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190

# LOYOLA LAW REVIEW

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## ROMAN LAW AND ENGLISH LAW: TWO PATTERNS OF LEGAL DEVELOPMENT

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It is commonplace among scholars to link in thought the growth of Roman law and of English law.<sup>1</sup> S.F.C. Milsom begins his distinguished *Historical Foundations of the Common Law*<sup>2</sup> with the words: "It has happened twice only that the customs of European peoples were worked up into intellectual systems of law; and much of the world today is governed by laws derived from the one or the other."<sup>3</sup> More strikingly, some scholars see an essential similarity in legal approaches in the two systems. Fritz Pringsheim entitled a well-known article *The Inner Relationship Between English and Roman Law*.<sup>4</sup> W.W. Buckland and A.D. McNair wrote of

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1. Most recently this link was made by P.G. Stein, *'Equitable' Remedies for the Protection of Property*, in *NEW PERSPECTIVES IN THE ROMAN LAW OF PROPERTY* 185ff (P. Birks ed. 1989). See also G. Pugliese, *Ius Honorarium a Roma ed equity nei sistemi di common law* 42 *RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE* 1105ff (1988).

2. S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* (2d ed. 1981).

3. *Id.* at 1.

4. This article can now be found in F. Pringsheim, *The Inner Relationship Between English and Roman Law*, in *GESAMMELTE ABHANDLUNGEN* 1, 76ff (1961). See also, R.C. VAN

"the affinity of the Roman jurist and the common lawyer" and even claimed, "It may be a paradox, but it seems to be the truth that there is more affinity between the Roman jurist and the common lawyer than there is between the Roman jurist and his modern civilian successor."<sup>5</sup> The former author wrote elsewhere of "the essential kinship, not of the Roman and the English law, but rather of the Roman and the English lawyer."<sup>6</sup>

Such writers are, of course, also aware of differences between the two systems. But the stress on similarities in these two approaches is, I believe, fundamentally misplaced, and leads to serious misunderstandings of the two systems, and of legal development in general. This paper is an attempt to correct the perspective.

The legal tradition has considerable impact on the shaping of the law, and the individual sources of law have different effects on the growth of the law. Judge made law is different from jurist made law, and both are different again from statutory law. So much is obvious and need not detain us more than a moment. Judges are, of course, in a difficult position when it comes to making law. In a system that gives force to precedent, as does English law, judges are concerned only with the immediate actual case, and with fitting it within the available remedies and with reconciling it with existing judgments. As law makers, they are not in a position to consider the legal institution as a whole. And a case when it comes before the bench may arrive at the wrong moment: the law may already be too settled to be easily redirected; or it may be so underdeveloped as to provide little guidance for a judgment which itself will determine the future growth of the law. In contrast, jurists can set out the law as a whole, treat a branch of the law in a systematic way, and deal with legal concepts theoretically. Even when concerned with an actual, factual, situation, jurists may consider other hypothetical situations, comparing and contrasting several together, always looking for a principle, concentrating on the outer limits of a rule or institution. And if the law seems settled but has taken a wrong turning, it is easier for jurists than for judges to postulate a new beginning.

CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 94f (2d ed. 1988).

5. W.W. BUCKLAND, *ROMAN LAW AND COMMON LAW* XIV (F.H. Lawson 2d ed. 1952). See also, e.g., Stein, *supra* note 1.

6. W.W. BUCKLAND, *EQUITY IN ROMAN LAW* V (1911).

When comparing Roman law with English law one might then be tempted by a sweeping generalization, namely that English common law was the product of judges, Roman private law the work of jurists and that the obvious differences in approach are to be attributed to that fact. The generalization has the appearance of truth but is deceptive. The flaw is that it misidentifies the proper starting point for comparison. English common law, I want to suggest, is the product of judges working within the medieval and later English court system, Roman private law is the work of jurists operating within the Roman court system. English common law—leaving aside here the issue of the input of statutes—is more than the sum of the decisions of judges; and Roman private law, as seen by modern scholars to be created by the jurists, is more than the sum of the opinions of the jurists.

We must begin, then, by differentiating the systems of courts at Rome and in medieval England.

## I.

In contrast to the well-known situation of medieval England which will be briefly treated subsequently in this section, the Roman citizen who believed he had a legal claim did not have available to him a large number of courts with competing jurisdictions operating legal systems which had conflicting legal rules. The Roman private law system was almost totally unitary—there was only one system of private law for the citizen.

Some features hide the unitary nature of the Roman legal system, and these must be uncovered. To begin with, for private law there were two important praetors the urban praetor and the peregrine praetor, each of whom issued his own Edict—setting out how he would enforce the law—and each with his own court. But the Edict of the peregrine praetor was very short and, I have argued elsewhere,<sup>7</sup> contained only the clauses which could not apply to citizens. On other matters the peregrine praetor in his court enforced the clauses set out in the urban praetor's Edict. The respective jurisdiction of the two praetors is a matter of great dispute with two opinions having active supporters. On the majority view,<sup>8</sup> the peregrine praetor's court heard disputes between a citizen and

7. A. WATSON, *LAW MAKING IN THE LATER ROMAN REPUBLIC* 63ff (1974).

8. See 1 F. WIEACKER, *RÖMISCHE RECHTSGESCHICHTE* 439 (1988).

a foreigner (peregrine), but David Daube, whom I favor, argues that throughout the Republic, the peregrine praetor's court heard disputes only between peregrines.<sup>9</sup> Which of these views is correct need not concern us here. On either of them, the law facing the Roman citizen, whether he could only sue in the court of the urban praetor or also in that of the peregrine praetor, would be the same.

Secondly, the curule aediles, elected officials with lesser authority than the praetors, controlled the markets and streets of Rome and they issued their own Edict which contained two striking and important clauses which had no parallel in the Edict of the praetors. These clauses relate to the sale of slaves and beasts and, above all, they promise a remedy—redhibition, the return of the slave or animal to the seller followed by an action to the buyer for monetary recompense—which is absent from the praetorian Edict. But again matters are not as they seem. The aedilician Edict overall contained only one other edictal clause, and these three provisions in total are nothing like sufficient to cover all of the issues which would come before the aedilician court. What would the aediles do for other cases? There is only one possible answer. The aediles would then use the general law of the land, namely that set out in the praetorian Edict and enforced in the praetorian courts. And, though the point is disputed, the texts show that aedilician redhibition was granted only in circumstances where an action was already allowed in the praetorian courts. And redhibition itself was brought in as a praetorian remedy within the scope of the basic praetorian action on purchase, the *actio ex empto*.<sup>10</sup> I would not want to be misunderstood as claiming that there could be no difference between aedilician and praetorian law. Rather, my point is that there was in fact little difference. The curule aediles issued their very few edicts only when they wanted to introduce a remedy not available in the praetorian courts, and the praetorian courts in their turn could, and did, take over aedilician remedies without issuing an edict that expressed this.

Thirdly, there is a well-known, perhaps fundamental, distinction at Rome between civil law and praetorian law, where the former term is meant to include statute law and the building up of law by jurists, and the latter the law as modified by the praetors and the juristic interpretation of the modifications. But the practi-

9. Daube, *The Peregrine Praetor*, J. ROMAN STUD. 41 66ff (1952).

10. See Watson, *Sellers' Liability for Defects: Aedilician Edict and Praetorian Law*, IURA (not yet published).

cal consequences of the distinction in the present context were not great. What must be stressed is that there were not two systems of courts operating either civil law or praetorian law. There was only one system of private law courts and that was operated by the praetors who applied civil law as modified by praetorian law. (Apart from the courts of the curule aediles just discussed).

This single jurisdiction is beyond dispute. And modern scholars tend to exaggerate the extent to which the Roman jurists distinguished between civil law (in this sense) and praetorian law. Thus, as we know, the jurists were responsible for two main types of extended commentary, the books *ad Sabinum*, on Sabinus, and the books *ad edictum*, on the Edict, and scholars often write as if the former were commentaries on the civil law and the latter commentaries on praetorian law.<sup>11</sup> This is not quite accurate. Both are simply commentaries on private law, but are structured differently. Certainly Sabinus' commentary and those that are modelled on it do not deal with legal institutions that were created by the praetor and which never had an action claiming that there was an obligation at civil law. But the explanation is not that these works deal only with the civil law. Otherwise, one could not have Paul in book 10 of his commentary *ad Sabinum* giving an action on the example of the *lex Aquilia* to the usufructuary<sup>12</sup> or refusing an *actio utilis ad exhibendum* against an owner whose slave had, without his knowledge, fraudulently lost possession.<sup>13</sup> Nor could one have Ulpian declaring in book 42 *ad Sabinum* that an *actio in factum* would lie against a person who read aloud a will that had been deposited with him;<sup>14</sup> or that a person who stripped another's slave and stole his clothes was also liable to an *actio in factum* when the slave died of cold.<sup>15</sup> The explanation actually is very different. Whole important topics of the civil law are also omitted. Sabinus' own commentary omitted very important topics of civil law such as marriage, divorce, guardianship (*cura*), slavery, and dowry because he was largely following the commentary of Quintus Mucius Scaevola (who was consul in 95 B.C.), and Quintus Mucius also omitted these topics.<sup>16</sup> And Quintus Mucius, extraordinary though

11. See J.A.C. THOMAS, TEXTBOOK OF ROMAN LAW 51 (1976).

12. DIG. 9.2.12.

13. DIG. 10.4.10.

14. DIG. 9.2.41.pr.

15. DIG. 19.5.14.1.

16. See, e.g., F. SCHULZ, HISTORY OF ROMAN LEGAL SCIENCE 156 (1946); A. WATSON, *supra* note 7, at 144ff.

this is, appears to have dealt only with topics set out in statute before about the mid-third century B.C., and topics which could be attached to these. Quintus Mucius actually missed out basic issues of civil law which had existed for centuries.<sup>17</sup> This very odd approach inevitably meant that institutions which were not statutory, but edictal and purely praetorian, were also excluded, especially since the main growth of the Edict was in the first century B.C.<sup>18</sup>

The commentaries *ad Edictum* follow the arrangement of the Edict. But the contents are not restricted to praetorian innovations. The Edict contains not only edictal clauses but also formulae, model forms of action, and formulae were equally appropriate and available for civil law and praetorian actions. Hence, civil law appears in the praetorian Edict and thus in the commentaries *ad edictum*. For example, the *lex Aquilia* is obviously part of the civil law, indeed it is a statute, but the main treatment in the appropriate *Digest* title, 9.2., is taken from Ulpian, book 18 *ad edictum*. Clearly, Justinian's compilers found this to be the most satisfactory treatment of the subject. The same is true for other subjects that are predominantly civil law. Thus, for example, the main source of the texts on the *condictio*, a civil law remedy par excellence, is in Ulpian books 26, 27, and 28 *ad edictum* though commentaries *ad Sabinum* were also much used. And for the *vindicatio*, the principal civil law action claiming ownership, the main treatment in *Digest* 6.1 is taken from Ulpian, book 16 *ad edictum*.

Thus, we can say that, throughout its formative period, the system of Roman private law was basically unitary, and there was one system of courts which imposed this unitary law.

English law, as is well-known, was very different with a variety of courts claiming exclusive or competing jurisdiction, and often applying conflicting law. Whether a plaintiff or defendant would prevail could well depend on the court to which the plaintiff gained access. There were the superior royal courts of common law, the Court of King's Bench, the Court of Common Pleas, and the Exchequer of Pleas. They not only had their own differing jurisdictions and law between themselves, but many were the legal situations appropriate to the county courts which could not, or not directly, be brought before the superior royal courts. There was the Chancery enforcing rules of equity, not law. And there was, among

17. See A. WATSON, *supra* note 7, at 143ff.

18. See *id.* at 31ff.

others, the High Court of Admiralty, the object of much jealousy by the common law courts.<sup>19</sup>

## II.

Both developed Roman law and medieval English law had formulaic written pleadings and these pleadings, too, have been taken as a mark of similarity between the two legal systems. But again the differences are great and they are very revealing. Model formulae, as I have said, were set out by the praetor in his Edict. It is instructive to give here two of the early formulae; that for the buyer in a contract of sale, that of the lessor in a contract of hire of a thing.

Whereas Aulus Agerius bought from Numerius Negidius<sup>20</sup> the man on account of whom the action is brought, and this is the subject matter of the action, whatever Numerius Negidius ought to give to or do for Aulus Agerius on that account in accordance with good faith, in that, judge, condemn Numerius Negidius to Aulus Agerius; if it does not appear, absolve him.<sup>21</sup>

Whereas Aulus Agerius leased to Numerius Negidius the farm on account of which the action is brought, and this is the subject matter of the action, whatever Numerius Negidius ought to give to or do for Aulus Agerius on that account in accordance with good faith, in that, judge, condemn Numerius Negidius to Aulus Agerius; if it does not appear, absolve him.<sup>22</sup>

Thus, for the first of these actions there had to be a contract of sale and not some transaction that did not amount to a sale, for the second there had to be a contract of hire. So fundamental was this that for long it was held that if the agreement fell within the scope of a type of contract but in the event the particular contract was void, the action was unavailable. For example, some things were regarded as "outside of commerce" (*extra commercium*), such as things sacred to the gods above or below, and public property, and they could not be the object of sale. Thus, until the early Empire the actions on sale would be refused even to an unwitting

19. See, e.g., S.F.C. MILSOM, *supra* note 2, at 11ff, 37ff, 82ff; J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 11ff, 34ff, 83ff, 101ff (2d ed. 1979).

20. Aulus Agerius and Numerius Negidius were the standard designations for plaintiff and defendant respectively.

21. See O. LENEL, DAS EDICTUM PERPETUUM 299 (3d ed. 1927).

22. See *id.* at 299ff.

buyer.<sup>23</sup> And even then, the trend was towards declaring that the sale was valid even though what was sold could not be owned.<sup>24</sup>

This approach has important consequences. But first we should take note of the astounding amount of information that is not included in a formula. For example, it does not relate what is necessary for the existence of a contract of sale, whether for instance any formalities are needed, whether the price has to be in coined money, whether future goods can be sold. It tells one nothing about the duties of the seller, whether he has to transfer ownership—in fact, he is under no such obligation—whether he warrants a good title or absence of hidden defects. Nothing is revealed about the passing of risk in the sold goods before delivery. In fact, the formula is postulated on the basis that the nature of the contract of sale is already somehow known. Although, of course, there can be no such thing as a legal contract of sale before there is an action to enforce a contract, and the formula is *the* action, and so its creation brought the contract into existence, the substantive rules of the contract are treated as if they were logically prior to the creation of the action. There was, it should be stated, no Roman Sale of Goods Act or any official initiative, other than the praetor's formula which marked the creation of the contract of sale. The point that concerns us at this stage is that, from the facts set out in this paragraph, it is impossible for the procedure to create or dominate the substance of the law. More than that, to an almost unbelievable extent, the substance of the law and the procedure to enforce legal rights are kept rigidly apart.

The issue becomes wider when we consider the formula for purchase and the formula for hire of a thing side by side. They indicate what is, in fact the case, that sale and hire are different contracts, and that different actions are provided for the various contracts. If Aulus Agerius sues Numerius Negidius on the formula for sale and it appears the contract was one of hire of a thing, then Aulus Agerius loses his case. And he could not subsequently sue on hire because of the basic principle of Roman law that once the decisive stage of the action—called *litis contestatio*—occurred, the plaintiff could not initiate a new action on the same facts. The result is that it was extremely important in Roman law to determine precisely what were the outer limits of a legal institution or act, to

23. See, e.g., P.G. STEIN, *Fault in the Formation of Contract in ROMAN LAW AND SCOTS LAW* 67ff (1958).

24. DIG. 18.1.4.5.6.pr.

determine what counted as sale or as hire of a thing. There was, accordingly, enormous effort expended to determine exactly what were the legal elements of something such as the contract of sale. It is not just that substantive law could not grow out of Roman procedure, but the nature of Roman actions was such that they demanded that the substantive law be highly developed in its own right.<sup>25</sup>

The nature of the issue and some of its impact are further illustrated by a text, 3.146, from Gaius, *Institutes*, a textbook that was written around 160 A.D.

Likewise if I deliver gladiators to you on the terms that twenty *denarii* are given to me for each one that emerges uninjured, on account of his exertions, but a thousand *denarii* for each one that is killed or injured, the question arises whether this is a contract of sale or of hire. The prevailing opinion is that a contract of hire was made of those who emerged uninjured, but of sale of those who were killed or injured. This emerges from the outcome, it being understood that there was a conditional sale or hire of each one. For it is not now doubted that things can be bought or sold or hired conditionally.<sup>26</sup>

Only one of these actions, of sale or of hire of a thing, was the correct one. Consequently, in this as in other situations it was essential to determine precisely what would count as a contract of sale and what as a contract of hire.<sup>27</sup> It was thus important that the *substance* of law be developed as fully as possible.

The importance of developing the substantive law because of the nature of Roman actions (but not because substantive law emerges from the actions) can be illustrated by another example. So far we have talked of hire, *locatio conductio*, of a thing, but the contract was very wide in scope and it is traditional to write of it as covering hire of a thing (*l.c.rei*), of services (*l.c. operarum*), and of work to be done (*l.c. operis faciendi*). The double name, *locatio conductio*, indicates that one party was the hirer (*conductor*) the other the lessor (*locator*). They each had their own specific action,

25. I am not, of course, claiming that all ambiguities were resolved. I do not intend to deal with early Roman law in this paper. But I have argued elsewhere that early Roman substantive law also could not emerge from the system of archaic actions, the *legis actiones*: Watson, *The Law of Actions and the Development of Substantive Law in the Early Roman Republic*, 89 *LAW Q. REV.* 387ff (1973).

26. G. INST. 3.146.

27. The situation in G. INST. 3.146 is not free from practical legal difficulty, as we shall shortly see.

the *actio ex conducto* or the *actio ex locato*. If I agree with you that you will carry my wine in your ship to Rome, this contract could, according to the particular formulation, be *locatio conductio operarum*, hire of services, or *locatio conductio operis faciendi*, hire of work to be done, and, in the event of your failure to perform for some reason, the assessment of liability could vary. But, more than that, if the contract was *l.c.operarum*, you, the carrier, would be the *locator* and I the *conductor*, hence my action would be the *actio ex conductio*; and if the contract was *l.c. operis faciendi*, I would be the *locator* entitled to the *actio ex locato*. To succeed, the party had to sue by the correct action, the *actio ex conductio* or *actio ex locato*. Which action was correct depended on the substance of the law. Hence, it was vital that the substantive law developed in such detail that one could determine the precise nature of the contract before proceeding with the action.

The English writ system operated to different effect. It is, of course, logically correct that at an early stage of legal development, the idea of substantive legal right exists before the action. The action is created because there is a feeling that a claim has substantive justification or validity. But in the English superior courts—superior enough to have authority for the development of substantive law—it came to be the situation that an action based on a claim of substantive right could be brought only if a writ was issued. And the writs were based on narrow sets of facts, and they came to be stabilized or fossilized—no new types of writs were being issued by the early fourteenth century.<sup>28</sup> At this stage, an action claiming a substantive legal right was possible only if a type of writ, already existing, was available. It is in the tortuous attempts to give a remedy on the basis of existing writs that one can claim English substantive law developed from actions or that a law of actions existed before substantive law. As is well-known, need not be set out here, and to some extent will appear in subsequent sections of this paper, the claims that could be made in writs had often to falsify the factual situation, were not based on legal categories recognizable to modern or Roman law, were often designed to steal a march on other courts, and were not a tool that could be used to develop legal concepts, institutions or clarity in the law.

Thus, the Roman procedure forces the jurists to develop concepts and clear rules of substantive law, and substantive law is

28. See, e.g., S.F.C. MILSOM, *supra* note 2, at 36.

kept thereby far removed from procedure. Moreover, the very procedure itself is based on the notion that the jurists have done and are doing their job. Indeed, the Roman court system itself forces the jurists not to be court oriented but to gear their discussions to legal institutions, rules or principles. In contrast, English procedure inhibits and obstructs the development of concepts of substantive law, and substantive law appears unimportant in contrast to the primacy of procedure. From the perspective of the client, the person with a problem, English law is a perversion. The client's interest begins with an issue of substance. In England, but not at Rome, he would be sucked into a labyrinth of procedural issues which—apart from the impact on the outcome—would be to him quite irrelevant. It need hardly be said that understanding one's legal rights in England became incomprehensible except for the specialist.

One further point should be made at this stage. It might be argued that the clarity of the Roman system of actions and substantive law, as argued for above, was muddled by the prevalence of *actiones utiles* and (*ad hoc*) *actiones in factum*. Exactly what distinguishes these forms of remedy from one another is not certain, but that need not detain us in the present context. What matters is that they are actions that are granted by the praetor when a claim is not covered by a formula in the Edict yet the praetor feels an action is appropriate. The action might be framed on the basis of an existing formula but with the insertion of a fiction: the judge is to proceed on the basis of a postulated hypothesis such as "if he [the plaintiff] were a Roman citizen." Or the formula might not allege any existing legal obligation but declare that if stated facts are found, a judgment is to ensue against the defendant.

These *actiones utiles* and *actiones in factum* are found in many contexts but above all they cluster round the *lex Aquilia*, the statute that dealt with damage to property. For instance, the action on the *lex Aquilia* was available only to the owner, but an *actio utilis* or *actio in factum* extended its benefits to certain non-owners such as a possessor in good faith or a usufructuary.<sup>29</sup> Again, since the action was for loss caused by damage to property, a free man who was injured could not sue on it, but he was granted an

29. See, e.g., DIG. 9.2.11.6-10.

*actio utilis Aquiliae*.<sup>30</sup> In other contexts we find that when an edict granted an action against the occupant on account of something thrown from a building, Paul gave an *actio utilis* against the person in charge of a ship;<sup>31</sup> and when someone was forced to repudiate an inheritance, the same jurist said the praetor would grant an *actio utilis* as if he were heir.<sup>32</sup>

On one level, the existence of such *actiones utiles* and *actiones in factum* does make the law more complicated because their existence has to be taken into account in order to know the law. But they are the ideal means for doing justice under law—to take account of the complexities of human situations—while preserving, or even increasing, the clarity of legal concepts and institutions. Thus, the concept of “ownership” can be developed in a “rational” manner by the jurists with no need for them to try to accommodate within that notion the possessor in good faith who might otherwise be left without a remedy for injury to the property he controlled. A particularly illuminating example is provided by G 3.146 which has already been quoted.<sup>33</sup> What if the supplier simply fails to deliver the gladiators for the games? Gaius has made it clear that until the outcome the arrangement was neither the contract of sale nor the contract of hire. But the games-giver surely deserves a remedy. If this were to be the *actio ex empto* or the *actio ex conductio*, the purity of the notion of these contracts would be adversely affected, and Gaius indicates that this is not going to be done. The dilemma of justice versus conceptual purity is resolved if the praetor grants an *actio in factum*. One might un-historically describe such actions as devices for the preservation of conceptual purity. Historically of course, they are devices to render justice under law without impairing conceptual purity. This concern for conceptual purity is far removed from anything to be found in English common law. And these Roman modified actions do not attempt to conceal the true facts.

30. Dig. 9.2.13. pr.

31. Dig. 9.3.6.3.

32. Dig. 4.3.21.6.

33. See *supra* note 27 and accompanying text.

### III.

One issue that requires little space and cannot be proved by direct textual evidence is nonetheless so important as to demand treatment in a separate section. I said above that lack of legal detail in the formulae had to be explained on the basis that the praetor could rely on the jurists building up the law. We should go further. The extreme lack of information in the formulae makes sense only on the basis that the substantive law was already known. And the only people to whom it could be known and who had the authority to declare the law were persons such as the jurists. This means in turn that there must have been active cooperation from the jurists, in drafting formulae and edicts, and in suggesting modifications to formulae and edicts. In large measure the credit for building up the Edict must be given to the “academic” and rather upper-class jurists.<sup>34</sup> The same must be true for *actiones utiles* and *actiones in factum*. When a jurist says the praetor will grant an *actio utilis* he means that the praetor will follow the advice of jurists and give the *ad hoc* remedy they have devised.

But English law, notoriously, was long bereft of scholars. During the formative years of English law there were, indeed, a few books like that of Bracton and that attributed to Glanvill. But they lacked impact on the form and substance of the law, on legal education, and even on subsequent book writing. A partial exception may be made for Coke's *Institutes of the Law of England*, apparently begun around 1616,—though he was making no attempt to develop the law—but its lack of theoretical structure is famous.<sup>35</sup>

### IV.

To change perspective at this point: One might be tempted by another generalization; namely that English common law is court-oriented, Roman private law is not. The emphasis in English law seems to be, “Will the court hear this case?” For Roman law, in stark contrast, there is no sign that the jurists were interested in

34. See Watson, *The Birth of the Legal Profession*, 85 MICH. L. REV. 1071ff, 1075f (1987). For an explanation of how the jurists came to be entrusted with making the law, see *id.*, 1079ff. For the social origins of the jurists, see W. KUNDEL, *HERKUNFT UND SOZIALE STELLUNG DER RÖMISCHEN JURISTEN* (2d ed. 1967). For change in the formulation of formulae and edicts, see A. WATSON, *supra* note 7 at 33f.

35. See, e.g., J.H. BAKER, *supra* note 19, at 165.

W

Jurists

the slightest in what happened in court. But the generalization again, in revealing part of the truth, conceals the whole. It is true that Roman private law is not court-oriented. But the question for English law is not, "Will the court hear this case?," but, "Which court, if any, will hear this case?" It is not just that English common law is court-oriented: it is at the same time court-oriented and court-specific.

The contrast appears sharply in the contrast of two basic books, the *Institutes* of the Roman jurist Gaius which were written around 160 A.D. and the work on the laws and customs of England attributed to the English justiciar Glanvill who died 1190. Gaius' *Institutes* is in four books, of which the first three deal systematically with substantive law, excluding discussion of actions. Only in book four is the subject matter the law of actions, and even that is primarily a systematic account of the general principles. Gaius does not set out the differences between one action and another. He does not have to, because each action is fundamentally the same as any other. Gaius' arrangement, moreover, indicates that Roman substantive law could be set out largely independently of any treatment of actions. But Glanvill's is a book of practice, focussing on procedure. More than that, it deals only with the king's courts to the exclusion of everything else, and of it has been said, "His custom of the realm was a law of writs, of the instruments which initiated lawsuits in the king's courts and of the remedies which they enshrined."<sup>36</sup> For Glanvill, moreover, every writ was individual. They each had to make the claim that this action was one that would specifically be heard in the king's court. And, of course, when the king's court came eventually to be a series of king's courts, each with competing jurisdiction, the problem was exacerbated. Even in the later eighteenth century, a major problem facing Blackstone in constructing his *Commentaries on the Laws of England* was how to treat substantive law separately from procedure.<sup>37</sup>

The difference in orientation comes out in substantive law. For me the paradigm case lies in contract where from an early stage in both England and Rome every kind of lawful bargain could be enshrined in a form that would be enforced by the courts. Both developed covenant in England and *stipulatio* at Rome re-

36. J.H. BAKER, *supra* note 19, at 13.

37. See Watson, *The Structure of Blackstone's Commentaries*, 97 YALE L.J. 795ff (1988).

*Blackstone*

quired formalities, but their purpose was strikingly different. By 1321 in England it was well settled that the *royal* judges would not hear a case on covenant that was not established by written deed. The validity of the bargain in the absence of writing was not challenged but the plaintiff had to produce acceptable proof of it, and the only proof that the royal judges would consider was a written document under seal. The purpose of the formalities for developed covenant was thus precisely to provide proof for the *royal court*. For its validity and full actionability the general Roman contract of *stipulatio* needed no writing and no witnesses. The promisee asked, "Do you promise . . .?," the promisor replied "I promise," necessarily using the same verb.<sup>38</sup> No other formalities were needed. Thus, in no sense were the formalities for *stipulatio* oriented towards proof for the court. On the contrary, their function lies purely between the parties to the bargain: the formalities show the parties that they have reached agreement and intend a contract. The court would, of course, need some evidence on which to base its judgment, but the point here is that that need is not reflected in the nature of the contract.

Here, too, with contract, the contrast is not between a system that is court-oriented and one that is not, but between a system that is court-oriented and court-specific and one that is not court-oriented.<sup>39</sup> The point for English law is not that courts would accept as proof of a contract only writing under seal but that *royal* courts would accept only such proof. And only the royal courts had such authority as to set the course for the development of general private law.

38. In very early law only the verb *spondere* created the contract.

39. The same point should be made about another example of apparent similarity, namely legal education in Rome of the Republic and in England until the nineteenth century. There were no law schools. The young learned their law at the feet of the great. But again the similarities should not be stressed. It is enough to observe that the Roman "oracles of the Law" were for the most part not involved with the courts, and prospective jurists came to listen to them at home to learn the law. See, e.g., A. WATSON, *supra* note 7, at 103. Most recently, though, J.W. Tellegen has argued there was no sharp distinction between jurist and orator: Tellegen, *Oratores, Jurisprudentes and the Causa Curiana*, 30 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITÉ 293ff (1983); Tellegen, *Parva Quaestio sed tamen Quaestio: Lawyers and Legal Argument Before the Senate*, 32 JURID. REV. 195ff (1987). English law was learned by listening to practitioners who were concerned with the practice of individual courts. See, e.g., J.H. BAKER, *supra* note 19, at 147ff.

## V.

An oft-repeated point of similarity strikes me as meaningless. It is stressed that:

Their relationship was in the first place based on the fact that both Roman law and English law were built up through the discussion and decision of cases. These rules were not in the form of broad propositions laid down by a legislature but rather were narrow statements declared in the context of particular sets of facts. Despite the number of statutes and other examples of *ius scriptum*, the essence of both laws was seen to be *ius*, rather than *lex*, that is law 'discovered' in debates among experts—the Roman jurists and the English judges—and elaborated by them.<sup>40</sup>

This is quite banal. How else would one expect law to *develop*? Progress 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. And we are considering legal systems that did develop. Even when there is grandiose legislation, this is postulated on preceding casuistic discussion. No better example exists than Justinian's *Corpus Juris Civilis* itself, with the *Digest* compiled with fragments of texts taken from jurists and with the *Code* largely composed of imperial answers to particular narrow questions put to them. Indeed, these imperial answers would be the work of jurist bureaucrats, and be informed by previous juristic discussion. Even when a nation borrows its law from elsewhere framed as legislation, what is borrowed is itself the fruit of casuistic discussion.<sup>41</sup>

What is again overlooked is the enormous difference between Roman and English casuistic discussion. The Roman jurist is at home. The question, real or hypothetical, will be put to him. He will reflect on it, perhaps in discussion with friends and students, fitting the facts within a general framework of a legal institution. The issue for him is an academic one. He is not being retained by a client whose interests he has to serve. He does not consider procedural dodges and devices to get an opponent into court or entrap him. He is not concerned with the outcome of a particular lawsuit. He has no interest in whether one party is a decent fellow, the other a rogue. He will set the particular facts within a wider con-

40. Stein, *supra* note 1, at 185.

41. The process is aided and abetted by the general lack of interest in governments in law making. See, e.g., A. WATSON, *SLAVE LAW IN THE AMERICAS* 1ff (1990).

text of facts that are "slightly different,"<sup>42</sup> to determine where lines should be drawn.

The English judge is in court, in his court, and he is faced with the issue whether his court, on this form of action for his court, should hear a suit on these particular facts. He will not rule on hypothetical facts. He is faced with practicalities. He is aware that one party is a rogue, another an honest man. He does not set an issue within a general institution, such as contract. He does not even ask himself, "Will *assumpsit* lie?"; but, "Will *assumpsit* lie in this court?" And his answer, as we shall see, might well differ, depending on whether his court is Common Pleas or King's Bench.

In this instance, too, it is egregious error not to notice that Roman case discussion is not court-oriented and that English case discussion is both court-oriented and court-specific. It is also misleading to play down or ignore the role of systematic treatises which are not problem-oriented and which were being written from the late Republic on. In their abstraction, concerns with the boundaries of institutions, reduction of facts to abstractions, these books have no parallel in English common law.

## VI.

But there are situations where Roman and English legal thinking do appear reasonably similar. These situations, naturally enough, involve courts. But it is precisely in dealing with these that we must be most on guard against misunderstanding.

One might single out as prime examples of similar approaches *in iure cessio* and *manumissio vindicta* for Rome and common recovery for England.

*In iure cessio* is described by Gaius:

G.2.24. *In iure cessio* is performed thus: in the presence of a magistrate of the Roman people, such as a praetor, the person to whom the thing is ceded in law (*is cui res in iure ceditur*), holding the thing says, "I declare that this slave is mine by the law of the citizens:" then, after he made the claim of ownership, the praetor asks the person who is transferring whether he is making a counterclaim; and when he replies in the negative or remains silent, he adjudges the thing to the person who claimed ownership and this is called an action of the law (*legis actio*).

42. See Daube, *Slightly Different*, 12 IURA 81ff (1962).

In form, this is the first stage of the old formal type of proceedings which were called *legis actiones* and were used before the introduction of the formulae. It is a transfer of ownership by a fictitious lawsuit. The person to whom the property is to be transferred makes a legal claim of ownership, the transferor does not make a counterclaim, and the praetor adjudges the object to the transferee.<sup>43</sup> Despite the form as a lawsuit, the reality was recognized and *cessio in iure* was valid as a transfer, and not just as between the parties.

In *manumissio vindicta*, someone who wished to free his slave had a friend start proceedings against him in a *vindicatio in libertatem*, the action claiming that a free person was wrongly being held as a slave. The owner did not defend, and the slave was adjudged free. Again the realities were recognized, and the former owner had all of the rights of patronage that were due someone who voluntarily freed a slave.<sup>44</sup>

The English common recovery was a collusive real action. The tenant in tail had a friend bring an action against him for the recovery of the entailed land, using the writ *praecipe quod reddat*. The tenant in tail raised no real defense except to claim falsely that he had received the land in conveyance from a named individual who had warranted for himself and his heirs that the title he gave was valid. The named individual, an accomplice with no land, would default. The court would award the land, which was the object of the suit, to the plaintiff, and that land was now unentailed. The court would also grant the defendant the worthless right to execute judgment against the lands of the defaulting accomplice. The judgment could not be attacked since in theory the issue of the tenant in tail and those having a revisionary interest were not injured. Subsequently, the plaintiff would reconvey the fee simple or else its value to the former tenant in tail.<sup>45</sup>

Certainly we have here an instance where the approaches in the Roman *in iure cessio* and *manumissio vindicta* and in the English common recovery are very much alike. Both, it should further

43. See, e.g., W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 233ff (P. Stein 3d ed. 1963).

44. See A. WATSON, ROMAN SLAVE LAW 24f (1987), and the works cited therein.

45. See, e.g., S.F.C. MILSOM, *supra* note 2, at 183ff; J.H. BAKER, *supra* note 19, at 234ff; G.C. CHESIRE, AND BURN'S MODERN LAW OF REAL PROPERTY 239f (E.H. Burn 14th ed. 1988). The best account is still W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND Vol. 2, 357ff (1st ed. 1766).

be noticed, are a response to a failure of government. But the concealed difference should not be overlooked since in fact it pinpoints the contrast between Roman and English law. In Roman law, no one is being overreached. There is no one who is adversely affected. At the most, one might suggest that the heir of the owner who manumits his slave loses the value of the slave. But not only is there no heir until the owner is dead, but the presumptive heir has no legal title to intervene any more than if the owner made a gift of the slave to a third party. In contrast, in common recovery the interests of both the issue of the tenant in tail and of the persons to whom the land would revert in the event of failure of such issue are overreached. They are deliberately overreached at that, and yet the whole point of the fee tail is to give contingent rights to them which cannot be taken away. In effect, the Roman officials are simply acquiescing in allowing all of the affected parties to make use of them, to achieve a purpose desired by all. In contrast, the English court is actively intervening to grant a new right to one party while taking rights away from others. The Roman procedural role here is mechanical, the English court's role is creative; and it is destructive of rights.

## VII.

Finally, we may consider a feature of Roman and English law that is stressed as indicating an inner relationship between the systems. In both Roman and English law use was made of fictions. For Rome the classic account is again to be found in Gaius' *Institutes*.<sup>46</sup> He describes some instances of fictions being used in formulaary actions. For example, the praetor had greatly changed the old civil law of succession and hence a praetorian action ought at times to be given to someone who was not the civil law heir as if he were the heir, either to claim the inheritance or to claim a debt owed to the inheritance. In the former instance, the action would begin: "Let X be judge. If Aulus Agerius (that is, the plaintiff) were heir to Lucius Titius, then if that estate which is the subject of this action would belong to him by civil law. . . ." Again, some actions, for instance those for damage to property under the *lex Aquilia* or for the private wrong of theft (*furtum*) could only be brought by a citizen. When it was desired to open these up to foreigners, and a peregrine was the plaintiff, the fiction would be in-

46. G. INST. 4.34-38.

served: "if he were a Roman citizen." The Roman fictions have in common that they are extending an existing right to a new class of persons or new class of situation.<sup>47</sup> There is no pretense about them. That the plaintiff in the *actio furti* is not a citizen is evident on the face of the action. The plaintiff is to have the rights he would have if he were a citizen, which he is not. Roman fictions are simply the easiest and most economical way of keeping the law up to date to meet changed circumstances or attitudes. They are meant to give relief in the court system, and they keep the law simple. They are the work of jurists operating in a unitary court system.

English fictions are very different. Primarily they operate on the basis of a stated fact which in actuality does not correspond to the factual situation, they emerge from one particular court snatching at jurisdiction on facts that do not allow jurisdiction, and an end result is that they bring obscurity to law and prevent development of concepts. It is enough to consider a few examples briefly.

The *ostensusurus quare* formulation for writs came early to be allowed for trespass only when the wrong was committed by force and arms and against the king's peace (*vi et armis et contra pacem regis*). The writ came to be used fictitiously to allow an action for non-violent wrongs over which the king's courts had no jurisdiction. Thus, one finds in the latter part of the fourteenth century a number of actions for trespass *vi et armis* where the injury was to a horse and the defendant can be identified as a blacksmith. The more obvious explanation is that the actions were for professional misconduct: in shoeing a horse under an agreement the smith caused it an injury.<sup>48</sup> Whatever the advantages may be for having a remedy in the king's courts in such circumstances, this fictitious approach makes the law obscure, understandable only by specialists. It also serves as an obstacle to the development of a law of contract and to a law of torts.

Again, English law like other systems, drew a distinction between misfeasance and nonfeasance; and for that particular kind of nonfeasance that consisted of a failure to pay money which was

47. This is so even when the fiction is in a new action such as the *actio Publiciana*: G. INST. 4.36. See also O. LENEL, *supra* note 21, at 169ff.

48. See, Milsom, *Trespass from Henry III to Edward III*, 74 LAW Q. REV. 195ff, 220f, 586 (1958); J.H. BAKER, *supra* note 19, at 57f.

owed there was only a writ in debt. Debt had severe limitations as a remedy: the defendant could wage his law, there was a narrow understanding of quid pro quo, the sum claimed had to be certain and debt did not lie against executors.<sup>49</sup> Another remedy, assumpsit, could be used before 1550 in a variety of situations of nonfeasance but naturally, given the notion of exclusivity of writs—for any situation there could not be more than one possible writ—not where the writ in debt would issue. The defects of debt were a reason for wishing to extend the scope of assumpsit, a reason found more cogent in the King's Bench than in the Court of Common Pleas which had a monopoly of debt.

At least three devices were created, before the celebrated Slade's Case of 1602, to extend assumpsit for non-payment of money. For all of them it was necessary to show there was some consideration in return for the promise to pay, and it is not easy to tell how often in the early examples the alleged facts correspond to the truth. One device to permit assumpsit was to allege that there was an existing debt which was followed by a promise to pay in return for an agreement not to sue for the debt for a specified time. The alleged waiting period might be as little as a day or two. The Court of Common Pleas did not treat this as genuine consideration, but the King's Bench did. A second device was appropriate for merchants dealing together when it was argued that a certain sum was owing. Assumpsit could be brought on the consideration that the parties had accounted together (*insimul computassent*) and the debt was found to be due. The third device was to use the promise to pay an existing debt, plus (in order to create the consideration needed for assumpsit) the allegation that the contract was requested by the defendant and that there was a consideration for the promise (often of a few pence) or the plaintiff had suffered loss because he was not paid on time. Such false allegations were rejected by the Common Pleas, but not by the King's Bench.<sup>50</sup>

And, for English law, one could go on with example after example of fictions being devised to ground jurisdiction in particular courts. It is enough now to remind the reader of the fictions devised after fictions by the common law courts and the Court of Admiralty, especially in the seventeenth century, to obtain juris-

49. See, e.g., J.H. BAKER, *supra* note 19, at 292.

50. See *id.* at 283ff; Milsom, *supra* note 2, at 339ff; J.H. BAKER & S.F.C. MILSOM, SOURCES OF ENGLISH LEGAL HISTORY 406ff (1986). A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 281ff (1975).

diction in maritime matters.<sup>51</sup>

### VIII.

To conclude. When jurists are lawmakers they will tend to produce law that is conceptualized, systematic, clear, with institutions sharply distinguished from one another. When judges are lawmakers they will tend to produce law that is poor in concepts, lacking in abstractions, rich in technical dodges and devices. But the Roman jurists were impelled by the very nature of the court system within which they operated always to press towards greater clarity of conception and sharpness of divisions between one institution and the next. The English judges, on the other hand, by virtue of the court structure in which they worked, were hindered in developing concepts and legal institutions such as contract and torts or such as the individual contracts, and were pushed towards developing particular technical devices and dodges of all kinds. Similarities though the two systems have, the striking fact is how differently Roman law and English law evolved.

To return to our starting point, the quotation from S.F.C. Milsom, "It has happened twice only that the customs of European peoples were worked up into intellectual systems of law." It is in the highest degree significant for our present purposes that Milsom's statement is inexact. Milsom immediately issues the qualification: "The starting-point is in customs, not the customs of individuals but the customs of courts governing communities." This is instructive for England. The courts do ask themselves what it is their custom to do. And different courts do different things. But the remarkable thing about Roman law, at least from the archaic point at which it becomes known to us, is its almost entire freedom from custom, from a postulated basis in what people do.<sup>52</sup> It results from gentlemen in their study ruminating on what a rule or institution ought to be or ought to do, and then fitting it within the unitary court system.

51. See J.H. BAKER, *supra* note 19, at 108.

52. See A. Watson, *supra* note 7, at 169ff.

## ARTICLES

### ROMAN LAW AND COMMON LAW—A DIFFERENT POINT OF VIEW

Obrad Stanojevic\*

My respected colleague, Professor Watson, delivered an inspiring and interesting lecture;<sup>1</sup> however, I must disagree with some of his ideas. Although he was correct in criticizing some exaggerations of Buckland and McNair,<sup>2</sup> I suppose that reacting to one exaggeration, as it happens, leads to exaggerations in other directions.

There is, of course, a danger in comparing legal systems which are so remote in time and space. Nevertheless, if we consider the *real* Roman law, not the elaboration that has come to us through medieval interpretation, we find basic similarities between the law of the Roman Empire and the common law.

First, both the English and the Romans have created two parallel sets of rules: an older, inflexible, traditional system (*ius civile* in Rome, common law in England),<sup>3</sup> and another more flexible, less formalistic system (*praetorian ius honorarium* in Rome, equity in

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1. Address by Alan Watson, Loyola Law School Fifth Annual Brendan Brown Lecture (Feb. 16, 1990), reprinted in 36 Loy. L. Rev. 247 (1990) [hereinafter Brendan Brown Lecture].

2. W. BUCKLAND & A. MCNAIR, *ROMAN LAW AND COMMON LAW* (2d ed. 1952).

3. A. SCHILLER, *AN AMERICAN EXPERIENCE IN ROMAN LAW* 57-61 (1971); Thomas, *Origins of the Common Law (A Three-Part Series) Part I: The Disappearance of Roman Law From Dark Age Britain*, 1984 B.Y.U.L. Rev. 563, 598.

England).<sup>4</sup> For example, there are both civilian ownership and praetorian ownership in Roman law, and both common law ownership and equitable ownership in England.

Roman law, at least in classical times, was in many ways related to the administration of justice in the court.<sup>5</sup> The praetorian edict was in some ways a guide-book for the court.<sup>6</sup> Although some differences exist between the Roman *formula* and the English writ, these instruments served basically the same function: as a letter to the judge containing instructions regarding the manner of case settlement if particular evidence was produced.<sup>7</sup>

Professor Watson correctly asserted that Roman Law consisted largely of the *jurisprudents'* activity; however, most of the work of outstanding jurists in Rome was oriented to the courts.<sup>8</sup> Because the legal system was complicated and included laymen acting as judges (*arbitri*), qualified persons, *jurisprudents*, were called upon to help in settling disputes.<sup>9</sup> *Arbitri* in most cases were honest and dependable, but not trained in law.<sup>10</sup> Therefore, *jurisprudents* satisfied a necessary role in aiding the courts in the administration of justice.

Another similarity between the two legal systems is the importance of the judicial decision, the case. It is true that in modern times one of the basic differences between civil law countries and the common law is in respect to the role of the case. France, Germany, Italy, and other countries which are in some respects heirs of Rome, have codes and statutes, while common law is based on the judicial decision, the case. However, if the works of a famous classical Roman jurist or a praetorian edict, or an imperial statute (*decreta*) are analyzed, the case will be found, not a bare general statement of the law.<sup>11</sup> The basic attitude of jurisprudence was this: *Da mihi facta, dabo tibi jus*.<sup>12</sup> The general rule or definition could be found, especially in textbooks (*Institutiones*), but was not

4. J. MACKINTOSH, *ROMAN LAW IN MODERN PRACTICE* 49-50 (1934); Stein, *Logic and Experience in Roman and Common Law*, 59 B.U.L. REV. 433, 439-41 (1979).

5. See Stein, *supra* note 4, at 438-39.

6. *Id.* at 439.

7. *Id.*

8. *Id.*

9. *Id.* at 439, 440.

10. *Id.* at 439; Hausmaninger, "Benevolent" and "Humane" Opinions of Classical Roman Jurists, 61 B.U.L. REV. 1139, 1139-40 (1981).

11. See Stein, *supra* note 4, at 439-40.

12. "Give me the facts, I will give you the law."

of importance. Famous is the position of Javolenus: "*Omnis definitio in jure civili periculosa est, rarum est enim ut subverti non possit.*"<sup>13</sup>

Most of the definitions attributed to the Roman law are in fact medieval deductions drawn from some text dealing with a specific situation.<sup>14</sup> For example, the definition of ownership (*plena in re potestas*) derives from a fragment of the Digest relating to the servitudes.<sup>15</sup> As Peter Stein points out, general rules and maxims were created during the time of postglossators and commentators of Roman law by omitting the concrete elements of the situation with which they were dealing.<sup>16</sup>

One of the major differences between the two kinds of legal traditions in the Western world is that civil law countries tend to have more or less systematic sets of rules, whereas this systematization does not appear in common law.<sup>17</sup> In this respect, Roman law is more closely allied to the English or American law than to the French or German law. Until the end of its history, Roman law was far from achieving any form of systematization, which was one of the motives for Justinian to undertake the codification.<sup>18</sup>

Various types of sources comprised the law of the Roman Empire: statutes, edicts of magistrates, decisions of the Senate (*senatus consulta*), decrees of emperors (*constitutiones principum*), and opinions of prominent jurists (*responsa prudentium*). Not only did jurists of different schools disagree, but those of the same school would contradict each other. Sometimes the same jurist would contradict himself in a subsequent book.<sup>19</sup> Some emperors, such as Diocletian, promulgated thousands of constitutions. If this source of law alone is considered, many contradictions and repetitions can be found.<sup>20</sup> Accordingly, the *Lex cita-*

13. "All definitions in law are dangerous, because rare are those that could not be overturned." DIG. 50.17.202. *E.g.*, G. INST. 1.1-12; 2.1-5, 10-16, 22; 3. 89-90. Most of the first Book of the Institutes of Justinian is also composed of general provisions. See also DIG., 1.5.4 pr. (a fragment from Florentin's Institutes), or DIG. 1.7.1 (taken from the *Regulae* of Modestinus).

14. See Stein, *supra* note 4, at 438.

15. *E.g.*, J. INST. 1.4.4.

16. P. STEIN, *REGULAE JURIS* 154-60 (1966).

17. See Stein, *supra* note 4, at 438.

18. *Id.* at 434.

19. *E.g.*, in G. INST. and the RES COTTIDIANAE several significant inconsistencies led some Romanists to the conclusion that the two books had been written by different people; see also Stanojevic, O. GAIUS NOSTER: PLAIDOYER POUR GAIUS, 84-98 (1989).

20. Compare, *e.g.*, CODE J. 4.44.2 with CODE J. 4.44.4.

*tionis* (promulgated by Theodosius II and Valentinian in the fifth century) and the elaboration of Justinian's codification were attempts to promote order and to facilitate the administration of justice in a complicated legal system.<sup>21</sup> This attempt at systematization is found in American and English common law systems today.

Common law directly borrowed some concepts from the Roman law, for example, unjust enrichment, classification of contracts, and, probably, adverse possession. However, this point is less significant. For instance, one cannot argue that Turkey and Germany have the same historic, sociologic, and economic features because Turkey adopted the German Civil Code. But if an unintentional similarity exists, one may conclude that some basic common features of two different societies led to the same or similar results.

Besides the similarities of the legal systems I have already mentioned, the importance of the case and the formula/writ relationship, others can be found. For example, the Roman *fiducia* strikingly resembles the common law trust. One concept that Professor Watson and I agree on is each system's use of fictions. Professor Watson validly distinguished the Roman and common law fiction,<sup>22</sup> but the significant fact is that both systems utilized fictions. However, the role of fiction in the civil law countries is unimportant.

I most closely agree with the following assertion by Rene David:

English law is, in many respects, closer to Roman law than the Romanists laws themselves are today, in the sense that it has duplicated, though quite autonomously, the same general evolution: the primary importance of the forms of action, the casuistic character of the legal rule and the suspicion of general formulae and systematization.<sup>23</sup>

Analogously, Jhering wrote in the last century, "English jurisprudence in all its ignorance of Roman law breathes nevertheless the air of ancient Roman law. There is the same manipulation with

21. Justinian speaks about so huge a legal system "that it exceeds any human capacity." Constitution Deo Auctore 1.

22. See Brendan Brown Lecture, *supra* note 1, at 265-67.

23. R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 31 n.1 (3d ed. 1985).

form, the same pedantry, the same roundabout means and make-believe transactions; and neither is there any lack of fictions."<sup>24</sup>

The paradox regarding how it is possible that Roman law is more closely related to the common law than to the "Romano-Germanic" family of laws is not easily explained in short form. Although the civil law countries based their legal system on the tradition of the Roman law, this relationship is not a direct one. Roman law has come to us through the long elaboration of many centuries and through many schools, starting with the Glossators in the eleventh century.<sup>25</sup> Although they spoke the same language, Latin, the medieval jurists belonged to a civilization which was much more dogmatic than the classical Roman civilization. After all the interpretations and additions made to the Roman law by medieval jurists, the pandectists, and others, civil law today resembles Roman law much as the Broadway show *My Fair Lady* resembles the Greek myth of Pygmalion, on which Bernard Shaw based his play and Lerner and Lowe based their musical.

I will try to offer some possible explanations for the similarities between English and Roman laws. Both the English and the Romans are the most successful builders of empires.<sup>26</sup> The achievements of these two peoples are similar; therefore, one can reasonably suppose that the civilizations possessed some common features. Britons and their relatives, the Americans, in some ways resemble the old Romans. For example, the plan of Manhattan was obviously based on the Roman urbanistic knowledge. Manhattan has a *forum* (Washington Square), *cardo* (Fifth Avenue), and *decumanis* (Fourth Street).

Both Romans and Britons are pragmatic minded. One of the differences between the Greeks and the Romans is that the Greeks created an enormous theory of the state composed of tiny states; whereas the Romans created a tiny theory of the state, but a tremendous empire. Unlike the Greeks, the Romans, Britons, and Americans have not contributed one single philosophy, if we exclude the philosophy of pragmatism, which is the negation of philosophy. This pragmatism, the supremacy of the experience over

24. See Zweigert & Siehr, *Jhering's Influence on the Development of Comparative Legal Method*, 19 AM. J. COMP. L. 215, 229 (1971) (citations omitted).

25. Wieacker, *The Importance of Roman Law for Western Civilization and Western Legal Thought*, 4 B.C. INT'L & COMP. L. REV. 257 (1981).

26. H.J. WOLFF, ROMAN LAW: AN HISTORICAL INTRODUCTION 11 (6th ed. 1951); see also Stein, *supra* note 4, at 438.

the abstract speculation, is probably the main reason for some basic common features of the two systems.

Indirect proof that the Roman law and common law are similar is the outstanding number of excellent Romanists with common law backgrounds. It seems that the common law practitioner has an advantage over his civil law colleague in better understanding some characteristics of Roman law as it really was.

## THE EVOLUTION IN TAX SHELTER LITIGATION: THE TAX COURT CLOSING THE DOOR ON GENERIC TAX SHELTERS, BUT A WINDOW REMAINS OPEN WITH RESPECT TO THE ADDITIONS TO TAX AND THE INCREASED INTEREST UNDER I.R.C. § 6621(c)

Kathleen O. Lier\*

Abusive tax shelter cases<sup>1</sup> have cluttered the United States Tax Court's docket for more than a decade<sup>2</sup> and caused substantial tax revenue loss to the federal government.<sup>3</sup> During this period, the Tax Court did not always use the same test to analyze these cases.<sup>4</sup> In 1987, in *Rose v. Commissioner*,<sup>5</sup> the Tax Court identified a select group of abusive tax shelters and defined them as generic

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1. Abusive tax shelter cases have typically been identified as those in which taxpayers claim credits and deductions associated with a transaction that is a sham, involves an asset that has a claimed inflated value in relation to an actual negligible value, or involves "write-offs" that are many times in excess of the amount expended by the taxpayers. See, e.g., *Rose v. Commissioner*, 88 T.C. 386 (1987), *aff'd*, 868 F.2d 851 (6th Cir. 1989) and cases cited therein at 88 T.C. at 413-14. See also Slaughter, *The Empire Strikes Back: Injunctions of Abusive Tax Shelters After TEFRA*, 3 VA. TAX REV. 1, 1 n.1, 3-4 & nn.15, 18 (1983).

2. See H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 985 (1984), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 1445, 1673. See also McCrary v. Commissioner, 92 T.C. 827, 862 (1989) (Gerber, J., dissenting); Todd v. Commissioner, 89 T.C. 912, 917 (1987), *aff'd*, 862 F.2d 540 (5th Cir. 1988). As of mid-1983, for example, the Tax Court estimated that one-third of its pending cases involved tax shelter issues. See Slaughter, *supra* note 1, at 3 & n.12.

3. Slaughter, *supra* note 1, at 1 n.2 (as of 1981, "abusive tax shelters cost the U.S. Treasury \$3.6 billion annually in lost tax revenue."). In addition to lost revenues, the Internal Revenue Service (IRS) had to concentrate a large amount of its resources on the identification and examination of taxpayers participating in tax shelters as well as in the litigation of their cases. *Id.* at 5-6, & n.29.

4. *Rose v. Commissioner*, 88 T.C. 386, 407-15 (1987), *aff'd*, 868 F.2d 851 (6th Cir. 1989).

5. 88 T.C. at 407-15.