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RELATIONSHIPS AMONG ROMAN LAW, COMMON LAW, AND MODERN CIVIL LAW

DEDICATION

The decision to publish a symposium on this topic was—like the topic itself—both forward and backward looking. The contributing authors in this issue look back 2,000 or more years to the Roman-law tradition and then project their findings forward to help us understand the development and structure of our modern legal systems. Similarly, the Board of Student Editors looked back into the *Tulane Law Review's* tradition to find a topic that would resonate with and be important to today's legal scholars. In comparative Roman law we think we have found such a topic.

This symposium is a reassertion of the *Tulane Law Review's* commitment to providing a forum for the discussion of Roman-law issues. Our very first issue featured an article on the value and importance of teaching Roman law.¹ Over the years, our contributing editors have included Romanists such as W.W. Buckland, Roscoe Pound, F.H. Lawson, and David Daube. In addition, the *Review* has published three landmark issues devoted entirely to Roman law—dedicated to *W.W. Buckland*,²

1. See Charles S. Lobingier, *The Value and Place of Roman Law in the Technical Curriculum*, 1 So. L.Q. (TUL. L. REV.) 117 (1916).
2. 22 TUL. L. REV. 1-179 (1947).

F. de Zulueta,³ and *F.H. Lawson*⁴ respectively. The *Review's* symposia on *Bracton*⁵ and the *Civilian Methodology*,⁶ the latter dedicated to Professor C.J. Morrow,⁷ consider related issues.

In the past, the *Tulane Law Review* featured works by many of the twentieth-century's finest Romanists, particularly in the above-mentioned symposia. The *W.W. Buckland* issue⁸ included: F. de Zulueta, H.F. Jolowicz, F.H. Lawson, Max Radin, and R.W. Lee, among others. The *F. de Zulueta* issue⁹ contained articles by: Roscoe Pound, A.A. Schiller, H.J. Wolff, Fritz Pringsheim, Alan Watson, and Peter Stein. Finally, the *F.H. Lawson* issue¹⁰ featured: A.M. Honoré, R. Feenstra, John Henry Merryman, J.A.C. Thomas, Barry Nicholas, and again, Alan Watson, and Peter Stein.

In addition, many of the above-mentioned scholars and other great Romanists have published individual articles in non-symposium issues. In many ways, particularly by comparing Roman and common law, the present symposium parallels one of the *Review's* early articles written by W.W. Buckland.¹¹ Two Tulane professors, Ferdinand F. Stone and Mitchell Franklin, often published articles on Roman-law topics in the *Review*, as have R.H. Helmholz and Tony Weir. In this issue, we are delighted once again to feature the works of Barry Nicholas, Peter Stein, Tony Weir, and R.H. Helmholz; to welcome several eminent Romanists for the first time; and perhaps to present some of the great Romanists of the future.

Special mention must be made of Peter G. Stein, Regius Professor of Civil Law in the University of Cambridge, Fellow of Queen's College. Professor Stein is known to all those interested in Roman law as one of the leading figures in the field because of his many articles, books, and editions of earlier books. He first published with our *Review* in the *F. de Zulueta* issue¹² and sub-

3. 33 TUL. L. REV. 451-659 (1959).

4. 48 TUL. L. REV. 781-1128 (1974).

5. 42 TUL. L. REV. 455-602 (1968).

6. 44 TUL. L. REV. 669-797 (1970).

7. See *Clarence J. Morrow*, 44 TUL. L. REV. 669 (1970).

8. 22 TUL. L. REV. 1-179 (1947).

9. 33 TUL. L. REV. 451-659 (1959).

10. 48 TUL. L. REV. 781-1129 (1974).

11. See W.W. Buckland, *Praetor and Chancellor*, 13 TUL. L. REV. 163 (1939).

12. See Peter Stein, *The Mutual Agency of Partners in the Civil Law*, 33 TUL. L. REV. 595 (1959).

sequently in the *F.H. Lawson* issue.¹³ Professor Stein was a visiting professor at Tulane in the Spring of 1992. In his short time here he has been an inspiration to all of his students, some of whom had never before been familiar with, or interested in, Roman law. His friendly and approachable style ensures that Roman law will remain a vibrant topic far into the future. We would like to offer Professor Stein our special thanks for his help with this issue and for gracing our law school and the *Review's* pages with his presence.

THE BOARD OF STUDENT EDITORS

13. See Peter Stein, *Civil Law Maxims in Moral Philosophy*, 48 TUL. L. REV. 1075 (1974).

STEIN

ROMAN LAW, COMMON LAW, AND CIVIL LAW

PETER G. STEIN*

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I. ROMAN LAW AND COMMON LAW

When a common-law lawyer is asked to identify the most obvious difference between the common law and the civil law, he will probably answer that the civil law is based on Roman law whereas the common law is relatively immune from Roman influence. Several recent Roman-law writers, however, have noted that the Roman law of the classical period, the first two centuries A.D. when it reached its highest point of technical development, is in many respects closer in character to the common law than it is to modern civil-law systems that are derived from Roman law. There are of course significant differences between the classical Roman law and the common law, and recently Professor Watson has argued that the stress on similarities "leads to serious misunderstandings of the two systems, and of legal development in general."¹

If the comparisons are confined to the structure of the two systems in their formative periods, it is suggested, there remain some important similarities.² They can be briefly listed. First, both systems were built up through the discussion and decision of cases, and the law was perceived as essentially law discovered through debates among experts over particular sets of facts

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1. Alan Watson, *Roman Law and English Law: Two Patterns of Legal Development*, 36 *LOY. L. REV.* 247, 248 (1990); see also Obrad Stanojevic, *Roman Law and Common Law—A Different Point of View*, 36 *LOY. L. REV.* 269, 269-74 (1990).

2. Peter G. Stein, 'Equitable' Remedies for the Protection of Property, in *NEW PERSPECTIVES IN THE ROMAN LAW OF PROPERTY: ESSAYS FOR BARRY NICHOLAS* 185, 185-86 (Peter Birks ed., 1989).

rather than as general rules laid down by a legislature. Watson considers this emphasis on the systems' casuistic character to be "banal," since in his view "[p]rogress is possible only on the basis of discussion of narrow facts to discover whether a situation falls within the scope of some particular remedy or counts as being some particular legal institution."³ Even legislation, he believes, is always "postulated on preceding casuistic discussion."⁴ Of course whatever the form of the law, its application to cases involves some casuistic discussion, but the point is that in both systems the major part of the law actually emerged out of recorded discussions of cases. Therefore, both systems produced narrow rules whose limits were continually being modified by further debates. In both systems it was assumed that the relevant law existed, but was not yet articulated, and that its precise scope needed definition. This is not a universal phenomenon. Other societies, such as ancient Athens, envisaged law as essentially the product of legislation. Early legislation, such as the Roman Twelve Tables, may well have aimed to clear up doubts as to the existing law, but there is no evidence that the terms of such legislation were always based on prior case discussions.

A second and related feature is that legal development centered around particular forms of action; legal discussion was concerned with remedies rather than with rules. In both systems a plaintiff could only bring an action by obtaining a document from a magistrate identifying the precise type of claim that he was asserting. This was the formula granted by the praetor in Rome and the writ granted by the Chancellor in England. Just as the praetor published in his Edict, for the benefit of litigants, the various formulae that he was prepared to grant, so the Chancellor issued a Register of writs that could be obtained by litigants on request from the Chancery. Both Edict and Register were continually updated. Thus the state, through its chief legal officer, was able to control the kinds of disputes that were considered suitable to be dealt with in the state courts.

Thirdly, the classical procedure of both Roman law and common law divided legal actions into two stages; the first was devoted to identifying the legal issue that divided the parties and the second was devoted to proof and the decision of that issue in

3. Watson, *supra* note 1, at 262.

4. *Id.*

favor of one of the parties.⁵ The second stage was assigned to laymen, the *iudex* in Rome and the jury in England, whose sole involvement with the administration of justice might be this one case. Thus, the first stage had to produce a clearcut question that was appropriate for a lay tribunal to decide. In a straightforward case, the formula or writ, when applied to the facts of the dispute, sufficiently presented that question. In some cases the praetor had to be asked to modify the terms of the formula in order to allow the pleading of defenses, and the common-law judges were asked to indicate what questions, within the terms of the writ already issued, the facts produced for the jury's decision. In both systems it was the laymen who had the last word.⁶ The formula or writ told them that if they found certain allegations had been proved, "they were to decide against the defendant and if they could not be satisfied on these matters, they were to absolve him."⁷

The laymen's decision, like that of the judgment of God which it replaced, was final and there was in principle no possibility of an appeal against their verdict. Since, therefore, the time-consuming work of considering evidence was left to unpaid laymen, and there were no appeals, the system made efficient use of official time.

A fourth similarity concerns the nature of the available remedy. An important consequence of leaving the last word to the laymen was the limitation on the relief they could give to a successful plaintiff. With only one or two minor exceptions, "the only remedy which the *iudex* [or] jury could provide was an award of money damages."⁸ This was probably because of the transitory nature of their office; once they had given their verdict, their office ceased to exist. This transitory character meant that neither *iudex* nor jury could give, for example, an order to a party to do or not to do something. "[W]hen the time came to decide whether the order had been obeyed, they would no longer be in existence."⁹

In both Roman and English society, there came a point at which remedies other than money damages were required, and

5. PETER G. STEIN, LEGAL INSTITUTIONS: THE DEVELOPMENT OF DISPUTE SETTLEMENT 25 (1984).

6. Stein, *supra* note 2, at 186.

7. *Id.*

8. *Id.* at 187.

9. *Id.*

they had to be provided by the magistrates themselves. These new remedies were provided by the praetor himself in Rome and, since the common-law judges restricted themselves to control of the writ system, by the Chancellor in England. Interdicts in Rome and injunctions in England were among the first such remedies. A characteristic of all of these magisterial remedies was that, unlike the formulae and writs which were granted as of right, they were discretionary and the magistrate had to satisfy himself, by personal inquiry, that they were merited by the applicant under the circumstances.¹⁰

A fifth similarity concerns the categorization of the law derived by legal experts from the remedies. In both systems there were perceived to be two distinct bodies of law: on the one hand, the traditional rules, which became rigid and difficult to change, and on the other, a more flexible set of rules based on ideas of fairness and justice.¹¹ The latter were the *ius honorarium* of the Roman praetor and the equity of the English Chancellor.¹² In Rome both bodies of law were administered by the praetor but were recognized as belonging to separate jurisdictions, the ordinary and the extra-ordinary; in England they were administered by separate courts, applying common law and equity respectively.¹³

II. CIVIL LAW AND COMMON LAW

When the common-law lawyer turns from ancient Roman law to the systems derived from it, he finds none of these familiar features. In many respects modern civil-law systems seem much more alien to the common-law lawyer than does ancient Roman law. This is because the characteristic external features of modern civil-law systems derive from post-Roman, or at least post-classical Roman, law.

The most obvious feature of modern civil law in the eyes of a common-law lawyer is that it is codified. Codification in the sense of a statement of the whole law in a coherent systematic

10. *Id.* at 188.

11. *Id.* at 185.

12. Peter G. Stein, *Equitable Principles in Roman Law, in EQUITY IN THE WORLD'S LEGAL SYSTEMS* 75, 76 (Ralph A. Newman ed., 1973), reprinted in PETER STEIN, *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS* 19, 20 (1988); see also Giovanni Pugliese, *Ius honorarium a Roma ed equity nei sistemi di common law*, 42 *RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE* 1105 (1988).

13. Stein, *supra* note 2, at 185-86.

form is a product of eighteenth century rationalism. It is true that Justinian's compilation, which concluded a millenium of Roman legal development and is our main source of knowledge of ancient Roman law, is often called a codification. Certainly Justinian decreed that his *Corpus Iuris* contained the whole law and that no reference should be made to earlier sources. The idea, therefore, that the code wipes the slate clean and offers a new beginning to the law may be traced to him. With the exception of the *Institutes*, however, which constitutes but a small fraction of the whole, Justinian's *Corpus Iuris* is neither systematic nor coherent. The largest part, the *Digest*, which is one and one half times the size of the Bible, is an anthology of extracts from the works of legal writers consisting principally of case discussions.

Another prominent feature of modern civil law is the sharp distinction between public law and private law.¹⁴ In civil-law countries, the first question that a lawyer is usually asked is whether he is a publicist or a privatist. If one is a public lawyer, one practices in a different set of courts from those that deal with private law, with a different procedure and a different atmosphere.¹⁵ There may, as in French law, be no public-law code, and the courts build up the law through their decisions. The public lawyer deals exclusively with cases in which one of the parties is a public authority; as a result, his whole approach to law is different from that of a private lawyer.¹⁶

Again it cannot be denied that the distinction between *ius publicum* and *ius privatum* can be found in the Roman-law texts, but it did not mark out two distinct bodies of law. Indeed, in the classical period of Roman law, when the private law reached its peak of technical development, Rome was under the sway of some of the most despotic of its emperors, and there was little sign of the existence of a public law in the sense of a body of rules applicable to the resolution of disputes between the government and private citizens.¹⁷ The function of the distinction was to mark off the area with which lawyers were concerned, namely, disputes between one private citizen and another, from

14. RENÉ DAVID, *FRENCH LAW: ITS STRUCTURE, SOURCES, AND METHODOLOGY* 98 (Michael Kindred trans., 1972) (1959); see H.F. JOLOWICZ, *ROMAN FOUNDATIONS OF MODERN LAW* 49 (1957).

15. See DAVID, *supra* note 14, at 98.

16. *Id.* at 99.

17. STEIN, *supra* note 5, at 107.

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that which was off limits for them. In general, imperial governments tacitly accepted that the private law was an area with which they were not concerned.¹⁸ Of course common-law lawyers now use the term public law when they refer to constitutional and administrative law, but the difference between public law and private law in common-law countries is still largely a matter of the type of remedies available when a public body is one of the parties. The common law is still seen as indivisible in the sense that it applies both to the government and the individual citizen, and the same courts deal with both public and private law.

The civil-law conception of the written law as the sole source of private law and the highly systematic nature of modern codes of civil law lie behind the form of reasoning that characterizes the civil law. Whereas classical Roman law was largely unwritten in the sense that it was the product of rules which were not stated in authoritative texts and whose scope was the subject of intense debate among the jurists, modern civil law presents an illusion of certainty. Civil-law reasoning may loosely be described as deductive reasoning, by which one proceeds from a broad principle, expressed in general terms, then considers the facts of the particular case and finally, as in a syllogism, applies the principle to the facts so as to reach a conclusion. This form of reasoning leads the civil-law lawyer to present a legal argument as if there can be only one right answer to any legal problem, and disagreement on the application of the law to the facts of a case must, in this way of thinking, be the result of faulty logic by somebody. Thus, civil-law judges in general do not give dissenting opinions and every judgment, even in appellate cases, is that of the court as a whole.

In the common law no formulation of a rule, whether by judge or academic, is final. A later judge can broaden or narrow the terms in which it is expressed. What is authoritative is not what is said but what is decided, and the difficulties of discovering what rule a particular decision has laid down are well known. The common law is thus open-ended in that new extensions to existing rules can be revealed at any time by the courts, but it has no existence as a body of material distinct from what the courts have decided. The common-law judge is the oracle of the law and takes personal responsibility for his decisions. If he

18. *Id.*

dissents from his colleagues, it may be because he is ahead of them; today's dissenting opinion may be tomorrow's majority view. As a result of this prominence of the judges, academic lawyers in common-law countries have not enjoyed the same prestige as their colleagues in civil-law countries.¹⁹

Traditionally the civil-law judge is a fungible person, one of a group of anonymous, almost colorless, individuals who hide their personality behind the collegiate responsibility of the court. Their duty is to apply the written law, and the meaning of that law is to be discovered from the writings of its academic exponents. The explanation of the authority accorded to academic writers in the civil law is partly historical. When the texts of Justinian's *Corpus Iuris* were re-discovered around the year 1100 after lying dormant for five hundred years, they were so complicated that no one could begin to understand them without the help of the medieval Gloss, so that the Gloss came to have as much authority as the texts themselves.²⁰ The late medieval commentators offered the key to understanding the texts and the judges traditionally deferred to them. Thus, in the civil law, by contrast with the common law, the academic commentator seems to be the senior and the judge the junior partner in the legal process.

Several of the features that seem to separate modern civil law most sharply both from the common law and from ancient Roman law derive from the distinctive procedure that pervades most civil-law systems. It is difficult to exaggerate the influence of procedure in the formative period of a legal system. As Henry Maine put it, in the beginnings of law, "substantive law has at first the look of being gradually secreted in the interstices of procedure."²¹ We have noted that both Roman law and common law, in their formative periods, were laws based on remedies. Modern civil law, however, makes a sharp distinction between substantive law and procedure. Academic courses on the substantive law say nothing about procedure, whereas courses on procedure include far more than the steps that a litigant must take in bringing or defending an action. Some of the principal legal theorists in Germany and Italy have been proceduralists. The distinction is not found in Roman law, but

19. Peter G. Stein, *Judge and Jurist in the Civil Law: A Historical Interpretation*, 46 *LA. L. REV.* 241 (1985), reprinted in STEIN, *supra* note 12, at 131.

20. *Id.* at 244-45.

21. HENRY S. MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 389 (1883).

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is the product of the changes worked out by the humanist jurists of the sixteenth century, particularly Hugo Donellus. In their view the civil law is not so much a set of objective rules but rather a system of subjective rights and so procedure is the mechanism for enforcing those rights. It follows that, whereas in Roman law and common law the law was largely derived from the remedies, in the civil law rights derive from the substantive law, and wherever that law recognizes a right, the procedural law, being accessory to the substantive law, must provide an appropriate remedy.

The change in perspective from law as rules to law as rights was made easier by the fact that in Latin and in all European languages, with the exception of English, the word for the objective law and the word for a right adhering to an individual is the same; *ius*, *droit*, *diritto*, *Recht*, all have a double meaning.²² They can refer to the legal position in general or to the legal powers of an individual. In English we say "law" for the first and "right" for the second, and we limit the objective meaning of right to the language of morality.

III. CIVIL-LAW PROCEDURE AND COMMON-LAW PROCEDURE

Historically the "inquisitorial" procedure of the civil law can be traced back to the *cognitio* procedure which, in the late Empire, the period of the decadence of Roman law, replaced the formulary system of the classical period.²³ Under this procedure, professional magistrates dealt with the whole case and there was no lay participation. When in the late Empire the Church set up courts of its own, it copied the contemporary secular courts and so the so-called Romano-canonical procedure was developed. From the thirteenth century onwards it was copied by secular authorities in continental countries, but by that time the jury system in England, dating from the previous century, was already well established.

Under the adversarial procedure of the common law, a trial is a kind of oral battle in which each party, backed by his own witnesses, confronts the other on a fixed day. The proceedings are oral and the witnesses must give their evidence in public. Each party must come to the trial completely prepared. The

22. STEIN, *supra* note 5, at 128.

23. *Id.* at 34.

parties control what issues are raised. The judge is a referee, ensuring that the questions put to the witnesses are relevant and the method of cross-examination is fair; he does not himself initiate lines of questioning.²⁴ At the conclusion of the case, the judge sums up the evidence and the relevant rules of law. This type of procedure was designed for cases in which the verdict was given by lay jurymen who were often illiterate.

The typical procedure of the civil law, on the other hand, seems to have no trial in this sense. Rather, there is a series of meetings and written communications between the parties' representatives and the judge, as a result of which a considerable amount of evidence is accumulated. Even though the parties themselves suggest questions to which their opponent should reply, the questions are put, at least formally, by the judge. Everyone knows in advance what points he will be raising, and an adjournment to enable the parties to obtain further evidence is always possible. The judge sees his function as to discover the true basis of the dispute, to bring to light all aspects of the case. All the evidence is written down and filed away. The whole proceedings, from a common-law perspective, have a rather leisurely and bureaucratic air about them.

We may now outline the main effects of this difference of procedure. The first concerns the relationship between fact and law. The classical common-law procedure, being designed for juries, aimed to reduce the dispute to precise terms from which laymen would know just what they had to discover if they were to condemn the defendant. The forms of action derived from particular writs aimed to limit the area of dispute, as far as possible, to a number of facts, asserted by one party and denied by the other, which could be decided by the jury. The jury, like the Roman *iudex*, never had to justify its verdict with reasons.

It is true that the common law now allows a plaintiff to initiate proceedings whenever he considers that his claim is well founded in law. But in the absence of a statute, the answer to the question whether the claim is well founded must be answered according to the rules of common law, and these rules are the product of the old forms of action. As Maitland said, "we have buried [them] but they still rule us from their graves."²⁵ The consequence is that in the common law, legal

24. *Id.* at 36-37.

25. F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES 1 (A.H. Chaytor & W.J. Whittaker eds., 1968).

issues tend to be strictly confined within certain categories of fact-situations. The distinction between one rule and another often depends on what may appear to be a slight difference in the relevant facts.

There is a tendency in the common law for questions of fact to turn into questions of law. For example, the question whether the parties to a contract have reached agreement on its terms is essentially a question of fact. But after a line of cases in which the judges have decided that when certain facts are proved, agreement must be presumed, the question becomes one of law. In a system in which the decisions of an appellate court on a point of law are binding on lower courts, the process of converting questions of fact into questions of law is accelerated.

The bureaucratic character of the civil-law procedure is closely connected with the nature of the civil law as a system of wholly written law. No rule of private law can be recognized which is not in statutory form. Such rules can be subjected to various kinds of interpretation but the rules themselves remain unchanged until they are modified by subsequent express enactment. The rules therefore have to be expressed in general terms and, when they refer to fact-situations, the questions which they raise, such as, for example, whether the parties to a contract have reached agreement, or whether the loss suffered by *A* was caused by the act of *B*, remain, at least in theory, questions of fact. In view of the generality of the legal rules that the civil-law lawyer is accustomed to work with, he tends to treat as questions of fact issues that for the common-law lawyer would be questions of law.

To the common-law lawyer the civil-law type of deductive logic seems to reverse the natural form of legal reasoning. The common-law lawyer begins his argument with an examination of the facts, with a view to identifying the precise legal issue raised by the case. When the relevant rules are derived from earlier cases cited as precedents, each party cites those precedents that favor his own position and emphasizes the facts of his case relevant to those precedents. They are then analyzed with a view to establishing which are the most significant precedents. At this point in the debate, there is usually much scope for argument; the common law is therefore never presented, like the civil law, as a set of certain rules that can be applied with inexorable logic.

The common-law lawyer is accustomed to opening his case with a discussion of the facts and only later to come to the rele-

vant rules of law. He finds it difficult to invert his normal mental processes, even when the issue turns on the interpretation of a legislative text. An English barrister, arguing a case on the application of Value Added Tax before the Court of the European Communities at Luxembourg, where the civil-law ethos prevails, began by reciting the circumstances that had given rise to the case. The judges interrupted him, asking what rules were applicable and what was the issue. How can you understand the problem, he replied, until I have explained what the case is about?

When a common-law lawyer asks what the case is about, he is thinking of the facts, with a view to identifying the material circumstances of the case and to showing that they fall within the scope of one rule rather than another. When a civil-law lawyer asks what the case is about, he generally refers to the legal issue defined in a general way. Often the adversarial procedure of the common law has the advantage of identifying the issue with greater precision. In the civil-law procedure the real points at issue may only emerge gradually as the case proceeds.

Another effect of the procedural differences is a different attitude towards evidence. The common law has a preference for publicity over secrecy and for oral testimony over written proof. A lay jury found it easier to deal with oral evidence than with documents that might be difficult to read, let alone understand. In the adversarial procedure it is assumed that a witness is more likely to tell the truth if he testifies in public, so that what he says can be immediately challenged in cross-examination by the party against whom he is testifying. In the civil law, by contrast, it is assumed that the witness is inhibited by the prospect that what he says can be publicly challenged and is more likely to tell the truth in private before a judge who questions him from a neutral standpoint. The two systems therefore exemplify a different epistemology.²⁶

The civil-law preference for written proof over oral testimony has led to the recognition that certain kinds of documents, prepared by professionals such as notaries public, have a special status in that their contents cannot normally be challenged. Notaries first appeared in late Roman law and were originally responsible for the documentation of the courts. When a private transaction is the subject of a formal instrument prepared by a

26. STEIN, *supra* note 5, at 38.

notary, the instrument is a public document to which the courts must accord "full faith." Such documents "prove themselves," and thus such transactions are always handled by notaries. In the common law, as in classical Roman law, legal documents are valid as long as they satisfy the requirements of signature and witnesses, whoever has prepared them. If their validity is challenged, proof must be made by oral testimony.²⁷

Common-law courts have generally refused to accord special evidentiary status to notarial instruments, whether they are prepared by foreign notaries or by English notaries trained in the civil-law tradition. A curious situation has arisen as a result of the United Kingdom's Civil Jurisdiction and Judgments Act of 1982, which gives effect to article 50 of the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments.²⁸ "The relevant part, which came into force on 1 January 1987, provides that a document drawn up or registered as an authentic instrument . . . in one contracting state, may have an order for its enforcement issued in another contracting state, provided that the instrument satisfies the conditions necessary to establish its authenticity in the state of origin. The term 'authentic instrument' is a direct translation of the French '*acte authentique*'"²⁹ and was previously unknown to English legal terminology. "As a result of this provision . . . foreign notarial acts [become] directly enforceable in the United Kingdom . . . merely [by being] registered . . . in the English or Scottish court."³⁰ In view of this "statutory recognition of foreign [notarial] instruments, it is a paradox" that such instruments issued by English notaries in the same form are "not even . . . accepted as having probative value."³¹

IV. CONCLUSION

This discussion has been concerned exclusively with the aspects of the civil law and common law that immediately strike an observer familiar with one system or the other. The point has been made that many of the most prominent aspects of the civil law did not appear in ancient Roman law. The discussion has

27. C.W. BROOKS ET AL., NOTARIES PUBLIC IN ENGLAND SINCE THE REFORMATION 5 (1991).

28. *Id.* at 140.

29. *Id.*

30. *Id.*

31. *Id.*

not been concerned with the content of the rules which are characteristic of the main civil-law systems, or with the subsidiary question of what systems may properly be described as belonging to the civil law. A study of modern civil law concentrating on content will make the onlooker familiar with Roman categories and institutions feel much more at home, and any system, the bulk of whose legal institutions are derived from Roman law, is entitled to be called a civil-law system.

This distinction between external form and procedure on the one hand and substantive content on the other must be particularly borne in mind when considering civil-law systems that have been influenced by common-law ideas and procedures. In Quebec and South Africa, for example, strenuous and successful efforts have been made, for cultural reasons, to maintain the substance of the civil law free of adulteration by the common law. Yet the visitor cannot help but be aware that the civil law in these countries looks different from the civil law elsewhere. In both systems, the judges are appointed from the practicing bar. They take personal responsibility for their judgments, which are attributed to them in the law reports and include dissenting opinions. Thus although the substance of the law on a particular point may be the same both in Quebec and in France, such structural features affect the way the law is applied, and therefore these two civil-law systems may leave quite a different impression on the neutral observer.