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## **Ryall v. Rolle and the Civilian Tradition**

*W. J. Zwalve\**

Nous prenons en garde les opinions et le savoir d'autrui, et puis c'est tout. Il les faut faire nôtres . . .

Que nous sert-il d'avoir la panse pleine de viande, si elle ne se digère?<sup>1</sup>

When Tom Denning was appointed a High Court Judge in 1944, he took a seat in the Probate, Divorce and Admiralty Division of that court, appropriately nicknamed the "court of wills, wives and wrecks." It was, according to his biographer,<sup>2</sup> not the kind of work Denning would have preferred, but it won him an appointment in the Court of Appeal only four years later. One of the first cases he had to decide as a Lord Justice of Appeal called for his experience as a probate judge. The case concerned the law on privileged wills of soldiers, a matter of some urgency in those days and subject to the Wills Act of 1837. The Wills Act, prescribing formalities for the validity of a will, had made a reservation for servicemen, who enjoyed the privilege of making informal wills. The privilege, however, only applied to soldiers "in active military service"<sup>3</sup> and the construction of this clause in the Act called for immediate action on the part of the Court of Appeal.

The leading case on this matter was *Drummond v. Parish*,<sup>4</sup> decided by Sir Herbert Jenner-Fust in 1843. Jenner-Fust was a civilian, not a common lawyer.<sup>5</sup> He was a judge of the Prerogative Court, an ecclesiastical court at that time doing most of the testamentary cases in England. It sat in a place Dickens described as "a lazy old nook near St. Paul's Churchyard," called "Doctor's Commons."<sup>6</sup> It was the place the peculiarities of English legal history had carved out for the civilians to contribute their part to the development of English law. It was a very modest part indeed, but nevertheless in the course of its business it was called upon occasionally to decide on the construction of an Act of Parliament, such as the Wills Act. Jenner-Fust decided to make the most of it and exhibited an impressive display of his deep learning. By an infusion of pure genius on his part, he was able to relate the clause on "active military service" in the Wills Act to Roman law from whence he stated, "it cannot be denied that the principle of this section is borrowed."<sup>7</sup> Because of this, a

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1. Montaigni, *Les Essais* I, 25.

2. Iris Freeman, *Lord Denning, a life* (1994).

3. 1 Vick. ch. 26, S. 11 (1834).

4. 163 Eng. Rep. 812 (1843).

5. See Sir William Holdsworth, *History of English Law* XVI, 150-52 (1966).

6. David Copperfield, Ch. 23.

7. 163 Eng. Rep. 212, 815.

perfectly plain sentence had to be constructed according to Roman law. Jenner-Fust feasted his audience on readings from the Digest and Justinian's Code in order to elucidate that according to the law of Rome as it stood in Justinian's time the privilege of a Roman legionnaire to make an informal will had been restricted to those being *in expeditione occupati*.<sup>8</sup> But what did this mean? In order to arrive at a good construction of this Latin(!) clause, the Commentators were called in. All the great names—Cujas, Donatus and Donellus, Paulus Voet and Joannes Voet, Huber and Hostiensis, Gaill and Viglius—were cited in argument and considered by Jenner-Fust. In the end, he opined that the restriction as forwarded in Justinian's Code, the clause *in expeditione occupati*, excluded all soldiers not on an expedition. This was the law as it stood in 1948. The rule in *Drummond v. Parish*,<sup>9</sup> commonly called *General Drummond's Case* was, of course, overruled by Denning.

If I were to inquire into the Roman law, I could perhaps after some research say how Roman law would have dealt with its soldiers on Hadrian's Wall or in the camp at Chester, but I cannot say how it would have dealt with an airman in Saskatchewan, who is only a day's flying from the enemy. This supposed throw-back to Roman law has confused this branch of the law too long. It is time to get back to the statute. Rid of this Roman test, this court has to decide what is the proper test.<sup>10</sup>

*Drummond v. Parish*<sup>11</sup> helps to familiarize the continental civilian with the idea that, contrary to generally held beliefs on the European continent (and sometimes even in England), the law of Rome has never been a closed book to England. Until 1857, an entire branch of the English judiciary was fully employed in the service of the civil law. Restricted as their competence might have been, the ecclesiastical courts held a key jurisdiction in Family Law and the Law of Succession. The advocates incorporated in "Doctor's Commons" got, to quote Dickens again, "very comfortable fees and [made] a mighty snug little party."<sup>12</sup> There was money to be made with the learning in the civil law they were all steeped in. There were other parts of the law of England more or less infiltrated by the civil law as well. The High Court of Admiralty is, of course, another good example. "Doctor's Commons" was dissolved in 1858 after that society's exclusive rights to appear in the Ecclesiastical Courts and the Court of Admiralty were abolished. Roman law did cease to be a part of the living law of England only after all these courts were abolished in 1874 and merged into what became known as the Probate, Divorce and Admiralty Division of the High

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8. C. Just. 6, 21, 17.

9. 163 Eng. Rep. 812 (1843).

10. *Andrews v. Wingham*, [1949] P. 187, 195 (Eng. C.A.).

11. 163 Eng. Rep. 812 (1843).

12. See *supra* note 6.

Court of Justice. These civil law courts, such as the Prerogative Court, the High Court of Admiralty or even the High Court of Chivalry, may be very interesting to a continental civilian, especially if he happens to be a legal historian as well, but there is little sense in illustrating the civilian interpretation of English law with cases from the civil law courts, such as *General Drummond's Case*. What is really interesting is the civilian interpretation of the common law, the law of the common law courts. The fascinating thing to a civilian, who teaches modern English commercial law as I do, is that he encounters many cases where common law judges employ the concepts of the civil law in order to assist them in their interpretation of the common law. This *modus operandi* is very old. The first common lawyer to make use of the civil law in this way was, of course, Henri Bracton.

Every common lawyer is (or ought to be) familiar with Bracton's explanation of the right of a bailee to sue a wrongdoer interfering with goods entrusted to him by a bailor.<sup>13</sup> As every civilian knows (or ought to know), the very concept of "bailment" is alien to the civil law. There is no such thing in Roman law, if only because a bailee is never a possessor, but a mere *detentor* with the bailor retaining constructive possession. The law of England, as Bracton found it, resembled the ancient German *Gewere* quite closely for the bailee was a possessor, whereas the bailor merely had a right to possession. In ancient German law, the bailee had a right to sue any interfering wrongdoer as a matter of course, whereas the bailor had no right to sue because he was out of possession.<sup>14</sup> To Bracton, looking at this from the perspective of Roman law, the right of the bailee to sue the wrongdoer was not as self-evident as it seemed. Roman law only recognized a right of the bailee to sue a thief if he was liable to the bailor. Bracton explained the common law of England (the right of the bailee to sue a wrongdoer) accordingly. It is trite learning to the historian of the common law that Bracton's ideas, taken from the civil law, have haunted the common law of bailment for ages.

*Claridge v. South Staffordshire Tramway Co.*,<sup>15</sup> commonly known as *Claridge's Case*, was the last instance in which a common law judge used a line of reasoning very familiar to the continental civilian. Only in 1902, after the case of *The Winkfield*<sup>16</sup> was decided, did English law free itself from the civilian fetters Bracton had forced upon it.

Much, perhaps even too much, has been said and written about Bracton and Roman law, practically always in connection with the question whether there ever was, or was not, such a thing as a "reception" of Roman law into the common law. Of course, this was certainly not what Bracton intended. All he did was use Roman concepts, as he understood them, to clarify the English law

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13. Sir William Holdsworth, *History of English Law* III, 340 ff.

14. *Der Sachsenspiegel* II art. 60, §1 (1911).

15. [1892] 1 Q.B. 422.

16. [1902] P. 42 (Eng. C.A.).

of his time to find the reasons of the law. He did so in Latin. The *Corpus Iuris Civilis* contained an enormous legal thesaurus and a wealth of ideas. Not to use Roman law's concepts and vocabulary would indeed have been extremely foolish. Contemporary French lawyers were doing the very same thing with French customary law. Jacques de Revigny (1210-1298), for example, used the concepts of Roman law to explain institutions of French customary law, like the right of first option (*retrait lignager*). Of course, Revigny was a civilian, and so this method came natural to him, but Philippe de Beaumanoir (1247-1296) was not. He wrote in French, but he used Roman law, or rather civilian concepts, to illustrate his native French customary law as well. This does not signify that the *coutumes* were actually supplanted by Roman law in the process, but merely that native law was subjected to what Bartolus called an *interpretatio passiva*. Bracton was, in brief, certainly not a civilian but a "Romanizing" common lawyer. There have been many others like him, such as Chief Justice Holt in the famous case of *Coggs v. Bernard*.<sup>17</sup> In all these relatively well-known instances the civil law was not employed by common lawyers because they felt it was in any way binding upon them. "The civil law is not of itself an authority in an English court, but," as Judge Blackburne said in his famous opinion in *Taylor v. Caldwell*,<sup>18</sup> "it affords great assistance in investigating the principles on which the law is grounded." Thus, the civilian doctrine of implied condition was introduced into the common law of contract.<sup>19</sup> It is a well-known fact that the continental civilian tradition, as embodied in Pothier's *Traité des Obligations*, was instrumental in the emergence of a comprehensive general doctrine of contract in England.<sup>20</sup> It is a less well-known fact that the civilian tradition played an important part in the development of the English law of property as well, especially in as far as the law of personal property is concerned.

Strange as it may seem to the civilian, who is familiar with an academic exposition of the law, a comprehensive doctrine of transfer of title to goods was only developed as late as 1890 by the Court of Appeal in the case of *Cochrane v. Moore*.<sup>21</sup> Lord Justice Fry emphasized that delivery of possession had always been regarded as a precondition to the transfer of title. Of course, it was Bracton who showed the way. A sweeping statement from Justinian's Code was reproduced by Bracton almost verbatim: *possession and ownership of things are*

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17. 92 Eng. Rep. 107.

18. 122 Eng. Rep. 309, 313.

19. Reinhard Zimmermann, *The Law of Obligations* 815-17 (1990).

20. P.S. Atiyah, *The Rise and Fall of Freedom of Contract* 399 (1979) (citing *Cox v. Troy*, 106 Eng. Rep. 1264, 1266 (1822) (Best, J.) ("the authority of Pothier is expressly in point. That is as high as can be had, next to the decision of a Court of Justice in this country.")). It ought to be observed, however, that *Cox* was about bills of exchange, raising a question on the law merchant, a part of the law of England that, according to Best, "should be the same in this as in every other commercial country."

21. [1890] 25 Q.B. 57 (Eng. C.A.). See also *Irons v. Smallpiece*, 106 Eng. Rep. 467 (1819) (on the necessity of delivery in the case of gifts).

*transferred either by delivery or acquisitive prescription.*<sup>22</sup> There were and are many important exceptions to the rule in modern English law,<sup>23</sup> but the presence of a broad civilian principle was of great assistance in developing yet another important part of the law of personal property. A leading case in the doctrine of assignment of choses in action is *Dearle v. Hall*,<sup>24</sup> decided in 1828. Sir Thomas Plumer decided the case reasoning along lines very familiar to the civilian. He equalled notice to a debtor in the case of assignment of choses in action to delivery of possession in the case of transfer of title to chattels:

The law of England has always been that personal property passes by delivery of possession; and it is possession which determines the apparent ownership . . . It is true that a chose in action does not admit of tangible actual possession . . . But in *Ryall v. Rowles* the judges held that, in the case of a chose in action . . . you must do that which is tantamount to obtaining possession . . . For this purpose, you must give notice to the legal holder of the fund; in the case of a debt, for instance, notice to the debtor is, for many purposes, tantamount to possession . . . Notice then is necessary to perfect the title, to give a complete right in rem, and not merely a right as against him who conveys his interest.<sup>25</sup>

There is more to this than a mere echo from the civil law originating in Bracton. The rule that notice to the debtor is tantamount to delivery of possession, and the development of the law of assignment of choses in action in analogy with the doctrine of transfer of title to tangibles, were fairly recent developments on the continent as well. The French civilians were instrumental here, for it is by Bourjon,<sup>26</sup> Domat,<sup>27</sup> and Pothier<sup>28</sup> that the analogy between a transfer of title to tangibles and intangibles was first developed systematically. Roman law did suggest the analogy strongly by recognizing that tangibles as well as intangibles were things (*res*) in the eyes of the law,<sup>29</sup> but it was only in the seventeenth and eighteenth centuries that important conclusions were drawn from this.<sup>30</sup> It was the same with the common law. As early as 1606, the Court of

22. Henri de Bracton, *De Legibus Et Consuetudinibus Angliae* F. 38b (George E. Woodbine ed., 1922) (traditionibus et usucapionibus possessiones et rerum dominia transferuntur). See also *id.* at F. 16, F. 38, F. 61b; cf. C. Just. 2, 3, 20 (traditionibus et usucapionibus dominia rerum, non nudis pactis transferuntur).

23. See *Cochrane v. Moore*, [1890] 25 Q.B. 57 (Eng. C.A.) (Fry, L.J.).

24. 38 Eng. Rep. 475 (1828).

25. *Id.* at 483-84.

26. Francois D. Bourjon, *Le droit commun de la France et la Coutume de Paris réduits en principe* Titre III, sect. ii, n° 7 & 8 (1770).

27. Jean Domat, *Les loix civiles dans leur ordre naturel* I,2,2,9 and III,7,2,22 (1777).

28. See, e.g., Robert J. Pothier, *Traité du contrat de vente* n° 554 (*Oeuvres de Pothier* IV 319 (1818)).

29. See *J. Inst.* 2.2.pr.-2.

30. There were considerable obstacles here, for a long time preventing the civilian tradition to make the analogy. Texts like Dig. 41.1.43.1 (Gaius) were in the way. The decisive breakthrough was effected by Grotius.

the Exchequer Chamber had decided that personal actions were included within the word "goods," as goods in possession were,<sup>31</sup> but it took Domat to open the eyes of a common lawyer to the great opportunities of this equation.<sup>32</sup> In the case of *Ryall v. Rolle*,<sup>33</sup> Chief Baron Parker observed that "[i]f a bond is assigned, the bond must be delivered, and notice must be given to the debtor. [S]uch acts are equal to a delivery of goods which are capable of delivery."<sup>34</sup> As the Report shows, this was taken from Domat. The requirements of delivery of the bond (*remise de la dette*) and notice to the debtor (*signification*) are still found in the French Civil Code,<sup>35</sup> and one look in the Louisiana Civil Code suffices to prove that Domat's doctrine is found there as well.<sup>36</sup> These were the broad civilian concepts enabling Sir Thomas Plumer to develop a rule of priority between successive assignees in *Dearle v. Hall*.<sup>37</sup>

The case of *Ryall v. Rolle* is significant in another way as well. Whereas it laid the foundations for the rule in *Dearle v. Hall* by picking up an idea rooted in the civilian tradition, it also offers a perfect example of the way in which common lawyers are inclined to use the concepts of the civil law in order to clarify the common law. This aspect of *Ryall v. Rolle* is really fascinating to a comparatist because it illustrates the enormous potential of the civil law as an instrument of comparative law.

Until 1986, *Ryall v. Rolle* was a leading case in English bankruptcy law. In that year the so-called "reputed ownership clause" of the old Bankruptcy Act<sup>38</sup> was finally repealed. It had been with the common law since 1623, when it was introduced by statute in order to swell the assets of a bankrupt available for distribution among his ordinary creditors.<sup>39</sup> The provision provided that, subject to certain exceptions, the property of a bankrupt divisible among his creditors included all goods that at the commencement of the bankruptcy were "in the possession, order or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, under such circumstances that he was the reputed owner thereof."<sup>40</sup> The effect of the reputed ownership clause, a phenomenon unknown to continental European bankruptcy law, was to extend the assets divisible for the benefit of creditors to goods in the *possession* of the bankrupt. Thus, a chattel mortgage did not give priority to the mortgagee over

31. Ford and Sheldon's Case, 77 Eng. Rep. 1283 (Ex. Ch. 1606).

32. The main problem in the common law was that for a very long time assignment of choses in action was not recognized at law. Equity showed the way here.

33. 26 Eng. Rep. 107 (1749).

34. *Id.* at 115.

35. Code Civil arts. 1689, 1690 (Fr.).

36. La. Civ. Code art. 2642, dealing with assignment of rights, especially choses in action, is clearly inspired by the treatment of this subject in the Code Civil. The matter is dealt with as part of the doctrine of transfer of ownership of things.

37. 38 Eng. Rep. 475 (1828).

38. Bankruptcy Act, 4 & 5 George 5, ch. 59, § 38(c) (1914) (Eng.).

39. 21 Jam. I, ch. 19, § 11 (1623) (Eng.).

40. Bankruptcy Act, 4 & 5 George 5, ch. 59, § 38(c) (1914) (Eng.).

ordinary creditors in bankruptcy, as the mortgagor remained in possession of the goods charged by way of chattel mortgage. Goods charged by way of chattel mortgage passed to the trustee in bankruptcy under the clause unless the chargee was able to prove that goods thus charged were not to be regarded as being in the reputed ownership of the chargor.

In *Ryal v. Rolle*,<sup>41</sup> Mr. Harvest, a brewer, had entered into a partnership with Mr. Stephens, deceased, to whom the defendant Rolle was the executor. Harvest had transferred half of his utensils and stock in trade to his partner Stephens, and sometime after that he mortgaged the remaining half to Stephens as well. Of course, Harvest remained in possession of all the utensils and stock in trade. On June 26, 1740, Harvest was declared a bankrupt and litigation arose between his trustee in bankruptcy (Mr. Ryall) and Mr. Rolle, the executor of Stephens' estate. Mr. Ryall claimed that all the utensils and stock in trade in the possession of Harvest, including the goods mortgaged to Stephens, were to be sold for the benefit of Harvest's ordinary creditors as he was to be regarded as the reputed owner of it all. Mr. Rolle, on the other side, contended that the goods mortgaged to the deceased Mr. Stephens, were not subject to the reputed ownership clause of the Bankruptcy Act.

Mr. Rolle's counsellor came up with an ingenuous argument. He contended that a common law mortgage was nothing else than the *hypothec* of the civil law. In granting a *hypothec*, a chargor does not divest himself of his general proprietary title, which remains vested in him, but merely grants a special property right, a *hypothec*, to the chargee. It was the same with a pledge, for here a mere special property right was vested in the pledgee as well, whereas the general proprietary title remained vested in the chargor. The civil law as well as the common law recognized two security interests, two special property rights, pledge and *hypothec*, the former being a possessory security interest, the latter a non-possessory security interest. Mr. Harvest had charged his goods with a non-possessory security interest, but he was still the owner of all the goods mortgaged to Mr. Stephens, who merely obtained a special property right. Consequently, Mr. Harvest could not be labeled as a "reputed owner" who was in possession of goods belonging to the "true owner." If, in other words, counsel succeeded in showing that the mortgagor rather than the mortgagee was to be regarded as the "true owner" in the eyes of the law (which is indeed the fact with a civilian *hypothec*), his client would have succeeded in his claim that the goods mortgaged by Mr. Harvest were not in his possession "by the consent and permission of the true owner,"<sup>42</sup> because Mr. Harvest *was* the owner. Consequently, counsel implied, the goods mortgaged to Stephens were not subject to the reputed ownership clause of the Bankruptcy Act, and therefore, Rolle had priority over the ordinary creditors in bankruptcy. It seems a far-fetched argument, but the sheer beauty of it impressed the courts. *Ryall v. Rolle* became

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41. 26 Eng. Rep. 107 (1749).

42. Bankruptcy Act, 4 & 5 George 5, ch. 59, § 38(c) (Eng.).

a "chequer chamber-case," involving the Lord Chancellor, the Lord Chief Justice of the Court of the King's Bench, the Lord Chief Baron and Judge Burnet from the Court of Common Pleas.

The only question to be decided by that impressive court was whether the two common law security interests of pledge and (chattel) mortgage did indeed correspond with the civilian security interests—pledge being essentially the Roman *pignus*, the (chattel) mortgage being of the same nature as the Roman *hypotheca*. Mr. Rolle lost his case, for the equation was explicitly rejected by Burnet. "[F]or an *hypotheca* gave only a lien and no property, with a right to be satisfied on failure of the condition [and a] mortgage with us, is an immediate conveyance with a power to redeem, and gives a legal property."<sup>43</sup> It is quite remarkable that Burnet tried to define a common law mortgage with reference to a text in the *Corpus Iuris*:

If your parents have sold land on condition that it be restored if either they themselves or their heirs have at some time or within a certain period offered to repay the price and the heir of the purchaser is not inclined to keep his part of that agreement, whereas you are prepared to satisfy him, a (personal) action on the basis of that agreement will be given to you.<sup>44</sup>

"This is the description of an English mortgage in Roman law," the learned judge observed.<sup>45</sup> This analysis leaves us with an excellent description of the common law (chattel) mortgage in terms of the civil law. All the texts used by Burnet are from section 54, of the fourth book of Justinian's *Codex*, inscribed *De pactis inter emptorem et venditorem compositis*, meaning "On the conditions agreed upon between buyer and seller." He, thus, defined the common law mortgage as a sale, vesting the general proprietary interest in chattel thus mortgaged in the mortgagee. This is, indeed, not the Roman *hypothec*, but it is, as the civilian will have noticed, quite like the modern German *Sicherheitsübereignung* that was inspired by the *vente à réméré* of the civil law, which was, in its turn, based on the very same texts used by Burnet to define a common law mortgage. What is to be learned from all this?

Continental comparatists still refer to a common law mortgage as the counterpart to a civil law *hypothec*. We now know from the authority of an English judge that this is incorrect and that its civilian counterpart is in fact the

43. *Ryall v. Rolle*, 26 Eng. Rep. 107, 108 (1749).

44. *Si fundum parentes tui ea lege vendiderunt: [ut] sive ipsi, sive haeredes eorum emptori pretium quandocunque, vel intra certa tempora obtulissent, restitueretur; teque parato satisfacere conditioni dictae, haeres emptori non paret, ut contractus fides servetur, actio praescriptis verbis, vel ex vendito tibi dabitur. Id.* at 108 (citing C. Just. 4.54.2).

45. *Si a te comparavit is, cujus meministi, et convenit, ut si intra certum tempus soluta fuerit data quantitas, sit res inempta, remitti hanc conventionem rescripto nostro non jure petis. Sed si se subtrahat, ut jure domini eandem rem retineat: denunciationis et obsignationis depositionisque remedio contra fraudem potes jure tuo consulere. Id.* (citing C. Just. 4.54.7).

modern German *Sicherheitsübereignung*. No civilian would think of putting a *hypothec* on a par with a transfer of title by way of security, so why continue doing so with a common law mortgage in personal property? This, however, is merely a matter of detail.

There is a lesson to be learned from the case of *Ryall v. Rolle* that goes far beyond trifles like this. The case illustrates that when a certain amount of conceptual precision is required in a legal argument, even a common law judge did not hesitate to employ the civil law as an instrument in attaining clarity. Of course, this was not done because Roman law was intellectually superior but because for more than five hundred years continental lawyers had been trying to make sense of a hopelessly unsystematic code, promulgated ages ago, in a country far away, for a society profoundly different from their own. They had been able to systemize it, uncovering general principles and thus discovering the right reasons of the law. In doing so, they had risen far above their sources. This is the great civilian tradition that has been an inspiration to the common law as well. It is to be found in Bartolus and Baldus, in Voetius and Vinnius, in Domat and Pothier, in Savigny and Windscheid and in the civil codes of all European countries. By a tragic twist of fate, continental civilians ignored this fundamental fact of their own legal history for too long and concentrated on "purely classical" Roman law, thus creating hosts of little Jenner-Fusts, mistaking the products of their historical inquisitiveness for learning in the law. This throw-back to classical Roman law has done immense harm to the civilian tradition on the European continent.<sup>46</sup> It is high time to impart new life to it. As the European Union is slowly but surely moving to greater uniformity, even in the field of substantive private law, assessments will have to be made on what is shared in common and what is not. The reasons of the law will, once again, have to be uncovered, and this can only be done on the basis of the civilian tradition. The European civilians can play a leading part in this. All they have to do is grab the opportunity that history, once again, offers to them.

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46. I am primarily concerned with the position of Roman law as a part of the education of modern continental European law students. It is here that the emphasis on "classical" Roman law has proved to be almost fatal. Certainly so, if these courses emphasize the profound *differences* between "classical" Roman and modern private law. Roman law was never meant to be a part of legal education on the European continent in order to impart a sense of history to law students, but to reveal the historical origins of the basic notions and general principles of modern private law. Of course, this does not apply to legal-historical research.

