that "the German and Roman law were making advances toward each other. If the one was becoming civilized, the other had been badly barbarized or rather vulgarized."<sup>58</sup> This Roman law was "vulgar" in the same sense that the Latin or Romance that was spoken by the people was "vulgar" when compared with classical Latin. Nevertheless, this "low" Roman law was the source of many of the doctrines and concepts that prevailed. It is to this that modern conveyancing owes its origin, and it is stated categorically that the "Anglo-Saxon 'land book' is of Italian origin."<sup>59</sup> To all this must be added that "through the fostering care of the Christian clergy, whose personal law was the Roman law,"<sup>60</sup> a knowledge of the Roman law was kept alive in Britain from the seventh to the eleventh century. It is no longer doubted that during these centuries Roman law was taught and studied in the Cathedral School at York.<sup>61</sup>

Committing the laws to writing, first accomplished by Ethelbert, set a precedent to be followed by several of the later kings. The first law book of Wessex was compiled by order of King Ina about 700 A.D. In 827 the kingdoms of the Angles and the Saxons united under Egbert and became Angle-land—England. Alfred, who has been called "the Great" by English historians by reason of his literary attainments and because he drove out the Danes, reigned from 871 to 901. In his youth he visited Rome and endeavored to import to England the learning of the Continent. He promulgated a code known as *The Laws of King Alfred*, wherein he gathered such laws of Ina and Ethelbert that to him seemed good.<sup>62</sup> The next great king is Canute, who ruled in Denmark and also in England from 1016 to 1035. He, too, had visited Rome and enacted comprehensive statutes, earning for him the honor of being called "the greatest legislator of the eleventh century."<sup>63</sup>

58. 1 Pollock & Maitland 15; see 2 Holdsworth 133.

59. *Ibid.*

60. Sherman, *supra* note 51, at 319.

61. *Ibid.*

62. Thorpe, *Ancient Laws and Institutes of England* 20, 27 (1840).

63. 1 Pollock & Maitland 20.

The Anglo-Saxon dynasty was restored with Edward the Confessor, who was crowned King on Easter Sunday, 1042. Edward, who had spent about thirty years of his life in exile on the Continent, was destined to continue Roman influence in Britain. Because of the spread of Norman influence during his reign, this period, just preceding the Norman conquest, has been dubbed "a sort of peaceful Norman conquest."<sup>64</sup> Since the early Norman kings, in order to obtain favor with the people, swore to keep the laws of Edward the Confessor, his laws form an important basis of the later English law.<sup>65</sup> In 1066, Edward died without issue and was succeeded to the throne by his wife's brother, Harold. This succession was disputed by William, Duke of Normandy, who defeated Harold at the Battle of Hastings on October 14, 1066, thus becoming in the pages of history William the Conqueror, King of England.

The legislative activity of this pre-Norman period by codifications, or generally by setting laws to writing, is a significant result of the contact with Rome and those familiar with its legal system. It is the fruition of the wish to follow "the example of the Romans" that laws can be made by the issue of commands.<sup>66</sup> "Statute appears as the civilized form of law."<sup>67</sup>

Discussing the sources of English law in the twelfth century, immediately after the Norman conquest, Pollock and Maitland ask: "Who shall say that there is not in it an Italian element?"<sup>68</sup> The references to the "Roman style" in the codifications long before the conquest indicate that the question, or rather observation, should not be limited to the twelfth century.

Although the foregoing sketch suggests the continuity of Roman influences, in particular through the presence of the Roman clergy, it does not represent the truly important contribution of Christianity to the island. What Christianity really brought concerned the moral ideas that were destined to revolutionize all of English law. In the words of Plucknett: "Christianity had inherited from Judaism an outlook upon moral questions which was strictly individualistic. The salvation of each separate soul was dependent upon the actions of the individual."<sup>69</sup>

Surely such an approach differed radically from the custom of the English tribes which looked to the family group rather than to the individual. As the people embraced Christianity, notions of individual moral responsibility replaced those of group responsibility. Just as did the

64. Plucknett, *A Concise History of the Common Law* 10 (5th ed. 1956).

65. 1 Pollock & Maitland 88, 95-96; Sherman, *supra* note 51, at 320.

66. 1 Pollock & Maitland 12.

67. *Ibid.*

68. *Id.* at 78.

69. Plucknett, *op. cit.* *supra* note 64, at 8-9.

Church, the law soon came to judge the act according to the intention of the person who committed it.

The foregoing Christian outlook of the morality and legality of human conduct assumes tremendous importance, for it goes to the very heart of English equity, which acted "in personam"—upon the conscience of the defendant. Although the Court of Chancery that administered "equity" was not an ecclesiastical court, its presiding officer was for a long time always an ecclesiastic. He was the King's Chancellor—the keeper of the royal conscience. It is not seriously disputed that he knew both the canon law and the Roman law. Through him "it was only natural that the doctrines and methods of the civil law should find entrance largely into this branch of the English system."<sup>70</sup> Separate treatment will be given to the Court of Chancery, which has been called "Roman to the backbone."<sup>71</sup>

#### V. THE NORMAN CONQUEST: WILLIAM AND LANFRANC

The most important immediate consequence of the Norman conquest was the introduction into Britain of an orderly system of law and government. William, apparently a gifted administrator, had developed a sound financial organization called the "Camera," or chamber.<sup>72</sup> After nearly twenty years of preparatory work, he accomplished the remarkable feat of successfully invading England by crossing the English channel. His victory over Harold at the Battle of Hastings and the date, 1066, are matters of common knowledge. However, even those who know of the contribution of William in systematizing the administration of the island may not know of the role played by Lanfranc, the lawyer from Pavia, most often described as "the Conqueror's right-hand man."<sup>73</sup> This distinguished scholar, who in 1070 became Archbishop of Canterbury, was William's "prime minister and chief adviser."<sup>74</sup> Not only was he a great prelate and theologian, but he was also an accomplished lawyer who had studied and taught Roman law at Pavia, in his native Italy. He was one of the "masters" of the "Longobardistic-Frankish" school of lawyers

70. Hadley, *Introduction to Roman Law* 47 (1880). See 2 Bryce, *Studies in History and Jurisprudence* 599-600 (1901); Burdick, *The Principles of Roman Law* 77-80 (1938).

71. Scrutton, *The Influence of the Roman Law on the Law of England* 2 (1885). Scrutton adds: "English Equity, however, invented and administered by clerical chancellors, derived much of its form and matter from Roman sources. I have neither the time nor the knowledge to enable me to give at all an adequate account of this Roman element, but the question has been discussed by Spence [Equitable Jurisdiction of the Court of Chancery (1846)], and I avail myself of his results." *Id.* at 155.

72. A recent scholarly Italian work, after referring to the contribution of Edward the Confessor, states that "infiltrations of Latin culture were not lacking." Calasso, *Medio Evo del Diritto* 618 (1954).

73. 1 Pollock & Maitland 77.

74. Burdick, *The Principles of Roman Law* 65 (1938).

and was always remembered "with respect" by the great jurists for his knowledge of the law.<sup>75</sup> By training and experience he was uniquely suited for the role of "prime minister."

Lanfranc arrived at Normandy and opened a secular school at Avranches. While in Normandy he became a monk and taught at the Abbey at Bec.<sup>76</sup> Although there is some doubt, it is probable that, in addition to grammar and rhetoric, he also taught Roman law both at Avranches and at Bec.<sup>77</sup> The probability is strengthened by the fact that he was remembered in Normandy as a discoverer of Roman law.<sup>78</sup>

By virtue of the special confidence reposed in Lanfranc by William, his influence upon the law at this most crucial period of English legal history cannot be overemphasized. Admittedly he knew Lombard law, Roman law and the canon law. When he was Archbishop "the *decreta* and *canones* were ever in his mouth."<sup>79</sup> In addition he dramatically proved that he had also mastered the English law. In the one great lawsuit of William's reign—to recover the See of Canterbury from a usurper—the cause was personally conducted by Lanfranc. William brought Aethelric, an ancient churchman steeped in the Saxon laws and lore, to the trial to evaluate Lanfranc's presentation. His training in the Italo-German legal customs, learned in Lombardy, was of tremendous value. The skillful Pavian prepared himself well and at the trial he "discoursed brilliantly on sac and soc, toll and team, infangthief and utfangthief," and thus won the lawsuit. The case was reopened in his absence and an adverse judgment was entered. At a retrial, Lanfranc was once again victorious. After this we are told that no one dared challenge him in legal matters.<sup>80</sup>

Most recently, Lanfranc has been described as William's "eminent collaborator, above all in the legislative field."<sup>81</sup> It is in the light of his

75. Calasso, *Medio Evo del Diritto* 307, 618 (1954). See references to the great quantity of literature on Lanfranc in Latin, English, French, German and Italian in Wigmore, *Lanfranc, The Prime Minister of William the Conqueror: Was He Once an Italian Professor of Law? (A Study in Historical Evidence)*, 58 *L.Q. Rev.* 61, 78-81 (1942).

76. Calasso, *op. cit. supra* note 75, at 618.

77. *Ibid.* 1 Pollock & Maitland 78.

78. See sources cited in 1 Pollock & Maitland 78.

79. *Ibid.*

80. See 1 Pollock & Maitland 77-78, 93; Zane, *The Five Ages of the Bench and Bar of England*, in *Studying Law* 41, 45 (Vanderbilt 2d ed. 1955), also reprinted in 1 *Select Essays in Anglo-American Legal History* 625, 628-29 (1907); Zane, *The Story of Law* 240 (Washburn ed. 1927).

81. Calasso, *Medio Evo del Diritto* 618 (1954). It is also said that the "Domesday Survey, which enumerated all the lands in England, and ascertained the status of each subject . . . was probably superintended by this great lawyer [Lanfranc]." Zane, *The Five Ages of the Bench and Bar of England*, in 1 *Select Essays in Anglo-American Legal History* 625, 628-29 (1907).

remarkable background, the august position that he occupied, and the historical importance of the period, that the reader can best appreciate Pollock and Maitland's rhetorical question about the sources of English law. They note that the "very existence of Lanfranc . . . must complicate the problem of anyone who would trace to its sources the English law of the twelfth century."<sup>82</sup> Then follows:

The Norman Conquest takes place just at a moment when in the general history of law in Europe new forces are coming into play. Roman law is being studied, for men are mastering the Institutes at Pavia and will soon be expounding the Digest at Bologna; Canon law is being evolved, and both claim a cosmopolitan dominion.<sup>83</sup>

Lanfranc's role in the development of the common law assumes new dimensions if it is remembered that, by his very presence and influence, he prepared the soil for the reception of the legal and intellectual revival that was beginning in northern Italy. And the revival of the Roman law was not limited to the universities.

In 1038, Conrad II, King of Germany, who in 1027 had been crowned emperor by the Pope at Rome, decreed that Roman law should once again be the territorial law of the City of Rome. In 1076 the *Digest* was cited in the judgment of a Tuscan court. Very soon, possibly before 1100, Irnerius, "the bright lamp of law," as he was called, began teaching Roman law at Bologna.<sup>84</sup> To him, "a simple teacher of liberal arts," is attributed the teaching of law at Bologna as an "autonomous" science, and "at the same time the study of [Justinian's *Code* and *Digest*] from genuine and complete texts . . ."<sup>85</sup> These he regarded as repositories of legal science and "written reason."

Irnerius, and the masters that followed him, set in motion a wave of Roman law influence that was to be felt in all of the former Roman provinces. It was truly a Renaissance, in the etymological sense of the word. This was to be a Roman conquest more lasting and enduring than any prior conquest by the sword.

82. 1 Pollock & Maitland 78.

83. *Ibid.*

84. See Wigmore, *A Panorama of the World's Legal Systems* 983-84 (1936).

85. Calasso, *Medio Evo del Diritto* 368 (1954). Irnerius is described as the "founder" of the law school of Bologna. *Id.* at 522. Although the University of Bologna is said to have been founded in 1088, Bologna, as a "studium" of arts, was already famous by the year 1000. "In Italy [the] Renaissance found its expression most conspicuously in a revival of the study of the Roman law, which started from Bologna. . . ." 1 Rashdall, *The Universities of Europe in the Middle Ages* 17 (Powicke & Emden ed. 1936). Although some say Ravenna, Pavia was probably "the main centre of legal studies in Italy before the rise of Bologna. . . ." *Id.* at 106. Irnerius was therefore not "the first teacher of the Roman law in medieval Italy." *Id.* at 101, 107. See also Maffei, *Alessandro d'Alessandro: Giurisconsulto Umanista, 1461-1523* (1956); Maffei, *Gli Inizi dell'Umanesimo Giuridico* (1956), and a review of these two books in Breen, *Renaissance Humanism and the Roman Law*, 38 *Ore. L. Rev.* 289 (1959).

#### VI. POST-NORMAN DEVELOPMENT: THE EARLY ARCHBISHOPS, VACARIUS AND THE LEGISTS

Lanfranc and the Abbey at Bec had a direct and profound influence upon England for generations to come. Lanfranc was followed as Archbishop of Canterbury by St. Anselm (1033-1109), who had also been a monk and teacher at the Abbey at Bec. St. Anselm was a Piedmontese who, because of his writings, is considered the father of Scholasticism. He is well known in English history for his quarrels with Rufus and Henry II, having thereby precipitated the Investiture contest in England. Under Anselm, not only do we see the independence which soon would cause Chancellors to assume jurisdiction and give relief in causes when the ordinary courts would not, but also an inceptive special prominence of the clergy in all matters legal—whether canonical, civil or Anglo-Saxon.

Anselm was succeeded as Archbishop by Theobald, in whose household was trained Thomas à Becket, who was to be Chancellor, Archbishop and martyr. In 1145 [1143?], Theobald brought to England, Vacarius, a celebrated "civilian glossator" from Mantua who taught Roman law at Bologna.<sup>86</sup>

The importance of Vacarius upon the subject can be gleaned from the introductory sentences of Scrutton in his Yorke Prize Essay. Scrutton's dictum is indeed a glowing tribute to the influence of Vacarius upon the law of England. He states:

Any discussion of the influence exercised in England by the Roman Law will naturally fall into two divisions separated by the arrival in the year 1143 of Vacarius on our shores in the train of Archbishop Theobald, and his lectures on Roman Law at Oxford in and after 1149; for these events, which in European history form part of the current of Roman influence which sprang from the enthusiastic studies of the Law School at Bologna in the 12th century, begin a new era in the history of English law and of its connexion with the legal system of Rome.<sup>87</sup>

In addition to teaching at the Archbishop's household, Vacarius

86. Ambrosino, 2 *Glossatore Vacario Polemista Antiereticale* (nota bibliografica), in *Rivista Italiana per le Scienze Giuridiche* 415-20 (1950); Calasso, *Medio Evo del Diritto* 618 (1954).

87. Scrutton, *The Influence of the Roman Law on the Law of England* 1 (1885). Scrutton proceeds to say: "We have then in our survey to deal with two great periods." *Ibid.* The period before Vacarius "is one of custom, not of written law; of vagueness rather than of precision; and it will afford no matter for surprise if in the legal obscurity of those early centuries we find very little ground for confident assertion in matters peculiarly difficult. With our second period we find more light. From the teaching of Vacarius in 1149, we pass at once to authoritative text books by masters of law." *Id.* at 1-2. "In the train of the Archbishop of Canterbury, an Italian named Vacarius, learned in the Justinian Law which the newly-born Law School of Bologna was teaching with a young convert's zeal, had landed on English shores; and from his lips Oxford and England heard the laws of Rome." *Id.* at 66.

founded the law school at Oxford, thus becoming the first law professor in England. A very successful teacher, "students looked up to him as their *magister* and reverently received his glosses."<sup>88</sup> Students, both rich and poor, flocked to hear him teach the Roman laws, and because those who were poor could not buy parchment copies of Justinian's *Code* and the *Digest*, he made a summary of them. This book, called *A Summary of Law for Poor Students*, written about 1149, is a condensed version of the *Code* richly illustrated by extracts from the *Digest*. We are told that because of Vacarius' *Liber Pauperum*, the law students at Oxford were "for a long time" called "pauperists."<sup>89</sup>

The spread of the study of civil law aroused the opposition of King Stephen, who disliked Theobald. This opposition, however, was ineffectual and soon vanished,<sup>90</sup> and from Stephen's reign the teaching of both Roman law and canon law attained ever-increasing prominence. Names will not be given other than Thomas of Marlborough, abbot at Evesham who taught law at Oxford, and perhaps Exeter, who brought to his monastery a collection of books *utriusque iuris*.<sup>91</sup> Clearly, any investigation of the legists and canonists of this period would reveal that a school of Roman and canon law was flourishing at Oxford.<sup>92</sup> At the same time, one cannot ignore that "the Italians had been first in the field and easily maintained their pre-eminence. During the rest of the Middle Ages hardly a man acquires the highest fame as legist or decretist who is not Italian, if not by birth, at least by education."<sup>93</sup> Nor were

88. Burdick, *The Principles of Roman Law* 67 (1938); 1 Pollock & Maitland 118. Discussing the "assured position" enjoyed by the study of Roman law at Oxford, Bryce states that "one of the earliest notices of the University is to be found in the sentence 'Magister Vacarius in Oxenefordia legem (sc. Romanam) docuit.'" 2 Bryce, *Studies in History and Jurisprudence* 889 (1901).

89. Ortolan, *The History of Roman Law* 422 (2d ed. Cutler 1896). It is said that Vacarius taught at Oxford as early as 1149. It is certain that he was in England as late as 1198. Although there is some question as to the time when Vacarius taught at Oxford, it is sufficiently established "that he did teach at Oxford." 3 Rashdall, *The Universities of Europe in the Middle Ages* 21 (Powicke & Emden ed. 1936). Professor Francis de Zulueta, Reader in Roman Law and Regius Professor of Civil Law at Oxford, and who wrote the *Liber Pauperum* of Magister Vacarius, died on January 16, 1958. The April 1959 issue of the *Tulane Law Review*, containing splendid articles on the Roman law, is dedicated to Professor de Zulueta as follows: "Recognizing Louisiana's civil law tradition and its debt to Roman law, the *Tulane Law Review* respectfully dedicates this issue to the memory of the late Professor Francis de Zulueta." 33 *Tul. L. Rev.* 451 (1959).

90. Hunter, *Roman Law* 109 (3d ed. 1897).

91. 1 Pollock & Maitland 120. Marlborough, at the advice of Pope Innocent III and Cardinal Ugolino (who became Gregory IX), went to Bologna and attended the lectures of Azo. *Id.* at 121-22.

92. 3 Rashdall, *The Universities of Europe in the Middle Ages* 7 (Powicke & Emden ed. 1936).

93. 1 Pollock & Maitland 120.

these civilians to preside solely in the classroom. They were practicing lawyers and skilled pleaders whose forensic powers of persuasion in the halls of justice equalled their academic mastery of the law. This is clearly to be inferred from Pollock and Maitland's statement: "All the great cases, the *causes célèbres*, went to Rome, and the English litigant, if prudent and wealthy, secured the services of the best Italian advocates."<sup>94</sup>

Curiously enough, the prestige and success of the civilian was so great that for a while the Church was concerned over the teaching of secular jurisprudence. The remarkable success of the teaching of Roman law and some of the opposition that it engendered is indicated by the following quotation from Jenks' *A Short History of English Law*:

Every ambitious youth studied eagerly the *Corpus Juris*; a knowledge of its contents gave him a sense of power almost intoxicating in its keenness. So fierce was the heat which radiated from this new enthusiasm, that the more conservative forces took alarm. In the year 1219, Pope Honorius III forbade the teaching of Roman law in the schools of Paris, then, and for long after, under clerical sway. The pious Henry of England, in 1234, issued a similar ordinance concerning the schools of London (i.e. of St. Paul's). A still more effective antidote to the teaching of Vacarius at Oxford, was the later settlement of the professors of the Common Law in the Inns of Court, between the Palace of Westminster and the cathedral. Soon the cleric, sheltered beneath the *coif* which concealed his tonsure, was pleading and judging causes in the new royal courts of the Common Law. But we may be sure, even if we had no evidence, that he did not entirely forget the law which he had learned at Oxford or Cambridge, that, when the customs of the realm, faithfully searched, gave no answer to a new problem, he fell back on the *Digest* and the *Code*.<sup>95</sup>

Because of this intense preoccupation with Roman law which resulted in a diminished interest in theological studies, it appeared necessary to protect the teaching of theology from the incursions of the Roman law. The Church thereby seemed to assist national conservatism.<sup>96</sup>

Regardless of the reasons or sources of the tribulations, the learned legal historians find it necessary to admit: "This did not destroy the

94. *Id.* at 121.

95. Jenks, *A Short History of English Law* 20 (2d ed. rev. 1922). "Do not think that I am exaggerating the attitude of repulsion in which the pure theologian and the pure moralist stood to the ecclesiastical lawyer who was making money out of the practice of the Courts Christian . . . Roger Bacon declares that the study of the civil law, attracting the clever men among the clergy, threw the study of theology into a second place, and secularised the clerical character, making the priest as much a layman as the common lawyer. . . ." Stubbs, *The History of the Canon Law in England*, in 1 *Select Essays in Anglo-American Legal History* 248, 269 (1907). Professor Munroe Smith is of the same opinion as Jenks on the question of the borrowing by the judges who were ecclesiastics trained on the Continent. Smith, *Elements of Law*, in *Studying Law* 171, 340-41 (Vanderbilt 2d ed. 1955).

96. 1 Pollock & Maitland 123.

study of the Roman books. Oxford and Cambridge gave degrees as well in the civil as in the canon law."<sup>97</sup>

The minimizing of the influence of Roman law during this period falls short of the objectivity required of the historian. Obviously the legal fabric of the government and its institutions were not such as to permit the direct reception of Roman law by the King's courts! The question is rather one of transmission, infusion and influence, and from this standpoint, the period in question has been called "the Roman epoch of English law."<sup>98</sup> How can it be doubted that the civilian legists as practitioners would plead the law they knew, even if only as persuasive authority as a body of "written reason." The habits of lawyers lend greater credence to the explanation of Amos, and others, that during this period and later, Roman law authorities "were habitually cited in the common law courts, and relied upon by legal writers, not as illustrative and secondary testimonies as at present, but as primary and as practically conclusive."<sup>99</sup> A specific example is found in the law reports of the fifth year of the reign of Edward II, who reigned from 1307 to 1327. According to the report, the *Digest* of Justinian, Book 50, Title 17, Fragment 14, was directly cited to prove that where no time is set for the performance of a promise, immediate performance can be demanded.<sup>100</sup>

Furthermore, it is futile to attempt to depreciate Roman law influence by highlighting the roles of the ecclesiastical courts and the canon law. The latter were manifestly avenues for the indirect reception of the Roman law. Elsewhere Pollock and Maitland pay tribute to the canon law as being a "wonderful system,"<sup>101</sup> and acknowledge that in the twelfth century the relationship between the Roman and the canon law was "very close." They must add, of course, that "the canon law had borrowed its form, its language, its spirit, and many a maxim from the civil law."<sup>102</sup>

97. Ibid. See 3 Rashdall, *The Universities of Europe in the Middle Ages* 156-57 (Powicke & Emden ed. 1936).

98. See Hunter, *Roman Law* 109 (3d ed. 1897).

99. Amos, *The History and Principles of Civil Law* 450 (1883).

100. Ibid. Sherman, *The Romanization of English Law*, 23 *Yale L.J.* 318, 323 (1914). See examples of the citation of the *Digest*, and a "fragment of Ulpian," in Pollock, *A First Book of Jurisprudence* 349-52 (1929). In *Acton v. Blundell*, 12 *Mees. & W.* 324, 353, 152 *Eng. Rep.* 1223, 1234-35 (Ex. 1843), where the *Digest* was cited, Tindal, C.J., stated: "The Roman Law forms no rule, binding in itself upon the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries in Europe. The authority of one at least of the learned Roman lawyers appears decisive upon the point in favour of the defendants."

101. 1 *Pollock & Maitland* 114.

102. *Id.* at 116.

On the question of the influence of the Roman law upon the common law, is not the avenue of transmission inconsequential? What does it matter whether the channel was the canonical system or the ecclesiastical courts? Various means at different times played a part in swelling the stream.

It is perhaps fitting to conclude this particular topic with the thought and words of Jenks:

It is idle to suppose that such knowledge [of the Roman law] was not used; especially in the solution of those problems for which the ancient customs made no provision. But the point to be remembered is, that the influence of Roman Law became in England secret, and, as it were, illicit.<sup>103</sup>

#### VII. THE FORMATIVE LEGAL LITERATURE: GLANVILL, BRACTON, AND MAGNA CARTA

Surely, much more can be said about Vacarius and the influence that he must have exerted upon the minds of the intellectually curious of his time. Suffice it to say that it was a pupil of Vacarius, Ranulf de Glanvill (1130-1190), an ecclesiastic, to whom is attributed the writing of the most ancient work extant on the common law of England. This Latin text, written between 1187 and 1189, is called *A Treatise on the Laws and Customs of England composed in the time of King Henry the Second while the honourable Ranulf Glanvill held the helm of justice*. Glanvill, who enjoyed the complete confidence and respect of Henry II, who himself might have been a pupil of Vacarius,<sup>104</sup> became Chief Justiciar of England in 1180. Whether this first classic text on the common law was actually written by Glanvill, or merely under his supervision by his nephew and secretary, Walter Huber, a learned civil lawyer, who in turn was to become Chief Justiciar and Archbishop of Canterbury, is not important. What does matter is that it must have been written with the approval of Glanvill and Henry, and that the writer knew both Roman and canon law. Perhaps he "had read the *Institutes*" and "his ideas of what a law-book should be had been derived from some one of the many small manuals of romano-canonical procedure that were becoming current."<sup>105</sup> Although Glanvill "was no partisan of Rome," the book, *Tractatus de Legibus et Consuetudinibus Regni Angliae*,<sup>106</sup> shows Roman influence commencing with the title and its preface, which cites from the *Institutes*.<sup>107</sup>

103. Jenks, *A Short History of English Law* 20 (2d ed. rev. 1922).

104. Stubbs, *The History of the Canon Law in England*, in 1 *Select Essays in Anglo-American Legal History* 248, 259 (1907).

105. 1 *Pollock & Maitland* 165.

106. Zane, *supra* note 81, at 636. See Beames, *A Translation of Glanville* (1900); Woodbine, *Glanvill: De Legibus et Consuetudinibus Regni Angliae* (1932).

107. See Stubbs, *supra* note 104, at 260.

The work, which is predominantly procedural, is of the greatest importance because it established the method of legal writing for centuries to come. It is also significant that it takes for granted that the reader is familiar with Roman law. Even though Glanvill refers to Roman law as a "foreign law," he draws upon it, particularly in his treatment of agreements and contracts.

The most notable legal contributions of the reign of Henry II, the centralization of the judicial structure, the introduction of the "inquest" or "recognition," and the "writ," are treated in Glanvill's treatise. Since it consists of a commentary upon the writs and the forms of action, it has the earmarks of a modern manual on procedure and practice. Glanvill's borrowing of the canon law rules on the competence of witnesses—which he adopted as challenges to jurors—has fortified the belief of scholars that the jury system is of Roman origin. Although there was formerly some doubt, the verdict of scholars is now clear that trial by jury, which dates from the inquest of "recognitors" or jurors of Henry II, is not of Anglo-Saxon but of Frankish or Continental origin.<sup>108</sup> Likewise Henry II's assize of novel disseisin, so important in English legal development, was borrowed from the canon law, which developed the procedure from the Roman actions. Pollock and Maitland remind us that "the most famous words of Magna Carta will enshrine the formula of the novel disseisin."<sup>109</sup>

However cursory, a discussion of Glanvill's work and its influence may close with a reminder that it was not only the very first, a form or model to be followed, but that it was for many years the standard textbook on the law of England.

Notwithstanding the lasting contributions of Henry II, and even up to the reign of Henry III, who reigned from 1216 to 1272, it could hardly be said that there was in England a "common law." Curiously enough, the words themselves represent a borrowing since they are a translation of the *ius commune* of the canon and Roman law. Although the words were well known to the canonists, they were not yet of frequent usage. The words *ius commune* soon were, quite naturally, borrowed from the

108. See 1 Pollock & Maitland 138-42. "[T]hey come to 'recognize,' to declare, the truth: their duty is, not *indicia facere*, but *recognoscere veritatem*." *Id.* at 140. "Such is now the prevailing opinion, and it has triumphed in this country over the natural disinclination of Englishmen to admit that this 'palladium of our liberties' is in its origin not English but Frankish, not popular but royal." *Id.* at 141-42. See Sherman, *supra* note 100, at 324.

109. 1 Pollock & Maitland 146. The reference is to chapter 35 of the Charter: "Nullus liber homo . . . dissaisietur de libero tenemento suo . . . nisi per legale indicium parium suorum vel [et] per legem terrae."

canon law that had borrowed them from the Roman law as can be easily seen, for example, from the *Code* of Theodosius.<sup>110</sup>

The person who gave the greatest impetus to the early development of the common law of England was Henry de Bracton, an ecclesiastic and a royal judge, who for two years, from 1265 to 1267, was Chief Justiciar of England under Henry III. His book, *Tractatus de Legibus et Consuetudinibus Angliae*, has earned such unparalleled tributes as "the crown and flower of English medieval jurisprudence,"<sup>111</sup> "the finest production of the golden age of the common law,"<sup>112</sup> and the "great ornament" of the reign of Henry III.<sup>113</sup> Bracton's work, written in Latin between 1250 and 1258, does more than merely bring up to date the work of Glanvill. Although it bears practically the same title as Glanvill's book, this is not only a book of procedure, but an expository text and commentary; compared to Glanvill's this is a "voluminous work."<sup>114</sup> By his clarity of style and comprehensiveness of treatment, Bracton contributed immeasurably to the development of the English legal system and the arts of legal writing and advocacy. Specifically, in addition to the treatment of the original writs, Bracton introduced complete transcripts of the pleadings of selected cases. The selection of particular cases and his comments upon them, whether favorable or critical, give his work a very modern air—almost that of a forerunner of the case-method approach to the study of law with the use of "case-books" as teaching materials. Although he exercised the widest latitude in choosing cases and selected them to illustrate what the law ought to be, still his attempt was to set forth the most approved practice of the King's courts. Bracton's book, which cites no less than 494 cases, was very successful, and became the basis of the legal literature of Edward I. In view of the number of epitomes that were made of the work, it may fairly be regarded as the book that gave impetus to the preparation of the Year Books.<sup>115</sup>

In any discussion of the Roman contribution to the common law, Bracton must hold a unique place of honor worthy of special treatment. The "broad cosmopolitan learning"<sup>116</sup> and use of "foreign materials," *i.e.*, the Roman law, which made possible the very format, style and

110. E.g., "Judaei romano et communi iure viventes," *Code Theod.* 2.1.10; "vivant iure communi," *Code Theod.* 16.5.23.

111. 1 Pollock & Maitland 206.

112. Zane, *supra* note 81, at 643.

113. 2 Reeves, *History of the English Law* 357 (Finlason ed. 1880).

114. *Ibid.* See Zane, *supra* note 81, at 644-45. See also the introduction of Sir Travers Twiss in his edition of Henrici De Bracton de Legibus et Consuetudinibus Angliae (1878).

115. See Brunner, *The Sources of English Law*, in 2 *Select Essays in Anglo-American Legal History* 7, 35-36 (1908); Plucknett, *A Concise History of the Common Law* 258-61 (5th ed. 1956).

116. Plucknett, *op. cit.* *supra* note 115, at 261.

comprehensive treatment for which English law is in Bracton's debt,<sup>117</sup> have made him the source of great controversy. Some historians regard his Romanism so great that they would deny him a place in a discussion of English legal literature. Perhaps the most forceful critic is Sir Henry Maine, who refers to "the plagiarisms of Bracton"<sup>118</sup> and, with seeming contempt and scorn, writes:

That an English writer of the time of Henry III should have been able to put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the Corpus Juris, and that he should have ventured on this experiment in a country where the systematic study of the Roman law was formally proscribed, will always be among the most hopeless enigmas in the history of jurisprudence. . . .<sup>119</sup>

Even those who attempt either to disparage or minimize the Romanism in Bracton must admit that without it the work would have been of a far different and inferior calibre. Reeves, for example, who declares that the Roman law passages "would perhaps not fill three whole pages of his book . . . ,"<sup>120</sup> must, in fairness, also state:

The excellence of Bracton's style must be attributed to his acquaintance with the writings of the Roman lawyers and canonists, from whom likewise he adopted greater helps than the language in which they wrote. Many of those pithy sentences which have been handed down from him, as rules and maxims of our law, are to be found in the volumes of the imperial and pontifical jurisprudence.<sup>121</sup>

Clearly, therefore, in an effort to give English law "form and beauty," Bracton "did not refuse such helps as could be derived from other sources to improve and augment it."<sup>122</sup> Attempts to minimize his knowledge of

117. "Still Bracton's debt—and therefore our debt—to the civilians is inestimably great. But for them, his book would have been impossible . . ." 1 Pollock & Maitland 208. See Woodbine, *The Roman Element in Bracton's De Acquirendo Rerum Dominio*, 31 *Yale L.J.* 827, 847 (1922). "[B]elieving that Bracton was trying to do something other than merely to reproduce the Roman doctrines and technical terms, believing that he was trying to write a systematic and complete exposition of English law (without in any way attempting to change that law), we can not but regard his use of Roman material in *De Acquirendo Rerum Dominio* as both intelligent and skillful." Sir Paul Vinogradoff, commenting on Professor Woodbine's conclusion, writes: "I am glad to find that Professor Woodbine sides with me in his general appreciation of Bracton's Romanesque learning. Instead of marking Bracton down on account of his real or supposed blunders and misunderstandings, he points out that in most cases Bracton's peculiarities of rendering and interpretation of Roman doctrines are traceable to the definite plan of using, as it were, Roman bricks for the construction of an English edifice." Vinogradoff, *The Roman Elements in Bracton's Treatise*, 32 *Yale L.J.* 751 (1923).

118. Maine, *Ancient Law* 82 (9th ed. 1883). Sir William Markby wrote that because of the "admixture" of Roman law, Bracton was "reputiated" by the judges. Markby, *Elements of Law* 57 (6th ed. 1905).

119. Maine, *supra* note 118, at 82. See comment on this question in 2 Holdsworth 267.

120. 2 Reeves, *History of the English Law* 360 (Finlason ed. 1880).

121. *Id.* at 359.

122. *Id.* at 360.

Roman law, by showing inaccuracies, have met with the reply that his knowledge must be tested not by the *Digest*, but by the Romanized customs of the Continent.<sup>123</sup>

Sir William Holdsworth, who has given a rather detailed account of the Romanism in Bracton,<sup>124</sup> offers the following penetrating evaluation:

What, then, was the debt of Bracton and English law to the Roman law? . . . We cannot say that all Bracton's law is English in substance, that the influence of Roman law is merely formal. No doubt there is a body of thoroughly English rules; and Bracton differs at very many points from the Roman texts. But it is clear that he has used Roman terms, Roman maxims, and Roman doctrines to construct upon native foundations a reasonable system out of comparatively meagre authorities. Even when he is dealing with purely English portions of his Treatise, and discouraging upon the assizes, the writs of entry, or the writ of right, Roman illustrations and phrases naturally recur to him. And it is clear that his study of Roman law has led him to discuss problems which, when he wrote, were very far from any actual case argued in the royal courts. Thus he deals with accessio, specificatio, and confusio; and "where," says Maitland, "in all our countless volumes of reports shall we find any decisions about some questions that Azo has suggested to Bracton?" Similarly he deals with many questions relating to obligation and contract, fraud and negligence, about which the common law had as yet no rules. In dealing with these matters he necessarily uses Roman terms and borrows Roman rules. It is, as we shall see, because his Treatises have given to English law at least one authority upon many matters which were outside the routine of the practising lawyer of the thirteenth century that his influence upon the history of English law has been so great. That his Treatise deals with such matters is due to the Roman law which it contains.<sup>125</sup>

The reference to Azo is to the famous lawyer and Glossator of Bologna who was called "the master of the masters of the law." There can be no doubt that not only had Bracton "diligently studied"<sup>126</sup> Azo's *Summary of Roman Law*, but he made copious use of the book!

As a matter of diversion, it may be added that there was a popular

123. See Scrutton, *Roman Law Influence in Chancery, Church Courts, Admiralty and the Law Merchant*, in 1 *Select Essays in Anglo-American Legal History* 208, 209 (1907), where he discusses Sir Edward Coke's Institutes and says: "Coke cites very largely from Bracton, and some of the passages are those directly derived from Roman sources," Vinogradoff, *Roman Law in Mediaeval Europe* 88-105 (1909).

124. 2 Holdsworth 267-86. "The introductory sections of the Treatise are modelled on the introductory sections of the Institutes. They also contain traces of the dialectical methods of the glossators. . . . But all through the book we can see that Roman doctrine is used to illustrate and explain the principles of the law, or is worked, in a modified form, into its substance. . . . Even where the substance of the law is not Roman, Roman phraseology is used, and Roman texts are followed sometimes with considerable exactness." *Id.* at 271, 282, 284.

125. *Id.* at 285-86.

126. 1 Pollock & Maitland 207. For authorities that Bracton "copied from Azo," see 2 Holdsworth 267. "Law is just when it renders to every one his own. 'Juris praecepta sunt tria haec, honeste vivere, alterum non laedere, jus suum unicuique tribuere,' says Bracton, quoting from the *Digest* and Azo." Rooney, *Lawlessness, Law, and Sanction* 73 (1937). See note 36 *supra*.

jingle about Azo—of particular interest to the lawyer who aspired to judicial office:

Unless on Azo you prepare  
Judicial robes you'll never wear.<sup>127</sup>

Zane, in a thought-provoking lecture, declared that "the greatness of Bracton's work is best proven by the reflection that five centuries were to pass away before another English lawyer, in the person of Blackstone, was to appear, competent to write a treatise upon the whole subject of English law."<sup>128</sup> Although the influence of Bracton has varied over the centuries and Zane's test of time has much validity, Bracton's immortality would have been assured by his emphasis upon responsibility and the supremacy of the law. For Bracton, the King, too, was subject to God and the law—and this was the answer to the state absolutism of the Tudors and the Stuarts, and is no less responsive to the totalitarian state of all ages. And in the tradition of the great lawyers of classical Rome, justice was due to all men, and all men are under the law, King and servant alike.<sup>129</sup>

The words of Bracton, "*Ipse autem rex, non debet esse sub homine sed sub Deo et sub lege, quia lex facit regem,*" and "*Non est enim rex ubi dominatur voluntas et non lex,*" embodied all that was noble in medieval government.<sup>130</sup> In all future crises, excepting Magna Carta, no words were to be cited more often than his.

The assertion of the existence of a body of law above the King was Bracton's legacy to posterity.<sup>131</sup> It was the dramatic answer given by Sir Thomas More, albeit unsuccessfully, on July 1, 1535, at his trial for high treason for having refused to take the Oath of Supremacy acknowledging the King as the head of the Church. "This indictment," said More, "is grounded upon an act of parliament directlie repugnant to the lawes of God and his holie church . . ."<sup>132</sup>

Of Bracton and his contemporaries of the twelfth and thirteenth centuries, Professors Pollock and Maitland have written:

127. Wigmore, *A Panorama of the World's Legal Systems* 1008 (1936).

128. Zane, *supra* note 81, at 645.

129. See passages in 2 Holdsworth 253-55.

130. "The King himself, however, must not be subject to man, but to God and to the law because it is the law which makes the King." "For there is no King where the will [of a man] governs and not the law." (Author's translation.) See McIlwain, *The High Court of Parliament and Its Supremacy* 101 (1910).

131. See *Re, Freedom in the International Society*, in *Concept of Freedom* 219-20, 236-38 (Grindell ed. 1955).

132. See Roper, *The Life of Sir Thomas More* 108 (Singer ed. 1817); *The Mirror of Vertue in Worldly Greatnes or the Life of Sir Thomas More Knight* by William Roper, in *The King's Classics* 91 (Gollancz ed. 1903). See the account of More's trial in 1 Howell's *State Trials* 385 (1809). See also McIlwain, *The High Court of Parliament and its Supremacy* 278-79 (1901).

English law was administered by the ablest, and best educated, men in the realm; nor only that, it was administered by the self-same men who were "the judges ordinary" of the church's courts, men who were bound to be, at least in some measure, learned in the canon law.<sup>133</sup>

And they proceed to rectify a false notion inflicted by Blackstone upon generations of common law lawyers that the nation was "divided into two parties": "The bishops and clergy," espousing foreign jurisprudence, and "the nobility and the laity, who adhered with equal pertinacity to the old common law."<sup>134</sup> They proceed to pronounce the following judgment, the significance of which requires no comment:

It is by "popish clergymen" that our English common law is converted from a rude mass of customs into an articulate system, and when the "popish clergymen," yielding at length to the pope's commands, no longer sit as the principal justices of the king's court, the creative age of our medieval law is over.<sup>135</sup>

It is fitting that a discussion of Glanvill, Bracton and Azo close with the thought of a modern legist who has recently written that Glanvill and Bracton were able to write their works, and particularly Bracton's "scientific systematizing of the common law or the national law of England," because they were "nurtured by romanistic doctrine."<sup>136</sup>

No remarks concerning the era commencing with Glanvill and ending with Bracton, during the reign of Henry III, could conclude without mentioning King John, from whom "the Army of God and the Holy Church" wrested the Great Charter. Magna Carta is the very symbol of freedom, liberty and the rule of law in Anglo-American jurisprudence.<sup>137</sup> Nonetheless, its historical antecedents and its humble origins as a document of human liberty are not too well known, even by the English-speaking lawyer, who relates the glorious achievement of the barons on June 15, 1215, with justifiable pride. A study of the Charter must commence with Thomas à Becket who, refusing to submit to the pre-

133. 1 Pollock & Maitland 132.

134. 1 Blackstone, *Commentaries* \*19. Blackstone, in referring to "the bishops and clergy," adds: "many of them foreigners." *Ibid.* He refers to the "popish ecclesiastics" on the following page.

135. 1 Pollock & Maitland 133.

136. Calasso, *Medio Evo del Diritto* 619 (1954). Glanvill and Bracton are acknowledged as "the first authorities on the common law" by jurists, historians and political scientists. Dunning, *A History of Political Theories from Luther to Montesquieu* 197-98 (1928), adds the name "Richard Nigel." The reference is to an anonymous book, *Dialogus de Scaccario*, written between 1177 and 1179 and ascribed to Richard Fitz Neal, i.e., Richard son of Nigel, Bishop of Ely, who was the nephew of Roger, Bishop of Salisbury. Written by an experienced King's treasurer, it is a fine work by an educated man on the exchequer and government. See references in 1 Pollock & Maitland 161-62.

137. See Thompson, *Magna Carta: Its Role in the Making of the English Constitution, 1300-1629* (1948), and materials cited in *Re, Book Review*, 24 *St. John's L. Rev.* 185 (1949).

tensions of Henry II, was assassinated on the altar of the Cathedral of Canterbury. It has been said of Thomas that he was "not more a martyr of religion than he was of freedom and justice."<sup>138</sup>

King John's serious difficulties began when Pope Innocent III compelled him to accept Cardinal Stephen Langton as Archbishop of Canterbury, and John retaliated by confiscating Church property. Langton, a truly worthy successor of Thomas à Becket, an exponent of doctrines that all human conduct is subject to law and that "loyalty was devotion, not to a man, but to a system of law and order,"<sup>139</sup> joined with the barons in bringing about, in retrospect, perhaps the most dramatic of all events in English history—the signing of the Magna Carta by King John.<sup>140</sup>

Although the specific author of the Charter is not known with certainty, the most reasonable assumption is that its draftsman was Stephen Langton, a Doctor of Laws from the University of Bologna.<sup>141</sup> The belief that Langton is the author is fortified by the Charter's style and content, and the fact that he was the most prominent among the assemblage of clergy and barons.

The provisions of Magna Carta are introduced as follows:

To all archbishops, bishops, abbots, priors, earls, barons, sheriffs, provosts, officers; and to all bailiffs, and other our faithful subjects, who shall see this present charter, greeting. Know ye, that we, unto the honor of Almighty God, and for the salvation of the souls of our progenitors and successors kings of England, to the advancement of the holy church, and amendment of our realm, of our mere and free will, have given and granted to all archbishops, bishops, abbots, priors, earls, barons, and to all freemen of this our realm, these liberties following to be kept in our kingdom of England forever.<sup>142</sup>

The very first article proclaims the freedom of the Church, which concept is reiterated in the last. From this it has been inferred that the

138. Morris, *The History of the Development of Law* 254 (1909).

139. Powicke, *England: Richard I and John*, in 6 *The Cambridge Medieval History* 205, 219 (1936). Powicke, Regius Professor of Modern History at Oxford, is one of the editors of the splendid three-volume work, Rashdall, *The Universities of Europe in the Middle Ages* (Powicke & Emden ed. 1936).

140. For a treatment of the provisions of Magna Carta see 2 Reeves, *History of the English Law* 17-30 (Finlason ed. 1880). Blackstone, among others, indicates that "the great charter of liberties, which was obtained, sword in hand, from King John, and afterwards, with some alterations, confirmed in parliament by King Henry the Third, his son . . . contained very few new grants; but as Sir Edward Coke observes, was for the most part declaratory of the principal grounds of the fundamental laws of England." 1 Blackstone, *Commentaries* \*127-28.

141. Professor Powicke has written a biography of this famous cleric and statesman. Powicke, *Stephen Langton* (1928). Quite apart from passages of the Code, "the writings of both Seneca and Tacitus show that even under the Roman Empire men had become accustomed to the idea that laws existed to control rulers." Seagle, *The Quest for Law* 223 (1941).

142. See 2 Reeves, *History of the English Law* 17 (Finlason ed. 1880).

Charter is "to a far greater extent" the work of Langton and the bishops than it is of the barons.<sup>143</sup> In this monumental historic event it is believed that Langton was assisted by Cardinal Pandulph (Pandolfo), the Papal Legate in England, who upheld Langton's appointment against the protests of King John. And it is interesting to note that although Shakespeare makes no mention of Magna Carta in *King John*, he does have the King utter the following words in answering Pandulph:

Add this much more, that no Italian priest,  
Shall tithes or toll in our dominions.<sup>144</sup>

Pandulph and John later reconciled, and when in the reign of Henry III Langton asked Rome to remove Pandulph, he was replaced by Cardinal Guala Bicchieri, of whom Pollock and Maitland say: "Another lawyer who for a while controls the destiny of our land is Cardinal Guala Bicchieri, but it were needless to say that he was no Englishman."<sup>145</sup>

The intellectual environment immediately preceding and following Magna Carta sustains the belief of authorship herein put forth. It is the period of Ugolino, Azo, the legists and canonists—strong cultural currents, which did not escape the kings. "Henry III kept in his pay Henry of Susa, who was going to be cardinal bishop of Ostia, and who, for all men who read the law of the Church, will be simply *Hostiensis*. Edward I had Francisus Accursii at his side."<sup>146</sup>

As for Magna Carta, clearly its source and inspiration were not the English feudalistic institutions, but notions of the majesty and universality of the law as proclaimed by the Roman legal tradition.<sup>147</sup> And as for its authorship, the concession might be made by even a Blackstone that the person most likely to have written it was Stephen Langton.

#### VIII. THE GENESIS OF ENGLISH EQUITY: THE CHANCELLOR, THE COURT OF CONSCIENCE, AND A MORE PERFECT REMEDY

Several references have been made to the Chancellors and the Courts of Chancery which administered "equity." When viewed dispassionately one cannot avoid the conclusion that this "equity" infused into the common law system the qualities of flexibility and liberality which evidence the maturity of law.

143. Morris, *The History of the Development of Law* 256-57 (1909).

144. Shakespeare, *The Life and Death of King John*, Act III, Scene 1. Pandulph asks John why "against the church" he keeps "Stephen Langton, chosen Archbishop of Canterbury, from that holy see?" John refers to Pandulph as a "meddling priest." See comment on this passage in Thompson, *Magna Carta: Its Role in the Making of the English Constitution, 1300-1629*, at 164-65 (1948).

145. 1 Pollock & Maitland 121.

146. *Id.* at 122.

147. See Morris, *The History of the Development of Law* 255 (1909); Sherman, *The Romanization of English Law*, 23 *Yale L.J.* 325 (1914).

The Court of Chancery takes root in the notion that the King "with us," says Lord Campbell, in his *Lives of the Lord Chancellors*, "has ever been considered the fountain of justice."<sup>148</sup> Since he could not personally decide all controversies and remedy all wrongs, tribunals were established to execute the law—hence, the King's courts. Nevertheless, applications for relief by injured parties were still made to the King, who referred them to the appropriate forum. The office that assisted the King in this administrative phase of royal justice was called the *officina justitiae*, or Chancery.<sup>149</sup> This was the first occupation of the Chancellor. The second, of infinitely greater importance in the development of English law, was in deciding—always in the King's name—"a peculiar class of suits as a judge."<sup>150</sup> These cases involved those petitions addressed to the King, as a matter of grace, because the complainants deemed themselves wronged by the common law—either because the common law offered them no remedy or because the remedy was inadequate. This became the "equitable" jurisdiction of the Chancellor which, as it expanded, incurred the wrath of the common law judges, thus creating a problem that was not solved until 1616 when James I personally decided in favor of Chancery.

Although many descriptions are available of the Chancellor's "equitable jurisdiction," Lord Campbell's commends itself because of its simplicity and brevity. He writes:

By "equitable jurisdiction" must be understood the extraordinary interference of the chancellor, without common-law process, or regard to the common-law rules of proceeding, upon the petition of a party grieved, who was without adequate remedy in a court of common-law; whereupon the opposite party was compelled to appear and to be examined, either personally or upon written interrogatories; and evidence being heard on both sides, without the interposition of a jury, an order was made *secundum aequum et bonum*, which was enforced by imprisonment.<sup>151</sup>

One additional aspect of the Chancellor's duties casts considerable

148. 1 Campbell, *Lives of the Lord Chancellors* 3 (7th ed. 1885). Lord Campbell says that it "has been too much the fashion to neglect our history and antiquities prior to the Norman conquest" and proceeds to mention those who held the office of Chancellor under the Anglo-Saxon Kings. After naming Augmentus as the "Chancellor" or Referendarius of Ethelbert, "who received petitions and supplications addressed to the Sovereign," he adds: "There is great reason to believe that he was one of the benevolent ecclesiastics who accompanied Augustine from Rome on his holy mission, and that he assisted in drawing up the Code of Laws then published, which materially softened and improved many of the customs which have prevailed while the Scandinavian divinities were still worshipped in England." *Id.* at 32. He then tells about St. Swithin, who also became Chancellor and accompanied Alfred the Great to Rome, "taking the opportunity of pointing out to him the remains of classical antiquity visible in the twilight of refinement which still lingered in Italy." *Id.* at 34.

149. 1 Campbell, *op. cit.* supra note 148, at 3.

150. *Id.* at 6.

151. *Id.* at 8.

light upon the atmosphere that must have pervaded Chancery, that is, his function as the "Keeper of the King's Conscience," and whose court also came to be called the Court of Conscience.

This came about as follows:

From the conversion of the Anglo-Saxons to Christianity by the preaching of St. Augustine, the King always had near his person a priest, to whom was intrusted the care of his chapel, and who was his confessor. This person, selected from the most learned and able of his order, and greatly superior in accomplishments to the unlettered laymen attending the Court, soon acted as private secretary to the King, and gained his confidence in affairs of state. The present demarcation between civil and ecclesiastical employments was then little regarded, and to this same person was assigned the business of superintending writs and grants—with the custody of the great seal.<sup>152</sup>

By the time of Edward III, the Chancellor's court assumed a definite and separate character, and petitions as a matter of grace were addressed directly to him. Such practice soon became customary and hence the growth of the equitable jurisdiction of Chancery. Several factors, intellectual, moral and spiritual, combined to give this growth "Roman lines."<sup>153</sup>

Up to the time of St. Thomas More, practically all of the Chancellors had been "churchmen" or "ecclesiastics." To the end of Cardinal Wolsey's Chancellorship in 1530, the office had been held by no less than 160 "ecclesiastics."<sup>154</sup> Commenting upon this "clerical preponderance," Scrutton draws the inference that "the advantages of the Civil law, familiar to the Chancellors by their early training, and as the system in use in the ecclesiastical courts, are obvious."<sup>155</sup> And to the influence of these "clerics" must be added that of the Masters of the Chancery who were appointed to assist the Court of Chancery. These Masters, learned in civil and canon law, were to advise the Chancellor as to the equity of the civil law and matters of conscience.

The work of these ecclesiastical Chancellors has been judged to have been "an exceedingly beneficial one, for it may well be doubted whether judges trained in the practice of the Common Law would ever have possessed the courage to interfere with its rules, in the face of the professional opinion of their brethren, or indeed have been sufficiently detached in mind to discover that the rules stood in need of correction."<sup>156</sup>

The following summary of the nature of equitable jurisdiction, from the lips of James I, will reveal its close analogy to the *aequitas* of the

152. *Id.* at 4.

153. Scrutton, *The Influence of the Roman Law on the Law of England* 153 (1885).

154. 1 Spence, *Equitable Jurisdiction of the Court of Chancery* 340 (1846).

155. Scrutton, *op. cit.* supra note 153, at 153.

156. Kerly, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* 94-95 (1890).

Roman law and the *jus gentium* of the Roman *praetor peregrinus*. He declared: "Where the rigor of the law in many cases will undo a subject, there the Chancery tempers the law with equity, and so mixes mercy with justice. . . ."<sup>157</sup> To this may be added a quotation from the work of Christopher St. Germain (1460-1540), a barrister of the Inner Temple who possessed an admirable command of philosophy and the canon law. The book, written in Latin, entitled *Dialogues Between a Doctor of Divinity and a Student of the Common Law*, shows that the moral and philosophical bases of equity are found in the canon law, and depicts equity thus:

Equity is a right wiseness that considereth all the particular circumstances of the Deed, the which also is tempered with the Sweetness of Mercy. And such an Equity must always be observed in every Law of Man, and in every general Rule thereof: And that knew he well that said thus, Laws covet to be ruled by Equity.<sup>158</sup>

From this latter quotation one sees the Aristotelean notion of *epikeia* (*epieikeia*),<sup>159</sup> which was adopted by the theologians.<sup>160</sup> Since future lay Chancellors were to turn to St. Germain's book, popularly called *Doctor and Student*, for the underlying ideas of equity, its importance is manifest.

157. Cited in Scrutton, *op. cit. supra* note 153, at 154, and in 1 Spence, *Equitable Jurisdiction of the Court of Chancery* 409 (1846). See, e.g., the quotations from the *Digest* and from Cicero in the first chapter of Story's *Equity Jurisprudence*, 1 Story, *Commentaries on Equity Jurisprudence* 1-10 (14th ed. 1918).

158. St. Germain, *Doctor and Student*, ch. XVI, f.52 (1721). Sir William Markby in 1889 wrote that equity "has to a great extent lost in England that feature, which at first sight it would seem easiest to preserve, its elasticity." Markby, *Elements of Law* 76 (6th ed. 1905). "The problem of Equity was known quite early to Greek thought. It was, as is implied in the word chosen, *epieikeia*, something soft and yielding, in contrast with the harshness of law, and Plato, in the *Laws*, puts it together with clemency, as an infraction of strict justice which must sometimes be permitted. It was Aristotle however who, though he did not discard the old implications, first formulated a definition, and his formulation has never been surpassed." Jolowicz, *Roman Foundations of Modern Law* 54 (1957). St. Thomas Aquinas knew Aristotle's views on *epikeia*. "Aristotle (*Ethic. v. 10*) mentions *epieikeia* as being annexed to justice. . . ." *Summa Theologica* II, Q. 80.

159. Aristotle, *Ethica Nicomachea*, Book V, 10, in 9 *The Works of Aristotle*, 1137b (Ross ed. 1925). The Aristotelean definition and idea is followed closely by Lord Ellesmere in the Earl of Oxford's Case, 1 Ch. Rep. 1, 6, 21 Eng. Rep. 485, 486 (1615), wherein he stated that the Chancellor intervened because "Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances."

160. See the definition in Riley, *The History, Nature and Use of Epieikeia in Moral Theology* 137 (1948), which follows the definition in Prümmer, *Manuale Theologiae Moralís* 110, 154 (1935), which in turn follows Aristotle's. These definitions are set forth in Re, *Selected Essays on Equity* xi-xii (1955). The ecclesiastical Chancellor is therein referred to as one "who perfected the common law by bringing to bear on many problems the wisdom of the Canon law and the moral tradition of the western world." *Id.* at xii.

Equity, therefore, originated and was presented as a canonical contribution alleviating the rigor of the law—just as was done by the Roman praetors. The analogy to the Roman *praetor peregrinus* (c. 247 B.C.), who, in doing justice, was not bound by the formalistic rules of the *jus civile*, indicates that England too was approaching a period of maturity in the law. The doing of equity or the affording of a more perfect remedy, *i.e.*, specific relief and prevention of wrongs, is the second stage of the doing of justice. And it is indeed a trenchant observation that "only those legal systems which have come to maturity display a growth of equity."<sup>161</sup>

Primitive systems of law, like the early Roman, granted only pecuniary compensation; notions of prevention and restriction are of a later development. And it was in the fashioning of specific remedies that the Chancellor made his greatest practical contribution to the common law.<sup>162</sup> An American scholar who has made a special study of equitable decrees and remedies concluded:

The history of remedies in the other great legal system of the Western world, the Roman law, affords a striking parallel to the development which our Anglo-American law has followed. Moreover it points the way to the rounding out of our common-law scheme of remedies by means of an effective enforcement of specific relief. . . .<sup>163</sup>

Within this framework the genius of Maitland is apparent when he observed that "Equity saved the common law."<sup>164</sup>

The very liberality of equity aided the Chancellors immensely in drawing upon their ecclesiastical training in deciding the cases that came before them. Bryce introduces the Roman element in English equity as follows:

Our system of Equity, built up by the Chancellors, the earlier among them ecclesiastics, takes not only its name but its guiding and formative principles, and many of its positive rules, from the Roman *aequitas*, which was in substance identical with the Law of Nature and the *ius gentium*. For obvious reasons the Chancellors and Masters of the Rolls did not talk much about Nature, and still less would they have talked about *ius gentium*. They referred rather to the law of God and to Reason. But the ideas were Roman, drawn either from the Canon Law, or directly from the *Digest* and the *Institutes*, and they were applied to English facts in a manner not dissimilar from that of the Roman jurists. The very name, Courts of Conscience, though the conscience may in the immediate sense have been the King's, suggests that moral element on which the Romans insisted so strongly; and the wide, some-

161. Seagle, *The Quest for Law* 184 (1941).

162. For the almost unlimited number of situations wherein equity injunctions are sought, see the works on equity cited in Chafee & Re, *Cases and Materials on Equity* (4th ed. 1958), and particularly the cases referred to in the Historical Note concerning requests for injunction against alleged nuisances. *Id.* at 795-96.

163. Huston, *The Enforcement of Decrees in Equity* 39 (1915).

164. Maitland, *A Sketch of English Legal History* 128 (1915).

times almost too wide, discretionary power which Equity judges exercised, finds its prototype in the passages in Roman texts which refer to natural equity as the consideration which guides the judge in qualifying, in special cases, the normal strictness of law.<sup>165</sup>

Sir Henry Maine, in his *Ancient Law*, observed:

The jurisprudence of the Court of Chancery, which bears the name of Equity in England . . . derives its materials from several heterogeneous sources. The early ecclesiastical chancellors contributed to it, from the Canon Law, many of the principles which lie deepest in its structure. The Roman Law, more fertile than the Canon Law in rules applicable to secular disputes, was not seldom resorted to by a later generation of Chancery judges, amid whose recorded dicta we often find entire texts from the *Corpus Juris Civilis* imbedded, with their terms unaltered, though their origin is never acknowledged.<sup>166</sup>

Scholars have traced many doctrines of equity, such as the system of uses and trusts and the equity of redemption in the law of mortgages, to canonical and Roman notions.<sup>167</sup> Spence states that the Chancellors availed themselves of Roman rules in the construction of legacies and documents.<sup>168</sup> Scrutton adds that since "Chancery had no original jurisdiction in testamentary matters," it "felt bound to adopt the rules of the Ecclesiastical Courts, which were those of the civil law."<sup>169</sup> Indeed much has been written about this. Oliver Wendell Holmes stated that at the end of the reign of Henry V, the Chancery Court was an established court of the realm and "had already borrowed the procedure of the Canon law, which had been developed into a perfected system at the beginning of the thirteenth century. . . ."<sup>170</sup> Eminent scholars have attested to this borrowing<sup>171</sup> and new and fascinating discoveries are constantly being made as to the specific points of contact of the two systems. One scholar in particular, who has made a special study of St.

165. 2 Bryce, *Studies in History and Jurisprudence* 599-600 (1901). Scrutton capsules all this by saying: "English Equity however, invented and administered by Clerical Chancellors, derived much of its form and matter from Roman sources." Scrutton, *op. cit. supra* note 153, at 155.

166. Maine, *Ancient Law* 44-45 (9th ed. 1883).

167. A common example is the Roman fideicommissa as the origin of the English system of uses and trusts. See Holmes, *Early English Equity*, in 2 *Select Essays in Anglo-American Legal History* 705, 715-16 (1908); Scrutton, *op. cit. supra* note 153, at 156-57.

168. 1 Spence, *Equitable Jurisdiction of the Court of Chancery* 518, 523, 566 (1849).

169. Scrutton, *op. cit. supra* note 153, at 158.

170. Holmes, *Early English Equity*, in 2 *Select Essays in Anglo-American Legal History* 705 (1908).

171. Langdell, *The Development of Equity Pleading from Canon Law Procedure*, in 2 *Select Essays in Anglo-American Legal History* 753 (1908). "The procedure of the ecclesiastical courts is called the civil-law system, not because it ever prevailed among the ancient Romans, but because it has grown out of the latest Roman procedure, and because it prevails generally in those countries and jurisdictions which derive their procedure from the Romans." *Id.* at 753-54.

Germain, has recently traced English equity to the *denunciatio evangelica* procedure of the canon law.<sup>172</sup> This penitentiary procedure, originating in the idea that a sinner ought to make amends, reform and save his soul, served the purpose of obtaining reparation for wrongs and thus acquired legal character. This procedure, resting on the words of the Evangelist,<sup>173</sup> has recently received masterful treatment by one who concluded that although it disappeared on the Continent, because "most disputes could be satisfactorily dealt with on the basis of Roman law," it survives "only in English equity . . . in however modified a form."<sup>174</sup>

No researcher of equity, particularly during the centuries when the common law had already been cast into its distinctive mold, could possibly avoid encountering such common threads as the canon law, ecclesiastical influence and Roman thought. In fact, it has also been attempted to show that equity was designed to do more than merely amend or correct the inadequacies of the common law. It has been submitted that equity

had for its province as well to enforce a superior morality by relieving in the interest of good conscience against many types of defects in the substantive law, that its root is in the sovereign prerogative of grace in civil matters, the same prerogative to which the Roman praetor accredited his boons.<sup>175</sup>

Regardless of the weight that one desires to ascribe to the various factors that have produced the end product of English equity—e.g., the ecclesiastical Chancellor, the ecclesiastical courts, the canon law—the result is undeniable. Even Blackstone had to subdue his bias against the "popish ecclesiastics" and had to admit the glaring fact that in Chancery "the proceedings are to this day in a course much conformed to the civil law."<sup>176</sup>

A treatise on the law of equity that has had much influence upon generations of lawyers and judges in the United States is Pomeroy's *Equity*

172. De Luca, *Aequitas canonica ed equity inglese alla luce del pensiero di C. St. Germain*, 3 *Ephemerides Juris Canonici* 46, 63 (1947).

173. "And if thy brother sin against thee, go, show him his fault between thee and him alone: if he hear thee, thou hast gained thy brother. But if he hear thee not, take with thee one or two more, that at the mouth of two witnesses or three every word may be established. And if he refuses to hear them, tell it unto the church and if he refuses to hear the church also, let him be unto thee as the gentile and the publican." Matthew 18:15-17.

174. Coing, *English Equity and the Denunciatio Evangelica of the Canon Law*, 71 *L.Q. Rev.* 223, 241 (1955). "The denunciatio evangelica enforces the duties of 'reason and conscience,' or, more precisely, of the divine law and the natural law binding on human conscience. The same is true of equity as is shown by the whole treatise *Doctor and Student*. . . . The mere observance of the positive law is held insufficient both by *denunciatio evangelica* and by equity." *Id.* at 233.

175. Billson, *Equity in its Relations to Common Law* iv (1917).

176. 1 Blackstone, *Commentaries* \*20.

*Jurisprudence.* It seems appropriate to close this phase of the discussion with the following quotation from that work:

The growth and functions of equity as a part of the English law were anticipated by a similar development of the same notions in the Roman jurisprudence. In fact, the equity administered by the early English chancellors, and the jurisdiction of their court, were confessedly borrowed from the *aequitas* and judicial powers of the Roman magistrates; and the one cannot be fully understood without some knowledge of the other.<sup>177</sup>

#### IX. ADDITIONAL INROADS: THE CANON LAW, THE ECCLESIASTICAL COURTS AND THE LAW MERCHANT

It must be obvious that the failure to attribute a separate treatment to the canon law is not because it has not made a monumental contribution. Rather, since the canonical influence has been the sturdy thread that has given body and texture to the entire legal fabric, it has been impossible to separate its influence throughout the discussion of other areas. This feeling of inseparability has also struck Stubbs, who in his essay on the *History of the Canon Law in England* said that he "must . . . couple the two Roman systems together, for to all purposes of domestic litigation they were inseparable: the 'canones legesque Romanorum' were classed together, and worked together. . . ."<sup>178</sup> He added that "if you take any well-drawn case of litigation in the middle ages, such as that of the monks of Canterbury against the archbishops, you will find that its citations from the Code and Digest are at least as numerous as from the Decretum."<sup>179</sup> Indeed, if one were asked for a single source which contributed Roman law to English law, the best answer would probably be the canon law. Witness the positive statement in Winfield: "It is in the Canon Law which borrowed liberally from Roman Law that we must look for the more abiding influence of Roman Law on our system, rather than in the pure Civil Law."<sup>180</sup>

Certain specific references will be helpful even if only to place in evidence the great work of a Bolognese monk, Gratian, whose *Decretum* systematized the canon law.

177. 1 Pomeroy, *A Treatise on Equity Jurisprudence* § 2 (5th ed. Symons 1941). See the interesting reference to Chancellor Kent of New York, the author of Kent's Commentaries, in Burdick, *The Principles of Roman Law* 80-81 (1938). An indication of Kent's respect for the Roman or civil law, is seen in his chapter on the civil law. He writes: "The whole body of the civil law will excite neverfailing curiosity, and receive the homage of scholars, as a singular monument of human wisdom." 1 Kent, *Commentaries on American Law* 507-08 (1826).

178. Stubbs, *The History of the Canon Law in England*, in 1 *Select Essays in Anglo-American Legal History* 248, 261-62 (1907).

179. *Id.* at 262.

180. Winfield, *The Chief Sources of English Legal History* 57 (1925).

Although the "Western church had grown up within the Empire,"<sup>181</sup> it was this growth and expansion, continuing after the Empire declined, that perpetuated the Roman tradition of a universal law. With this expansion the acquisition and formulation of rules for the government of the Church and its members became inevitable. Soon canonists would speak of a *jus commune*, *i.e.*, the ordinary common law of the universal church as distinguished from rules peculiar to particular provinces, long before "the term common law" was used by "temporal lawyers."<sup>182</sup> When these church rules, consisting of the legislation and decisions of the Popes and council resolutions, became bulky, the need was felt to gather and codify at least the important ones into a single commentary. Although these compilations began as early as the year 500, a compilation, known as the *Pannormia*, which shows the growth of a coherent body of law,<sup>183</sup> was produced by Ivo (Ives), who became Bishop of Chartres (1091-1116). It is interesting to note that Ivo, a contemporary of Henry I of England, was a pupil of Lanfranc at the Abbey at Bec.<sup>184</sup> Notwithstanding the efforts of all prior attempts to state this common law of the Church, "the fame of earlier labourers was eclipsed by that of Gratian."<sup>185</sup> Gratian's *Decretum*, published about 1140<sup>186</sup> and entitled *Concordia Discordantium Canonum* (The Concordance of Discordant Canons), although unofficial, came to be regarded as an authoritative work. It is not merely a compilation of authorities but a digest logically arranged with a discussion of doubtful materials. Not only has it been hailed as "a great lawbook," but it is significant that the "spirit which animated its author was not that of a theologian, not that of an ecclesiastical ruler, but that of a lawyer."<sup>187</sup> Rashdall says that the "Decretum is

181. 2 Holdsworth 137.

182. 1 Pollock & Maitland 176.

183. See 2 Holdsworth 139; Stubbs, *The History of the Canon Law in England*, in 1 *Select Essays in Anglo-American Legal History* 248, 254 (1907). For a simple and interesting presentation of "The Papal Legal System," see Wigmore, *A Panorama of the World's Legal Systems* 931-75 (1936).

184. 1 Rashdall, *The Universities of Europe in the Middle Ages* 127 (Powiecke & Emden ed. 1936). The Ives (1035-1115) of the canonical text, *The Pannormia*, and who became Bishop of Chartres is not to be confused with St. Yves of Brittany, who is regarded as the patron of lawyers. Ives, the pupil of Lanfranc, "had as a fellow pupil another Italian, Anselm, from Aosta in Piedmont, who was of the same age, having been born in 1033." Both Ives and Anselm were later canonized. Ortolan, *The History of Roman Law* 418 (2d ed. Cutler 1896).

185. 1 Pollock & Maitland 112.

186. The date generally given is "c. 1150." Although Pollock and Maitland put the date between "1139 and 1142," it is probably between 1139 and 1141. See 2 Holdsworth 139 n.12; 1 Pollock & Maitland 112.

187. 1 Pollock & Maitland 113.

one of those great text-books which, appearing just at the right time and in the right place, take the world by storm."<sup>188</sup>

With the appearance of Gratian's *Decretum*, or *Digest*, the canon law acquired dignity and professional status as a separate body of legal learning also to be taught in the universities. As for Gratian, he became the leader of a school of lawyers who mastered the Roman law. Henceforth the canon law was to be taught alongside of the Roman law and those who mastered both laws acquired the degree of *juris utriusque doctor*.<sup>189</sup>

Even these cursory remarks may have helped explain the justification for the statement that the "canon law had borrowed its form, its language, its spirit, and many a maxim from the civil law."<sup>190</sup> And this is the canon law that became one of the sources of the law of England.

The ecclesiastical courts, which have had a "longer history than the Courts of Common Law and Equity,"<sup>191</sup> provided a direct channel for the infusion of canon law and Roman concepts into English law and English institutions. These courts, which were very numerous, were assured the development of their own Roman and canonical procedures from the moment that William the Conqueror separated them from the civil courts. The law effecting this separation provided that these courts would be administered "*secundum canones et episcopales leges rectum Deo et Episcopo suo faciat*."<sup>192</sup> Furthermore, William "assumes that all men know what causes are spiritual, what secular."<sup>193</sup>

The lasting influence wielded by these courts can, perhaps, best be appreciated by a statement of its vast jurisdiction. Contrary to what one might guess, their jurisdiction was not limited to those matters which were by their nature ecclesiastical, such as ordination, consecration, the status of ecclesiastical persons and ecclesiastical property. In the foregoing matters the jurisdiction of the ecclesiastical courts was exclusive, but it also exercised a wide jurisdiction over matters that are taken for granted today as being purely civil. In addition to a criminal

188. 1 Rashdall, *The Universities of Europe in the Middle Ages* 127 (Powicke & Emden ed. 1936).

189. See Pound, *The Lawyer from Antiquity to Modern Times* 64 (1953), wherein Dean Pound says: "Bachelor, Master and Doctor of Laws (notice not of law) and the continental degree of Doctor of Either Law (J.U.D.), in each of these cases referring in terms to two systems, bear witness to the two coordinate systems of law which obtained in the Middle Ages."

190. 1 Pollock & Maitland 116.

191. Holdsworth, *The Ecclesiastical Courts and Their Jurisdiction*, in 2 *Select Essays in Anglo-American Legal History* 255 (1908).

192. Stubbs, *Select Charters* 85 (3d ed. 1876). "Let [the Court] do justice before God and its proper bishop by following the canons and episcopal norms." (Author's translation.) See 1 Pollock & Maitland 450, and *id.* at 439-57 (dealing with the clergy).

193. 1 Pollock & Maitland 450.

jurisdiction over clerics accused of crime and cases involving offenses over religion, they possessed a vast jurisdiction over matrimonial matters relating to marriage, divorce and legitimacy, and the testamentary jurisdiction included all matters pertaining to the administration of estates, intestate succession and supervision over executors and administrators.<sup>194</sup>

The relationship of the "Ecclesiastical law" administered by these courts to the common law of England can be seen from the following dictum of Lord Chief Justice Tindal, uttered in 1844:

[T]he law by which the Spiritual Courts of this kingdom have from the earliest times been governed and regulated is not the general canon law of Europe, imported as a body of law into this kingdom, and governing those Courts *proprio vigore*, but instead thereof, an ecclesiastical law, of which the general canon law is no doubt the basis, but which has been modified and altered from time to time by the ecclesiastical Constitutions of our Archbishops and Bishops, and by the Legislature of the realm, and which has been known from early times by the distinguishing title of the King's Ecclesiastical Law.<sup>195</sup>

Notwithstanding feelings of hostility on the part of the common law courts against the ecclesiastical courts, and in spite of the effects of the Reformation in England, these courts continued to function until the middle of the nineteenth century. Even when their jurisdiction, excepting matters purely ecclesiastical, was by statute transferred to other courts, for example, the Court for Divorce and Matrimonial Causes,<sup>196</sup> the new courts were to proceed and give relief on principles and rules which might be conformable to those on which the ecclesiastical courts had theretofore acted and given relief.<sup>197</sup> Of course, these ecclesiastical courts operated on the principle that "where 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."<sup>198</sup> And this is precisely the attitude that was adopted by Chancery in such matters.<sup>199</sup>

Any discussion of the Roman contribution to the common law must offer a place of enduring prominence to the law merchant. The law merchant, or the *lex mercatoria*, is admittedly of "foreign" origin. Holds-

194. See 2 Reeves, *History of the English Law* 341-50 (Finlason ed. 1880); 4 *id.* at 69-149. See also sources cited in Holdsworth, *The Ecclesiastical Courts and Their Jurisdiction*, in 2 *Select Essays in Anglo-American Legal History* 255 (1908).

195. *The Queen v. Millis*, 10 Cl. & Fin. 534, 678, 8 Eng. Rep. 844, 898 (H.L. 1844).

196. Established by Matrimonial Causes Act of 1857, 20 & 21 Vict., c. 85, §§ 4, 6, 22. Such jurisdiction was transferred to the Probate, Admiralty and Divorce Division of the High Court of Justice. Supreme Court of Judicature Act of 1873, 36 & 37 Vict., c. 66, §§ 34, 70, 74; Supreme Court of Judicature Act of 1875, 38 & 39 Vict., c. 77, §§ 18, 21.

197. See Holdsworth, *The Ecclesiastical Courts and Their Jurisdiction*, in 2 *Select Essays in Anglo-American Legal History* 255, 284-86 (1908); Scrutton, *The Influence of the Roman Law on the Law of England* 165 (1885).

198. 1 Hale, *The History of the Common Law* 38 (5th ed. 1794).

199. See cases cited in Scrutton, *op. cit. supra* note 197, at 158.

worth, in considering courts which administer a body of law "outside the jurisdiction of the Courts of Common Law and the Courts of Equity," lists the courts which administer the law merchant.<sup>200</sup> Nevertheless, the law merchant was so completely received that it became, according to Coke, a part of the "lawes within the realme of England."<sup>201</sup> Blackstone also acknowledged that the "*lex mercatoria*, which all nations agree in, and take notice of . . . is held to be part of the law of England."<sup>202</sup> Yet this body of law, being the customs and usages of all merchants and of "all nations," included many rules of the Roman and civil law which continued as the practice of the merchants bordering the Mediterranean. Although many of the customs date back to the Babylonians and Phoenicians, commercial law in the modern sense began to develop during the tenth, eleventh and twelfth centuries, principally in the northern Italian city-states, and the seaport cities of Italy, Spain, France and Germany. From these sources may be said to have sprung a new *jus gentium* of commerce. These customs were written in several codes, the best known being the *Consolato del Mare*, the *Laws of Oleron*, the *Laws of Wisbuy* and the *Ordonnance de la Marine* of Louis XIV.<sup>203</sup>

Although worthy of individual treatment, courts of admiralty will not be mentioned since they were closely connected with the law merchant. Apart from later developments, therefore, the civil law procedure and Romanism that animated the law merchant courts also pervaded the admiralty courts. Holdsworth, in fact, says that the maritime and merchant courts are so closely connected that they may be regarded as "branches of the same Law Merchant."<sup>204</sup>

The law merchant and the customs of the sea, therefore, as we shall treat this area of customary law, involved the usages of merchants in lands that had been under Roman sway and developed with the needs of commerce—both land and maritime. Whereas this *jus gentium* of merchants originally applied only to merchants, it ultimately governed all

200. Holdsworth, *The Development of the Law Merchant and Its Courts*, in 1 *Select Essays in Anglo-American Legal History* 289 (1907). The others listed are the Court of the Constable and the Marshal, Courts of the Forest, and the ecclesiastical courts. A most interesting early book is Malynes, *Lex Mercatoria* (1622).

201. Coke, *Institutes of the Laws of England*, Lib. I, 11b (15th ed. Hargrave & Butler 1774).

202. 1 Blackstone, *Commentaries* \*273. ". . . the custom of merchants or *lex mercatoria*: which, however different from the general rules of the common law, is yet ingrafted into it, and made a part of it." *Id.* at \*75.

203. See Howe, *Studies in the Civil Law* 95 (2d ed. 1905); Mears, *The History of the Admiralty Jurisdiction*, in 2 *Select Essays in Anglo-American Legal History* 312, 325-29 (1908). See also Mitchell, *An Essay on the Early History of the Law Merchant* (1904); Sanborn, *Origins of the Early English Maritime and Commercial Law* (1930).

204. Holdsworth, *The Development of the Law Merchant and Its Courts*, in 1 *Select Essays in Anglo-American Legal History* 289, 304 (1907).

commercial transactions. A remarkable system, embodying the experience of centuries, it needed only a great judge to adopt its rules and absorb them into the common law of England.

The person most responsible for this most beneficial addition and amelioration of the common law was Lord Mansfield, who merits the honor of being called the "father of modern Mercantile law."<sup>205</sup> Mansfield, who had studied Roman law at the University of Leyden, during the thirty-two years that he was Lord Chief Justice of the King's Bench, molded a modern commercial law. Once again, we encounter the element of prejudice against that which is foreign, and Mansfield was subjected to attacks because of the Roman and civil law qualities of the law that he absorbed into English law. Note the following aimed at Mansfield:

In contempt or ignorance of the Common law of England, . . . you have made it your study to introduce into the court where you preside measures of jurisprudence unknown to Englishmen. The Roman code, the law of nations, and the opinion of foreign civilians, are your perpetual theme. . . .<sup>206</sup>

To Campbell's reply that there was "no sufficient ground for the general charges" that he "gave a preference to the Roman Law,"<sup>207</sup> one must add the sober judgment of Mr. Justice Buller in the case of *Lickbarrow v. Mason*:<sup>208</sup>

[W]ithin these thirty years . . . the commercial law of this country has taken a very different turn from what it did before. . . . From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the human understanding. And I should be very sorry to find myself under a necessity of differing from any case on this subject which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country.<sup>209</sup>

#### X. EPILOGUE: CIVILIZATION AND THE UNIVERSALITY OF THE ROMAN LEGAL SYSTEM

Had an attempt been made to trace the borrowing and adaptation of specific rules, an interminable project might have been assumed. Indeed, whole areas of the law have been omitted, and even some fascinating matters have been neglected.<sup>210</sup> The countrymen of Mansfield, all heirs

205. Scrutton, *op. cit. supra* note 197, at 180, citing Park, *Insurance* (1789). For an evaluation of his contribution, see 3 Campbell, *The Lives of the Chief Justices of England* 291-345 (1881).

206. 3 Campbell, *The Lives of the Chief Justices of England* 337 (1881).

207. *Ibid.*

208. 2 Term R. 63, 100 Eng. Rep. 35 (K.B. 1787).

209. *Id.* at 73, 100 Eng. Rep. at 40.

210. "Many of the basic principles of American law are Roman in many fields:

of Scottish birth, may well demand an apology for daring to ignore the Roman law that survives in Scotland.<sup>211</sup> Yet, they would have to admit that some prominence was accorded to Lord Mansfield, whereas no mention was made of Lord Holt, who presided over the King's Bench from 1689 to 1710. Like Mansfield, Holt also was learned in the Roman law. Holt was introduced to the study of Roman law by reading Bracton, and through Lord Holt, some of Bracton's Romanisms and "academic speculations . . . became living common law."<sup>212</sup> Not only did Holt prepare the way for Mansfield's adoption of the law merchant, but he actually anticipated Lord Mansfield's decision in *Somerset v. Stewart*,<sup>213</sup> which decided that one could not be a slave on English soil. Although he authored many decisions that were milestones in the development of the common law,<sup>214</sup> the most celebrated is *Coggs v. Bernard*,<sup>215</sup> decided

adverse possession, bailments, carriers and innkeepers, contracts, corporations, the descent of property, easements, legacies and wills, guardianship, limitations of actions, marriage, ownership and possession, conveyances, sales, trusts, warranties, partnerships, mortgages. It was the Romans who developed the conveyance of real estate by written instruments and subscribing witnesses, and passage of title by a will, also to be in writing and with subscribing witnesses." Palmer, *An Imperishable System: What the World Owes to Roman Law*, 45 A.B.A.J. 1149, 1152, 1220 (1959). One may even find that certain concepts and phrases seemingly distinctively Anglo-Saxon, such as "an Englishman's house is his castle," were borrowed from Roman sources. The house-castle notion, for example, apparently first appeared in Coke's Institutes, and the "Latin phrase, the only one Coke cites as authority, is taken almost verbatim from the Digest," and the passage in the Digest is taken from Gaius' Commentaries on the Twelve Tables. Radin, *The Rivalry of Common-Law and Civil Law Ideas in the American Colonies*, in 2 *Law: A Century of Progress* 404, 424 (1937).

211. See Levy-Ullmann, "Le Droit Écossais, 53 Bulletin de la Société de Législation Comparée 148 (1924) (it is "absolutely Roman in character"); Muirhead, *An Outline of Roman Law* xxxi (2d ed. 1947).

212. Plucknett, *A Concise History of the Common Law* 300 (5th ed. 1956).

213. Lofft 1, 98 Eng. Rep. 499 (K.B. 1772); see *Smith v. Brown*, 2 Salk. 666, 91 Eng. Rep. 566 (K.B. 1705). "Holt, C.J., held, that as soon as a negro comes into England, he becomes free: one may be a villein in England, but not a slave." *Ibid.*

214. See, e.g., *Ashby v. White*, Holt K.B. 524, 90 Eng. Rep. 1188, 1189 (1702), which was probably motivated by the Latin maxim "ubi jus ibi remedium." "Lord Holt, contrary to the other judges who decided for the defendant, stated that the plaintiff should have been allowed a cause of action . . . for the deprivation of his right to vote. He stated: ' . . . the plaintiff had a right to vote, and that in consequence thereof the law gives him a remedy, if he is obstructed. . . . It is a vain thing to imagine, there should be right without a remedy. . . .' On a writ of error to the House of Lords, the judgment for the defendant was reversed 'by a great majority of the Lords, who concurred with Holt, C.J.'" Chafee & Re, *Cases and Materials on Equity* 865 n.7 (4th ed. 1958).

215. 2 Ld. Raym. 909, 92 Eng. Rep. 107 (K.B. 1703). "This Bracton I have cited is, I confess, an old author, but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in Justinian's Inst. lib. 3, tit. 15." *Id.* at 915, 92 Eng. Rep. at 111. Lord Holt also cited St. Germain's Doctor and Student. *Ibid.*

in 1703, which contains a full exposition of the law of bailments inspired by the Roman law passages found in Bracton.

It is now evident that to find a convenient place upon which to end is no less difficult than to have found a proper point for the beginning. Rome is a legendary name of the greatest historical significance. At least twice it led the world. First, by the might of its republican and imperial legions, it gave the world political unity and a legal system. Secondly, by the diffusion of Christianity, it brought spiritual unification throughout the western world, and once again, its system of laws.<sup>216</sup> To tell the story of Rome and its law is to tell the story of civilization itself.

The story of civilization will not be one of self-sufficiency and autonomy. It is one of constant building upon the wisdom and experience of prior peoples and a blending of the knowledge from many lands. The numbers in which we count, the alphabet we use, and indeed language itself are eloquent tributes to the genius of other lands. And although little can be regarded as more English than London's St. Paul's, yet it is Greek and Roman; surely it is Gothic before being English. Since there is truth to the thought that the law of a people develops in much the same manner as its language, it may be worthy to repeat the illustration found in Howe. He pointed out that in the name of "a well-known society, the American Bar Association . . . there is not a word . . . of British or Anglo-Saxon origin." He hastens to add that by admitting the "Romanic origin" of the words "we would not be disparaging our noble English language, nor denying its continuous organic life and growth and its distinctly national character, nor would we be proposing to return to the use of Latin for purposes of conversation or in the writing of books. We would simply be recognizing the truth of history, which every one will admit to be a proper thing to do."<sup>217</sup>

It is opportune to repeat at this juncture what Judge Cardozo observed in a footnote in his *Paradoxes of Legal Science*. Citing Royce,<sup>218</sup> he wrote: "We may say of law what Royce says of philosophy: 'Our common dependence upon the history of thought for all our reflective undertakings is unquestionable. Our best originality . . . must spring from this very dependence.'<sup>219</sup>

The notion of universality finds a classical example in the Empire

216. Professor Yntema, following the observation with which Jhering commenced his work on Roman law, says that "Rome gave laws to the world and bound the nations in unity" three times: the first "by the force of arms," the second by "the unity of the Church," and the third "through the reception of Roman law in western Europe, in the unity of law." Yntema, *Roman Law as the Basis of Comparative Law*, in 2 *Law: A Century of Progress* 346 (1937).

217. Howe, *Studies in the Civil Law* 109-10 (2d ed. 1905).

218. Royce, *The Spirit of Modern Philosophy* vii (1892).

219. Cardozo, *The Paradoxes of Legal Science* 57 n.146 (1928).

that was Rome and the Roman law. The word "Roman" was clearly not confined to the seven hills or even to a peninsula. Its universality may even be highlighted by the place of birth of the greatest of its jurists. Papinian, who was among jurists what Homer was to poets, and who contributed about 600 extracts from his works to the *Digest*, was probably born in Syria. The greatest contribution came from Ulpian, and he was born at Tyre. A great jurist and teacher was Gaius, and although he lived in Rome, he was born in Greece.<sup>220</sup> As for Justinian himself, who was probably of Slavonic parentage, he was born in Tauresium in Illyricum on the eastern Adriatic coast.<sup>221</sup>

The Roman mind, as can be gleaned from the foregoing, was a composite of the genius of many lands. Such are the roots of civilization. And, in its final form, the Roman law was truly all-embracing and cosmopolitan. It was "the embodiment of Stoic philosophy and Christian morals. Because it drew from so many diverse sources and was applied to the citizenship of a universal empire, it proved to be the one contribution of ancient Rome which lives on in the world today."<sup>222</sup> These, therefore, were some of the men that helped fashion a system of laws of universal validity for the civilized world.<sup>223</sup>

Of this system of laws "embodied and transmitted to posterity in the law-books of Justinian," d'Entrèves says:

It is no exaggeration to say that, next to the Bible, no book has left a deeper mark upon the history of mankind than the *Corpus Iuris Civilis*. Much has been written about the impact of Rome upon Western civilization. Much has been disputed about "the ghost of the Roman Empire" that still lurks far beyond the shores of the Mediterranean. The heritage of Roman law is not a ghost, but a living reality. It is present in the court as well as in the market-place. It lives on not only in the institutions but even in the language of all civilized nations.<sup>224</sup>

This universality is attested by Bryce:

The Roman law is indeed still worldwide, for it represents the whilom unity of civilized mankind. There is not a problem of jurisprudence which it does not touch: there is scarcely a corner of political science on which its light has not fallen.<sup>225</sup>

The discussion has concerned itself with the degree of enlightenment

220. Wigmore says that Gaius, the jurist, typifies the advent of law as a science. One of "Gaius' treatises, the *Institutes*, served as the text-book of legal study for three centuries after his death (which occurred perhaps about 200 A.D.), and is the only Roman law-book, prior to Justinian, that has survived to us in fairly complete text." Wigmore, *A Panorama of the World's Legal Systems* 437 (1936).

221. His original name was Uprauda, derived from prauda, which in old Slavic means jus, justitia.

222. Shotwell, *The Long Way to Freedom* 606 (1960).

223. Sohm, *Institutes* 70 (3d ed. Ledlie transl. 1907). Chapter II is entitled, "Roman Law as the Law of the World."

224. d'Entrèves, *Natural Law* 17 (1951).

225. 2 Bryce, *Studies in History and Jurisprudence* 898 (1901).

that the common law of England derived from Roman law. What may one conclude of the Roman contribution to the common law? Some of the main channels of transmission have been mentioned. Without making extravagant claims as to the exact extent of the contribution, it ought to be sufficiently clear that "there must be some profound error on the part of those who so stoutly deny the obligation of the law of England to the Roman system."<sup>226</sup> To those who deny this contribution one may reply with the saying of Liebnitz concerning philosophers—that they are often right in what they affirm and often wrong in what they deny.<sup>227</sup>

Winfield's statement of the indebtedness to the Roman system of laws is as profound as it is important:

But it would be a mistake to gauge the effect of Roman Law by a nice calculation of the especial rules in our law which can be affiliated to it. What men gained by it was not a heap of fresh material for building English law, but a knowledge of the principles of legal architecture.<sup>228</sup>

It is hoped that enough has been said to show that the roots of the common law of England are not exclusively Anglo-Saxon. Since there is neither virtue nor greatness in autonomy, and since such a conclusion would do violence to the rules of probability in civilization, the more objective evaluation would acknowledge a Roman influence. Even assuming that the soil was not prepared during the Roman occupation, it is impossible to discount the role of St. Augustine and the missionaries who followed him.<sup>229</sup> And all of this before the Norman invasion with its influx of a host of Roman law scholars commencing with Lanfranc. The story thereafter shows more clearly how the common law was nurtured in an atmosphere of Roman intellectuality—ethical, philosophical and judicial.

It has been said that greatness can only come from participation in the culture of other people. Jhering expressed this thought well when he justified the reception of Roman law in Germany on the broad ground that no nation can attain the highest civilization except by participation in the civilization of the world.<sup>230</sup>

226. Howe, *Studies in the Civil Law* 110 (2d ed. 1905).

227. Liebnitz, *Opera Philosophica* 702 (Erdmann ed. 1840).

228. Winfield, *The Chief Sources of English Legal History* 60 (1925).

229. See Dawson, *Religion and the Rise of Western Culture* 59, 61, 73 (Image Books ed. 1958).

230. "German jurisprudence . . . commences with, and is due to, the reception of Roman law. As the child of Roman jurisprudence, it was but natural that, from the very outset, German jurisprudence should bear the impress of its origin." See Smith, *Four German Jurists, in A General View of European Legal History* 110, 121 (1927).

"No sooner, therefore, had Roman law effected its first entrance in Germany, that its own inherent virtues ensured it a rapid and easy victory. Roman jurisprudence came, saw and conquered." Sohm, *The Institutes* 2 (3d ed. Ledlie transl. 1907).

As for the Romans, time has decreed that their most permanent contribution was their law. What can be said of Rome can be said of Justinian. Justinian, like earlier Roman emperors, was a great builder of roads and public buildings. The most splendid of his many churches was the dome-covered Cathedral of St. Sophia. However, history will continue to proclaim his name because he was the Roman Emperor who finally codified the Roman law.<sup>231</sup>

And so, perhaps abruptly, and at a point not as felicitous as desired, our survey comes to an end. It concludes with the hope that "insular" patriotism may some day give way to that of "mankind at large."<sup>232</sup> It reaffirms Cicero's profound conviction of the equality of men and the solidarity of mankind.<sup>233</sup> When such a philosophy becomes a rule of daily life, all men, of whatever heritage, who read of Papinian, Ulpian, Augustine, Lanfranc, Vacarius, Glanvill, Bracton, Langton and countless others, will conclude that they were men worthy of gratitude and commemoration. The greatest debt of gratitude, of course, is owed by those who reap the blessings of the common law.

231. Justinian reigned from 527 to 565 A.D. It was his plan to consolidate the entire existing law into one Code. For a summary account of how this was accomplished by a commission of professors and advocates under the supervision of Tribonian, see Sohm, *The Institutes* 121-25 (3d ed. Ledlie transl. 1907). For a discussion of "The Legislation of Justinian" see Jolowicz, *Historical Introduction to the Study of Roman Law* 488 (1932). "The importance of his work lies in the fact that in his 'Digest' and in his 'Code,' he collected a great mass of excerpts from classical authors, and of imperial enactments, and that he gave to Roman law what was, in a sense, its final form." *Id.* at 6.

232. "The justice of mankind at large . . . is rooted in the social union of the race of men." Cicero, *Tusculan Disputations*, I, xxv, 64.

233. See Cicero's *De Officiis* and his *De Republica*, and discussion in McIlwain, *The Growth of Political Thought in the West* (1932). See summary of Cicero's philosophy in 1 Scott, *Law, The State and the International Community* 143-57 (1939).

## AID TO EDUCATION — FEDERAL FASHION†

LEONARD F. MANNING\*

*The President of the United States has touched off a great debate with his recent declaration that the Constitution prohibits federal aid to church-related schools. From an examination of the cases and American traditions as well, Professor Manning concludes that nothing in the Constitution, in case law or in history precludes aid to church-related education in any form or at any level.*

"WE ARE a religious people whose institutions presuppose a Supreme Being." Mr. Justice Douglas' characterization of our American heritage and of our 1952 society was, naturally enough, warmly indorsed and roundly re-echoed in episcopal circles. In other areas the Douglas pronouncement stirred a mild tremor, particularly among those of his admirers who, even in 1952, had come to regard him as a complete libertarian—French style—with a mind unfettered by conformist traditions.

Mr. Justice Black, albeit a most frequent collaborator of Douglas, had more secular thoughts in 1947. In *Everson v. Board of Educ.*<sup>2</sup> he added to an otherwise clear and cohesive decision the clouded comment: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."<sup>3</sup> A few years before Douglas or Black had turned their judicial thoughts to matters of church and state, George Orwell had put forth a more aery aphorism. "All animals are equal," he said, "but some animals are more equal than others."<sup>4</sup> Was Justice Black thinking in terms of the animals on the Orwell farm? Did he mean that all animals are equal but that the irreligious animal is more equal than the religious animal? Or did he simply mean that all animals, both religious and irreligious, are equal and that no ani-

† Professor Manning was asked by the editors to comment upon the two governmental aid-to-education proposals recently in the news—President Kennedy's recommendations to the Congress and Governor Rockefeller's recommendations, specifically the "scholar-incentive" plan, made to the New York Legislature. The two proposals have been treated separately. The constitutional issues presented by the President's proposals are treated in this article. The constitutional issues presented by the Governor's "scholar-incentive" plan are treated in *Aid to Education—State Style*, immediately following this article, p. 525 *infra*.

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1. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).
2. 330 U.S. 1 (1947).
3. *Id.* at 15.
4. Orwell, *Animal Farm*, ch. 10 (1945).