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in Continental and Anglo-American Legal History

Vergleichende Untersuchungen zur kontinentaleuropäischen
und anglo-amerikanischen Rechtsgeschichte

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The Civilian Writers of Doctors' Commons, London

Three Centuries of Juristic Innovation in Comparative, Commercial and International Law

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Prof. Dr. Daniel R. Coquillette

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Herausgegeben von

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und

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To Judith, Anna,
Sophia, Julia,
and My Parents

Foreword

Those who would study the Anglo-American law of commercial transactions, or estate and probate law, or admiralty law, or the law of credit, or domestic relations law, or the specialized law of bills of exchange and insurance, will eventually encounter the legacies of a now-extinct, ghostly elite, the civil law jurists of Doctors' Commons in London. The exact nature of their technical doctrinal influence on Anglo-American law is still debatable and mysterious, but their juristic spirit and their theoretical jurisprudence have persisted long after their institutional death. It is their jurisprudence that is the subject of this book.

Neither history nor lawyers love a loser. As Richard Helmholz has observed in his brilliant Selden Society lecture, "[L]egal history is winner's history [and] ... Doctors' Commons is gone."[1] The death of Doctors' Commons in 1858 was the final victory of the civilians' implacable rivals, the powerful Inns of Court and the common law bar. Even worse, the purported association of the English civilians with the Stuart monarchy during the seventeenth century earned these civilians the ire of both Edward Coke and the great Whig historians. To this day, the brilliant treatises of the English civilians are rare books, their leaders' names unknown to most.

Yet, civilian influence in England dates from at least before the thirteenth century, when disciples of the new Roman law studies at Bologna found a place in the infant English universities. A civilian monopoly of English university legal education prevailed for almost 600 years, and was broken only by Blackstone's famous Oxford lectures and his appointment as first Vinerian professor in 1758. The English civilians were also an important practicing bar, with their professional headquarters at Doctors' Commons in London. There they enjoyed nearly three centuries of quasi-monopoly over admiralty, estate, probate, ecclesiastic, and domestic law controversies, and a large range of mercantile matters. Three secular courts – the Court of Requests, the Admiralty, and the High Court of Chivalry – were centers of civilian practice, and civilians had much work in other concilar courts, in the Chancery, and in the ecclesiastical courts.

My study specifically concerns those English civilian jurists who wrote from 1523 to 1732. The particular attribute of these English civilian jurists was a belief in the perfectability of law, through reason. This belief was crit-

[1] *R. Helmholz,* Canon Law and English Common Law 3 - 4 (1983).

ical to their view of the legal process. In part due to their romantic search for the *ius gentium* of the Roman law texts, and in part to their very real international career system, later English civilians developed a commitment to cosmopolitanism and to the ideal of a rational, universal legal science. This civilian commitment was often in sharp contrast to the localized outlook of the common lawyers.

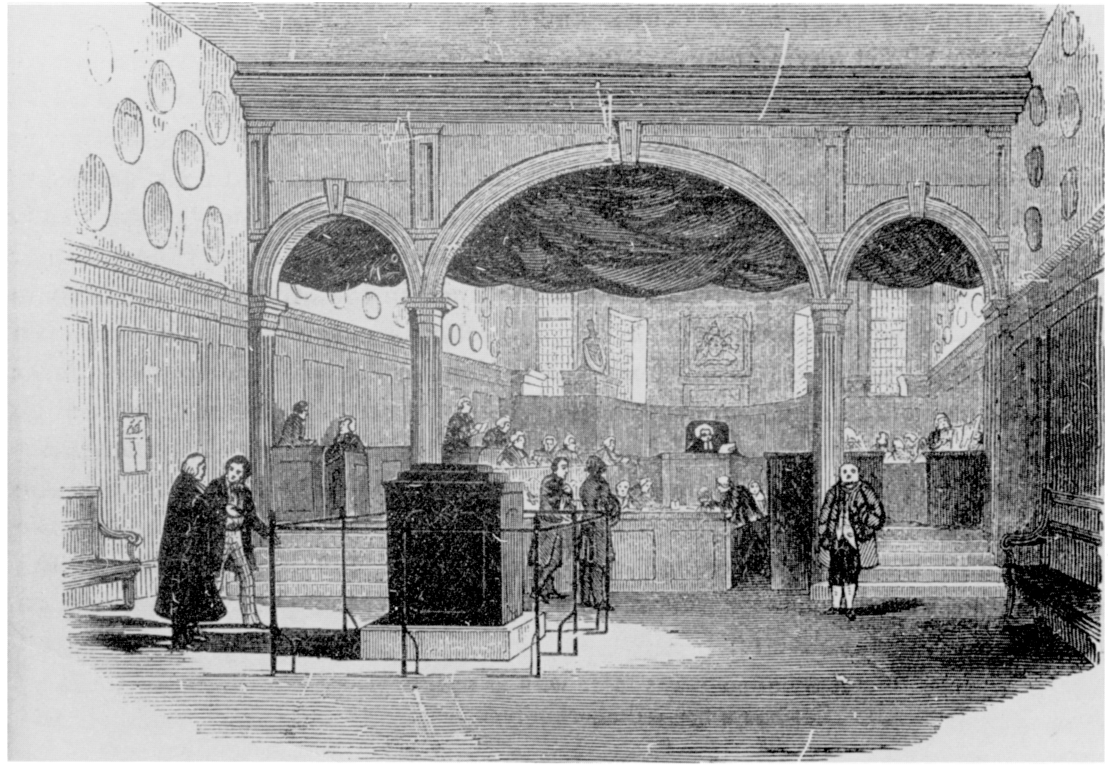
These civilian jurists also were pioneers in the early study of comparative law. They looked – and traveled – outside England to find the best law. To them, the first principle of a good legal system was, necessarily, a universal test of reason. There could hardly also be a paramount loyalty to local precedent or custom. Furthermore, if the test was to be one of reason, it was clear to such civilians that the English common law had made some disastrously wrong turns. Lay juries may be fine as a kind of collective factual memory, but as arbitrators of legal standards they were usually without qualification. They were suspiciously like devices for evading work for common law judges, and possibly for saving such judges from the responsibility of open and principled decision making as well.

Likewise, to the civilians the use of incremental decisions to develop legal doctrine hardly appeared ideal. What kind of advance notice did that give the merchant of new commercial rules, and what opportunity did that provide for building a systematized, harmonious system? Of course one could try to force the raw dross of the common law, *ex post facto,* into some elegant jurisprudential mold – as Englishmen from Bracton to Cowell tried to do – but it was, as one scholar put it, like "crushing an Ugly Sister's foot, bunions and all, into Cinderella's glass slipper."[2]

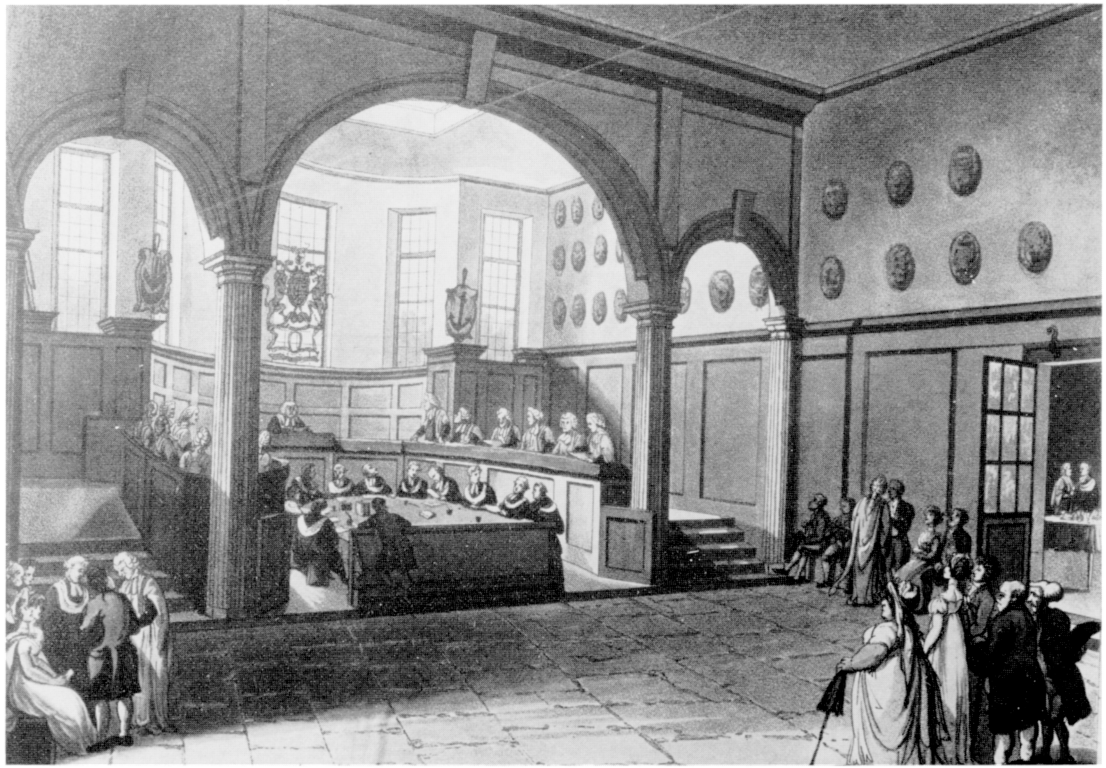
The fragmented English common law courts, with even the Common Pleas and the King's Bench occasionally in conflict and a substructure of local feudal courts still in existence, were, to the civilian mind, often barbaric. The use of more specialized courts, such as the Admiralty, to remedy these failings was a stopgap, but it was better than nothing. In addition, civilians eventually sought to isolate from the common law those commercial and diplomatic areas where Englishmen had to deal with foreigners. In those areas of practice, as in the ancient universities, learned men could still deal with the law as a cosmopolitan science. Indeed, civilians regularly undertook diplomatic missions in which their juristic learning proved important.

Proud of their expertise, the English civilians often regarded themselves as the modern descendants of the great Roman jurists - men who achieved authority not through public office or judicial power, but through the force of their learning and argument. This self-image was at least comforting for a group who were ineligible for judicial position in the growing common law

[2] *Sir Jocelyn Simon,* Dr. Cowell, 26 Cambridge L.J. 260, 263 (1968).



The Court Room at Doctors' Commons in 1851, shortly before its dissolution. London (1851) vol. 5, p. 7 (ed. Charles Knight). This is almost exactly the scene described by the great Charles Dickens in David Copperfield 403, 413 (1st ed. London). See text accompanying notes 25 - 28, in Part I, *supra*. The court usher is standing to the right, and a client consultation is occuring, on the left. The black object in the center is the stove described by Dickens. "The languid stillness of the place was only broken by the chirping of this fire and by the voice of one of the Doctors . . ." Id. at 413. Dickens covered the court as a freelance newspaper reporter when he was only a boy of sixteen, hoping to pick up scandalous pieces of news about "people's wills and people's marriages, and disputes among ships and boats." Id at 403.



The Court Room at Doctors' Commons in 1808, from The Microcosm of London (1808) vol. I, facing p. 224 (pub. Rudolf Ackermann). Court is in session. To the immediate right is the door to the Hall and Library, where a Proctor and a Doctor can be seen enjoying a drink. Doctors are sitting in the highest tier around the Judge, while Proctors, who served a role similar to common law solicitors, are sitting at the table below. In the foreground, a Doctor and a Proctor are seen consulting with clients. The figures are executed by Thomas Rowlandson (1756 - 1827), a famous draughtsman and caricaturist.

system, and it also encouraged publication of English civilian books, of which there were a suprising number. Moreover, the English civilians were much aware of continental "advances" in political theory. The laicization of English and French society was important in promoting the civilian cause relative to the canonists, and the continental writers, such as Jean Bodin, quickly found converts among the English civilians. This was in part because the concept of an effective, rationalist central state closely coincided with civilian convictions and self-interest. English civilians were skeptical of the legitimacy of custom and convinced of the good of strong, central government. They also remained devoted to the notion that progress could be achieved only by systematic law reform and by the scientific study of government.

This book is an attempt to analyze English civilian jurisprudence from the origins of Doctors' Commons, in about 1511, to the gradual civilian return to academic specialities in the eighteenth century, a period spanning three centuries. It deliberately focuses on juristic writing and papers, rather than political controversies or doctrinal cases, primarily because these original juristic writings have received far too little attention. There also is an analysis of commercial law doctrine, focusing on the all-important bill of exchange.

While there remains much that is unclear concerning the direct incorporation of English civilian doctrine into the common law, the historical record leaves little doubt as to the intellectual vitality and originality of English civilian jurisprudence. Whether it be through their specialist expertise in prize law, commercial law or admiralty law, or through their first pioneering efforts in comparative legal studies, or through their advocacy of law reform and codification, or through their development of the initial stages of private international law and conflict of law doctrine, or simply through their faith in a cosmopolitan, universal legal science, the English civilians have left to Anglo-American law a rich legacy of ideas – a heritage that remains one of our most significant historical links with the rest of the legal world.

At this point I should acknowledge some special debts of my own. The leadership and guidance of our Coordinator, Professor Dr. Vito Piergiovanni, and General Editors Professor Dr. Dr. Helmut Coing and Professor Dr. Knut Wolfgang Nörr together with his most helpful assistant, Mathias Gläser (Tübingen), have made the entire "Courts and the Development of Commercial Law" series a great success, and I am very grateful to them. I am also deeply indebted to the generous support of the Gerda Henkel Stiftung, and to all of my good and generous colleagues of our Courts and Commercial Law Work Group, which has already met twice in beautiful Genoa through the kindness of Professor Dr. Piergiovanni and my colleague Rodolfo Savelli. At home, I owe special gratitude to Professors Charles

Donahue, Jr., John Leubsdorf, and James S. Rogers, scholars who put collegueship first in their own busy schedules and never fail to lend a helping hand. My administrative assistant, Davíd W. Price, and my research assistant, David J. Sheldon, have left the evidence of their dedication and intelligence on every page. Finally, to my family, to Judith, Anna, Sophia, Julia and to my mother and father, I owe the most important thanks of all. Without their loyalty, this project would have been impossible.

Newton, Massachusetts
October 22, 1987 *Daniel R. Coquillette*

Note:

All citations to the Dictionary of National Biography are to the Compact Edition (complete text reproduced micrographically) of 1975. That edition also gives cross-references to the full-sized edition.

In addition, many case references are cited to both the original "nominative" reports and to the English Reports, Full Reprint (1378 - 1865). In "id." cites, the page in the "nominative" reporter is put in brackets to distinguish it from the English Reports. For example, Mutford v. Walcot (12 W.3 Trin.) is cited both to 1 Lord Raymond 574 (the "nominative" reporter), and to 91 English Reports 1284. An "id." cite would be to "Id. at [574] 1284."

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PART I

The Early English Civilian Writers (1523 - 1607)*

> "And sure I am that no man can either bring over those bookes of late written (which I have seene) from Rome or Romanists, or read them, and justifie them, or deliver them over to any other with a liking and allowance of the same (as the author's end and desire is they should) but they runne into desperate dangers and downefals . . . These bookes have glorious and goodly titles, which promise directions for the conscience, and remedies for the soul, but there is *mors in olla:* They are like to Apothecaries boxes . . . whose titles promise remedies, but the boxes themselves containe poyson."[1]
>
> *Sir Edward Coke*

> "A strange justice that is bounded by a river! Truth on this side of the Pyrenees, error on the other side."[2]
>
> *Blaise Pascal*

I. Introduction

Two years ago, a group of Russian jurists visited Boston as part of the exchanges made possible by the Prague Accords. It was their first trip out of Russia. They had prepared certain lines of questions, hoping to surmount both the language and cultural barriers.

I was part of a small group of nervous American lawyers assigned to be their guides. The initial questions of the Russians all concerned what they

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* Earlier versions of this chapter were presented on October 4, 1977 to a Cornell Law School faculty symposium and on December 18, 1979 to the Faculty Legal History Dinner at the Harvard Law School, and published the Boston University Law Review in volume 61, number 1, 1 (1981). I am particularly grateful to Professor Harold Berman of the Harvard Law School for his encouragement of the first version of this paper, and to the late Professor John P. Dawson of the Harvard Law School and the Boston University School of Law, Professor Charles Donahue Jr. of the Harvard Law School, Professor John Leubsdorf of the Boston University School of Law, and Barry M. Okun, Articles Editor of 61 Boston University Law Review, for their invaluable assistance. Remaining errors are my own.

[1] Coke, Preface to 7 Coke Rep. (8th page, unpaginated) (London 1608).

[2] B. Pascal, Pénsees 101 (W. Trotter trans. 1941) (1st ed. Paris 1670).

hoped would be our common bond as lawyers and jurists, namely, our university programs in Roman and foreign legal systems, comparison of our legal procedures with those of Roman and other civil law systems, and our notions of *ius gentium* and universal principles of law. Owing to our narrow professional training as common lawyers, it was most difficult for us to respond in any meaningful way.

There is danger in a limited, provincial view of what a lawyer should know, and what legal principles can do. This danger was a basic concern of the early English specialists in civil and Roman law, the so-called English "civilians." These English civilians were dedicated to legal science as a transnational force and as a critical source of principles of universal application.

Harold Berman has emphasized that "the growth of nationalism in modern times has made inroads into the transnational character of Western legal education and the links between law and other university disciplines have been substantially weakened."[3] The insular professionalism of legal education in America today would be striking to English civilians such as Alberico Gentili, William Fulbecke, or John Cowell. They believed that ideas about law were eminently suitable for transplanting.[4] It made no difference to them whether the source was university scholarship, legal practice, or a foreign system. They were committed to the transnational character of Western legal science, and to the nature of law as a universal discipline inviting comparative study and innovative thought. As Fulbecke observed, "[T]he common lawe cannot otherwise bee divided from these twain [canon and civil law], then the flower from the roote and the stalke."[5]

It has been too easy to forget that not all "English lawyers" were "common lawyers." The English civilians played an important role in the development of English legal science.[6] Stereotypical views of these civilians,

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[3] *Berman,* The Origins of Western Legal Science, 90 Harv. L. Rev. 894, 941 (1977).

[4] See *Donahue,* What Cause Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century, 78 Mich. L. Rev. 59, 60 (1979). See generally *A. Watson,* Legal Transplants (1974).

[5] W. Fulbecke, A Parallele or Conference of the Civil Law, the Canon Law and the Common Law of this Realme of England, vol. 1, 62 (2d ed. London 1618) (1st ed. London 1602) [hereinafter cited as A Parallele, vol. 1].

[6] Holdsworth asserted that "we must know something of the manner in which ideas drawn from the civil and canon law shaped the political theory of western Europe, if we are to understand the medieval history of [England] or of any other western European country . . ." *Holdsworth,* The Place of English Legal History in the Education of English Lawyers: A Plea for Its Further Recognition, in Essays in Law and History 20, 22 (1946). Donahue has commented,

> The abrasive contact between the civil law taught in the academies, the non-civil law espoused in the courts, and the diverse human conflicts which call for resolution led thoughtful men to search for first principles. That contact occured in England at many times, most notably in the 16th and early 17th centuries, and it is the effect of this contact that ought to be more fully explored.

often invented by their enemies, have greatly obscured the extent and quality of their contribution.[7] The critical distinguishing feature of English civilians was their specific legal ideology – their ideas about law.[8] "The community of civil law systems consists more in a unity of formal technique than of content."[9] Although particular substantive legal rules can be characterized as "civilian" because of their Roman origins,[10] the most critical contribu-

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Donahue, Book Review, 84 Yale L. J. 167, 181 (1974) (reviewing *B. Levack,* The Civil Lawyers in England 1603 - 1641).

The Boston University Law Review has published a number of important Articles which have promoted the study of civil law ideas in America, many of them by a founder of the Review, the Roman law scholar Charles P. Sherman. See, e.g., *Sherman,* Moderness of Roman Military Law, 24 B. U. L. Rev. 31 (1944); *Sherman,* Roman Law in the United States: Its Effect on the American Common Law, 14 B. U. L. Rev. 582 (1934); *Sherman,* Salient Features of the Reception of Roman Law into the Common Law of England and America, 8 B. U. L. Rev. 183 (1928); *Setaro,* History of the English Ecclesiastical Law (Parts One & Two), 18 B. U. L. Rev. 102, 342 (1938); *Setaro,* Prologue to a History of English Ecclesiastical Law, 16 B. U. L. Rev. 158 (1936). Additionally, the *Review* has published significant Articles in conjunction with the Charles P. Sherman Lectureship in Comparative Law at Boston University. See *Lawson,* Roman Law as an Organizing Instrument, 46 B. U. L. Rev. 181 (1966); *Schiller,* The Nature and Significance of Jurists Law, 47 B. U. L. Rev. 20 (1967); *Stein,* Logic and Experience in Roman and Common Law, 59 B. U. L. Rev. 433 (1979). See generally *Speidel,* Foreword – Logic and Experience in Roman and Common Law, 59 B. U. L. Rev. 433, 433-36 (1979).

[7] See, e.g., *J. Baker,* An Introduction to English Legal History 50-58 (1st ed. 1971); W. Blackstone, Commentaries*, vol. 1, 19-23; *A. Harding,* A Social History of English Law 190-93 (1973); *T. F. T. Plucknett,* A Concise History of the Common Law 298-300, 661-63 (5th ed. 1956). Whig historians such as Trevelyan linked the "[s]tudents of the Roman Law" directly with the excesses of the Stuart "prerogative courts," *G. Trevelyan,* History of England 391 (3d ed. 1945); Macaulay observed that these courts, "guided chiefly by the primate and freed from the control of Parliament, . . . displayed a rapacity, a violence, a malignant energy, which had been unknown to any former age," 1 *T. Macaulay,* The History of England 88 (London 1849). Only recently has John Langbein laid to rest one of the worst curses on the civilians, that they introduced torture to England. See *J. Langbein,* Torture and the Law of Proof 131-34 (1977).

[8] If we look for civil law influence in the specific rules that the common law or equity courts adopted, we quickly find ourselves in a helpless morass. For every principle of common law alleged to have civil law ancestry, there is a case to be cited which explains it totally in common law terms, or a text from the Digest which suggests that the civil law rule was really quite different.

The problem with this kind of analysis is that it glorifies the specific rule by which the case is decided and underplays the basic principles underlying the rule and the methodology used to arrive at that rule. If it is true that the life of the law has not been logic but experience, it is equally true that experience has been shaped by the power of certain fundamental ideas and methods of proceeding. And in the development of these ideas and methods in England, civilian influence may have played some part.

Donahue, supra note 6, at 179-80.

[9] *Sundberg,* Civil Law, Common Law, and the Scandinavians, 13 Scan. Stud. L. 181, 200 (1969) (quoting M. Rheinstein); see *Donahue,* supra note 6, at 179-80.

[10] See generally *W. Howe,* Studies in the Civil Law, and Its Relation to the Law of England and America (1896); *Baker,* The Law Merchant and the Common Law Before 1700, 38 Camb. L. J. 295 (1979); *Sack,* Conflicts of Laws in the History of English Law, in 3 Law: A Century of Progress, 1835 - 1935, at 342 (1937); *Stein,* The Attraction of the Civil Law in Post-Revolutionary America, 52 Va. L. Rev. 403, 403-04 (1966); *Stein,* Continental Influence On English Legal Thought, 1600 - 1900, in 3 Atti de III Congresso Internazionale della Societa'Italiana per la Storia del Diritto 1105,