developed. The Continental ius commune in the sixteenth, seventeenth and eighteenth centuries (and that is the time in the course of which South African law branched off) showed many features that we like to see today as typically English. For it was not a professorial law characterized by impractical abstractions, deductive reasoning and concept-jurisprudence; to a large extent it was judicial law, 'jurisprudentia forensis', developing through lawyers' interpretation and judicial opinions, creating a continuous literary legal tradition and leading towards an authoritative communis opinio totius orbis, 'secundum quem usum semper interpretatio fieri debet'. Protagonists of the law in action were judges and legal counsel, lawyers such as Molinaeus and Domat, Grotius and Hyurkeshock, Huber and Sande, Carpozov and Mevis; the method of their decisions was largely casuistic; and a particularly important part of legal literature written or compiled during this time was forensic in character.

(b) Secondly, England in reality was never cut off from Continental legal culture. Indeed, in its very inception 'the common law, which became a real hallmark of English life, was... nor English at all. It was a species of continental feudal law developed into an English system by kings and justices of continental extraction.' In a similar vein, Maitland once said: 'I know just enough to say this with confidence, that there [on the Continent] are great masses of medieval law very comparable with our own.' Throughout the centuries Roman (civil) law, through various channels, has exercised a considerable influence on English law and jurisprudence.

(aii) As far as jurisprudence is concerned, we can think of Bracton, whose work De Legibus et Consuetudinibus Angliae 'has not an insular but a European character and must be studied within the framework of the European legal literature of his time'. Thorne, in his introduction to the most recent edition of Bracton, has pointed out that the first third of the work alone contains quotations from nearly 200 different sections of the Digest. Bracton, he states, 'was a...

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127 As to the following, cf. especially the research undertaken by Gino Gorla, conveniently summarized in Gorla & Mancini op cit note 125 at 143ff, cf also the research programme sketched by H. Laken in Helmut Gogin & K. W. Nolte, op cit note 125 at 89ff.
128 Cf Gino Gorla, 'La "communis opinio totius orbis" et la reception jurisprudentielle du droit au cours des XVIe, XVIIe et XVIIIe siecles dans la "civil law" et la "common law"' in Mauro Cappelletti, New Perspectives for a Common Law of Europe (1978) 54.
129 Cf. for example, Wiesacker, op cit note 56 at 215, for a detailed panorama of the forensic literature on the Continent (Decisiones, Quaestiones, Consilia etc), see the contributions in Helmut Gogin (ed), Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte II 2 (1976) 111ff.
131 Why the History of English Law is Not Written' in Collected Papers I 480 at 493.
133 Fritz Scholz, 'A New Approach to Bracton' (1944) 2 Seminar 42.
135 xxvi, cf also J. L. Harton, op cit note 132 at 13ff.
trained jurist with the principles and distinctions of Roman jurisprudence firmly in mind, using them throughout his work, wherever they could be used, to rationalize and reduce to order the results reached in English courts. Roman law supplied him not only with a number of concepts under which his English matter could be subsumed, and thus fashioned, for the first time, into an articulated system of principles, but with a precise technical vocabulary, infinitely more subtle than the language of the plea rolls, with which to describe and analyze it. We can also think of Sir Matthew Hale in the seventeenth century, according to Holdsworth 'the first of our great modern common lawyers', who had studied Roman law as it was interpreted by the Humanists, and who introduced, on that basis, the historical conception of the growth and ongoingness of the common law to England. We can think, in the eighteenth century, of Blackstone, who was able to state English law in a rational fashion because he believed in the idea of a law common to all the countries of Western Europe, or, in the nineteenth century, of John Austin, who got his Roman law from both Savigny’s historical school of jurisprudence and (particularly) the Pandectists.

(6b) As far as substantive law is concerned, 'from the days of Edelbert onwards English law was under the influence of so much Roman law as had worked itself into the tradition of the Catholic Church'. Up to the time of the Reformation, the ecclesiastical courts had a comprehensive jurisdiction, ranging from matrimonial affairs to testamentary causes, from defamation matters to habeas corpus (release of a sworn promise). For these courts, Canon law had the same binding authority as it had for any ecclesiastical court on the Continent. From here the main principles of procedure were borrowed by the chancellors for their Court of Chancery, from here many substantive principles filtered through into equity. After all, down to the time of Henry VIII the chancellors were clergymen.

187 Peter Stein, Roman Law and English Jurisprudence Yesterday and Today (inaugural lecture at Regius Professor of Civil Law in the University of Cambridge, 1949) 76ff
188 Maitland op cit note 131 at 469; cf also A W B Simpson, ‘The Rise and Fall of the Legal Treatises: Legal Principles and the Forms of Legal Literature’ (1981) 48 University of Chicago LL Rev 632 at 653 (‘... Blackstone, it must be remembered, was essentially a civilist and not an academic; his disappointed ambition was to become Professor of Civil Law at Oxford.’)
189 Andreas B Schwarz, ‘John Austin und der deutsche Rechtswissenschaft seiner Zeit’ in Rechtsphilosophie und Geisteswissenschaftliche Schriften zur neueren Privatrechtsgeschichte und Rechtsvergleichung (1940) 77ff.
190 Maitland, Outlines of English Legal History, 560–641ff in Collected Papers II 417 at 430.
191 Cf, for example, Brian L Woodward, Medieval Ecclesiastical Courts in the Diocese of Canterbury (1657).
192 Cf especially F W Maitland, Roman Canon Law in the Church of England (1898). For a recent re-examination of the views of Maitland and W Stubbs (the main exponent of the traditional view (c f op cit note 122)), cf Charles Donahue Jr, ‘Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-examined After 75 Years in the Light of Some Records from the Church Courts’ (1973–4) 72 Michigan L Rev 647; cf also Charles Donahue Jr, ‘Church Court Records on the Commentaries and in England’ in Helmut Coning & K W Nütt (eds) op cit note 125 at 63.
usually well versed in Canon law and Roman law. This European insitutumque, in turn, was what had come to be taught from the twelfth century at the two English universities of Oxford and Cambridge. 

As on the Continent, Latin was used as the written language of the law. Until the year 1731 it remained 'the solemnest language of [English] law'.

(iii) Even after the Reformation, Canon law continued to be applied in the ecclesiastical courts, but only as far as it was not 'contrary ... nor repugnant to the lawes statutes and customes of this Realme nor to the damage or hurt of the Kynges prerogatryve Royall'. However, the teaching of Canon law was suppressed at Oxford and Cambridge, and thus we find the emphasis shifting from Canon law to Roman law. Royal chairs ('regii professores') of civil law were created and continuously filled from the middle of the sixteenth century. The students graduated with the degree of Bachelor or Doctor of Civil Law. These civilians, in their Society of Doctors' Commons, kept the tradition not only of the Roman but also of the Canon law alive. A guide 'to one, that would begin to study, the Civil and Ecclesiastical Law', dating from the second half of the seventeenth century, prescribed the study of the great canonists of the Middle Ages for whoever wanted to practise as a Doctor of Civil Law in the ecclesiastical courts. But there were certain functions in the secular administration and jurisdiction, as well, that were or could be looked after by learned (civil) lawyers, for example, in the Courts of Admiralty or in the Court of Chancery. There had been

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144 The law schools at both Oxford and Cambridge followed the Continental pattern. The teaching of civil law at Oxford started with the Bologna-trained Rialon, Magister Vacarius, in about the middle of the twelfth century. Guillemus de Drogheda (who died around 1245) was appointed as 'Regens in Legibus'. For details, see H G Richardson 'The Oxford Law School under John' (1946) 57 LQR 319; Kamen/Rathbone (1949–1951) 7 Traditio 279. Chairs of common law were created at first in the United States, then also at the University of London, where, however, the chair of English law was abolished in 1869. CWR S. Holdsworth A History of English Law XII (1938) 1000; XV (1953) 231ff. The first academic degrees in English law were established in 1832 (Oxford) and 1855 (Cambridge); cf R M Jackson The Mathematic of Justice in England 7 ed (1977) 424ff.


146 25 Hen 8 c 19 s 7; for details, see Gieson op cit note 122 at 422ff. For a contemporary analysis, see Thomas Balfe A View of the Civil and Ecclesiastical Law. And wherein the Practice of them is illustrated and may be relieved within this Land (1607).

147 W Stubbs Doctors’ Commons and the Old Court of Admiralty (1922); G D Squibb Doctors’ Commons (1977); on the civilians generally, see Brian P Leveck The Civil Lawyers in England 1660–1661 (1973); Gieson op cit note 122 at 446, and especially Daniel R Coquillette 'Legal Ideology and Incorporation: The English Civilian Writers, 1522–1607' in Legal Ideology and Incorporation: Sir Thomas Holdre, Charles Molyne, and the Literary Battle for the Law Mercian, 1607–1676' in (1981) 61 Boston University L R 1, 315.

148 Hostunss, Spectator, Panaont,navus, Covarrivas y Leyva and others; cf Gieson op cit note 122 at 459. As to what was expected with regard to the study of civil law, cf William Palece A Direction or Preparatory to the Study of the Law (1649). The following authors were recommended for study: Bartoli, Baldin, Paulus de Castro, Philippus Ducius, Acelius, Zosiis, Rusteni, Dievrius, Guicciard, Hontournain, Doncellus and Albrettus Gentilis (Regius Professor of Civil Law from 1587).

149 As to the occupational opportunities of the civilians, see Leveck op cit note 147 at 21ff; cf also Ichmar Coing Das Schriftum der englischen Civilisten und die kontinentale Rechtsliteratur in der Zeit zwischen 1550 und 1600 in (1973) 5(Jab Commun 11), Coquillette op cit note 147 at 19ff.