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.[127] 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'.[128] Protagonists of the law in action were judges and legal counsel, lawyers such as Molinaeus and Domat, Grotius and Bynkershoek, Huber and Sande, Carpzov and Mevius; 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.[129]

(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 . . . not English at all. It was a species of continental feudal law developed into an English system by kings and justices of continental extraction.'[130] In a similar vein, Maitland once said: 'I know just enough to say this with confidence, that there [sc, on the Continent] are great masses of medieval law very comparable with our own.'[131] Throughout the centuries Roman (civil) law, through various channels, has exercised a considerable influence on English law and jurisprudence.[132]

(aa) 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'.[133] Thorne, in his introduction to the most recent edition of Bracton, has pointed out[134] that the first third of the work alone contains quotations from nearly 200 different sections of the Digest. Bracton, he states,[135] 'was a

[127] As to the following, cf especially the research undertaken by Gino Gorla, conveniently summarized in Gorla & Moccia op cit note 125 at 143ff; cf also the research programme sketched by J H Baker in Helmut Coing & K W Nörr op cit note 125 at 49ff.

[128] Cf Gino Gorla 'La "communis opinio totius orbis" et la reception jurisprudentielle du droit au cours des XVI^e^, XVII^e^ et XVIII^e^ siècles 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, Wieacker 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 Coing (ed) *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* II 2 (1976) 1113ff.

[130] R C van Caenegem *The Birth of the English Common Law* (1973) 110.

[131] 'Why the History of English Law is Not Written' in *Collected Papers* I 480 at 490.

[132] Cf generally John L Barton 'Roman Law in England' *Ius Romanum Medii Aevi* pars V 13 a (1971).

[133] Fritz Schulz 'A New Approach to Bracton' (1944) 2 *Seminar* 42.

[134] Samuel E Thorne (ed, transl, comm) *Bracton De Legibus et Consuetudinibus Angliae* I (1968) xxxvi.

[135] xxxiii; cf also J L Barton 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',[136] 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.[137] 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,[138] 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.[139]

(bb) As far as substantive law is concerned, '[f]rom the days of Ethelbert onwards English law was under the influence of so much of Roman law as had worked itself into the tradition of the Catholic Church'.[140] 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 laesio fidei (breach of a sworn promise).[141] For these courts, Canon law had the same binding authority as it had for any ecclesiastical court on the Continent.[142] 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.[143] After all, down to the time of Henry VIII the chancellors were clergymen,

[136] W S Holdsworth *A History of English Law* VI 2 ed (1937) 594f.

[137] Peter Stein *Roman Law and English Jurisprudence Yesterday and Today* (inaugural lecture, as Regius Professor of Civil Law in the University of Cambridge 1969) 7ff.

[138] Maitland op cit note 131 at 489. Cf also A W B Simpson 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature' (1981) 48 *University of Chicago LR* 632 at 655 ('. . . Blackstone, it must be remembered, was essentially a civilian and an academic; his disappointed ambition was to become Professor of Civil Law at Oxford').

[139] Andreas B Schwarz 'John Austin und die deutsche Rechtswissenschaft seiner Zeit' in *Rechtsgeschichte und Gegenwart. Gesammelte Schriften zur neueren Privatrechtsgeschichte und Rechtsvergleichung* (1960) 73.

[140] Maitland 'Outlines of English Legal History, 560–1600' in *Collected Papers* II 417 at 430.

[141] Cf, for example, Brian L Woodcock *Medieval Ecclesiastical Courts in the Diocese of Canterbury* (1952).

[142] 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 (cf 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 LR* 647. Cf also Charles Donahue 'Church Court Records on the Continent and in England' in Helmut Coing & K W Nörr (eds) op cit note 125 at 63.

[143] Cf, for example, Helmut Coing 'English Equity and the Denunciatio Evangelica of the Canon Law' (1955) 71 *LQR* 223; John L Barton op cit note 132 at 50ff.

usually well versed in Canon law and Roman law. This European ius utrumque, in turn, was what had come to be taught from the twelfth century at the two English universities of Oxford and Cambridge.[144] 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'.[145]

(cc) Even after the Reformation, Canon law continued to be applied in the ecclesiastical courts, but only as far as it was not 'contraryant nor repugnant to the lawes statutes and customes of this Realme nor to the damage or hurte of the Kynges prerogatyve Royall'.[146] 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,[147] 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[148] 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.[149] There had been

[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 Italian, Magister Vacarius, in about the middle of the twelfth century. Guilelmus de Drogheda (who died around 1245) was appointed as 'Regens in Legibus'. For details, see H G Richardson 'The Oxford Law School under John' (1941) 57 *LQR* 319; Kuttner/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. Cf W S Holdsworth *A History of English Law* XII (1938) 100ff; XV (1965) 231ff. The first academic degrees in English law were established in 1852 (Oxford) and 1855 (Cambridge); cf R M Jackson *The Machinery of Justice in England* 7 ed (1977) 434ff.

[145] Maitland 'Outlines of English Legal History, 560–1600' in *Collected Papers* II 417 at 435.

[146] 25 Hen 8 c 19 s 7; for details, see Giesen op cit note 122 at 422ff. For a contemporary analysis, see Thomas Ridley *A View of the Civile and Ecclesiasticall Law: And wherein the Practice of them is streitned and may be relieved within this Land* (1607).

[147] W Senior *Doctors' Commons and the Old Court of Admiralty* (1922); G D Squibb *Doctors' Commons* (1977); on the civilians generally, see Brian P Levack *The Civil Lawyers in England 1603–1641* (1973); Giesen op cit note 122 at 446, and especially Daniel R Coquillette 'Legal Ideology and Incorporation I: The English Civilian Writers, 1522–1607', 'Legal Ideology and Incorporation II: Sir Thomas Ridley, Charles Molloy, and the Literary Battle for the Law Merchant, 1607–1676' in (1981) 61 *Boston University LR* 1, 315.

[148] Hostiensis, Speculator, Panormitanus, Covarruvias y Leyva and others: cf Giesen op cit note 122 at 450. As to what was expected with regard to the study of civil law, cf William Fulbecke *A Direction or Preparative to the Study of the Lawe* (1600). The following authors were recommended for study: Bartolus, Baldus, Paulus de Castro, Philippus Decius, Alciatus, Zasius, Budaeus, Duarenus, Cujacius, Hotomannus, Donnellus and Albericus Gentilis (Regius Professor of Civil Law from 1587).

[149] As to the occupational opportunities of the civilians, see Levack op cit note 147 at 21ff; cf also Helmut Coing 'Das Schrifttum der englischen Civilians und die kontinentale Rechtsliteratur in der Zeit zwischen 1550 und 1800' in (1975) 5 *Ius Commune* 11; Coquillette op cit note 147 at 191f.