The Civil Law Influence on the Evolution of Testamentary Succession

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Acknowledgements

I would like to begin by acknowledging every person who has made this thesis possible. Any errors contained within it are my own.[1] I am also aware of the slight historical significance of this work being the last law thesis written in what may become known as old Bexley. It could even be the last thesis ever written in the red zone that will soon become little more than a memory. The period that I wrote this has been the most trying in my life. It stems from the 22nd February Earthquake that crippled the city of Christchurch, changed so many lives for the worse, and those personal losses each of us faced. I will never forget the arsons and attempted burglaries occurring periodically over the last two years. It has not been pleasant study conditions. I hope that despite the hardship, I have produced something worthy of the University of Canterbury that reflects the high standards of that institution.

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My final acknowledgements are unnecessary but I think reflect the aspirations of my work. I would like to thank the English civilians who worked so diligently in their field despite the pressures they must have faced. This seems to be the first effort in New Zealand attempting to emulate their tradition. The closure of the Doctors Commons must surely be one of the greatest losses to the state of the law. I hope thesis is in some way a reflection of how they approach legal problems and is worthy enough to form part of their tradition. It is my hope New Zealand scholarship will continue this legacy.

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1. Abbreviations and Glossary of Terms[2]

Abbreviations

Civil Law:

Dig. *Digest*
Inst. *Institutes*
Cod. *Code*
Nov. *Novels*
Gaius. *Institutes of Gaius*

Canon Law:

X. *Liber Extra*
Dist. Distinctio (*Decretum*)
C. Causa (*Decretum*)
q. quaestio (*Decretum*)
c. capitulum
Sext. *Liber Sextus*

gl. Gloss

Glossary

Ademptio: The revocation, express or implied, of any disposition.

Agnate: A person related through the male line to a common male ancestor.

Beneficium inventarii: Benefit of Inventory. According to an enactment of Justinian, an heir had the right to call for an inventory of the inheritance. This gave them the benefit that they were liable for the debts of the testator and the legacies only to the amount of three quarters of the estate with the remaining fourth being reserved for them as the so-called *quarta Falcidia*.

[2] Please note these are notably absent from the NZ legal citation method. Roman law definitions derived from: A. Berger, 'Encyclopaedic Dictionary of Roman Law' (1953) 43 (2) *Transactions of a Philosophical Society*, 333- 809; T. Mommsen (ed), P. Krueger (ed), A. Watson (ed), *The Digest of Justinian*, volume 3, Philadelphia: University of Pennsylvania Press 1985; D. Johnston, *Roman Law in Context* (Cambridge University Press, Cambridge 2006). Amended where appropriate. The glossary is provided for the benefit of the reader and is not extant. The student has been granted discretion concerning footnote layout. Footnotes are not included in the final word count. Punctuation has been included.

Bonorum Possessio: A type of possession originally granted by the praetor, which gave rise to an extended or sometimes alternative system of succession. The praetor originally followed the rules of succession of the *ius civile*, but in the later development, they introduced new rules of succession that differed from it.

Bonorum possessio contra tabulas: *bonorum possessio* contrary to the will. In certain cases, the praetor granted the possession of the estate contrary to the will of the testator - in particular, when a testator passed over an emancipated son without instituting or disinheriting them.

Bonorum possessio secunda tabulas: *bonorum possessio* according to the will. Given to the heirs instituted in a will despite its apparent under the *ius civile*.

Canon: Dist. 3, c. 1 defines canon as rule and Dist. 3, c. 2 adds "Some say, it is called a rule because it leads one right and never leads astray. Others say, it is called a rule because [it] presents a norm for right living or sets right what is [wrong]".

Capitis deminutio: The loss of civil status of a person and their legal ability to conclude legally valid transactions (including will making) through the loss of one of the three elements: freedom, Roman citizenship, or membership in a Roman family.

Causa: The word holds multiple legal meanings. Primarily it is the reason for the introduction of judicial measures (actions, exceptions, and interdicts), and the purpose for which an action is brought in a specific controversy. Frequently, *causa* refers to the trial itself or the matter from which it originated. It indicates a causes in the ecclesiastical courts and is indicated with a small letter 'c' or *contra* e.g. *Broke, Offley et al c Barrett*. Notably, causes in later ecclesiastical courts follow the standard method 'v' e.g. *Dew v Clark*.

Civilian: A jurist trained in the learned laws.

Comitia calata: One of the ancient forms of *comitia* convoked (*calata*) by the *pontifex maximus* (high priest) for special religious purposes. Citizens had the opportunity to make a will during this occasion.

Comparatio litterarum: The comparison of handwriting. Experts on handwriting gave evidence when doubts arose concerning the authenticity of a written document.

Corpus Iuris Canonici: A collective title given to the books of the canon law to distinguish them from the *Corpus Iuris Civilis*.

Corpus Iuris Civilis: A collective designation used by Godefroy in 1583. The denomination embraces the *Institutes*, the *Digest*, the *Codex*, and the *Novels*.

Cum testamento annexo: A grant of administration 'with the will annexed'.

Curator: A person charged with the care of the well-being and/or property of certain persons. The most important forms were the care of lunatics and the guardianships of persons *sui iuris* who are also *minors*.

Doctors Commons: A collegiate of practising civilians established in London c 1511.

Ex officio: 'From the office' it refers to powers exercisable by a judge as an incidence of their office.

Exheredatio: Disherison. The exclusion by the testator of their issue or some other persons from succeeding to the inheritance.

Extranei heredes: An outside heir who is not subject to the testator's power at their death.

Executor: The term and the institution are unknown to Roman classical law. According to the modern conception, the executor is a person holding an estate in trust, and administering and distributing it according to the testator's wishes.

Familia: This covers a family in the modern sense but includes a person's whole household.

Familiae emptor: A third party who purchased the inheritance *per aes et libram* and transferred it to the designated heir.

Fides: Honesty, uprightness, trustworthiness. In legal relations, fides denotes honest keeping of one's promises and performing the duties assumed by agreement. On the other side, fides means the confidence, trust, and faith one has in another's behaviour, particularly with regard to the fulfilment of their liabilities.

Fideicommissum: A charge in a will imposed on an heir or legatee to transfer property to someone else.

Filiusfamilias: A son under the *patria potestas* of the *paterfamilias*.

Furiosus: An insane person or a lunatic. The law does not recognise a manifestation of their will. They are not able to conclude a legal transaction except during a lucid interval when they regain a normal state of their mental faculties.

Heredis Institutio: The designation of a person in a testament who will be the testator's heir (*heres*) and shall succeed as the owner of the whole estate.

Hereditas*:* Used on the one hand in the sense of the complex of goods, rights, and duties of the deceased (the estate as a whole), and on the other hand to describe the legal position of the heir who after the death of another enters into upon their legal situation.

Hereditas iacens: Corporeal things belonging to an estate during the time before the heir entered upon the inheritance.

Hereditatis petito: An action by which an heir claims the delivery of the estate.

Heres: The heir succeeds to all advantages and disadvantages resulting from the legal relations of the deceased. A *heres neccessarius* was a type of *heres* who became *sui iuris* after the deceased's death and could not refuse the inheritance. An *extraneus heres* was someone not subject to the *patria potestas* of the deceased at the time of death.

Heres fiduciarius: An heir, instituted in a testament, on which the testator has imposed the duty to deliver the estate wholly or in part to a third person.

Heres scriptus: An heir appointed in a written testament (see *heres testamentarius*).

Heres suus et necessaries: A person under the paternal power of the deceased who after their death becomes *sui iuris*.

Impubes: A person under the age of puberty (fixed at twelve for girls and fourteen for boys). An *impubes* lacked mental capacity and the law placed those who were *sui iuris* under the tutelage of a guardian.

In procinctu: A testament made by a soldier before their unit prior to combat - is one of the earliest forms of testament.

Inofficosum testamentum: A testament by which violates the natural rights of succession is inofficious.

Intestato: Refers to a succession in which there is no valid testament.

Ius civile: The Civil law. The original rules, principles and institutions of Roman law, derived from various kinds of statute and juristic opinion.

Ius commune: The general law common to all. The collective name given to the canon and civil law.

Ius gentium: The *ius gentium* is the law governing the relations of Rome with other states. Jurists relate concept to the *ius natural*, which dictates the law common to all peoples.

Ius honorarium: Praetorian Law. The law introduced by magistrates, especially the praetor, by means of an Edict, to aid, supplement, or correct the existing *ius civile*.

Ius Naturale: Undefined but often synonymous with *ius gentium* or 'natural reason'.

Legitima portio: A fixed share of a person's estate that descends to children.

Lex Falcidia: A constitution providing that legacies should not exceed three quarters of the testator's estate. The law reserved a minimum fourth part to the heir appointed in the testament.

Loco Haeredis: A person who is not the heir but occupies the place of, or in the same legal situation, as an heir.

Mancipatio: A formal conveyance before five witnesses and a person holding a scale. Ownership was conveyed 'by bronze and scale' to the acquirer.

Minor: A person over the age of puberty but under the age of twenty-five. The law could assign a minor with a curator to protect their property.

Paterfamilias: The head of a family, without regard as to whether or not a person so designated has children, whether he is married or is below the age of puberty. A *paterfamilias* must be a Roman citizen and not under paternal power of another.

Patria potestas: The power of the head of a family (*paterfamilias*) over the members, i.e., his children, natural and adoptive, his wife. It developed to include moral duties such as protection, maintenance, and assistance.

Persona: The principal division of persons including collective entities that, although not human in nature, "function" as persons - such as a *hereditas*.

Pias causa: Pious cause. Justinian's legislation favoured gifts to charitable institutions (foundations), such as orphanages, hospitals, poorhouses, almshouses for the elderly.

Pietas: Dutifulness, respectful conduct, sense of duty, affection towards gods, parents, or near relatives; in general noble mindedness and honest way of thinking.

Potestas: *Potestas* in the field of private law refers either to the power of a head of a family over its members.

Praetor: Important magistrates during the republic and early principate with different jurisdictional duties including dealing with *fideicommissum* and *bonorum possessio*.

Querela inofficiosi testamenti: An action available to an heir who would be legitimate in intestacy but the testator had omitted or unjustly disinherited them.

Substitutio: The appointment of another heir or heirs to cover the possibility that the first instituted might not or could not accept the inheritance, which would otherwise leave the will void.

Sui iuris: A person free from the *patria potestas* of another.

Testamenti Factio: The legal capacity of a person to make a testament. The law distinguishes from *testamenti factio* (called in the literature by the non-Roman term, *testamenti factio activa*) from the capacity to be instituted heir or to receive a legacy (*testamenti factio passiva*). *Testamenti factio* also refers to the ability to witness a testament of a specific person.

Testamentum: A solemn act by which a testator instituted one or more heirs to succeed to their property after death. The appointment of an heir was the fundamental element of a testament; a last will that fails to appoint an heir was invalid. A testament could contain other dispositions, such as legacies or the appointment of a guardian. A will was ambulatory. The existence of a valid testament excluded the admission of heirs on intestacy.

Testamentum militis: A soldier's testament.

Testamentum parentis inter liberos: A testament by which a father (*pater familias*) disposed of his property in favour of his children alone. A testator could make this form of will without witnesses if they wrote it in their own hand and gave the exact names of the heirs and their shares.

Testamentum per nuncupationem: The oral declaration of a will that appointed heirs in the presence of witnesses.

Testamentum ruptum: A testament which was "broken" by a later event e.g., by the birth of a posthumous child who was omitted in the father's testament or was revoked by the testator through a later testament.

Testatio mentis: An expression of a person's mind.

Testis: A witness. Witnesses were occasionally necessary for the validity of an act or transaction under Roman law. For solemn acts, like making a testament, the number of witnesses prescribed was usually seven.

Tutela: A form of guardianship over the person and property of an *impubes* who is *sui iuris*.

Twelve Tables: A collection of early rules traditionally dating from 450 BC.

Ultimis voluntatibus: 'Last will' refers to a will as an alternative to testament.

2. Introduction

The Wills Act 2007 is New Zealand's first native statute addressing testamentary succession.[3] The Act represents a significant departure from its predecessor and a number of uncertainties concerning its operation have arisen. It does not purport to cover all aspects of testamentary succession and an examination of the Act must include reference to preceding practice.[4] This presents an opportunity to examine the historical evolution of the will to interpret the Act's nature. The Act also introduces the term 'will-maker', instead of the expression 'testator', which is controversial because of its departure from historical usage and its cumbersome nature.[5] Thomas Wentworth's use of the term in the sixteenth century suggests the word possesses some common law pedigree and the present author will use both terms where appropriate.[6] Nonetheless, the Latin expression testator appears to be an indicator that a Roman influence permeates New Zealand testamentary succession. This influence would likely have only arisen if it already formed part of our English legal heritage rather than through a direct incorporation of civil law principles by New Zealand lawmakers. Nevertheless, its presence is enough to suggest the Wills Act 2007 can only be understandable by reference to the civil law and civilian practice that once formed part of the English legal system.

Few modern treatises have addressed the subject of testamentary succession in English legal history and no one has ever satisfactorily unravelled the complex interplay of legal principles that underlie the subject.[7] English testamentary jurisprudence itself is divisible into natural law, divine law, the *ius gentium*, civil law, ecclesiastical law, common law, statutory law, equity, and custom.[8] However, the fact that England's ecclesiastical courts, rather than the

[3] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 345; N. Peart "Where there is a Will, There is a Way - A New Wills Act for New Zealand" (2007) 15 (1) *Waikato Law Review*, 26 at 26.
[4] N. Peart "Where there is a Will, There is a Way - A New Wills Act for New Zealand" (2007) 15 (1) *Waikato Law Review*, 26 at 27.
[5] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 345.
[6] T. M. Wentworth, *The Office and Duty of Executors*, (Printed by the Assigns of Richard and Edward Atkins, London 1589) at 3; also see N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 345.
[7] M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 48- 49; C. Donahue Jr. "*Ius commune*, Canon and Common Law in England" (1992) 66 (6) *Tulane Law Review*, 1745 at 1778.
[8] H. J. Berman, "Introductory Remarks: Why the History of Western Law is not Written" (1984) 1984 (3) *University of Illinois Law Review*, 511 at 512; Bracton, G. E. Woodbine (ed), S. E. Thorne (trans), *De legibus et consuetudinibus Angliae*, volume 2, (Harvard University Press, Cambridge, 1968 – 1977) at 22, 25 – 27; C. St.

common law, spearheaded testamentary development appears to accompany the lack of attention devoted by modern legal historians. Dr. Helmholz warns that any account of English legal development that does not consider ecclesiastical jurisdictions is an incomplete examination.[9] These courts introduced the treasure trove of civil law principles into English law to define and extrapolate the features of the will.[10] The extent of the civil law's influence on English legal development may be uncertain; but it appears to have exerted a profound influence in this area of law and reveals valuable insight into the operation of ecclesiastical jurisdiction.[11] In *Moore v Moore*[12], the spiritual court noted that "the whole of the testamentary law which we administer has its basis in the civil law; and, without an intimate knowledge of the Roman code, it would be impossible to acquire a knowledge of our practice, or understand the principles of our decisions".[13] This civil law influence continues to resonate in New Zealand testamentary law.[14] Even a cursory glance over the *Institutes* and Dr. Richardson's *Nevills Law of Trusts, Wills, and Administration* ought to impress upon the reader a number of familiar concepts. Therefore, it is desirable to examine the civil law to appreciate how New Zealand law has evolved and how it may do so in the future.

Any study of the civil law in a common law system appears automatically relegated to the broader category of legal history because its influence on New Zealand's legal system

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Germain, W. Muchell (ed), *The Doctor and Student or Dialogues between a Doctor of Divinity and a Student in the Laws of England Containing the Grounds of Those Laws Together with Questions and Cases concerning the Equity Thereof Revised and Corrected* (Robert Clarke & Co, Cincinnati, 1874) at 12, 15; C. Donahue Jr. "*Ius commune*, Canon and Common Law in England" (1992) 66 (6) *Tulane Law Review*, 1745 at 1778.

[9] R. H. Helmholz, "Trust in the Ecclesiastical Courts 1300 – 1640" in R. H. Helmholz (ed), R. Zimmermann (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 154

[10] W. A. Hunter, "The Place of Roman Law and Legal Education" (1875) 4 (1) *Law Magazine and Review Monthly Journal of Jurisprudence and International Law*, 66 at 78.

[11] R. H. Helmholz, "The Roman law of Guardianship in England" (1978) 52 (2) *Tulane Law Review*, 223 at 223; W. A. Hunter, "The Place of Roman Law and Legal Education" (1875) 4 (1) *Law Magazine and Review Monthly Journal of Jurisprudence and International Law*, 66 at 78; M.H. Hoeflich, *Roman & Civil Law and the Development of Anglo-American Jurisprudence in the Nineteenth Century*, (The University of Georgia Press, Athens 1997) at 87; C. S. Lobingier, "The Common Law's Indebtedness to Rome" (1925) 11 (4) *American Bar Association Journal*, 265 at 268; F. Pringsheim, "The Inner Relationship Between English and Roman Law" (1935) 5 (3) *Cambridge University Press*, 347 at 363; J. Ram, *The Science of Legal Judgment: a Treatise Designed to Show the Materials Whereof and the Process by Which the Courts of Westminster Hall Construct Their Judgements and Adapted to Practical and General Use in the Discussion and Determination of Questions of Law*, (John S. Littell, Philadelphia 1835) at 44; R. H. Helmholz, *The Ius commune in England: Four Studies*, (Oxford University Press, Oxford 2001) at 6.

[12] (1817) 1 Phill. Ecc. 406; 161 Eng. Rep. 1026

[13] 1 Phill. Ecc. 406 at 433; 161 Eng. Rep. 1026 at 1035.

[14] Judicature Act 1908, s 16; A. Lewis, "What Marcellus says is against you" in A.D.E Lewis (ed), D.J. Ibbetson (ed), *The Roman Law Tradition*, (Cambridge University Press, Cambridge 1994) at 208.

requires an appreciation of the context surrounding its development.[15] Both disciplines are under threat this millennium because of their perceived lack of value to modern legal practice despite the need to revitalise their presence in legal academia.[16] The study of both is important to understanding the evolution of the law and can impart wisdom for future development.[17] Legal historians frequently despair at modern law faculties increasingly ignoring their subject and have indicated general history departments have produced far more qualitative studies in the field than law academics.[18] However, academic study of the civil law is in an even worse state. Its value exceeds its relationship to legal history and it could furnish valuable insight into the rules and principles surrounding modern testamentary succession.[19] This value appears to be lost on modern lawyers. Spiller summarises the state of the civil law in New Zealand as "virtually unknown to generations of lawyers after World War II".[20] During the Wills Bill's first reading, Parliament acknowledged that "Romans made wills" without any further discussion beyond this cursory observation.[21] Therefore, this neglect is lamentable because the civil law remains a useful tool for understanding important legal questions that continue to arise in modern courts and reference to its principles furnishes equitable solutions.[22]

It is traditional for academics to begin their treatise on the civil law with an apology to justify its treatment when faced by a perceived lack of interest by their audience or even hostility

[15] M. Kirby, "Is Legal History now Ancient History?" (2009) 83 (1) *Australian Law Journal*, 31 at 38; C. Donahue, "What Happened in the English Legal System in the Fourteenth Century and Why would anyone want to Know" (2010) 63 (3) *Southern Methodist University Law Review* 949 at 966.
[16] M. Kirby, "Is Legal History now Ancient History?" (2009) 83 (1) *Australian Law Journal,* 31 at 37- 39, 43; P. Spiller, "Roman Law and New Zealand Law" [2005] *New Zealand Law Review* 9 at 11 see F. H. Newark, "The future of Roman law and Legal Education in the United Kingdom" (1959) 33 (3) *Tulane Law Review*, 647 at 648; F. W. Maitland, *Why the History of English Law is not Written* (C. J. Clay & Sons, London: 1888) at 16-17; M. Crackanthorpe, "The Uses of Legal History" (1896) 12 (4) *Law Quarterly Review* 337 at 350.
[17] J. Rose, "Studying the Past: The Nature and Development of Legal History as an Academic Discipline" (2010) 31 (2) *Journal of Legal History,* 101 at 128; H. J. B. Martin, "The Place of Jurisprudence in Legal Education" (1911) 36 (4) *Law Magazine & Quarterly Review of Jurisprudence 5th Series*, 418 at 421; R. Zimmermann, "Legal History: Does it Still Deserve its Place in the Curriculum" (1981) 69 (1) *New Series* 1 at 5.
[18] A. Lewis, "Roman Law in the Middle of Its Third Millennium" (1997) 50 (1) *Current Legal Problems*, 397 at 418.
[19] R. Zimmermann, "Legal History: Does it Still Deserve its Place in the Curriculum" (1981) 69 (1) *New Series*, 1 at 8; G. Gorla, L. Moccia, "A 'revisiting' of the comparison between 'Continental Law' and 'English Law'" (16th-19th Century)" (1981) 2 (2) *The Journal of Legal History*, 143 at 155.
[20] P. Spiller, "Roman Law and New Zealand Law" [2005] *New Zealand Law Review*, 9 at 10.
[21] (10 October 2006) 624 NZPD at 5557 (C. Finlayson)
[22] S. Herman, "The Contribution of Roman law to the Jurisprudence of Antebellum, Louisiana" (1995) 56 (2) *Louisiana Law Review*, 257 at 257; A. Lewis, "What Marcellus says is against you" in A.D.E Lewis (ed), D.J. Ibbetson (ed), *The Roman Law Tradition*, (Cambridge University Press, Cambridge 1994) at 202.

towards the subject.[23] This was necessary in common law jurisdictions because of an absurd perception that the civil law was an invasive foreign force that ought to be repelled.[24] Even the eminent Fredrick Maitland praised the success of the common law spirit holding out against "the temptations of Romanism".[25] In the early to mid-nineteenth century, the perception existed that the common lawyers had a shameful degree of pride in their ignorance of the civil law.[26] These attitudes likely had a role in the civil law's decline from New Zealand legal thought.[27] Common lawyers have been traditionally hostile for two reasons. The first is a nationalistic attitude that stems from an imaginary English rivalry with the Roman Empire, and a general hostility towards anything associated with papism after the Reformation.[28] The second is that it presents an insidious influence, which suggests the civil law represents authoritarianism and poses a moral threat to the fabric of society and integrity

[23] R. Cosin, *An Apologie for Sundrie Proceedings by Jurisdiction Ecclesiasticall* (Printed by the Deputies of Christopher Baker, London 1591) at vii; H. Consett, *The Practice of the Spiritual or Ecclesiastical Courts*, (Printed for W. Battersby, London 1700) at iii; W. F. Foster, "The Study of Roman Law" (1898) 7 (5) *Yale Law Journal*, 207 at 207; J. Reeves, W. F. Finlason, *Reeves's History of the English Law: From the Time of the Romans of the End of the Reign of Elizabeth*, volume 1 (M. Murphy, Philadelphia 1880) at cxvii; T. F. T. Plucknett, "The Relations between Roman Law and English Common Law down to the Sixteenth Century: A General Survey" (1939) 3 (1) *University of Toronto Law Journal*, 24 at 24.

[24] E. Coke, *The Second Part of the Institutes of the Laws of England*; *Containing the Exposition of Many Ancient and Other Statutes*, volume 1, (E. and R. Brooke, London 1797), at 98; P. Grossi, *A History of European Law* (Wiley-Blackwell, Oxford 2010) at 49; J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at pref; M. S. Amos, "The Common Law and the Civil Law in the British Commonwealth of Nations" (1937) 50 (8) *Harvard Law Review*, 1249 at 1252; T. Oughton, J. T. Law, *Forms of Ecclesiastical Law: Being a Translation of the First Part of Oughton's Ordo Judiciorum*, (Saunders and Benning, London 1831) at 5; D. Nestorovska, "Influences of Roman Law and Civil Law on the Common Law" (2005) 1 (1) *Hanse Law Review*, 79 at 79; S. P. Scott, *The Civil law*, (Central Trust Company, Cincinnati 1932) at pref; R. Phillimore, *The practice and courts of civil and ecclesiastical law, and the statements in Mr. Bouverie's Speech on the Subject* (W. Benning & Co, London 1848) at 7; R. H. Helmholz, "Continental Law and Common Law: Historical Strangers or Companions?" (1990) 1990 (6) *Duke Law Journal*, 1207 at 1217; D. J. Seipp, "The Reception of Canon Law and the Civil Law on the Common Law Courts Before 1600" (1983) 13 (3) *Oxford Journal of Legal Studies*, 388 at 388.

[25] F. W. Maitland, F. C. Montague, J. F. Colby (ed), *A sketch of English Legal History,* (G.P. Putnam's Sons, New York 1915) at 45; F.W. Maitland, *Equity; also the forms of Action at Common Law:Two courses of Lectures* (Cambridge University Press, Cambridge, 1929) at 373 see L. Moccia, "English Law attitudes to the 'Civil Law'" (1981) 2 (2) *Journal of Legal History*, 157 at 158; H.F. Jolowicz, "Political Implications of Roman Law" (1948) 22 (1) *Tulane Law Review* 62 at 62; D. J. Seipp, "The Reception of Canon Law and the Civil Law on the Common Law Courts Before 1600" (1983) 13 (3) *Oxford Journal of Legal Studies*, 388 at 388

[26] J. G. Phillimore, *Principles and Maxims of Jurisprudence*, (J. W. Parker and Son, London 1856) at 356

[27] P. Spiller, "Roman Law and New Zealand Law" [2005] *New Zealand Law Review*, 9 at 9; A. R. Crittenden, "Roman Law in Modern Life and Education" (1919) 15 (3) *The Classical Journal*, 148 at 154.

[28] F. W. Maitland, F. C. Montague, J. F. Colby (ed), *A sketch of English Legal History*, (G.P. Putnam's Sons, New York 1915) at 128; L. Moccia, "English Law attitudes to the 'Civil Law'" (1981) 2 (2) *Journal of Legal History*, 157 at 158; J. E. Curran Jr., *The British History, Protestant Anti-Romanism, and the Historical Imagination in England 1530- 1660*' (University of Delaware Press, Newark 2002) at 133; M. M. Knappen, *Constitutional and Legal History of England* (Harcourt Brace, New York 1942) at 45; S. Herman, "Legacy and Legend: The Continuity of Roman and English Regulation of the Jews" (1992) 66 (6) *Tulane Law Review*, 1781 at 1845; E. Rabel, "Private Laws of Western Civilisation", (1950) 10 (1) *Louisiana Law Review*, 1 at 8; J. B. Murphy, "The Influence Of The Civil Law Upon The Common Law" (1932) 13 (2) *Loyola Law Journal*, 39 at 40; T.W. Marshall, "Roman law: Its Study in England" (1901) 26 (3) *Law Magazine & Quarterly Review of Jurisprudence 5th Series*, 288 at 289 – 291.

of the law.[29] Nevertheless, these attitudes are romanticised and jurists were more sympathetic to the civil law as part of the fabric of English law than common law scholarship suggests, and that any conflict between them sits alongside cooperation and reciprocation in the area of testamentary succession.[30] Therefore, there is no need for an apology modern times.[31]

The civil law is divisible into two separate stages that make it distinguishable from preceding Roman law.[32] The first period of its evolution is the five hundred year development of Roman law that culminated in the creation of the civil law; the second stage is the rediscovery of the *Digest* and the subsequent twelfth century renaissance period that made its reception into modern jurisprudence possible.[33] The study of the civil law has intrinsic qualities that have often garnered it praise as a 'noble pursuit'.[34] Wiseman sums up the sentiment echoed by academics throughout history in his statement that the civil law is "the best and most perfect law of all others".[35] The civil law's fifteen hundred year pedigree and the fact its principles

[29] J. E. Curran Jr., *The British History, Protestant Anti-Romanism, and the Historical Imagination in England 1530- 1660*, (University of Delaware Press, Newark 2002) at 136, 183; J. Q. Whitman, "The Disease of Roman law: A Century Later" (1994) 20 *Syracuse Journal of International Law & Commerce*, 227 at 227; J. Q. Whitman, "The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence" (1996) 105 (6) *Yale Law Journal,* 1841 at 1841; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999) at 2.

[30] L. Moccia, "English Law attitudes to the 'Civil Law'" (1981) 2 (2) *Journal of Legal History*, 157 at 158; R. H. Helmholz, "Canon Law and English Common Law" in Selden Society, *The Selden Society Lectures: 1951 – 2001*, (William S. Hein & Co, New York 2003) at 516 - 519; J. B. Murphy, "The Influence Of The Civil Law Upon The Common Law" (1932) 13 (2) *Loyola Law Journal*, 39 at 42; R. H. Fritze, W. B. Rombison (eds), *Historical Dictionary of Late Medieval England, 1272 – 1485* (Greenwood Publishing Group, Westport 2002) at 90; D. J. Seipp, "The Reception of Canon Law and the Civil Law on the Common Law Courts Before 1600" (1983) 13 (3) *Oxford Journal of Legal Studies*, 388 at 389 – 390.

[31] C. S. Lobingier, "The Common Law's Indebtedness to Rome" (1925) 11 (4) *American Bar Association Journal*, 265 at 265.

[32] W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 87; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and comparative Jurisprudence*, (Kegan Paul, Trench & Co, London 1883) at ix; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 3; H. F. Jolowicz, *Roman Foundations of Modern Law*, (Clarendon Press, Oxford 1957) at 1; G. J. McGinley," Roman law and its influence in America" (1928) 3 (2) *The Notre Dame lawyer*, 70; F. Wieacker, "The Importance of Roman Law for Western Civilization and Western Legal Thought" (1981) 4 (2) *Boston College International and Comparative Law*, 257 at 261; H. Grotius, F. W. Kelsey (trans), *De Jure Belli Ac Pacis Libri Tres*, volume 2, (Clarendon Press, Oxford 1925) at 28; G. Mousourakis, *The Historical and Institutional Context of Roman law* (Ashgate Publishing Ltd, Aldershot 2003) at 2.

[33] T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 32; O. Tellegen Couperus, *A Short History of Roman law* (Routledge, Oxon 1993) at xiii.

[34] C. J. de Ferriere, *The History of the Roman Or Civil Law: Shewing Its Origins and Progress*, (Printed for D. Brown, London 1724) at 131 - 133; G. Carleton Lee, *Historical Jurisprudence: An Introduction to the Systematic Study of the Development of Law*, (The Macmillan Company, London 1900) at 187; Samuel Hallifax, *Elements of the Roman civil law*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at viii; F. E. R. Stephens, "A sketch of the Civil and Canon Laws in England" (1896) 44 (3) *The American Law Register and Review*, 141 at 142.

[35] R. Wiseman, *The Law of Laws: Or Excellency of the Civil Law* (Printed for R. Royston, London 1664) at 21

are still comparable to modern legal achievements is a testament to its timeless quality.[36] Its universality allows reference to its principles to address any legal problem that arises no matter the jurisdiction.[37] Jurists also describe the civil law as a moral force because its predilection for equity and its role in shaping philosophical notions of justice are necessary to prevent authoritarian control of the law.[38] Furthermore, academics have viewed it as a valuable tool to introduce students to concepts of moral development of the law and legal philosophy, which are now lessons associated with legal history.[39] New Zealand academics

[36] G. Carleton Lee, *Historical Jurisprudence: An Introduction to the Systematic Study of the Development of Law*, (The Macmillan Company, London 1900) at 187, 188; A. Watson, "Illogicality and Roman Law" (1972) 7 (1) *Israel Law Review*, 14 at 14; A. Watson, *Roman Law & Comparative Law*, (University of Georgia Press, Athens, 1991) at 3; F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 1; C. P. Sherman, "The Study of Law in Roman Law Schools" (1908) 17 (7) *Yale Law Journal*, 499; A. H. F. Lefroy, "Rome and Law" (1907) 20 (8) *Harvard Law Review* 606 at 606; C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 13; P. B. H. Birks, "English and Roman learning in *Moses v Macferlan*" (1984) 50 (1) *Current Legal Problems*, 1 at 2; F. P. Walton, Historical Introduction to the Roman Law, fourth edition, (W. Green & Son, Edinburgh 1920) at 10; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 3.

[37] P. Spiller, "Roman Law and New Zealand Law" [2005] *New Zealand Law Review*, 9 at 9; C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 15; R. Zimmermann, "Roman law and European Culture" [2007] *New Zealand Law Review*, 341 at 372; A. H. F. Lefroy, "Rome and Law" (1907) 20 (8) *Harvard Law Review*, 606 at 617; F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 10; W. F. Foster, "The Study of Roman Law" (1898) 7 (5) *Yale Law Journal* 207 at 210; G. Bowyer, *Readings Delivered Before the Honourable Society of the Middle Temple in the Year 1850*, (V. & RI. Stevens and G. S. Norton, London, 1851) at 14; J. Maclaren, *Roman Law in English Jurisprudence*, (William Briggs, Toronto 1888) at 4. At 38; J. Lee, "*Confusio*: Reference to Roman Law in the House of Lords and the Development of English Private Law" (2009) 5 (1) *Roman Legal Tradition*, 22 at 38.

[38] R. Zimmermann, "Roman law and European Culture" [2007] *New Zealand Law Review*, 341 at 357; C. J. Richard, *Why we're all Romans: the Roman contribution to the Western World*, (Rowman & Littlefield Publishers, Plymouth, 2011) at 54; A. H. F. Lefroy, "Rome and Law" (1907) 20 (8) *Harvard Law Review*, 606 at 607; C.S. Lobingier, "The Flowering of Roman Law" (1924) 1 (6) *China Law Review*, 269 at 270; J. R. Kroger, "The Philosophical Foundations of Roman Law: Aristotle, the Stoics, and Roman Theories of Natural Law" [2004] (3) *Wisconsin Law Review*, 905 at 905; C. P. Sherman, "The Value of Roman Law to the American Lawyer of Today" (1911) 60 (3) *University of Pennsylvania Law Review and American Law Register*, 194 at 195; C. J. de Ferriere, *The History of the Roman Or Civil Law: Shewing Its Origins and Progress*, (Printed for D. Brown, London 1724) at 132; R. Wiseman, *The Law of Laws: Or Excellency of the Civil Law*, (Printed for R. Royston, London 1664) at 30; A. H. F. Lefroy, "Rome and Law" (1907) 20 (8) *Harvard Law Review*, 606 at 617; C. J. Richard, *Why we're all Romans: the Roman contribution to the Western World*, (Rowman & Littlefield Publishers, Plymouth, 2011) at 48; A. Watson, "Seventeenth-Century Jurists, Roman Law, and the Law of Slavery" (1993) 68 (3) *Chicago– Kent Law Review*, 1343 at 1343; M. Kirby, "Is Legal History now Ancient History?" (2009) 83 (1) *Australian Law Journal*, 31 at 42; P. G. Monateri, "Black Gaius: A Quest for the Multicultural Origins of the Western Legal Tradition" (2000) 51 (3) *Hastings Law Journal*, 479 at 495.

[39] A. R. Crittenden, 'Roman Law in Modern Life and Education' (1919) 15 (3) *The Classical Journal*, 148 at 148; C. P. Sherman, "The Value of Roman Law to the American Lawyer of Today" (1911) 60 (3) *University of Pennsylvania Law Review and American Law Register* 194 at 196; M. Kirby, "Is Legal History now Ancient History?" (2009) 83 (1) *Australian Law Journal*, 31 at 40; C. P. Sherman, "The Value of Roman Law to the American Lawyer of Today" (1911) 60 (3) *University of Pennsylvania Law Review and American Law Register* 194 at 195; F. Wieacker, "The Importance of Roman Law for Western Civilization and Western Legal Thought" (1981) 4 (2) *Boston College International and Comparative Law*, 257 at 280; R. W. Lee, "The Civil Law and the Common Law: A World Survey" (1915) 14 (2) *Michigan Law Review,* 89 at 89.

ought to acknowledge the timeless, universal, and equitable elements of the civil law principles when they are discernable in testamentary succession.[40]

An appeal to civil law principles is also justified because the system is unsurpassed as an apex of logic and deductive reasoning that lies at the heart of legal science, which common lawyers have yet to reproduce.[41] It provides jurists with a method of structuring the law because it acts as a foundation to conceptualise how legal principles ought to develop.[42] Blackstone's *Commentaries* utilised the civil law to structure the common law, a system bereft of internal order, which equipped his text for systematic university study in a manner that continues to resonate in modern law faculties.[43] It is arguable the absence of civil law courses have deprived students of a clear map of analysing the law scientifically.[44] Furthermore, the current trend of decline of this valuable source of legal reasoning will leave New Zealand students poorer off in a climate of increased globalism.[45] The common law and

[40] But see J. Hopkins, "Missing the point? Law, Functionalism and Legal education in New Zealand" (2011) 9 (2) *Waikato Law Review*, 188 at 189.

[41] C. J. de Ferriere, *The History of the Roman Or Civil Law: Shewing Its Origins and Progress*, (Printed for D. Brown, London 1724) at 13; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 5; R. Zimmermann, "Legal History: Does it Still Deserve its Place in the Curriculum" (1981) 69 (1) *New Series*, 1 at 9; R. Zimmermann, *The Law of Obligations: Roman foundations of the Civilian Tradition* (Jura & Co, Cape Town 1990) at xi; J. Bryce, "A Comparison of the History of Legal Development at Rome and in England " in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 1, (Little, Brown and Company, Boston 1907) at 337; W. W. Buckland, *Equity in Roman Law*, (University of London Press, London 1911) at 129; D. J. Ibbetson (ed), "The Roman Law Tradition" in A.D.E Lewis (ed), D.J. Ibbetson (ed), *The Roman Law Tradition*, (Cambridge University Press, Cambridge 1994) at 1; J. Gordley, "Method of the Roman Jurists" (2013) 87 (4) *Tulane Law Review*, 933 at 953 – 954.

[42] R. Zimmermann, *The Law of Obligations: Roman foundations of the Civilian Tradition* (Jura & Co, Cape Town 1990) at xiii; C. Pejovic, "Civil Law and Common Law: Two Different Paths Leading to the Same Goal" (2001) 32 (3) *Victoria University of Wellington Law Review*, 817 at 817.

[43] J. Rose, "Studying the Past: The Nature and Development of Legal History as an Academic Discipline" (2010) 31 (2) *Journal of Legal History*, 101 at 109; F. W. Maitland, *Why the History of English Law is not Written* (C. J. Clay & Sons, London: 1888) at 11 - 12; A. Watson, "The Structure of Blackstone's Commentaries" (1988) 97 (5) *Yale Law Journal*, 795 at 796; J.H. Baker, A*n Introduction to English Legal History,* fourth edition, (Reed Elsevier (UK) Ltd, London, 2002) at 170; D. M. Rabban, "The Historiography of the Common Law" (2003) 28 (4) *Law & Society Inquiry*, 1161 at 1167; C. S. Lobingier, *The Evolution of the Roman Law from before the Twelve Tables to the Corpus Juris Civilis*, second edition, (W.S. Hein & Co, New York 1999) at 8.

[44] H. F. Jolowicz, *Roman Foundations of Modern Law*, (Clarendon Press, Oxford 1957) at 31; S. Randazzo, "Roman Legal Tradition and American Law" (2002) 1 (1) *Roman Legal Tradition*, 123- 133; J. J. Bray, "A Plea for Roman Law" (1983) 9 (1) *Adelaide Law Review*, 50 at 59.

[45] P. Spiller, "Roman Law and New Zealand Law" [2005] *New Zealand Law Review*, 9 at 11; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 355; D. B. Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority*, (Cambridge University Press, Cambridge 2007) at 4; J. G. Glenn, "Some Aspects of Roman Law in the World Today" (1954) 47 (13) *The Classical Weekly*, 196 at 196; see F. F. Stone, "On the Teaching of Law Comparatively" (1948) 22 (1) *Tulane Law Review*, 158 at 164; R. Zimmermann, "Roman and comparative law: The European perspective (Some Remarks Apropos a Recent Controversy)" (1995) 16 (1) *The Journal of Legal History*, 21 at 28; R. H. Helmholz, "Continental Law and Common Law: Historical Strangers or Companions?" (1990) 1990 (6) *Duke Law Journal*, 1207 at 1207.

the civil law sit together as part of a Western legal tradition that has come to dominate jurisdictions around the world.[46] New Zealand is one of the non-civil law jurisdictions that have benefitted from the utilisation of civil law principles in its legal system.[47] Therefore, modern students who avail themselves by studying the civil law principles surrounding testamentary succession will benefit from its reasoning and have a greater understanding of the subject.[48]

The jurists of the *ius commune* were in fact no more successful at defining the will than modern commentators who struggle with settling on an appropriate definition today.[49] Section 8 (1) of the Wills Act 2007 is the starting point for New Zealand law and defines a will as a document made by a natural person disposing property or appointing a testamentary guardian. Dr. Richardson extrapolates s 8 (1) and settles on the authoritative definition that a will is "a document executed in prescribed form evidencing the intentions of the will-maker to take effect on his or her death".[50] Her definition echoes Modestinus's description in Dig. 28.1.1 that "a will is the lawful expression of our wishes concerning what someone wishes to be done after his death".[51] This is an oft-cited starting point to determining the legal nature of a will and captures the essential elements of both the civil law testament and the English

[46] R. Zimmermann, "Roman law and European Culture" [2007] *New Zealand Law Review*, 341 at 350, 369; P. G. Monateri, "Black Gaius: A Quest for the Multicultural Origins of the Western Legal Tradition" (2000) 51 (3) *Hastings Law Journal*, 479 at 482, 485; H. J. Berman, "The Origins of Western Legal Science" (1977) 90 (5) *Harvard Law Review*, 894 at 932; D. Johnston, "The Renewal of the Old" (1997) 56 (1) *Cambridge Law Journal,* 80 at 94; J. G. Fleming, "Changing Functions of Succession Laws" (1977) 26 (2) *American Journal of Comparative Law*, 233 at 238; S. L. Sass, "Medieval Roman law: A Guide to Sources and Literature" (1965) 58 (2) *Law Library Journal,* 130 at 139; A. R. Crittenden, "Roman Law in Modern Life and Education" (1919) 15 (3) *The Classical Journal*, 148 at 148; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 355; J. Bryce, "The Extension of Roman and English Law Throughout the World" in J. Bryce, *Studies in History and Jurisprudence*, (Henry Frowde, London 1901) at 72; H. E. Ytena" Roman Law and its Influence on Western Civilization" (1950) 35 (1) *Cornell Law Quarterly*, 77 at 77; A.D.E Lewis (ed), D.J. Ibbetson (ed), "The Roman Law Tradition*"* in A.D.E Lewis (ed), D.J. Ibbetson (ed), *The Roman Law Tradition*, (Cambridge University Press, Cambridge 1994) at 14; C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 12; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at viii; G. J. McGinley," Roman law and its influence in America" (1928) 3(2) *The Notre Dame lawyer*, 70 at 85; C. H. Kinnane "Roman Law as a Civilising Influence" (1953) 2 (1) *De Paul Law Review*, 28 at 31; F. Wieacker, "The Importance of Roman Law for Western Civilization and Western Legal Thought" (1981) 4 (2) *Boston College International and Comparative Law*, 257 at 258.

[47] P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 23; P. Stein (ed), A.D.E Lewis, *Studies in Justinian's Institutes in memory of J.A.C. Thomas*, Sweet & Maxwell, London 1983 at viii.

[48] P. W. Duff, "Roman Law Today" (1948) 22 (1) *Tulane Law Review*, 2 at 12.

[49] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 398.

[50] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 345 see W Patterson (ed), A Tipping (ed) *The Laws of New Zealand, Will* (LexisNexis 2012, Wellington) at [2].

[51] "*testamentum est voluntatis nostre justa sententia de eo quod quis post mortem suam fieri velit*"

canonical will.[52] Bernard's *summa* on the *Liber Extra*, devoting an extensive title to testamentary succession, defines the will as "a disposition of [the will-maker's] things [and] what they desire to be done after death, [which is] an attestation of their mind".[53] His definition is applicable to the practice of English jurists who imagined a will as an expression concerning the distribution of our property after death.[54] The function of the will as an instrument that 'speaks from death' to convey the will-maker's instructions is traceable throughout its legal history and its purpose has remained unchanged since the classical period.[55] The maxim in Dig. 29.2.39 remains relevant because "so long as an inheritance can be accepted under a will, it is not offered on intestacy".[56]

English jurists followed the *ius commune* to recognise a number of different species of will divisible into solemn civil law testaments, unsolemn canonical wills, written and nuncupative

[52] *Reformatio Legum Ecclesiasticarum,* 27.1; *Attorney General v Jones* (1817) 3 Price 368 at 391; 146 Eng. Rep. 291 at 298; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 3; D. Gofredus, *Institutiones Iustiniani*, (Apud Iuntas, Venice 1621) at 216 gl; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 525; Hostiensis, *Summa Aurea*, Liber 3, (Venice 1574) at 1032; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 213; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 15- 16; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 276; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 117; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 577; A. N. Localizado, *Modern Probate of Wills, Containing an Analysis of the Modern Law of Probate in England and America, with Numerous References to the English and American Cases, and Copious Extracts from the Leading Cases*, (Charles C Little and James Brown, Boston 1846) at 1; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 3; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 56; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 9; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 499.

[53] Bernard's *Summa Decretalium* 3.22.1 "Testamentum est dispositio, qua quis disponit, quid de rebus suis post mortem suam fieri velit, et dicitur testamentum quasi testatio mentis i. e. manifestatio voluntatis." see H. Consett, *The Practice of the Spiritual or Ecclesiastical Courts*, (Printed for W. Battersby, London 1700) at 12; Goffredus de Trano*, Summa Super Titulis Decretalium* (Neudruck Der Ausgabe Lyon, 1519) at 143

[54] *Reformatio Legum Ecclesiasticarum*, 27.1.

[55] Gaius. 2.103; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 156; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 256; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 577; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 1; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 1; Bracton, G. E. Woodbine (ed), S. E. Thorne (trans), *De legibus et consuetudinibus Angliae*, volume 2, (Harvard University Press, Cambridge, 1968 – 1977) at 47.

[56] Dig. 50.17.89; Dig. 50.17.201 see *Public Trustee v Sheath* [1918] NZLR 129 at 147.

wills, and the distinction between privileged and unprivileged instruments.[57] The inclusion of the civil law testament was ultimately unimportant to the development of English testamentary succession but the distinction between the instruments was an important feature of the will's evolution. The civil law was never far from the minds of English jurists shaping the law of testamentary succession. Section 8 (1) of the Wills Act 2007 places a corporeal limitation confining the legal definition of a will to a document that emphasises its physical form over the metaphysical expression of the will-maker's wishes.[58] However, the civil law acknowledged a variety of methods, preferring to emphasise the manifestation of intent rather than precise form, which allowed the term *ultimis voluntatibus* to extend to a number of legal arrangements despite its practical confinement to wills.[59] This is a more accurate manner of conceptualising a will than the confined definition within the Act. It forms part of the requirement that a will-maker must possess *animus testandi* for the will-maker's testamentary intention to manifest.[60] Every jurisdiction agrees that a will is a product of a sound and disposing mind or otherwise the document it is contained in can have no effect.[61]

A second fundamental characteristic of testamentary succession is an appointment of an executor to carry out the deceased's will. Their essential function prompted the jurist

[57] Hostiensis, *Summa Aurea*, Liber 3, (Venice 1574) at 1032; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 47; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 273; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 200; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 527; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 399; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 51; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 497.

[58] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 345.

[59] Bernard's *Summa Decretalium* 3.22.1; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 6; J. Perkins, M. Walbanck (trans), *A profitable book of Mr. John Perkins*, (Printed for Matthew Walbanck, London 1657) at 178; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 69; R. Zimmermann, *The Law of Obligations: Roman foundations of the Civilian Tradition* (Jura & Co, Cape Town 1990) at 598; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 51.

[60] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 368.

[61] B. Beinart, "Some Aspects of Privileged Wills" [1959] *Acta Juridica*, 200 at 200; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 4; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 84; C. J. Reid, P*ower over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon law*, (Wm B. Eerdmans Publishing Co, Grand Rapids 2004) at 154.

Godolphin to add "with the appointment of an executor" to Modestinus's definition.[62] The inspiration for his addition reflects the fact that an appointment of a universal successor was necessary to perfect a testament despite the executor's inclusion sitting uncomfortably with their modern role as a personal representative.[63] Nonetheless, English jurists reconciled the seemingly opposing concepts and introduced civil law principles despite the purpose of the English will to leave legacies rather than institute an heir.[64] The final quality of testamentary succession is that a properly executed will is a fluid instrument that allows the will-maker to revoke or alter it at their discretion.[65] Its ambulatory character is an essential feature of the will and English jurists introduced civil law principles to permit revocation to occur before its consummation according to the tenets of testamentary freedom.[66] Hostiensis notes this ambulatory character meant a will could not take effect until after death.[67] These additional elements are crucial principles that jurists imported from the *ius commune* to form part of English law. Jarman's definition of a will includes the additional element that "[a will] is

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[62] J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 3.

[63] Dig. 28.2.30; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 7; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 234; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 2; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston1909) at 747.

[64] *Hurst v Beach* (1820) 5 Madd 351 at 360; 56 Eng. Rep. 929 at 932; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) (2) *The Jurist*, 632 at 677; F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at 43; G. J. McGinley," Roman law and its influence in America" (1928) 3(2) *The Notre Dame Lawyer*, 70 at 78; P. Spiller*, A Manual of Roman Law*, (Butterworths, Durban 1986) at 150.

[65] *Marston v Roe* (1838) 8 AD. & E. 14 at 32, 50; 112 Eng. Rep. 742 at 749, 755; N. Richardson, "Wills made in Contemplation of Marriage" (2009) 6 (7) *New Zealand Family Law Journal*, 215 at 336- 337; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 8, 471; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 130; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 237; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 154; T. M. Wentworth, *The Office and Duty of Executors*, (Printed by the Assigns of Richard and Edward Atkins, London 1589) at 9; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 9; W. Patterson (ed), A. Tipping (ed) *The Laws of New Zealand, Will* (LexisNexis, Wellington 2012) at [76].

[66] Hostiensis, *Summa Aurea*, Liber 3, (Venice 1574) at 1039; Goffredus de Trano*, Summa Super Titulis Decretalium* (Neudruck Der Ausgabe Lyon, 1519) at 143; *Butler v Baker's Case* 3 Co. Rep. 36a; 76 Eng. Rep. 684 at 709; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 389, 565; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 238; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 128; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 4; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 930; J. Ritchie, "What is a Will?" (1963) 49 (4) *Virginia Law Review*, 759 at 759; A. Iwobi, *Essential Succession*, second edition, (Cavendish Publishing Limited, London 2001) at 1.

[67] C. J. Reid, *Power over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon law*, (Wm B. Eerdmans Publishing Co, Grand Rapids 2004) at 164.

ambulatory and revocable during [the will-makers] lifetime".[68] Therefore, the statement in *Moore v Moore* indicates that any scholar attempting to gain a full appreciation of the modern will requires an understanding of the civil law principles embedded within the Wills Act 2007 and New Zealand's testamentary jurisprudence.

[68] A. Iwobi, *Essential Succession*, second edition, (Cavendish Publishing Limited, London 2001) at 1.

3. The First Stage of the Civil Law

Unfamiliarity with the civil law in New Zealand requires any treatise dealing with the subject to begin with a brief historical examination of its sources and the general nature of Roman succession. The *Corpus Iuris Civilis* or 'body of the civil law' is the collective name given to the *Code*, *Digest*, *Institutes*, and *Novels*, which are its principal sources.[69] The civil law itself represents a millennium of Roman legal development, and Rome's legacy to the modern world.[70] It is the product of Emperor Justinian's vision at the beginning of his reign (527 – 565 A.D.) to undertake a grand project to revitalise the Empire.[71] By 528, Justinian had assembled a team of ten jurists and instructed them to arrange, select, amend, abridge, and remove any superfluities they found within the existing imperial constitutions and reduce them into a single code.[72] This process of law reform is not unique to his reign and reflects a

[69] C. Pejovic, "Civil Law and Common Law: Two Different Paths Leading to the Same Goal" (2001) 32 (3) *Victoria University of Wellington Law Review*, 817 at 818; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 170; G. Carleton Lee, *Historical Jurisprudence: An Introduction to the Systematic Study of the Development of Law*, (The Macmillan Company, London 1900) at 306; C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 116; P. Stein, "Roman Law" in M. Rubin (ed), W. Simons (ed), *The Cambridge History of Christianity: Christianity in Western Europe c. 1100–c. 1500*, volume 4, (Cambridge University Press, Cambridge 2009) at 43.

[70] Cod. 1.17.1.5; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 4, 319; C. S. Lobingier, *The Evolution of the Roman Law from before the Twelve Tables to the Corpus Juris Civilis*, second edition, (W.S. Hein & Co, New York 1999) at 318; H. E. Smith, *Studies in Juridical Law*, (T. H. Flood and Company, Chicago 1902) at 224; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 114; P. Stein, "Justinian's Compilation: Classical Legacy and Legal Source" (1993) 8 (1) *Tulane European and civil law forum*, 1 at 1; S. Alward, "The Triumphs of the Roman Civil Law" (1918) 38 (1) *Canadian Law Times*, 12 at 12; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern* Law, (The Lawyers Cooperative Publishing Co, New York 1938) at 155; C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 115; P. Stein, "Roman Law" in M. Rubin (ed), W. Simons (ed), *The Cambridge History of Christianity: Christianity in Western Europe c. 1100–c. 1500*, volume 4, (Cambridge University Press, Cambridge 2009) at 42; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 53; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999) at 35; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 23; W. A. Hunter, *Introduction to Roman La*w, fourth edition, (William Maxwell & Son, London 1887) at 15; S. L. Sass, "Medieval Roman law: A Guide to Sources and Literature" (1965) 58 (2) *Law Library Journal* 130 at 130; F. W. Maitland, Francis C. Montague, J. F. Colby (ed), *A sketch of English Legal History*, (G.P. Putnam's Sons, New York 1915) at 4.

[71] G. Carleton Lee, Historical Jurisprudence: *An Introduction to the Systematic Study of the Development of Law*, (The Macmillan Company, London 1900) at 291; H. E. Smith, *Studies in Juridical Law*, (T. H. Flood and Company, Chicago 1902) at 224; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 23, 305; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 56; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 377; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999) at 3.

[72] Cod., pref. 1; G. Carleton Lee, H*istorical Jurisprudence: An Introduction to the Systematic Study of the Development of Law*, (The Macmillan Company, London 1900) at 291; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 159; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 57; P. Stein, *Roman*

practice of codification during the post-classical era, evident in the *Codex Theodosianus,* to collate and promulgate the law into a single instrument.[73] Their efforts produced a first edition of the *Code* in 529 before the enactment of a second edition in 534 to accommodate subsequent changes introduced by the *Digest, Institutes*, and later constitutions.[74] The final edition consists of twelve books arranged into titles containing four thousand constitutions enacted by various Emperors dating back to Hadrian's reign (117- 138 A.D.).[75]

Law in European History, (Cambridge University Press, Cambridge 1999) at 33; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 57; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 1, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at xvi; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 22.

[73] G. Carleton Lee, *Historical Jurisprudence: An Introduction to the Systematic Study of the Development of Law*, (The Macmillan Company, London 1900) at 291; C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 107; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 8; S. Alward, "The Triumphs of the Roman Civil Law" (1918) 38 (1) *Canadian Law Times*, 12 at 19; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 156; P. Stein, "Justinian's Compilation: Classical Legacy and Legal Source" (1993) 8 (1) *Tulane European and Civil Law Forum*, 1 at 1; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 57; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 19, 22; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 97; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 16; D. Liebs, "Roman Law*"* in A. Cameron (ed), B. Ward- Perkins (ed), M. Whitby (ed), *The Cambridge Ancient History: Late Antiquity: Empire and Successors, A. D. 425 – 600*, volume 14, (Cambridge University Press, Cambridge 2000) at 258; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 52.

[74] Cod, pref. 3; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 169; G. Carleton Lee, *Historical Jurisprudence: An Introduction to the Systematic Study of the Development of Law*, (The Macmillan Company, London 1900) at 292, 293; C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 117; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 13, 315; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 378, 385; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 1, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at xvi; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 19, 23.

[75] G. Carleton Lee, *Historical Jurisprudence: An Introduction to the Systematic Study of the Development of Law*, (The Macmillan Company, London 1900) at 294; J. Hadley, *Introduction to Roman Law in Twelve Academical Lecture*s, (D. Appleton and Company, New York 1873) at 13; H. E. Smith, St*udies in Juridical Law*, (T. H. Flood and Company, Chicago 1902) at 225; P. Stein, "Justinian's Compilation: Classical Legacy and Legal Source" (1993) 8 (1) *Tulane European and Civil Law Forum*, 1 at 1; J. A. Brundage, T*he Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 58; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 377; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 19, 23; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and comparative Jurisprudence*, (Kegan Paul, Trench & Co, London 1883) at 98; D. Liebs, "Roman Law*"* in A. Cameron (ed), B. Ward- Perkins (ed), M. Whitby (ed), *The Cambridge Ancient History: Late Antiquity: Empire and Successors, A. D. 425 – 600*, volume 14, (Cambridge University Press, Cambridge 2000) at 247; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at ix.

In 530 A.D., Justinian appointed Tribonian to lead a team of sixteen to collect the juristic works of the most eminent Roman jurists and arrange them into a single grand collection known as the *Digest*.[76] The *Digest* was the first compilation of its kind in Roman legal history and Justinian charged its compilers with preserving the best of classical law and juristic reasoning.[77] Justinian granted them the authority to select the most authoritative writings and to supplement, amend, repeal, correct, reconcile, avoid contradictions, and use any other means necessary to clarify or perfect the law.[78] In just three years, Tribonian's team had completed the monumental task of abridging three million lines from thirty-nine different jurists into 150,000 passages, and arranging them into fifty books.[79] However, this discretion

[76] Cod. 1.17.1.2; Cod. 1.17.1.6; Cod. 1.17.2.9; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 160; G. Carleton Lee, *Historical Jurisprudence: An Introduction to the Systematic Study of the Development of Law*, (The Macmillan Company, London 1900) at 295; C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 118; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) 118; H. E. Smith, *Studies in Juridical Law*, (T. H. Flood and Company, Chicago 1902) at 226; P. Stein, "Justinian's Compilation: Classical Legacy and Legal Source" (1993) 8 (1) *Tulane European and Civil Law Forum*, 1 at 1; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 378, 379; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999) at 33; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 1, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at xvi; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 18, 23; D. Liebs, "Roman Law" in A. Cameron (ed), B. Ward- Perkins (ed), M. Whitby (ed), *The Cambridge Ancient History: Late Antiquity: Empire and Successors, A. D. 425 – 600*, volume 14, (Cambridge University Press, Cambridge 2000) at 250; Q. Breen, "Justinian's Corpus Juris Civilis" (1944) 23 (4) *Oregon Law Review*, 219 at 239; W. W. Buckland, "Interpolations in the Digest: A Criticism of Criticism" (1941) 54 (8) *Harvard Law Review* 1273 at 1278.

[77] J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 10; P. Stein, "Justinian's Compilation: Classical Legacy and Legal Source" (1993) 8 (1) *Tulane European and Civil Law Forum*, 1 at 1.

[78] Dig. pref. 2; Cod. 1.17.1.1; Cod. 1.17.1.7; Cod. 1.17.1.9; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 160; C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 119; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 10; H. E. Smith, S*tudies in Juridical Law*, (T. H. Flood and Company, Chicago 1902) at 226; P. Stein, "Justinian's Compilation: Classical Legacy and Legal Source" (1993) 8 (1) *Tulane European and Civil Law Forum*, 1 at 1; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 379; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999) at 34; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprude*nce, (Kegan Paul, Trench & Co, London 1883) at 99.

[79] Cod. 1.17.2.1; Cod. 1.17.2.12; G. Carleton Lee, *Historical Jurisprudence: An Introduction to the Systematic Study of the Development of Law*, (The Macmillan Company, London 1900) at 296; P. Stein, "Roman Law" in M. Rubin (ed), W. Simons (ed), *The Cambridge History of Christianity: Christianity in Western Europe c. 1100–c. 1500*, volume 4, (Cambridge University Press, Cambridge 2009) at 42; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 378, 382; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at16; Q. Breen, "Justinian's Corpus Juris Civilis" (1944) 23 (4) *Oregon Law Review*, 219 at 240; C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 118; H. E. Smith, *Studies in Juridical Law*, (T. H. Flood and Company, Chicago 1902) at 226; S. Alward, "The Triumphs of the Roman Civil Law" (1918) 38 (1) *Canadian Law Times*, 12 at 20; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 58; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 58; P. Stein, *Roman Law in*

resulted in the *Digest* being an unfaithful abridgement of juristic writings because it possessed a number of interpolations, which Tribonian's team attributed to a particular jurist despite not reflecting the actual state of Roman law as it had existed.[80] These interpolations present a problem to modern analysts examining the classical nature of its principles despite their necessity to achieve Justinian's aim.[81] The Emperor purportedly settled all controversies surrounding the ancient jurists and subsequently banned all further citation and commentary of their work.[82] Scholars continue to regard the *Digest* as the most valuable part of the civil law and it is the foremost source for its principles.[83]

Justinian recognised the *Digest* and its fifty books presented such a complex picture of the law that it was impractical for early study.[84] He addressed this problem by publishing the

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European History, (Cambridge University Press, Cambridge 1999) at 34; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 24.

[80] C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 119; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 61; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999) at 34; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 57; W. W. Buckland, "Interpolations in the Digest" (1924) 33 (4) *Yale Law Journal,* 343 at 343; D. Johnston, "Justinian's Digest: The Interpretation of Interpolation" (1989) 9 (2) *Oxford Journal of Legal Studies*, 149 at 150 see Cod. 1.17.2.14.

[81] P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999) at 34; W. W. Buckland, "Interpolations in the Digest" (1924) 33 (4) *Yale Law Journal*, 343 at 345; D. Johnston, "Justinian's Digest: The Interpretation of Interpolation" (1989) 9 (2) *Oxford Journal of Legal Studies* 149 at 151 – 152; Q. Breen, "Justinian's Corpus Juris Civilis" (1944) 23 (4) *Oregon Law Review*, 219 at 238; W. W. Buckland, "Interpolations in the Digest: A Criticism of Criticism" (1941) 54 (8) *Harvard Law Review* 1273 at 1273, 1274

[82] Cod. 1.17.1.12; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern* Law, (The Lawyers Cooperative Publishing Co, New York 1938) at 163; H. E. Smith, *Studies in Juridical Law*, (T. H. Flood and Company, Chicago 1902) at 226; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 57; T. Mackenzie, S*tudies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 25; Q. Breen, "Justinian's Corpus Juris Civilis" (1944) 23 (4) *Oregon Law Review*, 219 at 240.

[83] J. Hadley, Introduction to Roman Law in Twelve Academical Lectures, (D. Appleton and Company, New York 1873) at 11, 309; H. E. Smith, *Studies in Juridical Law*, (T. H. Flood and Company, Chicago 1902) at 227; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 25.

[84] G. Carleton Lee, *Historical Jurisprudence: An Introduction to the Systematic Study of the Development of Law*, (The Macmillan Company, London 1900) at 298; P. Stein, "Roman Law" in M. Rubin (ed), W. Simons (ed), *The Cambridge History of Christianity: Christianity in Western Europe c. 1100–c. 1500*, volume 4, (Cambridge University Press, Cambridge 2009) at 43; J. Hadley, I*ntroduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 16, 307; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) 121; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 380; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999) at 35; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and comparative Jurisprudence*, (Kegan Paul, Trench & Co, London 1883) at 97; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 60; S. L. Sass, "Medieval Roman law: A Guide to Sources and Literature" (1965) 58 (2) *Law Library Journal* 130 at 131.

Institutes alongside the *Digest* in 533 to act as a student manual of the civil law.[85] The *Institutes* hold the distinction of being the first and last textbook to have legislative force.[86] It consists of four books and ninety-nine titles, borrowing its arrangement and much of the content from Gaius *Institutes*, making it the best introductory text to the civil law.[87] The Emperor held that law students must begin with the texts of the *Institutes* for the first year in preparation for their study of the *Digest* in the following three years, before concluding with the *Code* on their fifth.[88] Justinian intended the *Institutes*, *Digest*, and *Code* to bring the law up to date.[89] Nonetheless, a final collection published in 564 known as the *Novels*, consisting of 168 constitutions enacted during Justinian's lifetime, stand as the final source of the civil law.[90] A strict interpretation of the civil law grants the *Novels* the highest authority followed

[85] Inst. pref; Cod. 1.17.1.11; C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 121; H. E. Smith, *Studies in Juridical Law*, (T. H. Flood and Company, Chicago 1902) at 225; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 58; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 381; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 62; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 26; Q. Breen, "Justinian's Corpus Juris Civilis" (1944) 23 (4) *Oregon Law Review*, 219 at 248.

[86] Inst. pref; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern* Law, (The Lawyers Cooperative Publishing Co, New York 1938) at 167; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999) at 35; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 61; Q. Breen, "Justinian's Corpus Juris Civilis" (1944) 23 (4) *Oregon Law Review*, 219 at 241.

[87] Inst. pref; C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 121; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 2, 307; P. Stein, "Justinian's Compilation: Classical Legacy and Legal Source" (1993) 8 (1) *Tulane European and Civil Law Forum*, 1 at 1; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 63; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 48; G. Carleton Lee, *Historical Jurisprudence: An Introduction to the Systematic Study of the Development of Law*, (The Macmillan Company, London 1900) at 300; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Court*s, (University Press, Chicago 2008) at 58; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at16; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence*, (Kegan Paul, Trench & Co, London 1883) at 30; P. Van Warmelo "The Institutes of Justinian as a Student's Manual" in P. Stein (ed), A.D.E Lewis (ed), *Studies in Justinian's Institutes in memory of J.A.C. Thomas*, (Sweet & Maxwell, London 1983) at 179.

[88] Inst. pref; Dig. pref. 1; C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 140; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 18; D. Liebs, "Roman Law" in A. Cameron (ed), B. Ward- Perkins (ed), M. Whitby (ed), *The Cambridge Ancient History: Late Antiquity: Empire and Successors, A. D. 425 – 600*, volume 14, (Cambridge University Press, Cambridge 2000) at 254; C. P. Sherman, "The Study of Law in Roman Law Schools" (1908) 17 (7) *Yale Law Journal*, 499 at 507.

[89] Cod. 1.17.2.12; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 18; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 121; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 399.

[90] W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 170- 171; G. Carleton Lee, *Historical Jurisprudence: An Introduction to the Systematic Study of the Development of Law*, (The Macmillan Company, London 1900) at 302; C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 121; P. Stein,

by the *Digest* and the *Institutes*, and the *Code* the least.[91] However, the practice of English civil lawyers, or civilians, reveals an equally authoritative treatment of their principles.

The *Corpus Iuris Civilis* devotes a large body of principles to the subject of succession.[92] The *Digest* alone devotes a significant eleven books - twenty-eight to thirty-nine - and a total of a quarter of its contents to succession; and the subject spans books two and three of the *Institutes*.[93] Justinian aimed to codify the best elements of the Roman law and preserve its integrity for future generations.[94] He did not outright succeed because his masterpiece contained a number of repetitions, contradictions, obsolete rules, and ambiguities.[95] The

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"Roman Law" in M. Rubin (ed), W. Simons (ed), *The Cambridge History of Christianity: Christianity in Western Europe c. 1100–c. 1500*, volume 4, (Cambridge University Press, Cambridge 2009) at 43; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 7; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 58; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 63; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 386; D. Liebs, "Roman Law*"* in A. Cameron (ed), B. Ward- Perkins (ed), M. Whitby (ed), *The Cambridge Ancient History: Late Antiquity: Empire and Successors, A. D. 425 – 600*, volume 14, (Cambridge University Press, Cambridge 2000) at 243; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotlan*d, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 27; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and comparative Jurisprudenc*e, (Kegan Paul, Trench & Co, London 1883) at 101; at 252; N. Jansen, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 29; Q. Breen, "Justinian's Corpus Juris Civilis" (1944) 23 (4) *Oregon Law Review*, 219 at 224; H. E. Smith, *Studies in Juridical Law*, (T. H. Flood and Company, Chicago 1902) at 228; S. Alward, "The Triumphs of the Roman Civil Law" (1918) 38 (1) *Canadian Law Times*, 12 at 20; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 68; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999) at 35; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at18.

[91] T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 28.

[92]C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 121; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 401; W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 34.

[93] B. W. Frier, *The Rise of the Roman Jurist: studies in Cicero's pro-caecina*, (Princeton University Press, Princeton 1985) at 38; B. W. Frier, T. A. J. Mc Ginn, *A Casebook on Roman Family Law*, (Oxford University Press, Oxford 2004) at 321; W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 16.

[94] Cod. 1.17.2.12; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and comparative Jurisprudence*, (Kegan Paul, Trench & Co, London 1883) at 10, 54; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 23, 58; G. Carleton Lee, *Historical Jurisprudence: An Introduction to the Systematic Study of the Development of Law*, (The Macmillan Company, London 1900) at 218; C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 115; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 20; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 66; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 400; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999) at 35; Q. Breen, "Justinian's Corpus Juris Civilis" (1944) 23 (4) *Oregon Law Review*, 219 at 242.

[95] J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 20; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at

Digest, in particular, is criticisable for its complexity and unwieldy arrangement that can confuse modern users.[96] Nonetheless, the civil law itself follows the classical tripartite division of law into the law of persons, things, and actions.[97] The law of things divides succession principally into testate and intestate inheritance.[98] The subject also occupied a prominent position in Roman legal history that dates back to the Twelve Tables, the founding instrument of Roman law, which first established the unique notion of *patria potestas* or paternal power that lies at the heart of civil law succession.[99] This table empowered the head of the household or *pater familias* to exercise control over all the people and property in his *familia* until his death.[100] The death of a *paterfamilias* was the main form of wealth

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65; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 383; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and comparative Jurisprudence*, (Kegan Paul, Trench & Co, London 1883) at 9; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 56 see Cod. 1.17.2.15;but see Cod. 1.17.2.13.

[96] C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 120; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 61; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 384; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999) at 34; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and comparative Jurisprudence*, (Kegan Paul, Trench & Co, London 1883) at 8; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 61; D. Johnston "The Jurists" in C. Rowe (ed), M. Schofield (ed), S. Harrison (ed), M. Lee (ed), *The Cambridge History of Political Thought: The Cambridge History of Greek and Roman Political Thought*, volume 1, (Cambridge University Press, Cambridge 2009) at 617; R. P. Saller, *Patriarchy, Property and Death in the Roman Family* (Cambridge University Press, Cambridge 1994) at 157; A. A. Schiller, "Sources and Influences of the Roman Law, III-VI Centuries A.D." (1933) 21 (2) *Georgetown Law Journal*, 147 at 147; H. F. Jolowicz, *Roman Foundations of Modern Law*, (Clarendon Press, Oxford 1957) at 61.

[97] Gaius.1.2.8; P. Stein, "Roman Law" in M. Rubin (ed), W. Simons (ed), T*he Cambridge History of Christianity: Christianity in Western Europe c. 1100–c. 1500*, volume 4, (Cambridge University Press, Cambridge 2009) at 43; C. P. Sherman, "The Study of Law in Roman Law Schools" (1908) 17 (7) *Yale Law Journal*, 499 at 500; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 91; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 48.

[98] P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 142.

[99] Twelve Tables, Table 4.1; Dig. 1.2.5; Inst. 1.9.2; Isidore *Enty*. 5.1; S. Alward, "The Triumphs of the Roman Civil Law" (1918) 38 (1) *Canadian Law Times*, 12 at 12; D. Johnston, *Roman Law in Context*, (Cambridge University Press, Cambridge 2004) at 2; L. S. Cushing, *An Introduction to the Study of the Roman Law*, (Little, Brown, and Company, Boston 1854) at 33; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 96; G. Carleton Lee, *Historical Jurisprudence: An Introduction to the Systematic Study of the Development of Law*, (The Macmillan Company, London 1900) at 306; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 55; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and comparative Jurisprudence*, (Kegan Paul, Trench & Co, London 1883) at 12; H. E. Smith, *Studies in Juridical Law*, (T. H. Flood and Company, Chicago 1902) at 217; W. W. Howe, S*tudies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 9- 10; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 31; H.F. Jolowicz, B. Nicholas, *Historical introduction to the study of Roman law*, third edition, (Cambridge University Press, London 1972) at 114; M. C. Alexander, "Law in the Roman Republic" in N. Rosenstein (ed), R. Morstein-Marx (ed), *A Companion to the Roman Republic* (Wiley- Blackwell Publishing, Oxford 2010) at 238.

[100] Cod. 8.46.2; Cod. 8.46.3; Inst. 1.9.3; Dig. 50.16.195.2; Dig. 50.16.195.3; Dig. 50.16.196; J.F. Gardner, *Family and Familia in Roman Law and Life*, (Clarendon Press, Oxford 1998), at 1-2; R.P Saller, "*Pater*

redistribution in Roman society because the civil law only allowed a person *sui generis*, or independent from the *potestas* of another, to own property.[101] Romans did not expect children to remain in *potestas* for long and high mortality rates suggest many people became *sui generis* by their fourteenth year and the majority by their thirtieth.[102] Females marrying *cum manu* entered the *potestas* of their husbands; although later marriages were frequently *sine manu* meaning she remained under the *potestas* of her father until he died.[103] This feature of family law played a crucial role in the development of Roman succession but does not have a place in modern New Zealand.

New Zealand readers must note that the Roman civil law, or the *ius civile*, never produced law reports like those that dominate the common law, and it excluded the judiciary from the law-making process.[104] The advice of jurists, general principles of law, authoritative commentary, and the weight of the evidence presented guided the decision of civil law courts; and the absence of authority given to case law formed part of later civilian practice in England.[105] It is notable that the presence and use of ecclesiastical law reports suggests a

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Familias, *Mater Familias*, and the Gendered Semantics of the Roman Household" (1999) 94 (2) *Classical Philology*, 182 at 184.

[101] Inst. 1.12; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 205; B.W. Frier, *The Rise of the Roman Jurist: Studies in Cicero's pro-caecina*, (Princeton University Press, Princeton 1985) at 37; B. W. Frier, T. A. J. Mc Ginn, *A Casebook on Roman Family Law*, (Oxford University Press, Oxford 2004) at 321; J. F. Gardner, *Family and Familia in Roman Law and Life*, (Clarendon Press, Oxford 1998), at 2; L. Estaven "Roman Law in Plautus" (1966) 18 (5) *Stanford Law Review*, 873 at 882 see 1.12.6; E. Champlin, *Final Judgments, Duty and Emotion in Roman Wills, 200 BC – A.D. 250*, (University of California Press, Berkeley and Los Angeles, 1991) at 6; but see: Cod. 12.36.2; Dig. 49.17.9; Dig. 49.17.10; Cod. 6.22.12; Dig. 28.3.6.13.

[102] E. Champlin, *Final Judgments, Duty and Emotion in Roman Wills, 200 BC – A.D. 250*, (University of California Press, Berkeley and Los Angeles, 1991) at 63, 105.

[103] Inst. 1.9.3; S. Treggiari, *Roman Marriage* (Oxford University Press, Oxford 1991) at 442; R.P Saller, "*Pater Familias*, *Mater Familias*, and the Gendered Semantics of the Roman Household" (1999) 94 (2) *Classical Philology*, 182 at 184; A. T. Bierkan, C. P. Sherman, E. Stocquart, Jr, "Marriage in Roman Law" (1907) 16 (5) *The Yale Law Journal*, 303 at 311.

[104] Dig. 1.1.7; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 59; Q. Breen, "Justinian's Corpus Juris Civilis" (1944) 23 (4) *Oregon Law Review*, 219 at 219; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 6 -7; E. Metzger, "Roman judges, Case Law, and the Principles of Procedure" (2004) 22 (2) *Law and History Review*, 243 at 252; F. Pollock, *A First Book of Jurisprudence for Students of the Common Law,* (Macmillan and Co, London 1896) at 275; M. C. Alexander, "Law in the Roman Republic" in N. Rosenstein (ed), R. Morstein-Marx (ed), *A Companion to the Roman Republic* (Wiley- Blackwell Publishing, Oxford 2010) at 246; A. Watson "Roman Law and English Law: Two Patterns of legal Development" (1990) 36 (2) *Loyola Law Review*, 247 at 258; J. Gordley, "Method of the Roman Jurists" (2013) 87 (4) *Tulane Law Review*, 933 at 940, 949; C. Pejovic, "Civil Law and Common Law: Two Different Paths Leading to the Same Goal" (2001) 32 (3) *Victoria University of Wellington Law Review*, 817 at 820.

[105] Inst. 1.2. 8; A. Watson, *The Spirit of Roman Law*, (University of Georgia Press, Athens 1995) at 60; E. Metzger, "Roman judges, Case Law, and the Principles of Procedure" (2004) 22 (2) *Law and History Review*, 243 at 252; T. Weir, "Contracts in Rome and England" (1992) 66 (6) *Tulane Law Review*, 1615 at 1617; W. W. Howe, S*tudies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and

body of precedent had begun to crystallise before their abolition. Nonetheless, jurists enjoyed an enviable freedom to interpret the validity of legal acts without political influence, which allowed them to develop the law as a self-contained body of principles independent from the legislature or judiciary.[106] The 'cases' presented in their work are likely a combination of real and fictitious situations used to illustrate ideal legal principles.[107] These 'cases' are problematic for measuring the frequency of litigation; but they do reveal jurists were concerned with issues similar to those brought before modern courts.[108] A second branch of law, known as the *ius honorarium*, arose from the Praetor's use of magisterial discretion to judge matters according to conscience, and dispense with the rigours of the *ius civile*, including allowing actions for possession of an estate, in a manner seemingly anticipatory of English notions of equity and Chancery jurisdiction.[109]

Company, Boston 1896) at 12; M. C. Alexander, "Law in the Roman Republic" in N. Rosenstein (ed), R. Morstein-Marx (ed), *A Companion to the Roman Republic* (Wiley- Blackwell Publishing, Oxford 2010) at 246; A. Gauthier, *Roman Law and its Contribution to the Development of the Canon Law*, second edition, (Faculty of Canon Law Saint Paul University, Ottawa 1996) at 19.

[106] A. Watson, *Roman private law around 200 BC*, (Edinburgh University Press, Edinburgh 1971) at 38; B. W. Frier, *The Rise of the Roman Jurist: studies in Cicero's pro-caecina*, (Princeton University Press, Princeton 1985) at 195; A. Watson "Roman Law and English Law: Two Patterns of legal Development" (1990) 36 (2) *Loyola Law Review*, 247 at 257; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 66- 69; M. C. Alexander, "Law in the Roman Republic" in N. Rosenstein (ed), R. Morstein-Marx (ed), *A Companion to the Roman Republic* (Wiley- Blackwell Publishing, Oxford 2010) at 246.

[107] J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 66; D. Johnston, *Roman Law in Context*, (Cambridge University Press, Cambridge 2004) at 24; R. P. Saller, *Patriarchy, Property, and Death in the Roman Family* (Cambridge University Press, Cambridge 1994) at 156; M. C. Alexander, "Law in the Roman Republic" in N. Rosenstein (ed), R. Morstein-Marx (ed), *A Companion to the Roman Republic* (Wiley- Blackwell Publishing, Oxford 2010) at 248; A. Watson "Roman Law and English Law: Two Patterns of legal Development" (1990) 36 (2) *Loyola Law Review*, 247 at 258

[108] D. Johnston, *Roman Law in Context*, (Cambridge University Press, Cambridge 2004) at 25, 27; T. Weir, "Contracts in Rome and England", (1992) 66 (6) *Tulane Law Review*, 1615 at 1617; J. Gordley, "Method of the Roman Jurists" (2013) 87 (4) *Tulane Law Review*, 933 at 940; see Dig. 3.5.29.

[109] Dig. 1.1.7.1; Nov. 13.1; Inst. 1.2. 7; Dig. 5.5.1; Gaius. 1.1.6; *Re Jurisdiction of Court of Chancery Vindicated* (1678) 1 Chan. Rep 1 at 4 - 5; 21 Eng. Rep. 576 at 577; *Wright v Netherwood*; *Lug v Lug*, 2 Salkeld 593; 91 Eng. Rep. 497 at 500; D. Johnston, *Roman Law in Context*, (Cambridge University Press, Cambridge 2004) at 4; W. W. Howe, S*tudies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 10 - 11; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 107; S. Alward, "The Triumphs of the Roman Civil Law" (1918) 38 (1) *Canadian Law Times*, 12 at 12, 17; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 1, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at xv; P. S. Barnell, "Emperors, Jurists and Kings: Law and Custom in the Late Roman and Early Medieval West" (2000) (168) *Past and Present*, 6 at 12; M. C. Alexander, "Law in the Roman Republic" in N. Rosenstein (ed), R. Morstein-Marx (ed), *A Companion to the Roman Republic* (Wiley- Blackwell Publishing, Oxford 2010) at 241; J. Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, ninth edition, volume 1 (Boston: C.C. Little and J. Brown, Boston 1866) at 41; W. W. Buckland, "Praetor and Chancellor" (1939) 13 (2) *Tulane Law Review*, 163 at 164; B. W. Frier, *The Rise of the Roman Jurist: Studies in Cicero's pro-caecina*, (Princeton University Press, Princeton 1985) at 44; S. S. Symons (ed), *A Treatise on Equity Jurisprudence as Administered in the United States of America, adapted for all the states and to the union of Legal and Equitable Remedy is under the Reformed Procedure, by John Norton Pomeroy*, fifth edition, volume 1, (Bancroft- Whitney Company, San Francisco 1941) at 3, 7 – 9; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed

The fact Roman society fostered a deep concern with succession to property prompted jurists to broach the subject of testaments with passion.[110] The importance of reciprocity in Roman society, coupled with high mortality rates, resulted in a demand for a flexible method of benefitting the Emperor, patrons, clients, friends, freedmen, slaves, and others not provided for under intestacy.[111] Watson suggests the social need to ensure a desirable succession resulted in the topic occupying "a disproportionately large part of the legal sources [and litigation]".[112] The attention devoted to testamentary succession prompted Maine to assert that Romans considered dying intestate shameful and had a "horror of intestacy".[113] Roman sources suggest that witnessing a testament was a daily occurrence and a regular social ritual.[114] This insight provides a stark contrast to the irregular social participation of will making in modern New Zealand. Therefore, Roman jurists anticipated legal issues arising after death much more readily than modern statutes indicating that New Zealand lawmakers could benefit from reference to the extant principles contained in their writings.[115] However, issues concerning succession existed long before Roman legal history and it is unclear to the

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for the Company of Stationers, London 1607) at 11; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 5; J. Parkes, *A History of the Court of Chancery: with practical Remarks on the Recent Commission, Report, and Evidence, and on the means of Improving the Administration of Justice in the English Courts of Equity* (Longman, Rees, Orme, Brown and Green, London 1828) at 28; W. Stubbs, *Seventeen Lectures on the Study of Medieval and Modern History and Kindred Subjects Delivered at Oxford, under Statutory Obligation in the Years 1867-1884*, (Clarendon Press, Oxford 1887) at 336; P. Stein, "Equitable Remedies for the Protection of Property" in P. Birks (ed), *New Perspectives in the Roman law of Property: Essays for Barry Nicholas*, (Clarendon Press, Oxford 1989) at 185.

[110] Nov. 18; B. W. Frier, T. A. J. Mc Ginn, *A Casebook on Roman Family Law*, (Oxford University Press, Oxford 2004) at 6; T. Rufner, "Testamentary Formalities in Roman law" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative SuccessionLlaw: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 2; E. Champlin, "Creditur Vulgo Testamenta Hominum Speculum Esse Morum: Why the Romans Made Wills" (1989) 84 (3) *Classical Philology*, 198 at 198.

[111] E. Champlin, *Final Judgments, Duty and Emotion in Roman Wills, 200 B.C. – A.D. 250*, (University of California Press, Berkeley and Los Angeles, 1991) at 4, 11; T. Rufner, "Testamentary Formalities in Roman law" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative SuccessionLlaw: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 2; R. P. Saller, *Patriarchy, Property and Death in the Roman Family* (Cambridge University Press, Cambridge 1994) at 160.

[112] A. Watson, *The Law of Succession in the later Roman Republic*, (Clarendon Press, Oxford 1971) at I; see E. Champlin, "Creditur Vulgo Testamenta Hominum Speculum Esse Morum: Why the Romans Made Wills" (1989) 84 (3) *Classical Philology*, 198 at 199; E. Champlin, *Final Judgments, Duty and Emotion in Roman Wills, 200 BC – A.D. 250*, (University of California Press, Berkeley and Los Angeles, 1991) at 7.

[113] H. Maine, *Ancient Law*, fourth edition, (J. M. Dent & Sons ltd, London 1936) at 212; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 252; Y. Stern "The Testamentary Phenomenon in Ancient Rome Author" (2000) 49 (4) *Historia: Zeitschrift für Alte Geschichte*, 413 at 413 see D. Daube, "The Preponderance of intestacy at Rome" (1965) 39 (2) *Tulane Law Review*, 253 at 253; D. Cherry, "Intestacy and the Roman Poor" (1996) 64 (2) *Tijdschrift voor Rechtsgeschiedenis,* 155 at 156.

[114] E. Champlin, *Final Judgments, Duty and Emotion in Roman Wills, 200 BC – A.D. 250*, (University of California Press, Berkeley and Los Angeles, 1991) at 7; E. Champlin, "Creditur Vulgo Testamenta Hominum Speculum Esse Morum: Why the Romans Made Wills" (1989) 84 (3) *Classical Philology*, 198 at 199.

[115] B.W. Frier, *The Rise of the Roman Jurist: studies in Cicero's pro-caecina*, (Princeton University Press, Princeton 1985) at 38.

extent they drew upon outside jurisprudence.[116] Godolphin indicates the theological evidence suggests wills had been in use since the biblical seventh day.[117] Nevertheless, the juristic writings contained in the *Corpus Iuris Civilis* present a complex picture of testamentary succession that is neither concise nor systematic, despite the amount of attention devoted to the area, which includes a number of privileged forms applicable to soldiers, parents, and pious gifts.[118] This vast quantity of principles presents a difficult challenge for modern law academics to navigate.[119]

1. Civil Law Testament

The civil law testament never penetrated New Zealand law but an understanding of its features is necessary to appreciate the civil law aspect of modern wills. The instrument itself

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[116] (10 October 2006) 624 NZPD at 5557 (C. Finlayson); R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) 116; M. Smith, "Problems of Roman Legal History" (1904) 4 (8) *Columbia Law Review*, 523 at 524; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 95; E. Champlin, *Final Judgments, Duty and Emotion in Roman Wills, 200 BC – A.D. 250*, (University of California Press, Berkeley and Los Angeles, 1991) at 6; F. W. Maitland, "A Prologue to *A History of English Law* " in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 1, (Little, Brown and Company, Boston 1907) at 7; A. A. Schiller, "Sources and Influences of the Roman Law, III-VI Centuries A.D." (1933) 21 (2) *Georgetown Law Journal*, 147 at 151- 152, 157 - 158; S. J. Mcatee, "Ancient Wills" (1939) 2 (2) *Legal Chatter*, 37 at 38, 39; H. I. Boucher, "Will Clause Precedents - Who Invented the Will?" (1988) 13 (1) *Probate Notes*, 60 at 60; E. White, *A Collection of Essays upon Ancient Laws and Customs*, (The F. H. Thomas Law Book, St. Louis 1913) at 307- 310; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 12-13; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 1; L. E. Hay, "Executorship Reporting: Some Historical Notes" (1961) 36 (1) *The Accounting Review*, 100 at 100 also see D. Asheri, "Laws of Inheritance, Distribution of Land and Political Constitutions in Ancient Greece" (1963) 12 (1) *Historia: Zeitschrift für Alte Geschichte*, 1 at 8.

[117] J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 1-2 see W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 490 – 491;also see R. H. Heirs, "Transfer of Property by Inheritance and Bequest in Biblical Law and Tradition, (1994) 10 (1) *Journal of Law and Religion*, 121 at 121; D. Asheri, "Laws of Inheritance, Distribution of Land and Political Constitutions in Ancient Greece" (1963) 12 (1) *Historia: Zeitschrift für Alte Geschichte*, 1 at 9.

[118] N. Jansen, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 28; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 25.

[119] T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at 121; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 224; N. Jansen, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 29; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 25.

is the final product of the most complex legal development of Roman history.[120] The word *testamentum* is undefined and jurists appeared to have settled on the meaning behind *testatio mentis* or "a proving of intention by witnesses" to indicate its effect.[121] Romans gained the ability to make testamentary dispositions at an unusually early date, which is seemingly contradictory to academic observations surrounding the development of ancient succession.[122] The Twelve Tables were the first Roman legal instrument to give testators the opportunity to deviate from the automatic operation of law and an absolute power of testamentary freedom.[123] Table Five states "A *pater familias* making a bequest concerning household possessions, [or the guardianship of their estate], will have the force of law".[124] This table represents a starting point for the development of a full testament despite the

[120] T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 256; N. Jansen, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 27; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 152.

[121] Inst. 2.10; A. Watson, *The Law of Succession in the later Roman Republic*, (Clarendon Press, Oxford 1971) at 2; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 56; Goffredus de Trano*, Summa Super Titulis Decretalium* (Neudruck Der Ausgabe Lyon, 1519) at 143; J. Williams, *Wills and Intestate Succession*, (Adam and Charles Black, London 1891) at 5; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 499; E. Coke, *The First Part of the Institutes of the Laws of England*; *or a Commentary upon Littleton*; *Not the Name of the Author only, but of the Law itself*, sixteenth edition, volume 1, (Fleming and Phelan, London 1809) at 112b; R. Grey, *A System of English Ecclesiastical Law*, fourth edition, (Printed by Henry Lintot, Savoy 1743) at 152.

[122] W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 227, 273; F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 160.

[123] Twelve Tables, Table 5.1; *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 153; 96 Eng. Rep. 1128 at 1138; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 256; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 319; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 119; W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 227; R. P. Saller, *Patriarchy, Property and Death in the Roman Family* (Cambridge University Press, Cambridge 1994) at 163; B. W. Frier, T. A. J. Mc Ginn, *A Casebook on Roman Family Law*, (Oxford University Press, Oxford 2004) at 345; F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 159; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 13; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 331; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 491

[124] Table 5.3 "Paterfamilias uti super familia pecuniaque sua legassit, ita ius esto" and "Uti legassit super pecunia tutelaue suae rei, ita ius esto"; Dig. 50.16.120; Dig. 50.16.130; F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 158- 159; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 158; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 352.

absence of a prescribed form.[125] A pre-existing power to control property after death may also have existed before this period.[126] The idea of testamentary freedom is contrary to tenets surrounding familial obligations, rights of inheritance, and *pietas* that lie at the heart of Roman succession.[127] Nonetheless, the Twelve Tables provide insight into the prominent place of testamentary power that would come to characterise Roman succession, and prove to be one of the most enduring notions to survive into the modern era.[128]

Gaius *Institutes* provides "there were two kinds of original testaments made either at the *comitia calata*… or *in procinctu*" indicating these were the earliest formal testamentary instruments recognised by Roman law.[129] The first form to develop allowed a person who attended a *comitia calata*, a solemn assembly of the people held bi-annually, to express their will before those in attendance.[130] The assembly's role is to provide the consent to authorise

[125] W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 227; C. M. Brune, "Origin and History of Succession in Roman Law" (1911) 36 (4) *Law Magazine & Quarterly Review of Jurisprudence 5th Series*, 429 at 430; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 274.

[126] W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 580; E. R. Humpreys, *Manual of Civil Law: For the use of Schools, and more especially Candidates of the Civil Service*, (Longman, Brown, Green and Longmans, London 1854) at 98; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 768; F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 162.

[127] W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 158; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 167.

[128] R. P. Saller, *Patriarchy, Property and Death in the Roman Family*, (Cambridge University Press, Cambridge 1994) at 230; F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 145, 162; O. K. McMurray, *Liberty of Testation and some Modern Limitations Thereon*, in *Celebration Legal Essays, By Various Authors To Mark the Twenty-fifth Year of Service of John H. Wigmore*, (North Western University Press, Chicago 1919) at 540.

[129] Gaius 2.101; Hostiensis, *Summa Aurea*, Liber 3, (Venice 1574) at 1032; *Wyndham v Chetwynd* (1757) 1 Burr. 414 at 425; 97 Eng. Rep. 377 at 383; D. Gofredus, *Institutiones Iustiniani*, (Apud Iuntas, Venice 1621) at 215; F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 146; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 158; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 320; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 44; W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 234; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 526; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 133; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 254 – 255.

[130] Gaius 2.101; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 3; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 24; W. W. Buckland, *A Text-Book*

the act that was necessary to depart from automatic rules of inheritance, possibly requiring the demonstration of sufficient cause for departure, and to witness the testator's dispositions without interfering with their declarations.[131] An *inter vivos* oral declaration made at a *comitia calata* appears to have suffered a number of shortcomings, which included an inherent irrevocability and limited availability for general use.[132] The second form, the *testamentum in procinctu*, developed to provide soldiers on the eve of battle with the opportunity to make their final wishes in anticipation of death.[133] It consisted of an *inter vivos* declaration before other soldiers who acted as passive witnesses.[134] The soldiery itself consisted of free citizens able to vote in the assembly and fulfilled a similar function as a *comitia calata* to attest the testator's wishes.[135] Gaius indicates the difference between these

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of Roman Law: From Augustus to Justinian, (Cambridge University Press, London 1921) at 282; E. R. Humpreys, *Manual of Civil Law: For the use of Schools, and more especially Candidates of the Civil Service*, (Longman, Brown, Green and Longmans, London 1854) at 98; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 582; F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 148

[131] F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 147 - 148; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 273; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 257; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 3; C. S. Lobingier, *The Evolution of the Roman Law from before the Twelve Tables to the Corpus Juris Civilis*, second edition, (W.S. Hein & Co, New York 1999) at 38.

[132] F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 146; C. S. Lobingier, *The Evolution of the Roman Law from before the Twelve Tables to the Corpus Juris Civilis*, second edition, (W.S. Hein & Co, New York 1999) at 39; J. Williams, *Wills and Intestate Succession*, (Adam and Charles Black, London 1891) at 4; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 3.

[133] T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 3; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 158; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 257; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 24; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 582; W. W. Ramsay, *A Manual of Roman Antiquities*, (Griffin and Co, London 1863) at 259.

[134] Gaius 2.101; P. Cumin, A *Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 118; F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 148; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 3; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 282; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 542.

[135] F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 148; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 3.

modes of testation is that one occurred during peacetime and the other during campaign, which suggests the relaxed form of *testamentum in procinctu* gradually extended to all citizens and transformed the *comitia calata* into passive witnesses.[136] Both methods consist of an oral declaration of will and institution of an heir in a public forum, and may have developed an ambulatory and revocable quality.[137] However, Gaius 2.103 indicates both fell into disuse once a more popular method of testation had developed.[138]

Table Six, rather than the fifth Table, provided the vehicle for the development of a true ambulatory, revocable, and secret testamentary instrument considered the parent of all modern wills.[139] The table provides that an oral declaration to sell property will have legal force as a valid transaction without mentioning succession.[140] Nevertheless, the *testamentum per aes et libram*, or testament by bronze and balance, is an innovative interpretation of this table and it became the first private method of distributing property after death akin to a will.[141] The mancipatory will's ready availability made it fundamentally different from its

[136] Gaius 2.101; Inst. 2.10. 1; F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 148.
[137] F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 161; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 584; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 542.
[138] Gaius 2.103; F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 146, 149; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 152; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 5; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 258; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 282; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 114.
[139] J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 161; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 144; C. S. Lobingier, *The Evolution of the Roman Law from before the Twelve Tables to the Corpus Juris Civilis*, second edition, (W.S. Hein & Co, New York 1999) at 60; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 275; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 284; O. K. McMurray, *Liberty of Testation and some Modern Limitations Thereon*, in *Celebration Legal Essays, By Various Authors To Mark the Twenty-fifth Year of Service of John H. Wigmore*, (North Western University Press, Chicago 1919) at 543
[140] Table 6.1; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 162; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 217.
[141] Gaius 2.103; *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 153; 96 Eng. Rep. 1128 at 1138; F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 149 - 150; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 542; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 155; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 144; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 217; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second

predecessors by satisfying immediate needs and providing an easier method of conveyance.[142] Gaius outlines the settled form of the *testamentum per aes et libram* of the *ius civile* required five witnesses above the age of puberty, a scales holder, and wax *tabulae* containing the will, which are necessary parts of the *mancipatio* ceremony.[143] It involved the fictitious sale of the estate through a bilateral *mancipatio* that required the *paterfamilias* to transfer their property *inter vivos* to the *familiae emptor*, acting as purchaser, in a single uninterrupted and unitary act.[144] The *familiae emptor* then stated their acceptance and struck the scales with the bronze, which is then 'paid' to the testator before they took custody of the estate.[145] Their role as purchaser did not entitle them to acquire ownership of the estate because the testator transferred it in *fides*, a reliable method of transaction in Roman law,

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edition, (Fred B Rothman & Co, Littleton 1985) at 159; R. Parker, "History of the Holograph Testament in the Civil Law" (1943) 3 (1) *The Jurist*, 1 at 2.

[142] Gaius 2.103; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 4; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 283; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 119.

[143] Gaius 2.104; Inst. 2.10.1; Isidore *Etymologies* 5.24.5; A. Watson, *The Law of Succession in the later Roman Republic*, (Clarendon Press, Oxford 1971) at 11; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 526; C. S. Lobingier, *The Evolution of the Roman Law from before the Twelve Tables to the Corpus Juris Civilis*, second edition, (W.S. Hein & Co, New York 1999) at 59; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 320; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 8; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 526; J. A. Couch, "Woman in Roman Law" (1894) 8 (1) *Harvard Law Review*, 39 at 44.

[144] Inst. 2.10. 1; Gaius 1.119; Hostiensis, *Summa Aurea*, Liber 3, (Venice 1574) at 1032; *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 153; 96 Eng. Rep. 1128 at 1138; *Wyndham v Chetwynd* (1757) 1 Burr. 414 at 425; 97 Eng. Rep. 377 at 383; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 4, 6; B. W. Frier, T. A. J. Mc Ginn, *A Casebook on Roman Family Law*, (Oxford University Press, Oxford 2004) at 345; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 283; J. A. C Thomas (Trans) *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 94; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 25; F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 149; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 275; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 161; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 257; W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 234; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 217.

[145] Gaius 2.104; A. Watson, *The Law of Succession in the later Roman Republic*, (Clarendon Press, Oxford 1971) at 11; C. S. Lobingier, *The Evolution of the Roman Law from before the Twelve Tables to the Corpus Juris Civilis*, second edition, (W.S. Hein & Co, New York 1999) at 59; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 155; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 283; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 584, 593; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 114.

which required them to convey it according to the testator's wishes.[146] The final part of the ritual required the testator to accept the bronze and, in a manner distinguished from a sale, make an oral declaration or *nuncupatio* confirming the written tablet as their will before the witnesses present.[147]

The *testamentum per aes et libram* enabled testators to make complex arrangements concerning their estate, not previously available to them, which included the institution of heirs, legacies, and appointment of guardians that came to characterise later wills.[148] The earliest stages of development furnished an imperfect testamentary instrument because the *familiae emptor*, a person who was a third party to the *familia*, acquired an indefeasible and irrevocable right to the inheritance.[149] The *ius civile* eventually dispensed with the ceremonial elements of the *manicipatio* and transformed the *familiae emptor* from a fiduciary appointment to the role of another witness.[150] Furthermore, the testator became free to institute an heir without the interference of an intermediate third party and the absence of a

[146] T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 4; F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 150; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 542-543; B. Beinart, "Heir and Executor" [1960] *Acta Juridica*, 223 at 225.

[147] Gaius 2.104; Inst. 2.10. 1; Isidore *Etymologies* 5.24.12; *Wyndham v Chetwynd* (1757) 1 Burr. 414 at 425; 97 Eng. Rep. 377 at 383; A. Watson, *The Law of Succession in the later Roman Republic*, (Clarendon Press, Oxford 1971) at 11- 12, 14; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 5; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 161; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 542; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 120; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 526; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 134

[148] A. Watson, *The Law of Succession in the later Roman Republic*, (Clarendon Press, Oxford 1971) at 44; C. S. Lobingier, *The Evolution of the Roman Law from before the Twelve Tables to the Corpus Juris Civilis*, second edition, (W.S. Hein & Co, New York 1999) 172; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 213; E. Champlin, *Final Judgments, Duty and Emotion in Roman Wills, 200 BC – A.D. 250*, (University of California Press, Berkeley and Los Angeles, 1991) at 9

[149] P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 118; C. S. Lobingier, *The Evolution of the Roman Law from before the Twelve Tables to the Corpus Juris Civilis*, second edition, (W.S. Hein & Co, New York 1999) 60.

[150] T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds*), Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 5; F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 150; R. Parker, "History of the Holograph Testament in the Civil Law" (1943) 3 (1) *The Jurist*, 1 at 2; W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 235; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 145.

mancipatio quality allowed it to take effect after death as an ambulatory instrument.[151] The importance of the written element of the will likely developed through customary practices, and the inclusion of the witnesses' seals provide a method of protecting and later verifying, the deceased's wishes because the instrument could not be opened without breaking them.[152] It is the presence of writing, confirmed orally, which gave the *testamentum per aes et libram* the unilateral, secret and ambulatory qualities necessary to produce a satisfactory testamentary instrument.[153]

The evolution of Roman succession is characterised by the relationship between the *ius civile* and the *ius honorarium*.[154] The latter adopted a fourth form of testamentary device, derived from an interpretation of the *testamentum per aes et libram*, which aimed to give effect to the testator's intention without the necessity of instituting an heir.[155] Therefore, the praetor recognised the *ius civile* formalities were unnecessary to give effect to testamentary intentions and granted a person accruing a benefit in a testament *bonorum possessio secunda tabulas*, or grant of possession of goods according to tablets, despite the will's apparent invalidity.[156] This approach indicated that a written *tabula* with a minimum of formalities

[151] P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 144; F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 150.
[152] A. Watson, *The Law of Succession in the later Roman Republic*, (Clarendon Press, Oxford 1971) at 17- 18; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 5, 8; B. W. Frier, T. A. J. Mc Ginn, *A Casebook on Roman Family Law*, (Oxford University Press, Oxford 2004) at 345; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 95.
[153] P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 144; C. S. Lobingier, *The Evolution of the Roman Law from before the Twelve Tables to the Corpus Juris Civilis*, second edition, (W.S. Hein & Co, New York 1999) at 60; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 584; F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 150; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 192.
[154] T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 6; P. S. Barnell, "Emperors, Jurists and Kings: Law and Custom in the Late Roman and Early Medieval West" (2000) (168) *Past and Present*, 6 at 11.
[155] Inst. 2.10. 2; Dig. 37.1.1; Dig. 37.1.2; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 7; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 284; R. Parker, "History of the Holograph Testament in the Civil Law" (1943) 3 (1) *The Jurist*, 1 at 2; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 546.
[156] Cod. 6.11.2.1; Dig. 5.5.2; Dig. 37.2.1; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 145; J. A. C Thomas, *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 114, 190; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 6-7; A. Browne, *A Compendious View of the Civil Law, and of the*

remained effective as a testamentary instrument if it demonstrated a sufficient manifestation of intent and contained the seals of seven, rather than five, witnesses affixed in the presence of the testator.[157] The *ius honorarium* removed the fictitious bilateral sale of the mancipatory will and emphasised the written elements of the unilateral act to reduce the importance of its oral elements.[158] It did not apply if the testament was a nuncupative disposition or did not have the required number of witnesses.[159] The *ius honorarium* also retained features of the *ius civile* testament by requiring witnesses to be male citizens who are *pubes* and *sui iuris*, and required them to affix their seals to the will in the testator's presence in a single unitary act.[160]

Justinian's formal fusion of the *ius civile* and the *ius honorarium* into a single system had a profound effect on the future of testamentary succession because he revived the classical law

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Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin, (Halsted and Voorhies, New York 1840) at 275; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 271-273; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 156; C. S. Lobingier, *The Evolution of the Roman Law from before the Twelve Tables to the Corpus Juris Civilis*, second edition, (W.S. Hein & Co, New York 1999) at 170-172; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 284; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 120; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 585 see Dig. 50.16.138.

[157] Cod. 6.11.2.1; Inst. 2.10.3; Isidore *Etymologies* 5.24.6; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 7; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 145; J. A. C. Thomas, *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape town, 1975) at 114; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 526; B. W. Frier, T. A. J. Mc Ginn, *A Casebook on Roman Family Law*, (Oxford University Press, Oxford 2004) at 345; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 276; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 320; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 547; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 218.

[158] C. S. Lobingier, *The Evolution of the Roman Law from before the Twelve Tables to the Corpus Juris Civilis*, second edition, (W.S. Hein & Co, New York 1999) at 172; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 547; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 145.

[159] T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 7.

[160] T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 8; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 45.

to sit alongside contemporary innovations.[161] The *testamentum tripartitum*, or tripartite testament, takes its namesake as a culmination of the *ius civile*, *ius honorarium,* and later imperial enactments.[162] A public form of a testament made before a magistrate, developed by imperial constitution, also survived into Justinian's time.[163] The *testamentum tripartitum* imposed the *ius civile* requirement that the testator institutes an heir in a single unitary act, conclude their testament in the presence of seven credible witnesses according to the *ius honorarium*, and sign their will as directed by imperial enactment.[164] This instrument became

[161] Inst. 2.10.3; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 19- 20, 29; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 320; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 156; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 304; R. H. Helmholz, *The Ius commune in England: Four Studies*, (Oxford University Press, Oxford 2001) at 6.

[162] Cod. 6.23.21; D. Gofredus, *Institutiones Iustiniani*, (Apud Iuntas, Venice 1621) at 216 gl.; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 146; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 25, 146; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 114; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 320; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 285; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 309; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 122; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 585; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 134; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 256; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 218.

[163] W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 286; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 320; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 10; N. Jansen, "Testamentary Formalities and Early Modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 28; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 219; G. J. McGinley, "Roman law and its influence in America" (1928) 3(2) *The Notre Dame Lawyer*, 70 at 78.

[164] Nov. 90.1; Cod. 6.23.21; Inst. 2.10.3; *Grayson v Atkinson* (1752) 2 Ves. Sen. 454 at 455; 28 Eng. Rep. 291 at 291; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 146; D. Gofredus, *Institutiones Iustiniani*, (Apud Iuntas, Venice 1621) at 216 gl.; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 25, 145; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 18, 20; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 258; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 309; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 548; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 121- 122; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 589; W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 236; A. Browne, *A Compendious View of the Civil Law, and of the Law of the*

the foremost species of civil law testament that could be either in written or nuncupative form.[165] A testator could make a testament on any substance capable of bearing writing and could use any written form to express their will provided their intention manifests.[166] The nuncupative form required a testator to declare their wishes clearly before the seven witnesses.[167] Both forms of testament required the witness to be in a position to see and hear the testator, which jurists reasoned necessary to ensure the will's integrity by preventing fraud.[168] The civil law held that witnesses must be credible persons who were citizens over the age of puberty, not in the testator's *potestas*, and had capacity to perform their role at the time of execution.[169] A mistake in fact about a witness's legal capacity, or irregularities in the

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Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin, (Halsted and Voorhies, New York 1840) at 278; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 338; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 92; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 156; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 399; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 257; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 302, 304; H. J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, Harvard 1983) at 232.

[165] H. Maine, *Ancient Law*, fourth edition, (J. M. Dent & Sons ltd, London 1936) at 203; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 258; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J. W. Johnson & Co, Philadelphia 1892) at 19; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 320; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 135; N. Jansen, "Testamentary Formalities and Early Modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 28; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 256- 257; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 219.

[166] Inst. 2.10.12; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 258; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 327; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 310; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 212; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 124.

[167] Cod. 6.23.26; Inst. 2.10.14; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 258; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 219.

[168] Nov. 90; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 87; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 25; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at 121.

[169] Cod. 6.23.1; Cod. 6.23.21; Inst. 2.10.6, Inst. 2.10. 9; Dig. 22. 5.14; Dig. 22.5.15; *Holdfast on Demise of Ansty v Dowsing* (1747) 1 Black W. 8 at 10; 96 Eng. Rep. 5 at 6; D. Gofredus, *Institutiones Iustiniani*, (Apud

form of their acknowledgement, did not harm the testament.[170] Justinian additionally required testators to sign the testament, or have another sign on their behalf, and read it aloud before the present witnesses, although he abolished the second requirement in Nov. 119.9 because it undesirably defeated the secrecy of its contents.[171]

2. Inheritance and Institution of an Heir

The civil law testament is fundamentally different from the modern New Zealand will because its purpose was to convey the estate to a universal successor or heir. The heir is a pivotal figure in the Roman law of succession and their institution is an essential element of the testament.[172] The testator's death enabled the heir to enter the *hereditas*, ending the *hereditas iacens*, which allowed them to succeed to the entire estate *per universitatem* either *in factus* by a testament or *ab intestato* as *heres natus* according to the principle of universal succession.[173] The civil law treated the heir and the deceased as a single person because they,

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Iuntas, Venice 1621) at 218, 220 gl.; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 133; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 258; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 327; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 212; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 79.

[170] Inst. 2.10.7; *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 123; 96 Eng. Rep. 1128 at 1128; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 213; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 80.

[171] Cod. 6.23.21; Dig. 28.1.22.2; Inst. 2.10.3; W. M. Gordon, *Succession* in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 85; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 350; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 279; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 19.

[172] Dig. 28.2.30; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 136; W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 227- 228; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 331; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 252; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 270; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 9.

[173] Dig. 5.3.1; Dig. 29.2.19; Dig. 29.2.27; *Hogan v Jackson* (1775) 1 Cowp 299 at 305; 98 Eng. Rep. 1096 at 1100; *Jackson v Wilson* (1838) 2 Moore 178 at 193; 13 Eng. Rep. 75 at 83 (ed); T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood

according to the maxim, "stepped into the place of the testator" and continued from the testator's position after death.[174] Therefore, the fundamental purpose of a testament, as a variation from the rules of intestacy, is to institute an heir to succeed to the entire estate and a clear appointment was a necessary formality under both the Roman *ius civile* and the civil

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and sons, Edinburgh and London 1870) at 253; C.M. Brune, "Origin and History of Succession in Roman Law" (1911) 36 (4) *Law Magazine & Quarterly Review of Jurisprudence 5th Series*, 429 at 435; W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 228; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 15; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 123, 136; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 328; J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at 558 - 559; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 560; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 61, 70; J. F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphanotrophei, Halae Magdeburgicae 1769) at 402; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 313, 315; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 504; A. Kocourek, J. H. Wigmore, *Primitive and Ancient Legal Institutions* (Little, Brown, and Company, Boston 1915) at 554; J. Williams, *Wills and Intestate Succession*, (Adam and Charles Black, London 1891) at 1; F. J. Tomkins, H. D. Jencken, *A Compendium of the Modern Roman Law*, (Butterworths, London 1870) at 205; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 2; B. Beinart, "Heir and Executor" [1960] *Acta Juridica*, 223 at 223; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 12; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 234; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 234; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 871; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 448 see Dig. 29.2.32.

[174] Dig. 29.2.54; Dig. 50.17.62; Nov. 48; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) 152; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 328; J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at 560; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 560; F. J. Tomkins, H. D. Jencken, *A Compendium of the Modern Roman Law*, (Butterworths, London 1870) at 219; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 153; A. Kocourek, J. H. Wigmore, *Primitive and Ancient Legal Institutions* (Little, Brown, and Company, Boston 1915) at 555; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 268; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 312; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 601; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 871; E. Jenks (ed), H. O. Danckwerts, J. S. Stewart Wallace, *Stephen's Commentaries,* seventeenth edition, volume 2 (Butterworth & Co., Bell Yard, Temple Bar, London 1922) at 3; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 220, 223; P. Spiller*, A Manual of Roman Law*, (Butterworths, Durban 1986) at 153; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 270; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 202; W. M. Gordon, *Succession,* in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 80; G. Campbell, *A Compendium of Roman Law: Founded on the Institutes of Justinian*, (The Lawbook Exchange, Clark 2008) at 59.

law.[175] The heir could be an individual or a corporation, or the testator could appoint more than one heir who might succeed to a portion of the entire estate.[176] The failure to appoint an heir rendered the will and the dispositions within invalid because the absence of a universal successor resulted in intestacy.[177] The institution could also fail if the heir lacked *testamenti factio* at the time of publication and consummation of the testament or they became legally disqualified from succeeding to the estate.[178]

The civil law distinguishes the legal concept of succession as an acquisition of an entire estate, including bankruptcy, from the narrower notion of an inheritance to the legal position of the deceased.[179] A fundamental principle of civil law succession is that the sum of the

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[175] *Hogan v Jackson* (1775) 1 Cowp 299 at 305; 98 Eng. Rep. 1096 at 1100; F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphannotrophei, Halae Magdeburgicae 1769) at 402; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 153, 294, 304; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 293; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 21; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 256; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 318; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 343; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 123; C.M. Brune, "Origin and History of Succession in Roman Law" (1911) 36 (4) *Law Magazine & Quarterly Review of Jurisprudence 5th Series*, 429 at 431; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 155; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 310; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 600.

[176] Dig. 29.2.2; Inst. 2.15.4; W. M. Gordon, *Succession* in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 82 see Dig. 50.17.141.1.

[177] Dig. 50.16.64; Dig. 50.17.181; Gaius 2. 229; J. F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphanotrophei, Halae Magdeburgicae 1769) at 437; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 220; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 128; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 764; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 319; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 252; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 76; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 150; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 21.

[178] Cod. 5.70.7.2; Cod. 5.70.7.3; Inst. 2.14.1; Dig. 50.17.210; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 126; J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at 563; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 595; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 230, 232.

[179] Dig. 50.17.62; Dig. 50.16.208; G. J. McGinley," Roman law and its influence in America" (1928) 3(2) *The Notre Dame Lawyer*, 70 at 77; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935)

testator's rights and duties, the *hereditas*, continues to exist after death.[180] The *hereditas* consists of all the property and obligations of the deceased, although its capacity is limited to the substance of the estate because it could not engage in positive actions, such as entering a contract, on its own accord.[181] Dig. 50.16.24 defines it as "nothing other than succession to all the rights which the dead man possessed".[182] A *hereditas iacens*, or unclaimed estate, assumed a form of juristic personality, imbued with the capacity to acquire rights or incur liabilities, which arose in the interim between the testator's death and the entrance of the heir to the estate.[183] Classical jurists conceptualised the *hereditas* as representing the *persona* of the deceased arising after death, rather than the future heir, although this did not extend to the

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at 11 see Bracton, G. E. Woodbine (ed), S. E. Thorne (trans), *De legibus et consuetudinibus Angliae*, volume 2, (Harvard University Press, Cambridge, 1968 – 1977) at 184.

[180] Dig. 41.1.34; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 304; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 11; G. J. McGinley," Roman law and its influence in America" (1928) 3(2) *The Notre Dame lawyer*, 70 at 78; W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 228; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 120; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 331; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 582; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 313- 315; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 150; W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 231.

[181] J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at 559; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 313; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 514; T. Rufner, "Testamentary formalities in Roman law" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 9; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 304; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 306; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 122; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 238; F. J. Tomkins, H. D. Jencken, *A Compendium of the Modern Roman Law*, (Butterworths, London 1870) at 205; G. Campbell, *A Compendium of Roman Law: Founded on the Institutes of Justinian*, (The Lawbook Exchange, Clark 2008) at 59.

[182] See *Reformatio Legum Ecclesiasticarum,* 55.18.

[183] Dig 1.8.1; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965), at 152; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 263, 313; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 124- 125; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 293; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 512 – 513; F. J. Tomkins, H. D. Jencken, *A Compendium of the Modern Roman Law*, (Butterworths, London 1870) at 205; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, Lo 305; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 238.

socio-political position of the deceased including marital relations and public office.[184] However, these jurists merely defined the *hereditas* as an incorporeal and it did not become conceptualised as a *persona ficta* or juristic personality until later medieval civilians afforded it this attribute.[185] Nonetheless, it merged with the *persona* of the heir permitting them to succeed to the estate and fulfil their social function of ensuring the continuity of the *familia* beyond the death of the *paterfamilias*.[186] In *Trent v Hanning*[187], the court applied the civilian concept of inheritance to succession of personalty as distinct from real property.[188] However, no notion of *hereditas* ever operated in English law and the conceptualisation of the estate as a bundle of rights and duties that vested in an executor is not analogous.[189] The absence of a juristic personality is evident in New Zealand law, which simply defines an estate as all the real and personal property of the deceased.[190]

New Zealand law does not possess any office analogous to the civil law heir. The heir's significance to the Roman testament is evident by the classical requirement that all testaments must include formal words of appointment "Be [heir's name] my heir" expressed

[184] Dig 1.8.1.1; Dig. 29.2.37; W. M. Gordon, *Succession* in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 81; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 304; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 305 - 306; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 126 – 127; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 514; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 72; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 313.

[185] Dig. 1.8.1; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 304; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 305; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965), at 54, 153; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 126; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 514.

[186] F. J. Tomkins, H. D. Jencken, *A Compendium of the Modern Roman Law*, (Butterworths, London 1870) at 259; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 25; R. Saller, "Familia, Domus, and the Roman Conception of the Family" (1984) 38 (4) *Phoenix*, 336 at 343; E. Champlin, *Final Judgments, Duty and Emotion in Roman Wills, 200 BC – A.D. 250*, (University of California Press, Berkeley and Los Angeles, 1991) at 22.

[187] (1806) 7 East. 97; 103 Eng. Rep. 37.

[188] (1806) 7 East. 97 at 102; 103 Eng. Rep. 37 at 39.

[189] *Lynch v Bellew* (1820) 3 Phill. Ecc. 424 at 430; 161 Eng. Rep. 1372 at 1374; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) 152; O. K. McMurray, *Liberty of Testation and some Modern Limitations Thereon*, in *Celebration Legal Essays, By Various Authors To Mark the Twenty-fifth Year of Service of John H. Wigmore*, (North Western University Press, Chicago 1919) at 547.

[190] Administration Act 1969, s 2 (1).

imperatively at their beginning.[191] Justinian considered it undesirable that testaments could fail because of this technicality and Cod. 6.23.15.1 abolished the necessity of formal words of appointment or even that the heir's institution should come first provided they were ascertainable within the instrument.[192] Nov. 119.9 abolished a requirement established under Cod. 6.23.29 that the testator or a witness must physically write the heir's name on the testament because it resulted in a number of invalid instruments, although later civilians recognised this as good practice.[193] The civil law recognised several types of testamentary heirs.[194] The foremost are heirs *sui et neccessarii*, or lineal descendants under the *potestas* of the *paterfamilias*, who were known as *sui heredes* because they possessed a natural right to the *hereditas* and were necessary because the *ius civile* did not permit their refusal, which only became possible under the *ius honorarium* and followed by the civil law.[195] Secondly,

[191] Gaius 2. 116; Gaius 2. 117 "*titius heres esto*"; Dig 28.5.1; Dig 28.5.1.1; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 304; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 294; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 155; C. S. Lobingier, *The Evolution of the Roman Law from before the Twelve Tables to the Corpus Juris Civilis*, second edition, (W.S. Hein & Co, New York 1999) at 169; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 253, 259; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 600; A. Watson, *The Law of Succession in the Later Roman Republic*, (Clarendon Press, Oxford 1971) at 41; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 220; T. Rufner, "Testamentary formalities in Roman law" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 10.

[192] Cod. 6.23.15.2; Cod. 6.23.24; Gaius, E. Poste (ed), E. Whittuck (ed), A. H. J. Greenidge (ed), *Gai Institutiones or Institutes of Roman Law by Gaius, fourth edition, with a Translation and Commentary by the late Edward Poste* (Clarendon Press, Oxford1904) at 204; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 126; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 21; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 160; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 601; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 220; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 150 see Inst. 2.20.34.

[193] Inst. 2.10.4; Dig. 28.1.21; *Andrews v Powis* (1728) 1 Lee 242 at 255; 161 Eng. Rep. 90 at 95; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 258; E. R. Humpreys, *Manual of Civil Law: For the use of Schools, and more especially Candidates of the Civil Service*, (Longman, Brown, Green and Longmans, London 1854) at 99; P. Stein, "Interpretation and Legal Reasoning in Roman Law" (1995) 70 (4) *Chicago-Kent Law Review*, 1539 at 1551.

[194] Gaius 2. 152; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 66; A. Watson, *The Law of Succession in the Later Roman Republic*, (Clarendon Press, Oxford 1971) at 32.

[195] Gaius 2. 156; Gaius 2. 157; Gaius 2. 158; Dig. 5.3.3; Inst. 2.14.1; Cod. 6.28.4; Dig. 29.2. 57; Dig. 36.1.6.2; C.M. Brune, "Origin and History of Succession in Roman Law" (1911) 36 (4) *Law Magazine & Quarterly Review of Jurisprudence 5th Series*, 429 at 442; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 166; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 47; J. C. H. Flood, *An elementary Treatise on the*

extranei heredes, or external heirs, are people instituted who are not under the testator's *potestas* and who automatically possessed the right to accept or refuse the *hereditas* with valid notice.[196] A third class consisted of instituted slaves, known as *necessarii heredes*, who must accept and administer an insolvent estate or *hereditas damnosa* to avoid social disgrace falling on the *familia*.[197] The civil law did not require an examination of the motive behind the testator's choice of heir and no further dispositions were required after their institution.[198]

The presence of formalism had begun to wane before Justinian's reign and Roman law replaced the formal acceptance of the estate, or *cretio*, with any indication explicitly or implicitly that an heir accepts the estate.[199] Acceptance could not be conditional and the

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law relating to Wills of Personal Property and some subjects appertaining thereto, (William Maxell & Son, London 1877) at 67; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 343; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 239; C. S. Lobingier, *The Evolution of the Roman Law from before the Twelve Tables to the Corpus Juris Civilis*, second edition, (W.S. Hein & Co, New York 1999) at 173; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 303; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 140; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 235; F. J. Tomkins, H. D. Jencken, *A Compendium of the Modern Roman Law*, (Butterworths, London 1870) at 252; B. Beinart, "Heir and Executor" [1960] *Acta Juridica*, 223 at 223; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 223 – 224; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 111.

[196] Gaius 2. 161; Gaius 2. 162; Dig. 36.1.6; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 48; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 67; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 343; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 239; C. S. Lobingier, *The Evolution of the Roman Law from before the Twelve Tables to the Corpus Juris Civilis*, second edition, (W.S. Hein & Co, New York 1999) at 174; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 304; F. J. Tomkins, H. D. Jencken, *A Compendium of the Modern Roman Law*, (Butterworths, London 1870) at 252; B. Beinart, "Heir and Executor" [1960] *Acta Juridica*, 223 at 224; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 225.

[197] Cod. 6.27.1; Inst. 2.14.1; Inst. 2.19.1; Dig. 28.2.18; Dig. 28.5.84.1; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 238; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 301 – 302; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 596; B. Beinart, "Heir and Executor" [1960] *Acta Juridica*, 223 at 223; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 871; A. Watson, *Roman Private Law around 200 BC*, (Edinburgh University Press, Edinburgh 1971) at 95.

[198] P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 231; P. du Plessis, Borkowski's, *Textbook on Roman law, fourth edition*, (Oxford University Press, Oxford 2010) at 220.

[199] Cod. 6.30.17; Dig. 29.2.20; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 77; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 166; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The

maxim "a refusal of part of the estate is a refusal of the whole" reflected practice.[200] This requirement is also a manifestation of the maxim that "*nemo pro parte testatus pro parte intestates decedere potest*" or a "testator cannot die partly testate and partly intestate" causing the will to fail.[201] The instituted heir must succeed to the entire estate as universal successor or if there were multiple heirs, they shared its entirety between them despite holding separate portions.[202] Dig 28.5.9.12 presumed a testator who instituted multiple heirs and left part of the estate unallocated intended to divide it proportionately between them.[203] The civil law divided the estate, *as*, into twelve *unciae* or parts for the purpose of distribution, although the reason behind this division is unclear and it did not form part of civilian practice.[204] Dig.

Boston Book Company, Boston 1917) at 240; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 311; A. Watson, *The Law of Succession in the Later Roman Republic*, (Clarendon Press, Oxford 1971) at 188; A. Watson, *Roman Private Law around 200 BC*, (Edinburgh University Press, Edinburgh 1971) at 95; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 226; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 75 see Isidore *Etymologies* 5.24.15.

[200] Dig. 29.2.1; Dig. 29.2.2; Dig. 29.2.10; Dig. 29.2.13; Dig. 29.2.23; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 244; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 127- 128.

[201] Inst. 2.14.5; Dig. 50.17.7; *Owen v Owen* (1738) 1 West T. Hard 593 at 595; 25 Eng. Rep. 1102 at 1103; A. Watson, *The Law of Succession in the Later Roman Republic*, (Clarendon Press, Oxford 1971) at 47; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 310 - 311; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 266; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 221; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 150; T. Rufner, "Testamentary formalities in Roman law" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 9; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 764; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965), at 151.

[202] *Reformatio Legum Ecclesiasticarum,* 27.24; Inst. 2.14.6; Cod. 4.2.1; Dig 28.5.9.12; *Jackson v Wilson* (1838) 2 Moore 178 at 193; 13 Eng. Rep. 75 at 83 (ed); C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 260; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 262; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 228; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 9.

[203] Cod. 6.21.3.1; Inst. 2.14.6; Inst. 2.14.7; Dig 28.5.2; *Lectura* in F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at 48; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 347; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 227, 229; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 294; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 603; T. Rufner, "Testamentary formalities in Roman law" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 9 – 10.

[204] Cod. 6.24.13; Cod. 6.30.20; Inst. 2.14.5; Dig 28.5.13.1; Dig 28.5.13.2; Dig 28.5.13.3; Dig 28.5.13.4; Dig 28.5.51.2; *Lectura* in F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden

29.2.18 states, "That a person who can repudiate [an inheritance] can also acquire [it]", although the civil law did not permit an heir to refuse the inheritance after they touched the estate because they became bound to it.[205] The maxim "once an heir, always an heir" or "*semel heres simper heres*" protected their position from others once they accepted the estate.[206]

The significance of the heir meant the civil law testator could not leave their appointment to a third person because an uncertain appointment is contrary to the purpose of a testament, although this kind of uncertainty did not impinge the purpose of the legacy-driven canonical will.[207] The appointment did not have to be absolute and the presence of a condition required the heir to strive to fulfil it, although the testator risked dying intestate if it could not be

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Society, London, 1990) at 48; A. Watson, The Law of Succession in the Later Roman Republic, (Clarendon Press, Oxford 1971) at 47; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 127; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 346; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 227; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 259; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 253; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 298; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 136.

[205] Nov. 1.2.3; *Freyhaus v Cramer* (1829) 1 Knapp 108 at 112; 12 Eng. Rep. 261 at 263; *Jackson v Wilson* (1838) 2 Moore 178 at 193; 13 Eng. Rep. 75 at 83 (ed); P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 244; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 150; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 235.

[206] Inst. 2.14.9; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 222; J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at 560; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 295; B. Beinart, "Heir and Executor" [1960] *Acta Juridica*, 223 at 224; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 150; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 270; G. Campbell, *A Compendium of Roman Law: Founded on the Institutes of Justinian*, (The Lawbook Exchange, Clark 2008) at 70.

[207] Dig. 28.6.2.4; X. 3.26. 13; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 48; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 282; T. Rufner, "Testamentary formalities in Roman law" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 10 see Dig. 30.1.116; Dig. 31.1.80.

fulfilled.[208] A condition precedent required the satisfaction of a certain task or contingent event before the heir could enter the estate.[209] However, a testator could not impose a condition subsequent to an heir's institution or place a limitation on its duration as to permit a partial intestacy because 'once an heir always an heir'.[210] Both Roman and English judges construed an uncertain, illegal, or impossible condition in a testament as if it did not exist to allow the heir to enter the estate unconditionally.[211] Notably, the distinction between conditions precedent and subsequent was an anomalous English invention unknown to the civil law even if courts applied the terms to its principles to the consternation of later

[208] Inst. 2.14.11; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 310; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 325; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 48; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 150; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 271; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 402, 404; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 297; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 221 see Dig 28.7.5.

[209] Inst. 2.14.9; Dig 28.5.3.2; Dig 28.5.4.1; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 221; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 127.

[210] Inst. 2.14.9; Dig. 28.7.27.1; Dig 28.5.34; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 239; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 48; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 345; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 295.

[211] Cod. 6.25.9; Dig 28.7.1; Dig 28.7.6; Dig 28.7.9; Dig. 28.7.27; Dig. 28.7.14; Dig 28.5.46; Dig 28.5.51.1; *Scott v Tyler* (1788) 2 Bro. C. C. 431 at 453- 454; 29 Eng. Rep. 241 at 252; F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphannotrophei, Halae Magdeburgicae 1769) at 426; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 258, 264; W. Fulbecke, *A parallele or conference of the Civil law, the Canon law, and the Common Law of this Realme of England* (Printed for the Company of Stationers, London 1618) at 66 - 67; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 221; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 127; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 310; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 325; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 402; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 347- 348; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 295 – 296; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 150; R. Zimmermann, *The Law of Obligations: Roman foundations of the Civilian Tradition* (Jura & Co, Cape Town 1990) at 720; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 160; G. Campbell, *A Compendium of Roman Law: Founded on the Institutes of Justinian*, (The Lawbook Exchange, Clark 2008) at 71; R. Zouch, *Cases and Questions Resolved in the Civil Law*, (Printed for Leon Lichfield, for Tho Robinson, Oxford 1652) at 117.

practice.[212] The wise testator protected their testament with a general or vulgar substitution, a form of conditional appointment, which accounted for contingencies, including non-performance of a condition, in default of the first heir being unable to inherit.[213] The civil law enabled a testator to make as many substitutions as desired and in any number including instituting less than the original amount of heirs.[214] Inst. 2.15.2 states if the testator institutes multiple heirs to equal shares then the civil law presumed an intention they may substitute each other.[215]

The heir enjoyed the benefits of universal succession alongside the obligation to satisfy the debts, fulfilling the legacies, and following any other directions contained in the testament.[216]

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[212] *Holmes v Lysaght* (1733) 2 Brown 261 at 263; 1 Eng. Rep. 931 at 932; *Reynish v Martin* (1746) 3 ATK 331 at 332; 26 Eng. Rep. 991 at 922; *Clarke v Parker* (1811) 19 Ves. Jun. 1 at 9; 34 Eng. Rep. 419 at 422; *Re Dickson's Trust* (1850) 1 Sim. (N.S.) 37 at 41; 61 Eng. Rep. 14 at 16; *Scott v Tyler* (1788) 2 Bro. C. C. 431 at 439; 29 Eng. Rep. 241 at 245; D. W. McMorland, "A New Approach to Precedent and Subsequent Conditions" (1980) 4 (4) *Otago Law Review*, 469 at 486; N. Cox, "Conditional Gifts and Freedom of Testation: Time for a Review?" (2001) 9 (1) *Waikato Law Review*, 24 at 36; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 242

[213] Nov. 1.1.1; Nov. 1.3; Dig 28.6.1; Dig. 29.2.3; Dig 28.6.5; Dig. 50.16.162; Dig. 50.16.162.1; R. Zouch, *Cases and Questions Resolved in the Civil Law*, (Printed for Leon Lichfield, for Tho Robinson, Oxford 1652) at 123; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 128; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 311; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 326; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 49; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 298; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 146; A. Watson, *The Law of Succession in the Later Roman Republic*, (Clarendon Press, Oxford 1971) at 52; B. W. Frier, T. A. J. Mc Ginn, *A Casebook on Roman Family Law*, (Oxford University Press, Oxford 2004) at 347; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 222; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 151; G. Campbell, *A Compendium of Roman Law: Founded on the Institutes of Justinian*, (The Lawbook Exchange, Clark 2008) at 71.

[214] Inst. 2.15.1; Dig. 28.6.36.1; F. J. Tomkins, H. D. Jencken, *A Compendium of the Modern Roman Law*, (Butterworths, London 1870) at 232; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 326; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 251

[215] Dig 28.6.24; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 128; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 146.

[216] Cod. 4.16.1; Cod. 4.16.7; Nov. 48; *Jackson v Wilson* (1838) 2 Moore 178 at 193; 13 Eng. Rep. 75 at 83 (ed); W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 319; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 235; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 267; B. Beinart, "Heir and Executor" [1960] *Acta Juridica*, 223 at 224; G. J. McGinley," Roman law and its influence in America" (1928) 3(2) *The Notre Dame Lawyer*, 70 at 78; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 207; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 304; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 313; W. C. Morey, *Outlines of Roman Law*

The heir acquired rights *in rem* and *in personam* as formerly attached to the deceased including private actions without being accountable for the deceased's public offences.[217] Therefore, they could bring an action *hereditatis petitio* against third parties attempting to assume their position by holding the estate.[218] However, the obligation to pay legacies depended on the heir's acceptance of the estate because refusal caused them to fail.[219] Inst. 2.22 states the unlimited freedom of testation granted by the Twelve Tables encouraged testators to give away their entire estate in legacies, which prompted heirs to refuse the estate and resulted in a number of intestacies.[220] To increase the chances of acceptance, the heir was entitled to an unencumbered one quarter of the estate, referred to as the Falcidian portion after the *Lex Falcidia*, which is reserved after the exaction of debts and funeral expenses, and left the remaining three quarters of the estate for legacies.[221] The *Lex Falcidia* ensured heirs *sui et neccessarii* received their natural law entitlement and those *extranei* were recompensed for their labours after the payment of debts by causing legacies to abate if testators attempted to give away more than three quarters of their estate.[222] Goffin observes, "the vice of the

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Comprising its Historical Growth and General Principles, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 317; W. M. Gordon, *Succession* in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 82.

[217] G. J. McGinley," Roman law and its influence in America" (1928) 3(2) The Notre Dame lawyer, 70 at 78; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 3 (V. and R. Stevens and Sons, London 1849) at 347; P. *Mac Combaich de Colquhoun, A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 229, 244.

[218] A. Watson, The Law of Succession in the Later Roman Republic, (Clarendon Press, Oxford 1971) at 196; A. Watson, *Roman Private Law around 200 BC*, (Edinburgh University Press, Edinburgh 1971) at 96; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 3 (V. and R. Stevens and Sons, London 1849) at 346; B. Beinart, "Heir and Executor" [1960] *Acta Juridica*, 223 at 223.

[219] Inst. 2.22.2; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 317; W. M. Gordon, *Succession* in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 82.

[220] Table 5.3; Inst. 2.22; Dig. 35.2.17; S. Dixon, "Breaking the Law to do the Right Thing: The Gradual Erosion of the Voconian Law in Ancient Rome" (1985) 9 (4) *Adelaide Law Review*, 519 at 533

[221] Inst. 2.22; Inst. 2.22.1; Inst. 2.22.2; Inst. 2.22.3; Inst. 2.23.5; Nov. 92.1; Dig. 35.2.1; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 369; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 317; W. M. Gordon, *Succession* in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 82; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840 at 308; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 154; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 304; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 313; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 270; S. Dixon, "Breaking the Law to do the Right Thing: The Gradual Erosion of the Voconian Law in Ancient Rome" (1985) 9 (4) *Adelaide Law Review*, 519 at 528.

[222] Cod. 6.50.2; Inst. 2.22.3; Dig. 35.3.1; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 304; J. D. Hannan, *The Canon Law of Wills*, (The

Roman system lay in this, that the execution of a will was thrown upon the shoulders of persons who would benefit by disobeying the directions of the testator".[223] This is unique to the civil law and New Zealand does not recognise an heir or give the concept of universal succession a prominent position in modern succession. The Wills Act 2007 does not include the institution of an heir as a formal requirement, which is indicative of the will's evolution away from the foremost characteristics of the Roman testament. Nonetheless, the civil law testament, either in written or nuncupative form, contained witnessed dispositions that are ambulatory and revocable that identifies it as the progenitor of the modern will.[224]

Dolphin Press, Philadelphia 1935) at 313; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840 at 309.

[223] Cod. 3.31.1; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 8; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 147.

[224] L. E. Hay, "Executorship Reporting: Some Historical Notes" (1961) 36 (1) *The Accounting Review*, 100 at 100; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 210; B. Beinart, "Some Aspects of Privileged Wills" [1959] *Acta Juridica*, 200 at 201.

4. Testamentary Succession before the Civil Law

Blackstone begins his chapter on wills by stating: "with us in England this power of bequeathing is coeval with the first rudiments of the law; for we have no traces or memorials of any time when it did not exist".[225] This pre-existing power provides a valuable starting point for appreciating the civil law's impact on English testamentary succession.[226] The English experience with the Roman testament abruptly ended in c 410 A.D., having never received the *Corpus Iuris Civilis*, when the Anglo-Saxon invaders brought their own customary system to supplant it.[227] A full picture of Anglo-Saxon custom is not acquirable except that it likely possessed typical Germanic characteristics.[228] Many scholars cite Tacitus *Germania* as evidence that early Germanic law, representing the ancestors of the Anglo-Saxon *genus*, to suggest early Anglo-Saxons did not possess a will and that property always

[225] W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 491.

[226] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 2 -3; W. F. Finlason, *The History of Law of Tenures of Land in Britain and Ireland; With Particular Reference to Inheritable Tenancy; Leasehold Tenure; Tenancy at Will; And Tenant Right* (Stevens & Haynes, London 1870) at cxvii; D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at xvii.

[227] C. P. Sherman, "The Romanization of English Law" (1914) 23 (4) *The Yale Law Journal* 318 at 318; J. Maclaren, *Roman Law in English Jurisprudence*, (William Briggs, Toronto 1888) at 7, 9; E. D. Re, "The Roman Contribution to the Common law" (1961) 29 (3) *Fordham Law Review*, 447 at 458; W. Senior, "Roman Law in England before Vacarius" (1930) 46 (2) *Law Quarterly Review* 191 at 191; M. M. Knappen, *Constitutional and Legal History of Britain* (Harcourt, Brace, New York 1942) at 4, 24; H. E. Smith, *Studies in Juridical Law*, (T. H. Flood and Company, Chicago 1902) at 244; W. Stubbs, A. Hassall (ed), *Lectures on Early English Legal History*, (Longmans, Green and Co, London 1906) at 3; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 13; E. Jenks (ed), P. Landon, *Stephen's Commentaries,* seventeenth edition, volume 1, (Butterworth & Co., Bell Yard, Temple Bar, London 1922) at 16; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 2; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 367; T. E. Scrutton, *The Influence of the Roman Law on the Law of England. Being the Yorke Prize Essay of the University of Cambridge for the Year 1884*, (Cambridge University Press, Cambridge 1885) at 4; T. Smith, F. Smith, *Arminius A History of German People and of Their Legal and Constitutional from the Days of Julius Caesar to the Time of Charlemagne,* (James Blackwood, London, 1861) at 288; D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at ix; F. Pollock, "Anglo-Saxon Law" (1893) 8 (3) *The English Historical Review*, 239 at 240; P. H. Winfield, *The Chief Sources of English Legal History*, (Harvard University Press, Cambridge 1925) at 54; F. Pollock, F. Maitland, *The history of English Law before the Time of Edward I,* second edition, volume 1, (Cambridge University Press, Cambridge 1898) at xxxi; R. Washington, *Some observations upon the ecclesiastical jurisdiction of the Kings of England with an appendix in answer to part of an late book entitled the King's Visitatorial Power Asserted* (William Battersby, London 1689) at 23.

[228] F. Pollock, "Anglo-Saxon Law" (1893) 8 (3) *The English Historical Review*, 239 at 240, 243, 256; F. Pollock, "English Law Before the Norman Conquest" 14 (3) *Law Quarterly Review*, 291 at 298; F. W. Maitland, Francis C. Montague, J. F Colby (ed), *A sketch of English Legal History* (G.P. Putnam's Sons, New York 1915) at 5; T. Smith, F. Smith, *Arminius A History of German People and of Their Legal and Constitutional from the Days of Julius Caesar to the Time of Charlemagne*, (James Blackwood, London, 1861) at 287- 288; M. M. Knappen, *Constitutional and Legal History of Britain*, (Harcourt, Brace, New York 1942) at 24; F. Pollock, F. Maitland, *The history of English Law before the Time of Edward I,* second edition, volume 1, (Cambridge University Press, Cambridge 1898) at 26.

descended to kindred.[229] German custom followed the notion of collective ownership that held all property belonged to the family unit except personal chattels buried with their owner.[230] Tacitus states property descends foremost to issue, regardless of gender, or property passes collaterally to brothers then uncles, on both the paternal and maternal line, which suggests cognatic descent rather than agnatic succession despite preferring the latter.[231] It is unclear how long the Anglo-Saxons retained the collective ownership model and no immediate reason existed to deviate from succession laws in the early period.[232] St. Augustine of Canterbury's mission to Britain in 596 A.D. resulted in the establishment of an

[229] Tacitus, *Germania* 20, 35- 36; M. M. Knappen, Constitutional and Legal History of Britain (Harcourt, Brace, New York 1942) at 7; W. Stubbs, "The Anglo-Saxon Constitution" in W. Stubbs, A. Hassall (ed), *Lectures on Early English Legal History*, (Longmans, Green and Co, London 1906) at 4; T. Smith, F. Smith, *Arminius A History of German People and of Their Legal and Constitutional from the Days of Julius Caesar to the Time of Charlemagne*, (James Blackwood, London, 1861) at 287; A. T. Carter, *Outlines of English Legal History* (Butterworth & Co, London 1989) at 2; M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 5; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 11; J. Maclaren, *Roman Law in English Jurisprudenc*e, (William Briggs, Toronto 1888) at 11; W. S. Holdsworth, *A History of English Law*, third edition, volume 2, (Methuen & Co, London 1923) at 24; R. Hubener, F.S. Philbrick, P. Vinogradoff, W. E. Walz, *The Contienental Legal Series, volume Four: A History of Germanic Private Law*, (Little, Brown, and Company, Boston 1918) at 693; G. Spence, *An Inquiry into the Origin of the Laws and Political Institutions of Modern Europe Particularly of Those of Britain*, (John Murray, London 1826) at 403; J. Williams, *Wills and Intestate Succession*, (Adam and Charles Black, London 1891) at 7; W. Roberts, *A Treatise on the Statute of Frauds as it regards Declarations in Trusts, Contracts, Surrenders, Conveyances, and the Execution and Proof of Wills and Codicil* (Uriah Hunt, Philadelphia 1838) at 289; J. Selden, "Of the Dispositions or Administration of Intestate's Goods" in J. Selden, D. Wilkins (ed), *Joannis Seldeni Jurisconsulti Opera Omnia, Tam Edita quam Inedita. The Works of John Selden in Three volumes with New Introduction*, volume 3 part 2, (New Jersey, Clark 2006) at 1676; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 491; F. W. Maitland "The Materials for English Legal History" (1889) 4 (3) *Political Science Quarterly*, 496 at 504; M. M. Bigelow, "Theory of Post-Mortem Disposition: Rise of the English Will" (1897) 11 (2) *Harvard Law Review*, 69 at 75; T. E. Scrutton, *The Influence of the Roman Law on the Law of England. Being the Yorke Prize Essay of the University of Cambridge for the Year 1884*, (Cambridge University Press, Cambridge 1885) at 24.

[230] M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 1; R. Hubener, F.S. Philbrick, P. Vinogradoff, W. E. Walz, *The Contienental Legal Series, volume Four: A History of Germanic Private Law*, (Little, Brown, and Company, Boston 1918) at 693; C. M. Brune, "Origin and History of Succession in Roman Law" (1911) 36 (4) *Law Magazine & Quarterly Review of Jurisprudence 5th Series*, 429 at 439; O. K. McMurray, *Liberty of Testation and some Modern Limitations Thereon*, in *Celebration Legal Essays, By Various Authors To Mark the Twenty-fifth Year of Service of John H. Wigmore*, (North Western University Press, Chicago 1919) at 540; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 13; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 277; M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 5.

[231] Tacitus *Germania*, 20; R. Hubener, F.S. Philbrick, P. Vinogradoff, W. E. Walz, *The Contienental Legal Series, volume Four: A History of Germanic Private Law*, (Little, Brown, and Company, Boston 1918) at 106; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 491.

[232] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 5; F. W. Maitland, Francis C. Montague, J. F Colby (ed), *A sketch of English Legal History* (G.P. Putnam's Sons, New York 1915) at 15.

archiepiscopal seat, and the formal reconnection with Rome, which represents a turning point in Anglo-Saxon legal development.[233] Bede states the conversion of King Ethelbert of Kent led to the "establish[ment] with the help of his council of wise men, judicial decisions, after the Roman model; which are written in the language of the English, and are still kept and observed by them".[234] The personal laws of the Church may have preserved some memory of Roman law on ecclesiastical life prior to St. Augustine's arrival.[235] However, beyond the act of writing codes, the Anglo-Saxons did not adopt any other substantive Roman principles.[236] Nevertheless, Pope Gregory I encouraged the King to foster a renewed connection with Europe and the ecclesiastics who followed St. Augustine brought continental learning with them.[237]

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[233] R. H. Helmholz, *The Oxford History of the Laws of Britain, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s*, (Oxford University Press, Oxford 2004) at 13; F. C. Bryan, "Origin of English Land Tenures" (1906) 40 (1) *American Law Review*, 9 at 18; J. Moser, "The Secularization of Equity: Ancient Religious Origins, Feudal Christian Influences, and Medieval Authoritarian Impacts on the Evolution of Legal Equitable Remedies" (1997) 26 (3) *Capital University Law Review*, 483 at 507; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Deat*h (Mortis Causa Donationes), (T. & J.W. Johnson & Co, Philadelphia 1892) at 2 -3; E. D. Re, "The Roman Contribution to the Common law" (1961) 29 (3) *Fordham Law Review*, 447 at 458 - 459; M. M. Knappen, *Constitutional and Legal History of Britain* (Harcourt, Brace, New York 1942) at 15; J. Maclaren, *Roman Law in English Jurisprudence*, (William Briggs, Toronto 1888) at 10.

[234] Bede, *Historia Ecclesiastica Gentis Anglorum*, 2.5; E. D. Re, "The Roman Contribution to the Common law" (1961) 29 (3) *Fordham Law Review*, 447 at 459; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 62; F. Pollock, "English Law Before the Norman Conquest" 14 (3) *Law Quarterly Review*, 291 at 297; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (Chicago University Press, Chicago 2008) at 128; R. H. Helmholz, *The Oxford History of the Laws of Britain, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s*, (Oxford University Press, Oxford 2004) at 2; *Laws* 3 Salkend 221 at 221; 91 Eng. Rep. 788 at 788.

[235] E. D. Re, "The Roman Contribution to the Common law" (1961) 29 (3) *Fordham Law Review*, 447 at 460; W. Senior, "Roman Law in England before Vacarius" (1930) 46 (2) *Law Quarterly Review* 191 191; R. H. Helmholz, *The Oxford History of the Laws of Britain, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s*, (Oxford University Press, Oxford 2004) at 1 – 2, 13 – 14; F. Pollock, F. Maitland, *The history of English Law before the Time of Edward I,* second edition, volume 1, (Cambridge University Press, Cambridge 1898) at xxxii; J. F. Winkler, "Roman law in Anglo-Saxon England" (1992) 13 (2) *The Journal of Legal History*, 101 at 101.

[236] R. V. Turner, "Roman Law in England before the Time of Bracton" (1975) 15 (1) *Journal of British Studies* 1 at 1- 2; F. Pollock, "Anglo-Saxon Law" (1893) 8 (3) *The English Historical Review*, 239 at 239; R. H. Helmholz, *The Oxford History of the Laws of Britain, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s*, (Oxford University Press, Oxford 2004) at 2.

[237] Bede, *Historia Ecclesiastica Gentis Anglorum*, 1.32; M. M. Knappen, *Constitutional and Legal History of Britain* (Harcourt, Brace, New York 1942) at 15; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 62; E. D. Re, "The Roman Contribution to the Common law" (1961) 29 (3) *Fordham Law Review*, 447 at 459; W. Senior, "Roman Law in England before Vacarius" (1930) 46 (2) *Law Quarterly Review* 191 191; R. H. Helmholz, *The Oxford History of the Laws of Britain, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s*, (Oxford University Press, Oxford 2004) at 2; F. C. Bryan, "Origin of English Land Tenures" (1906) 40 (1) *American Law Review*, 9 at 18; F. Pollock, F. Maitland, *The history of English Law before the Time of Edward I,* second edition, volume 1, (Cambridge University Press, Cambridge 1898) at xxxii.

The involvement of clergymen in judicial and political matters had a profound effect on Anglo-Saxon legal development.[238] The pattern of addressing temporal and spiritual matters together characterises Anglo-Saxon jurisprudence and judicial practice.[239] Testamentary succession displays the same amalgamated view and Anglo-Saxon law treated the subject as a temporal and spiritual matter. The expression "for mire sawl" reveals the spiritual motive behind Anglo-Saxon succession and it is likely the clergy directly influenced this development.[240] Christian notions radically changed the pagan concept of burying personal chattels for the deceased's use in the afterlife, and shifted the impetus to benefitting the soul in heaven.[241] This gradual shift became possible because Germanic custom permitted the burial of personal chattels, which indicates an early proclivity to divide the deceased's estate beyond the notions of collective ownership.[242] Anglo-Saxons were also obliged to leave a

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[238] M. M. Knappen, *Constitutional and Legal History of Britain* (Harcourt, Brace, New York 1942) at 21; R. H. Helmholz, *The Oxford History of the Laws of Britain, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s*, (Oxford University Press, Oxford 2004) at 13, 55; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 3; T. E. Scrutton, *The Influence of the Roman Law on the Law of England. Being the Yorke Prize Essay of the University of Cambridge for the Year 1884*, (Cambridge University Press, Cambridge 1885) at 5; O. F. Robinson, T. D. Fergus, W. M. Gordon, *European Legal History*, third edition, (Butterworths, London 2000) at 128; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 195; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 3 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 61.

[239] *The Case of Premunire* 1 Davis 84 at 88; 80 Eng. Rep. 567 at 572; F. Pollock, "Anglo-Saxon Law" (1893) 8 (3) *The English Historical Review*, 239 at 252; R. H. Helmholz, *The Oxford History of the Laws of Britain, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s*, (Oxford University Press, Oxford 2004) at 18, 55; F. C. Bryan,"Origin of English Land Tenures" (1906) 40 (1) *American Law Review*, 9 at 18; W. Senior, "Roman Law in England before Vacarius" (1930) 46 (2) *Law Quarterly Review*, 191 at 196; D. Whitelock, Anglo-*Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at 132; M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 64.

[240] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 16; D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelo*ck, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at 100; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 108; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 20; see D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelo*ck, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at 5 (Will of Theodred), 11 (Will of Wynflaed), 21 (Elfgifu), 25 (Will of Ethelmaer), 35 (Will of Ethelflaed), 37 (Will of Ethelflaed), 39 (Elfflaed), 47 (Will of Wulfric), 57 (Will of Ethelstan), 61 (Will of Ethelstan), 63 (Will of Wulfwaru), 71 (Will of Thurketel Heyng), 71 (Will of Aelfric), 87 (Will of Edwin).

[241] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 7; V. Thompson, *Dying and Death in later Anglo-Saxon Glanden*, (The Boydell Press, Woodbridge 2004) at 170; M. Drout, "Anglo-Saxon Wills and the Inheritance of Tradition in the English Benedictine Reform" (2000) 10 (1) *Journal of the Spanish Society for Medieval English Language and Literature,* 1 at 5, 7.

[242] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Centur*y, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 6 - 8; D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at xx.

heriot and a mortuary fee.[243] Nonetheless, the new motive led to an increased desire to control property after death and even to divert it for other purposes outside familial interests.[244] Greater freedom to control property after death required appropriate legal mechanisms to fulfil the deceased's wishes.[245] Anglo-Saxon lawmakers did not meet these needs by importing the Roman testament and jurists only used the word *testamentum* merely to indicate a written instrument rather than a form of will.[246] The brief usage of the Roman testament by the Romano-British population did not penetrate Anglo-Saxon jurisprudence and missionaries bringing knowledge of the instrument did not displace local law although some scholars assert it had some influence.[247] Nonetheless, the Church's role was fundamental to the development of Anglo-Saxon methods of distribution, and its influence suggests England would have adopted the canonical will without the Norman Conquest.[248]

Anglo-Saxons had the power to dispose of property through three testamentary methods: the *verba novissima*, *donatio post obitum*, and the vernacular Anglo-Saxon will.[249] These were not true wills and more akin to gifts because it is uncertain whether they were revocable or ambulatory, and they were unable to create a representative of the deceased in the true sense

[243] D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at 17 (Will of Elfsige)33 (Will of Elfhelm), 53 (Will of Elfric), 71 (Will of Thurketel Heyng), 81 (Will of Thurstan), 85 (Will of Wulfgyth), 89 (Will of Ketel); M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 7.

[244] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 6, 18; D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at vii; L. Bonfield, L. R. Poos, "The Development of the Deathbed transfer in Medieval English Manor Courts" (1998) 47 (3) *Cambridge Law Journal,* 403 at 404; L. Tollerton, *Wills and Will-making in Anglo-Saxon England*, (York Medieval Press, York 2011) at 140.

[245] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century, (Pontifical Institute of Mediaeval Studies*, Toronto 1963) at 18.

[246] L. Tollerton, *Wills and Will-making in Anglo-Saxon England*, (York Medieval Press, York 2011) at 1; M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 9.

[247] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 9 - 12, 24, 93; D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at ix; J. Maclaren, *Roman Law in English Jurisprudence*, (William Briggs, Toronto 1888) at 11; E. D. Re, "The Roman Contribution to the Common law" (1961) 29 (3) *Fordham Law Review*, 447 at 457; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 20; P. H. Winfield, *The Chief Sources of English Legal History*, (Harvard University Press, Cambridge 1925) at 55; J. F. Winkler, "Roman law in Anglo-Saxon England" (1992) 13 (2) *The Journal of Legal History*, 101 at 102.

[248] J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 272.

[249] A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 204.

of the modern will.[250] The *verba novissima,* or last words, became the foremost method of distribution and, similar to its counter-parts, its execution and formalities are difficult to identify.[251] It required the donor to make an oral declaration that instructed those surrounding their bed to perform their final wishes.[252] The *verba novissima* possessed an ambulatory character because it had an implied condition of death and the donor could revoke it if they recovered from their illness.[253] The absence of formalities reflects the fact donors often made these gifts *in extremis* and their proximity to death rendered a written record of the transaction unnecessary because delivery occurred shortly after their passing.[254] Nonetheless, the last words were themselves insufficient to pass property until some form of delivery occurred to perfect the gift.[255] Therefore, Anglo-Saxon law restricted the *verba novissima* to chattels that either passed directly to the intended donee or through an agent instructed to deliver the item.[256] The final method of delivery gave the agent ownership of the property under a form of obligation to deliver it to the intended donee according to the donor's wishes.[257] Bishops often witnessed these final gifts as part of their clerical duties.[258]

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[250] A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 196; O. K. McMurray, *Liberty of Testation and some Modern Limitations Thereon*, in *Celebration Legal Essays, By Various Authors To Mark the Twenty-fifth Year of Service of John H. Wigmore*, (North Western University Press, Chicago 1919) at 543.

[251] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 31; R. H. Helmholz, *The Oxford History of the Laws of Britain, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s*, (Oxford University Press, Oxford 2004) at 53; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 196; L. Tollerton, *Wills and Will-making in Anglo-Saxon England*, (York Medieval Press, York 2011) at 56.

[252] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 31; G. W. Beyer, C. G. Hargrove, "Digital Wills: Has the Time come for Wills to Join the Digital Revolution" (2007) 33 (3) *Ohio Northern University Review*, 865 at 868; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 196.

[253] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 37 – 38.

[254] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 20, 34; L. Tollerton, *Wills and Will-making in Anglo-Saxon England*, (York Medieval Press, York 2011) at 66.

[255] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 24, 28.

[256] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 32, 34 - 35; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 197.

[257] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 37.

[258] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 60; L. Tollerton, *Wills and Will-making in Anglo-Saxon England*, (York Medieval Press, York 2011) at 63.

The first method Anglo-Saxon law developed known as the *donatio post obitum*, or post-obit gift, consisted of an *inter vivos* transfer of a chattel's ownership to the donee, analogous to other Germanic transactions, which had a delayed effect because the donor gained a right to use the item during their lifetime and it only passed after death.[259] Post-obit gifts are contractual rather than donative in character because they required the donee to perform an obligation, either before or after the donor's death, before the transfer was complete.[260] The contractual nature of the agreement meant it was irrevocable and enforceable through ecclesiastical censure unless the donor reserved a power to revoke under special circumstances.[261] Anglo-Saxons routinely put post-obit gifts into writing and made several copies of the document to ensure each party, and even third parties, possessed a copies of the agreement.[262] Whitelock states that the expression "I give after my death" indicates the donor left a post-obit gift.[263] From a modern perspective, a notable feature of the post-obit gift and other methods of distribution is the importance of the oral act over the written form.[264] Anglo-Saxon law treated the written instrument as only evidence of the legal effect given to

[259] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century, (Pontifical Institute of Mediaeval Studies*, Toronto 1963) at 24, 29; D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at xii; G. W. Beyer, C. G. Hargrove, "Digital Wills: Has the Time come for Wills to Join the Digital Revolution" (2007) 33 (3) *Ohio Northern University Review*, 865 at 868; K. A. Lowe, "The Nature and Effect of the Anglo- Saxon Vernacular Will" (1998) 19 (1) *The Journal of Legal History*, 26 at 26; L. Bonfield, L. R. Poos, "The Development of the Deathbed transfer in Medieval English Manor Courts" (1998) 47 (3) *Cambridge Law Journal,* 403 at 410; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 196; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 35.

[260] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 25, 27 - 28; R. H. Helmholz, *The Oxford History of the Laws of Britain, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s*, (Oxford University Press, Oxford 2004) at 53; D. Whitelock, A*nglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at xxii, xxv; K. A. Lowe, "The Nature and Effect of the Anglo- Saxon Vernacular Will" (1998) 19 (1) *The Journal of Legal History*, 26 at 29; A. Campbell, "An Old English Will" (1938) 37 (2) *The Journal of English and Germanic Philology*, 133 at 135 see D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at 9 (Will of Elfgar), 11 (Will of Wynflaed), 47 (Will of Wulfric), 55 (Will of Wulfgeat), 59 (Will of Ethelstan).

[261] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 28, 30.

[262] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 28.

[263] D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at viii, 3 (Will of Theodred), 7 (Will of Aelfgar), 11 (Will of Wynflaed), 47 (Will of Wulfric), 67 (Mantat the Anchorite).

[264] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 19; F. Pollock, "Anglo-Saxon Law" (1893) 8 (3) *The English Historical Review*, 239 at 239; B. Danet, B. Bogoch, "'Whoever Alters This, May God Turn His Face from Him on the Day of Judgment': Curses in Anglo-Saxon Legal Documents" (1992) 105 (416) *The Journal of American Folklore*, 132 at 138; L. Tollerton, *Wills and Will-making in Anglo-Saxon England*, (York Medieval Press, York 2011) at 56.

what the parties involved had actually said.[265] The form of the document was irrelevant and could be unattested, a partial report of the donor's intentions, or drafted after the transaction's completion without consequence.[266] Therefore, the written instrument never became an essential formality of disposing the estate and was only utilised to demonstrate the donor's intent.[267]

The final and most controversial form of *post mortem* disposition is the *cwide*, or sentence, which scholars refer to as the Anglo-Saxon vernacular will because it is the closest instrument to a will in the modern sense despite not having the legal character of a testamentary instrument.[268] The *cwide* is best describable as a bundle of gifts consisting of bilateral and unilateral arrangements in a single instrument with varying legal effects.[269] It possesses similar characteristics to the post-obit gift because it often required the principal donee to enter into a contractual relationship with the donor; but unlike the post-obit gift, it could deal with the entire estate, including future property, and a range of beneficiaries

[265] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 47; D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at viii, xxii; B. Danet, B. Bogoch, "'Whoever Alters This, May God Turn His Face from Him on the Day of Judgment': Curses in Anglo-Saxon Legal Documents" (1992) 105 (416) *The Journal of American Folklore*, 132 at 133; A. Campbell, "An Old English Will" (1938) 37 (2) *The Journal of English and Germanic Philology*, 133 at 135; F. Brandileone, "Preliminary notes upon the Anglo-Saxon Documents of the Eighth and Ninth Centuries" in A. Kocourek (ed), *Celebration Legal Essays by Various Authors: To Mark the Twenty-Fifth Year of the Service of John H. Wigmore*, (North-western University Press, Chicago 1919) at 385.

[266] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 54, 58; G. W. Beyer, C. G. Hargrove, "Digital Wills: Has the Time come for Wills to Join the Digital Revolution" (2007) 33 (3) *Ohio Northern University Review*, 865 at 868; K. A. Lowe, "The Nature and Effect of the Anglo- Saxon Vernacular Will" (1998) 19 (1) *The Journal of Legal History*, 26 at 38; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 4.

[267] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 53; B. Danet, B. Bogoch, "'Whoever Alters This, May God Turn His Face from Him on the Day of Judgment': Curses in Anglo-Saxon Legal Documents" (1992) 105 (416) *The Journal of American Folklore*, 132 at 138.

[268] K. A. Lowe, "The Nature and Effect of the Anglo- Saxon Vernacular Will" (1998) 19 (1) *The Journal of Legal History*, 26 at 23; D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at vii; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 197; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 35; M. Drout, "Anglo-Saxon Wills and the Inheritance of Tradition in the English Benedictine Reform" (2000) 10 (1) *Journal of the Spanish Society for Medieval English Language and Literature,* 1 at 11.

[269] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century, (Pontifical Institute of Mediaeval Studies*, Toronto 1963) at 40, 44, 46; D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at x; G. W. Beyer, C. G. Hargrove, "Digital Wills: Has the Time come for Wills to Join the Digital Revolution" (2007) 33 (3) *Ohio Northern University Review*, 865 at 868; K. A. Lowe, "The Nature and Effect of the Anglo-Saxon Vernacular Will" (1998) 19 (1) *The Journal of Legal History*, 26 at 26, 36; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 33.

without being limited to a single transaction.[270] Donors made *cwide* during times of good health and kept copies themselves, the principal beneficiaries, and gave them to clergyman.[271] A *cwide* could contain both enforceable post-obit gifts, either confirming those made earlier or making them, and simple bare promises that did not possess any legal protection.[272] However, the evidence suggests the *cwide* came to possess a spiritual nature in the late tenth century because donors expected that a person inhibiting the performance of their wishes would face ecclesiastical censure.[273] The flexibility of the instrument allowed donors to include default clauses in case the gift failed or a condition went unfilled, or to dispose of the residue of their estate.[274] Sheehan, the leading authority on Anglo-Saxon succession, concludes a donor could revoke a *cwide* completely or partially, depending on the arrangements made within, which suggests the instrument could possess an ambulatory quality.[275] However, the discovery of one *cwide* suggests that even the contractual elements were revocable, which means the instrument possessed an ambulatory quality in the nature of a true will.[276]

Anglo-Saxon testamentary dispositions possessed a number of features, seemingly developed without the influence of Roman law, which a modern jurist would associate as qualities of a true will. Firstly, it allowed a donor the freedom to leave a wide range of property, which

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[270] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 39- 40; D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at x, xii; K. A. Lowe, "The Nature and Effect of the Anglo- Saxon Vernacular Will" (1998) 19 (1) *The Journal of Legal History*, 26 at 26; M. Drout, "Anglo-Saxon Wills and the Inheritance of Tradition in the English Benedictine Reform" (2000) 10 (1) *Journal of the Spanish Society for Medieval English Language and Literature,*1 at 11.

[271] D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at 79 (Will of Leofgifu), 79 (Thurstan's bequest), 89 (Will of Edwin).

[272] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 39 - 40; D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at xii; see D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at 25 (Will of Ethelmer), 57 (Will of Wulfgeat), 59 (Will of Ethelstan), 85 (Will of Thurstan).

[273] B. Danet, B. Bogoch, "'Whoever Alters This, May God Turn His Face from Him on the Day of Judgment': Curses in Anglo-Saxon Legal Documents" (1992) 105 (416) *The Journal of American Folklore*, 132 at 147; D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at 35 (Will of Elfhelm), 133, 51 (Will of Wulfric), 152, 93 (Will of Siflaed), 206.

[274] See D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at 7 (Will of Elfgar).

[275] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 46 see K. A. Lowe, "The Nature and Effect of the Anglo- Saxon Vernacular Will" (1998) 19 (1) *The Journal of Legal History*, 26 at 36; L. Tollerton, *Wills and Will-making in Anglo-Saxon England*, (York Medieval Press, York 2011) at 52.

[276] K. A. Lowe, "The Nature and Effect of the Anglo- Saxon Vernacular Will" (1998) 19 (1) *The Journal of Legal History*, 26 at 38 (Will of Ethelgifu).

included rights attached to land, debts, and other choses in action.[277] Early gifts were limited to personal possessions that did not adversely affect the family, and property associated with survival, such as farm tools, were the most resistant to the power of bequest.[278] Chattels were the most common gift.[279] The association of land with community interest meant it became the final property to become available and the ability to bequeath it depended on its status.[280] In the ninth century, land created through royal title known as *bocland*, could be gifted; on the other hand, certain customary land, or *folcland*, appears unable to be alienated away from the community.[281] Stigma associated with the alienation of real property prevented frequent gifts of land.[282] Furthermore, donors required permission from the King.[283] The practice of reducing post-obit gifts to writing appears to be associated with ecclesiastical influence on

[277] M. M. Sheehan, T*he Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 100, 104; D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at 3 (Will of Theodred).

[278] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 83, 100.

[279] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 100; L. Tollerton, *Wills and Will-making in Anglo-Saxon England*, (York Medieval Press, York 2011) at 180.

[280] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 100; R. H. Helmholz, *The Oxford History of the Laws of Britain, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s*, (Oxford University Press, Oxford 2004) at 52; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 204; P. Vinogradoff, "Transfer of Land in Old English Law" (1907) 20 (7) *Harvard Law Review*, 532 at 532.

[281] F. Pollock, "Anglo-Saxon Law" (1893) 8 (3) *The English Historical Review*, 239 at 269 - 170; J. Maclaren, *Roman Law in English Jurisprudence*, (William Briggs, Toronto 1888) at 11; E. D. Re, "The Roman Contribution to the Common law" (1961) 29 (3) *Fordham Law Review*, 447 at 457; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 527; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 20; F. C. Bryan, "Origin of English Land Tenures" (1906) 40 (1) *American Law Review*, 9 at 19; P. Vinogradoff, "Transfer of Land in Old English Law" (1907) 20 (7) *Harvard Law Review*, 532 at 532; F. Pollock, "English Law Before the Norman Conquest" 14 (3) *Law Quarterly Review*, 291 at 304; A. H. F. Lefroy, "Anglo-Saxon Period of English Law" (1917) 26 (5) *The Yale Law Journal*, 388 at 392; L. Bonfield, L. R. Poos, "The Development of the Deathbed transfer in Medieval English Manor Courts" (1998) 47 (3) *Cambridge Law Journal,* 403 at 407; L. Tollerton, *Wills and Will-making in Anglo-Saxon England*, (York Medieval Press, York 2011) at 5; E. Coke, *The First Part of the Institutes of the Laws of England*; *or a Commentary upon Littleton*; *Not the Name of the Author only, but of the Law itself*, sixteenth edition, volume 1, (Fleming and Phelan, London 1809) at 6a; F. Pollock, F. Maitland, *The history of English Law before the Time of Edward I,* second edition, volume 1, (Cambridge University Press, Cambridge 1898) at 62; see K. A. Lowe, "The Nature and Effect of the Anglo- Saxon Vernacular Will" (1998) 19 (1) *The Journal of Legal History*, 26 at 38 - 39 (Will of Alfred).

[282] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 83, 106; T. J. Rivers, "Widows's Rights in Anglo-Saxon" (1975) 19 (3) *The American Journal of Legal History*, 208 at 211; L. Tollerton, *Wills and Will-making in Anglo-Saxon England*, (York Medieval Press, York 2011) at 180.

[283] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 61, 106; H. Spelman, "Of the Original of Testaments and Wills, And of their Probate to Whom Anciently Belonged (1633)" in H. Spelman, *Reliquiae Spelmannianae: The Posthumous Works of Sir Henry Spelman Relating to the Laws and Antiquities of England*, (Printed for D. Brown, W. Mears, F. Clay, London, 1723) at 130; D. Whitelock, Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at 7 (Will of Elfgar), 21 (Will of Elfgifu), 23 (Will of Elfheah), 61 (Will of Ethelstan), 63 (Will of Wulfwaru).

the alienation of *bocland* recorded in land books before the arrival of the *cwide* in the ninth century.[284]

The second feature analogous to the modern will is that the *cwide* utilised a person or *mund* to supervise a third party's delivery of an object to an intended beneficiary without deriving a benefit.[285] Their supervisory role is reminiscent of the early executor who supervised the common law heir and only took custody if necessary.[286] Donors made a frequent plea for a strong protector or *mund,* often nominating the King, to carry out the wishes of the deceased.[287] Furthermore, the person who they supervised also acted as a third party to deliver property in a similar manner to an executor despite the fact they acquired ownership.[288] The *mund* did not possess the characteristics of a personal representative and scholars suggest that the origins of the executor lie outside Anglo-Saxon law because the

[284] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 55- 56; G. W. Beyer, C. G. Hargrove, "Digital Wills: Has the Time come for Wills to Join the Digital Revolution" (2007) 33 (3) *Ohio Northern University Review*, 865 at 868; M. Drout, "Anglo-Saxon Wills and the Inheritance of Tradition in the English Benedictine Reform" (2000) 10 (1) *Journal of the Spanish Society for Medieval English Language and Literature, 1 at 8;* T. E. Scrutton, *The Influence of the Roman Law on the Law of England. Being the Yorke Prize Essay of the University of Cambridge for the Year 1884*, (Cambridge University Press, Cambridge 1885) at 23.

[285] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 150 - 151; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 751; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 197.

[286] R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 36; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 149 - 152; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence Concerning their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 130; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 751; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 197.

[287] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 40 - 41, 43; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 4.; R. Hubener, F.S. Philbrick, P. Vinogradoff, W. E. Walz, *The Contienental Legal Series, volume Four: A History of Germanic Private Law*, (Little, Brown, and Company, Boston 1918) at 666; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 752; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 130; D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at xxxvi, 9 (Will of Elfgar), 13 (Will of Wynflaed), 31 (Will of Ethewold), 33 (Will of Elfhelm), 35 (Will of Ethelflaed), 43 (Will of Ethelric), 45 (King Ethelred's confirmation of Ethelric's Will).

[288] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 41, 150; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 130.

office disappeared after the Norman Conquest.[289] The presence of witnesses is another important method of protecting the *cwide*, another quality of a testamentary instrument, which could number in the hundreds or be a small group.[290] Royalty, ecclesiastics, and other powerful people were preferred witnesses.[291] Donors also invoked God to act as a witness and to protect their wishes, and concluded their *cwide* with the popular expression "whoever alters this, may God turn his face from him on the day of judgment".[292] These features are notably absent from the civil law testament.

The Anglo-Saxon methods of testamentary succession display Germanic features that emphasise symbolism rather than qualities academics associate with the Roman testament and the institution of a universal successor.[293] The contractual character of Anglo-Saxon gifts reveals a culture of exchange characterised by the oral form that witnesses present could both

[289] *La Cloche v La Cloche* (1870) 6 Moore N.S. 383 at 392; 16 Eng. Rep. 770 at 773; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 149; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 563; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 130; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 752; L. E. Hay, "Executorship Reporting: Some Historical Notes" (1961) 36 (1) *The Accounting Review*, 100 at 100; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 36.

[290] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 47.

[291] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 49, 392; F. Pollock, "English Law Before the Norman Conquest" 14 (3) *Law Quarterly Review*, 291 at 304 - 305; A. H. F. Lefroy, "Anglo-Saxon Period of English Law" (1917) 26 (5) *The Yale Law Journal*, 388 at 392; D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at 95 (Brihtric Grim's bequest), 24 (Will of Elfheah), 27 (Will of Elfswith), 43 (Will of Ethelric), 45 (King Ethelred's confirmation of Ethelric's Will), 67 (Ethelflaed's Bequest), 79 (Thurstan's bequest), 83 (Will of Thurstan), 87 (Will of Wulfgyth).

[292] D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at 95 (Will of Siflaed); R. H. Helmholz, *The Oxford History of the Laws of Britain, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s*, (Oxford University Press, Oxford 2004) at 53; K. A. Lowe, "The Nature and Effect of the Anglo-Saxon Vernacular Will" (1998) 19 (1) *The Journal of Legal History*, 26 at 36; B. Danet, B. Bogoch, "'Whoever Alters This, May God Turn His Face from Him on the Day of Judgment': Curses in Anglo-Saxon Legal Documents" (1992) 105 (416) *The Journal of American Folklore*, 132 at 132, 142; M. Drout, "Anglo-Saxon Wills and the Inheritance of Tradition in the English Benedictine Reform" (2000) 10 (1) *Journal of the Spanish Society for Medieval English Language and Literature, 1 at 15;* R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 36; V. Thompson, *Dying and Death in later Anglo-Saxon Glanden*, (The Boydell Press, Woodbridge 2004) at 23; see D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at 5 (Will of Theodred), 9 (Will of Aelfgar), 17 (Will of Elfswith), 29 (Will of Brihtric and Elfswith), 35 (Will of Elfhelm), 55 (Will of Elfric), 61 (Will of Ethelstan), 67 (Will of Ethelfaed), 69 (Will of Thurketel),71 (Will of Thurketel Heyng),75 (Will of Elfric Modercope), 79 (Will of Leofgifu), 87 (Will of Wulfgyth), 91 (Will of Ketel), 93 (Will of Ethelmer).

[293] D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at ix; R. W. Lee, "The Interaction of Roman and Anglo-Saxon law" (1944) 61 (2) *South African Law Journal*, 155 at 158.

see and hear.[294] *Cwide* or post-obit gifts were often complex arrangements because donors made them in periods of good health compared to *verba novissima* made *in extremis* that were likely limited to simple gifts.[295] The later importance given to the written element and early use of charter indicates clergy introduced Roman evidentiary practices that included the execution of *cwide* into triplicate copies held by the donor, principal donee, and the Church.[296] However, this appears to reflect ecclesiastical practice introduced into Anglo-Saxon custom rather than a conscious importation of Roman law.[297] Sheehan suggests the donative character of the *verba novissima*, analogous to a *donatio mortis causa,* is the most likely institution to contain Roman elements because its unilateral nature is an exception to the contractual nature of Anglo-Saxon transactions.[298] Nonetheless, Roman legal studies or law books are noticeably absent from Anglo-Saxon society and the evidence they exercised any influence is scant.[299] Selden's conclusion that the Romans took their laws when they

[294] D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at xviii – xiv.
[295] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 38; K. A. Lowe, "The Nature and Effect of the Anglo- Saxon Vernacular Will" (1998) 19 (1) *The Journal of Legal History*, 26 at 38.
[296] D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at ix, xiii; L. Tollerton, *Wills and Will-making in Anglo-Saxon England*, (York Medieval Press, York 2011) at 282; M. Drout, "Anglo-Saxon Wills and the Inheritance of Tradition in the English Benedictine Reform" (2000) 10 (1) *Journal of the Spanish Society for Medieval English Language and Literature, 1 at 15;* R. J. C. Dorsey, "Roman Sources of Some English Principles of Equity and Common Law Rules" (1938) 8 (12) *American Law School Review*, 1233 at 1239; F. Pollock, F. Maitland, *The history of English Law before the Time of Edward I,* second edition, volume 1, (Cambridge University Press, Cambridge 1898) at 26.
[297] D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at xiii- xiv; F. Pollock, "Anglo-Saxon Law" (1893) 8 (3) *The English Historical Review*, 239 at 247; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 3; W. Senior, "Roman Law in England before Vacarius" (1930) 46 (2) *Law Quarterly Review*, 191 at 192; R. H. Helmholz, *The Oxford History of the Laws of Britain, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s*, (Oxford University Press, Oxford 2004) at 53.
[298] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 37.
[299] F. W. Maitland, Francis C. Montague, J. F Colby (ed), *A sketch of English Legal History* (G.P. Putnam's Sons, New York 1915) at 21; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (Chicago University Press, Chicago 2008) at 61; W. Senior "Britain and the Mediaeval Empire" (1924) 40 (4) *The Law Quarterly Review*, 483 at 488; T. F. T. Plucknett, "The Relations between Roman Law and English Common Law down to the Sixteenth Century: A General Survey" (1939) 3 (1) *The University of Toronto Law Journa*l, 24 at 30; C. P. Sherman, "Salient Features of the Reception of Roman Law into the Common Law of England and America" (1928) 8 (3) *Boston University Law Review*, 183 at 183; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 367 but see E. D. Re, "The Roman Contribution to the Common law" (1961) 29 (3) *Fordham Law Review*, 447 at 460; F. W. Maitland "The Materials for English Legal History" (1889) 4 (3) *Political Science Quarterly*, 496 at 509.

departed remains poignant today.[300] Anglo-Saxon testamentary development is a peculiar chapter in the will's evolutionary history that appears largely free from Roman influence.

Anglo-Saxon methods of distribution introduced testamentary concepts to English law prior to the reception of the civil law principles without profoundly shaping the future of the will.[301] This presence is a note-worthy interim in the evolution of testamentary succession and an indicator of the pervasiveness of later civil law influence and its testament. The Norman Conquest in 1066 meant Anglo-Saxon law never received the benefits of the rediscovery of the *Digest* and the twelfth century renaissance, although it is likely the civil law would have penetrated English law if the invasion had failed. The *verba novissima* and post-obit gift were in use in Norman law and survived the invasion; but the most drastic upheaval was the disappearance of the *cwide* that appears to have conflicted with the changes in society.[302] Therefore, the influence of Anglo-Saxon law on later testamentary developments is unclear. Notably, the anathema clause that characterised the Anglo-Saxon *cwide* only fell from use in the thirteenth century.[303] Chattels continued to be the most common form of property left by donors.[304] The *verba novissima* remained a prominent method of distributing property after death by people of various classes throughout Anglo-Norman society as a last minute distribution.[305] It persisted into English law as an oral gift of a chattel delivered to the donee and perfected by the donor's death.[306] The early post-obit gift

[300] J. Selden, D. Ogg (trans), *Ad Fletam Dissertatio*, (Wm. W. Gaunt & Sons, Inc, Holmes Beach 1986) at 163; see W. Senior, "Roman Law in England before Vacarius" (1930) 46 (2) *Law Quarterly Review*, 191 at 191; *Laws* 3 Salkend 221 at 221; 91 Eng. Rep. 788 at 788.
[301] R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 37; L. Tollerton, *Wills and Will-making in Anglo-Saxon England*, (York Medieval Press, York 2011) at 282; J. S. Beckerman, "Succession in Normandy, 1087, and in England, 1066: The Role of Testamentary Custom" (1972) 47 (2) *Speculum*, 258; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 119, 161.
[302] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 3, 108; G. W. Beyer, C. G. Hargrove, "Digital Wills: Has the Time come for Wills to Join the Digital Revolution" (2007) 33 (3) *Ohio Northern University Review*, 865 at 868; L. Tollerton, *Wills and Will-making in Anglo-Saxon England*, (York Medieval Press, York 2011) at 281; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 5.
[303]M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 194.
[304] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 106.
[305] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 115; J. S. Beckerman, "Succession in Normandy, 1087, and in England, 1066: The Role of Testamentary Custom" (1972) 47 (2) *Speculum*, 258 at 258.
[306] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 110, 117 – 118.

retained its contractual character as an instrument found in the Germanic law of both Normandy and the *thingatio* of Lombard law.[307] Nonetheless, the survival of these methods did not have any easily identifiable repercussions on the shape of the modern will.

[307] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 111, 114; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 205; J. S. Beckerman, "Succession in Normandy, 1087, and in England, 1066: The Role of Testamentary Custom" (1972) 47 (2) *Speculum*, 258 at 258; L. Tollerton, *Wills and Will-making in Anglo-Saxon England*, (York Medieval Press, York 2011) at 282; O. K. McMurray, *Liberty of Testation and some Modern Limitations Thereon*, in *Celebration Legal Essays, By Various Authors To Mark the Twenty-fifth Year of Service of John H. Wigmore*, (North Western University Press, Chicago 1919) at 544; J. S. Beckerman, "Succession in Normandy, 1087, and in England, 1066: The Role of Testamentary Custom" (1972) 47 (2) *Speculum*, 258 at 258.

5. The Second Stage of the Civil Law

England's civil law reception and the jurists trained in its principles breathed life into the instrument that became New Zealand's will. The second stage of its influence arose from the rediscovery of *Digest* and the efforts of jurists interpreting the civil law sources during the twelfth century renaissance to furnish a body of rules usable in medieval courts.[308] Its rediscovery proved necessary because Justinian's short-lived conquest of the Ostrogothic Kingdom meant the *Corpus Iuris Civilis* never obtained a foothold in Italy and the incoming Lombard law quickly superseded it.[309] The older Roman law had a profound impact on Lombard customary laws and on the shape of Germanic codes.[310] The Lombards followed the Germanic trend of personal laws that permitted the Roman clergy to regulate themselves according to their former laws.[311] This allowed the introduction of Roman testamentary

[308] P. Stein, "Legal History: The British Perspective" (1994) 62 (1) *Tijdschrift voor Rechtsgeschiedenis*, 71 at 72.

[309] J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 76; F. W. Maitland, "A Prologue to *A History of English Law*" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 1, (Little, Brown and Company , Boston1907) at17; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 358; M. H. Hoeflich, "Bibliographical Perspectives on Roman and Civil law" (1997) 89 (1) *Law Library Journal*, 41 at 43; P. Stein, "Justinian's Compilation: Classical Legacy and Legal Source" (1993) 8 (1) *Tulane European and Civil Law Forum*, 1 at 2; P. Vinogradoff, *Roman law in Medieval Europe*, second edition, (Clarendon Press, Oxford 1929) at 32; R. J. C. Dorsey, Roman Sources of Some English Principles of Equity and Common Law Rules" (1938) 8 (12) *American Law School Review*, 1233 at 1234.

[310] P. Vinogradoff, *Roman Law in Medieval Europe*, second edition, (Clarendon Press, Oxford 1929) at 20, 30; M. H. Hoeflich, J. M. Grabher, "The establishment of Normative Legal Texts: The Beginning of the Jus Commune" in W. Hartmann (ed), K. Pennington (ed), *The History of Medieval Canon Law in the Classical Period, 1140 – 1234. From Gratian to the Decretals of Pope Gregory IX*, (The Catholic University Press, Washington D.C. 2008) at 8; J. P. McIntyre, *Customary Law in the Corpus Iuris Canonici*, (Mellen University Press, San Francisco, 1990) at 58; W. E. Brynteson, "Roman Law and Legislation in the Middle Ages" (1966) 41 (3) *Speculum*, 420 at 420; F. W. Maitland, "A Prologue to *A History of English Law*" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 1, (Little, Brown and Company , Boston1907) at 13, 15; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 31-32; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999), at 31; W. S. Holdsworth, *A History of English Law*, third edition, volume 2, (Methuen & Co, London 1923) at 133 – 134.

[311] F. W. Maitland, "A Prologue to *A History of English Law*" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 1, (Little, Brown and Company , Boston1907) at 22; P. Vinogradoff, *Roman law in Medieval Europe*, second edition, (Clarendon Press, Oxford 1929) at 25, 29; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 77; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 405; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999), at 39 – 40; G. Mousourakis, *The Historical and Institutional Context of Roman law* (Ashgate Publishing Ltd, Aldershot 2003) at 430; W. S. Holdsworth, *A History of English Law*, third edition, volume 2, (Methuen & Co, London 1923) at 133; P.S Barnell, "Emperors, Jurists and Kings: Law and Custom in the Late Roman and Early Medieval West" (2000) (168) *Past and Present*, 6 at 6 – 7; J. F. Winkler, "Roman law in Anglo-Saxon England" (1992) 13 (2) *The Journal of Legal History*, 101 at 103.

concepts into Lombard society.[312] The civil law itself does not appear to have exercised any influence on the Germanic Codes, the early canon law, or testamentary succession.[313] However, there is evidence to suggest the *Institutes*, *Code*, *Novels*, and even fragments of the *Digest* formed part of collections held by early canonists.[314] Further evidence points to sporadic use of the *Institutes* in legal instruction, to interpret the *Lex Visigothorum*, despite the absence of a systematic study of law.[315] Nevertheless, the second stage of the civil law emerged during the investiture contest between Gregory VIII and Henry IV in the wake of the Gregorian reforms that resulted in both powers demanding jurists to find authority to support their respective jurisdictional boundaries.[316] This political setting resulted in the

[312] O. K. McMurray, *Liberty of Testation and some Modern Limitations Thereon*, in *Celebration Legal Essays, By Various Authors To Mark the Twenty-fifth Year of Service of John H. Wigmore*, (North Western University Press, Chicago 1919) at 544; P. Vinogradoff, *Roman law in Medieval Europe*, second edition, (Clarendon Press, Oxford 1929) at 32; M. M. Bigelow,, "The Rise of the English Will" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston 1909) at 777; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 14; M. M. Bigelow, "Theory of Post-Mortem Disposition: Rise of the English Will" (1897) 11 (2) *Harvard Law Review*, 69 at 75.

[313] H. J. Berman , C.J Reid, "Roman law in Europe and the *Ius commune*: A Historical Overview with Emphasis on the New Legal Science of the 16th Century" (1994) 20 *Syracuse Journal of International Law and Commerce* 1 at 1; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 59; F. Pollock, F. Maitland, *The history of English Law before the Time of Edward I,* second edition, volume 1, (Cambridge University Press, Cambridge 1898) at 8.

[314] F. W. Maitland, "A Prologue to *A History of English Law*" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 1, (Little, Brown and Company , Boston1907) at 22; P. Vinogradoff, *Roman law in Medieval Europe*, second edition, (Clarendon Press, Oxford 1929) at 40 - 41; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 77; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 405; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999), at 40; M. H. Hoeflich, J. M. Grabher, "The establishment of normative legal texts: The beginning of the jus commune" in W. Hartmann (ed), K. Pennington (ed), *The History of Medieval Canon Law in the Classical Period, 1140 – 1234. From Gratian to the Decretals of Pope Gregory IX*, (The Catholic University Press, Washington D.C. 2008) at 3; S. L. Sass, "Medieval Roman law: A Guide to Sources and Literature" (1965) 58 (2) *Law Library Journal* 130 at 139; F. Wieacker, T. Weir (trans), *A history of Private Law in Europe*, (Clarendon Press, Oxford 1995) at 25; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 362; W. S. Holdsworth, *A History of English Law*, third edition, volume 2, (Methuen & Co, London 1923) at 135.

[315] W. S. Holdsworth, *A History of English Law*, third edition, volume 2, (Methuen & Co, London 1923) at 136; S. L. Sass, "Medieval Roman law: A Guide to Sources and Literature" (1965) 58 (2) *Law Library Journal* 130 at 139; O. F. Robinson, T. D. Fergus, W. M. Gordon, *European Legal History*, third edition, (Butterworths, London 2000) at 23.

[316] O. F. Robinson, T. D. Fergus, W. M. Gordon, *European Legal History*, third edition, (Butterworths, London 2000)21; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999), at 42; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 89 - 90; C. J. Reid, P*ower over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon law*, (Wm B. Eerdmans Publishing Co, Grand Rapids 2004) at 12; G. Mousourakis, *The Historical and Institutional Context of Roman law* (Ashgate Publishing Ltd, Aldershot 2003) at 430; J. A. Brundage, *Medieval Canon Law*, (Longman, New York 1995) at vii; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 362; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 3 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 62

timely rediscovery of the *Digest* in an uncertain location, likely Pavia, during the 1070s.[317] Its rediscovery heralded the end of five hundred years of neglect of Roman law prompting Sass to compare it to a rising phoenix imparting its splendour onto the late eleventh century.[318]

The rediscovery sparked an intellectual revolution, known as the twelfth century renaissance, representing a turning point in western legal history and an academic approach to law.[319] It elicited euphoria for the study of the *Corpus Iuris Civilis* and scholars flocked to Italy to study law.[320] The *Digest* offered a treasure-trove of legal principles, including a vast jurisprudence on testamentary succession, for use in an increasingly complex socio-economic environment, and its antiquity and association with Roman imperialism heightened its allure.[321] However, five hundred years of neglect meant no suitable method existed to interpret its contents.[322] Historical tradition suggests Irnerius founded a school in Bologna to pioneer a principle-based method of studying the civil law, departing from a strict linguistic approach used to study Lombard law, which earned him a following throughout Europe.[323]

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[317] P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999), at 42; F. Wieacker, T. Weir (trans), *A history of Private Law in Europe*, (Clarendon Press, Oxford 1995) at 28; A. Winroth, *The Making of Gratian's Decretum*, (Cambridge University Press, Cambridge 2002) at 158; W. S. Holdsworth, *A History of English Law*, third edition, volume 2, (Methuen & Co, London 1923) at 134; H. J. Berman, "The crisis of the Western Legal Tradition" (1976) 9 (2) *Creighton Law Review*, 252 at 259; H. J. Berman, "Religious Foundations of Law in the West: An Historical Perspective" (1983) 1 (1) *Journal of Law and Religion*, 3 at 6, 8.

[318] P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 362; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999), at 141; S. L. Sass, "Medieval Roman law: A Guide to Sources and Literature" (1965) 58 (2) *Law Library Journal*, 130 at 130

[319] P. Stein, *Roman Law in European History* (Cambridge University Press, Cambridge 1999), at 43, 45; O. F. Robinson, T. D. Fergus, W. M. Gordon, *European Legal History*, third edition, (Butterworths, London 2000) at, 25.

[320] J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 76; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at x.

[321] J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 76, 82; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 5; M. Smith, "Roman Law in the English Universities" (1916) 9 (28) *The Classical Weekly*, 218 at 218.

[322] P. Stein, "Roman law, Common law, and Civil law" (1992) 66 (6) *Tulane Law Review*, 1591 at 1597.

[323] P. Vinogradoff, *Roman law in Medieval Europe*, second edition, (Clarendon Press, Oxford 1929) at 45, 50 - 51; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 33; F. W. Maitland, "A Prologue to *A History of English Law*" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 1, (Little, Brown and Company , Boston1907) at 31; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999), at 3, 46; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 82; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 406; W. S. Holdsworth, *A History of English Law*, third edition, volume 2, (Methuen & Co, London 1923) at 136; R. J. C. Dorsey, Roman Sources of Some English Principles of Equity and Common Law Rules" (1938) 8 (12) *American Law School Review*, 1233 at 1234; F. Wieacker, "The Importance of Roman Law for Western Civilization and Western Legal Thought" (1981) 4 (2) *Boston College International and*

His method involved examining the principle and placing an explanative note, known as gloss, used by the reader to interpret its legal nature.[324] The leadership of Irnerius's successors, Bulgarus, Martinus, Jacobus, and Hugo, collectively known as the four doctors, allowed Bologna to surpass Pavia as Western Europe's foremost institution for the study of law.[325] Bulgarus restricted his gloss to the literal meaning of the text to find the rationale of the law, which presumed the rule extrapolated took an equitable character.[326] Martinus adopted a liberal approach that sought to discover the equitable purpose.[327] Nonetheless, both their disciples, referred to as glossators, believed the C*orpus Iuris Civilis* could solve any legal problem, and painstakingly worked to render it into a form useful for legal practice.[328] Their efforts were successful and their notes became as authoritative as the civil law itself, which led to the expression "what the gloss does not recognise, the court does not follow".[329]

The twelfth century renaissance and revival of the civil law penetrated England and Selden described the period from 1100 to 1300 A.D. as the Roman period of English legal

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Comparative Law, 257 at 258; H. J. Berman, "The Origins of Western Legal Science" (1977) 90 (5) *Harvard Law Review*, 894 at 902, 909.

[324] C. Von Savigny, W. Holloway (Trans) *System of the Modern Roman Law*, volume 1, (J. Higginbotham, Madras 1867) at 61; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 362.

[325] J. A. Brundage, The *Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 86; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999), at 47; O. F. Robinson, T. D. Fergus, W. M. Gordon, *European Legal History*, third edition, (Butterworths, London 2000)56; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 363; P. Vinogradoff, *Roman law in Medieval Europe*, second edition, (Clarendon Press, Oxford 1929) at 45; F. W. Maitland, "A Prologue to *A History of English Law*" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 1, (Little, Brown and Company , Boston1907) at 30; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 80.

[326] J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 87; P. Vinogradoff, *Roman law in Medieval Europe*, second edition, (Clarendon Press, Oxford 1929) at 56; P. Stein, *Roman Law in European History,* (Cambridge University Press, Cambridge 1999), at 47; W. F. Cahill, "Development by the Medieval Canonists of the Concept of Equity" (1961) (2) *Catholic Lawyer*, 112 at 115; C. Lefebyre, J. Rodes (trans), "Natural Equity and Canonical Equity" (1963) 8 (1) *Natural Law Forum*, 122 at 127.

[327] J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 87; P. Vinogradoff, *Roman law in Medieval Europe*, second edition, (Clarendon Press, Oxford 1929) at 56; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999), at 47 W. F. Cahill, "Development by the Medieval Canonists of the Concept of Equity" (1961) (2) *Catholic Lawyer*, 112 at 115; C. Lefebyre, J. Rodes (trans), "Natural Equity and Canonical Equity" (1963) 8 (1) *Natural Law Forum*, 122 at 127.

[328] P. du Plessis, *Borkowski's Textbook on Roman law, fourth edition*, (Oxford University Press, Oxford 2010) at 363; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999) at, at 3; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 76.

[329] P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999) at 5, 49; C. Von Savigny, W. Holloway (Trans) *System of the Modern Roman Law*, volume 1, (J. Higginbotham, Madras 1867) at 61.

development.[330] There may have been an earlier acquaintance with the civil law because Archbishop Lanfranc studied Canon, Roman and Lombard law at Pavia, and his likely familiarity with the excitement surrounding the *Digest*'s rediscovery meant he could have encouraged reference to it in his capacity as William I's advisor.[331] Nonetheless, the reception of the civil law has a famous foundation story surrounding Archbishop Theobald's invitation of the Bolognese magister Vacarius to England in 1143 to assist in the administration of Canterbury.[332] Tradition suggests Vacarius founded a civil law school at Oxford University in 1149 and lectured there until 1170.[333] Modern scholars are sceptical

[330] T. C. Williams, "History of English law" (1895) 7 (3) *Judicial Review*, 260 at 266. C. P. Sherman, "Salient Features of the Reception of Roman Law into the Common Law of England and America" (1928) 8 (3) *Boston University Law Review*, 183 at 184- 185; F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at xxii; W. Senior, "England and the Mediaeval Empire" (1924) 40 (4) *The Law Quarterly Review*, 483 at 489; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 92; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 3 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 66; J. Walton, "Notes on the Early History of Legal Studies in England" (1899) *22nd Annual Report of the American Bar Association*, 601 at 601.

[331] C. P. Sherman, "Salient Features of the Reception of Roman Law into the Common Law of England and America" (1928) 8 (3) *Boston University Law Review*, 183 at 183; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 92; P. Du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 384; H. D. Hazeltine, "Vacarius as Glossator and Teacher" (1928) 44 (3) *Law Quarterly Review* 344; C. P. Sherman, "The Romanization of English Law" (1914) 23 (4) *The Yale Law Journal* 318 at 321; F. Pollock, F. Maitland, *The history of English Law before the Time of Edward I,* second edition, volume 1, (Cambridge University Press, Cambridge 1898) at xxxiii; J. Walton, "Notes on the Early History of Legal Studies in England" (1899) *22nd Annual Report of the American Bar Association*, 601 at 603.

[332] J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 92; H. H. L. Bellot, "Early Law Schools in London" (1911) 36 (3) *The Law Magazine and Review*, 257 at 258, 260; W. Senior, "Roman law in England before Vacarius" 46 (2) *Law Quarterly Review*, 191 at 203; R. V. Turner, "Roman Law in England before the Time of Bracton" (1975) 15 (1) *Journal of British Studies*, 1 at 6, 9; C. P. Sherman, "Salient Features of the Reception of Roman Law into the Common Law of England and America" (1928) 8 (3) *Boston University Law Review*, 183 at 184; P. Stein, "The Vacarian school" (1992) 13 (1) *The Journal of Legal History*, 23 at 23; H. D. Hazeltine, "Vacarius as Glossator and Teacher" (1928) 44 (3) *Law Quarterly Review* 344 at 344; T. E. Scrutton, *The Influence of the Roman Law on the Law of England. Being the Yorke Prize Essay of the University of Cambridge for the Year 1884*, (Cambridge University Press, Cambridge 1885) at 66; F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at xxiii; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 108; P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 169; P. Du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 384; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 67; W. S. Holdsworth, *A History of English Law*, third edition, volume 2, (Methuen & Co, London 1923) at 148; A. Ogle, *The Canon Law in Mediaeval England An Examination of William Lyndwood's Provinciale in Reply to the Late F. W. Maitland* (J. Murray, London 1912) at 27.

[333] C. P. Sherman, "Salient Features of the Reception of Roman Law into the Common Law of England and America" (1928) 8 (3) *Boston University Law Review*, 183 at 184; H. D. Hazeltine, "Vacarius as Glossator and Teacher" (1928) 44 (3) *Law Quarterly Review*, 344 at 344; T. E. Scrutton, *The Influence of the Roman Law on the Law of England. Being the Yorke Prize Essay of the University of Cambridge for the Year 1884*, (Cambridge University Press, Cambridge 1885) at 66; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 108 - 109; W. Blackstone, *Discourse on the Study of Law being an Introductory Lecture, Read in the Public Schools, October 25, 1758 (Clarendon Press, Oxford 1758)* at 16; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 67, 74; R. V. Turner, "Who was the Author of

about whether Vacarius actually lectured at Oxford and the absence of evidence supports this assertion.[334] Nonetheless, the question remains open for debate because Vacarius is an elusive figure and many historical treatments have reached erroneous and confused conclusions about his person.[335] He did serve a successful career as a papal judge delegate, served in the provinces of York and Canterbury, and spent his final years tending to ecclesiastical duties in Southwell and Northwell.[336] Furthermore, he likely gave private lessons as part of England's blossoming civil law education offered in cathedrals and the households of eminent persons.[337] Vacarius cemented his role in legal history by publishing the *Liber Pauperum,* or poor student's book*,* which contains extracts from the *Digest* and *Code* with gloss for exclusive use in England.[338] He became a figure of reverence amongst students, known as *pauperistae*, and his text's popularity likely led to his association with Oxford University.[339]

Glanvill? Reflections on the Education of Henry II's Common Lawyers" (1990) 8 (1) *Law and History Review*, 97 at 108.

[334] P. Du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 384; P. Stein, "The Vacarian school" (1992) 13 (1) *The Journal of Legal History*, 23 at 25; R. V. Turner, "Who was the Author of Glanvill? Reflections on the Education of Henry II's Common Lawyers" (1990) 8 (1) *Law and History Review*, 97 at 108; F. De Zulueta, P. Stein*, The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at xxii.

[335] P. Stein, "The Vacarian school" (1992) 13 (1) *The Journal of Legal History*, 23 at 23; P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essay*s, (The Hambledon Press, London 1988) at 167, 170; H. H. L. Bellot, "Early Law Schools in London" (1911) 36 (3) *The Law Magazine and Review*, 257 at 261; H. D. Hazeltine, "Vacarius as Glossator and Teacher" (1928) 44 (3) *Law Quarterly Review* 344 at 345

[336] P. Stein, "The Vacarian school" (1992) 13 (1) *The Journal of Legal History*, 23 at 23 - 24; H. D. Hazeltine, "Vacarius as Glossator and Teacher" (1928) 44 (3) *Law Quarterly Review*, 344 at 344; F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at xxiii - xxvi; P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 167, 169; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 92; J. A. Brundage, "Canonists versus Civilians: The Battle of the Faculties" (2011) 71 (2) *The Jurist*, 316 at 319.

[337] P. Stein, "The Vacarian school" (1992) 13 (1) *The Journal of Legal History*, 23 at 24; H. H. L. Bellot, "Early Law Schools in London" (1911) 36 (3) *The Law Magazine and Review*, 257 at 260; P. Stein, T*he Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 170; R. V. Turner, "Who was the Author of Glanvill? Reflections on the Education of Henry II's Common Lawyers" (1990) 8 (1) Law and History Review, 97 at 108; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 93.

[338] C. P. Sherman, "Salient Features of the Reception of Roman Law into the Common Law of England and America" (1928) 8 (3) *Boston University Law Review*, 183 at 184; P. Stein, "The Vacarian school" (1992) 13 (1) *The Journal of Legal History*, 23 at 24; H. D. Hazeltine, "Vacarius as Glossator and Teacher" (1928) 44 (3) *Law Quarterly Review* 344 at 345 - 350; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 109; F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at xxiii, xxvi, xxviii – xxix; P. Du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 384; P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 176; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 93; W. S. Holdsworth, *A History of English Law*, third edition, volume 2, (Methuen & Co, London 1923) at 149; H. H. L. Bellot, "Early Law Schools in London" (1911) 36 (3) *The Law Magazine and Review*, 257 at 261; J. A. Brundage, "Canonists versus Civilians: The Battle of the Faculties" (2011) 71 (2) *The Jurist*, 316 at 319.

[339] P. Du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 384; F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London,

However, it is likely Vacarius would have been too old to prescribe the text himself when Oxford established a law faculty during the 1190s.[340]

Vacarius contributed to the positive reception of the *Corpus Iuris Civilis* during the mid-twelfth century and English students flocked to European institutions and Bolognese glossators lectured in England.[341] Oxford University played a pivotal role teaching both the civil and canon laws, following the Bologna model of excluding municipal law in favour of the learned laws, and became successful enough to attract foreign students.[342] A *Lectura*[343] on Justinian's *Institutes* reveals English students, likely possessing copies of the *Liber Pauperum*, had access to a professional education on the civil law and its testamentary principles at a standard equivalent to the best modern law schools.[344] Vacarius stressed the civil law's importance to English law by promoting it as a storehouse of legal knowledge

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1990) at xxvi -xxvii; R. V. Turner, "Who was the Author of Glanvill? Reflections on the Education of Henry II's Common Lawyers" (1990) 8 (1) *Law and History Review*, 97 at 108; P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 171.

[340] P. Stein, "The Vacarian school" (1992) 13 (1) *The Journal of Legal History*, 23 at 24; F. De Zulueta, P. Stein, The teaching of Roman law in England around 1200, (Selden Society, London, 1990) at xxvii.

[341] P. Du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 384; R. V. Turner, "Roman Law in England before the Time of Bracton" (1975) 15 (1) *Journal of British Studies*, 1 at 107; F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at xxiii, xxxviii; L. E. Boyle "Canon law before 1389" in *The history of the University of Oxford: The early Oxford schools*, volume 1, (Oxford University Press, Oxford 1984) at 532; P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 167, 184; C. P. Sherman, "Salient Features of the Reception of Roman Law into the Common Law of England and America" (1928) 8 (3) *Boston University Law Review*, 183 at 185; W. Senior, "Roman Law MSS" (1931) 47 (3) *The Law Quarterly Review*, 337 at 337; A. J. Duggan, "Roman, Canon and Common Law in Twelfth-Century England: The council of Northampton (1164) re-examined" (2010) 83 (221) *Historical Research*, 379 at 386 – 387.

[342] J. Selden, D. Ogg (trans), *Ad Fletam Dissertatio*, (Wm. W. Gaunt & Sons, Inc, Holmes Beach 1986) at 135; H. H. L. Bellot, "Early Law Schools in London", (1911) 36 (160) *The Law Magazine and Review*, 257 at 268; P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 133; F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at xxxv; R. V. Turner, "Roman Law in England before the Time of Bracton" (1975) 15 (1) *Journal of British Studies*, 1 at 108; L. E. Boyle "Canon law before 1389" in *The history of the University of Oxford: The early Oxford schools*, volume 1, (Oxford University Press, Oxford 1984) at 532; R. W. Southern "From Schools to University" in T. H. Aston (ed), J. I. Catto (ed), *The history of the University of Oxford: The early Oxford schools*, volume 1, (Oxford University Press, Oxford 1984) at 21; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 113; J. A. Brundage, "Canonists versus Civilians: The Battle of the Faculties" (2011) 71 (2) *The Jurist*, 316 at 323; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999) at 57.

[343] British library, Royal MS.4. B. IV in F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990)

[344]P. Stein, "The Vacarian school" (1992) 13 (1) *The Journal of Legal History*, 23 at 26; F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at xxxviii, lii – liii; C. Donahue Jr. "*Ius commune*, Canon and Common Law in England" (1992) 66 (6) *Tulane Law Review*, 1745 at 1749; J. C. Tate, "Ownership and Possession in the Early Common Law" (2006) 48 (3) *American Journal of Legal History*, 280 at 284; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 119

capable of solving any problem.[345] Study of the civil law grew so popular that King Stephen passed an edict in c 1150 prohibiting its study or the ownership of civil law materials in an effort to prevent its introduction into English law.[346] The clergy continued to teach the civil law in their monasteries, disregarding the edict, and Henry II abandoned this stance to allow its study to resume.[347] Selden summarises that "silence was imposed on our Vacarius, but by God's grace the strength of the law increased in proportion as the forces of inequity threatened it".[348] Therefore, English law experienced a positive civil law reception that exercised a profound influence on testamentary development, which continues to resonate within the Wills Act 2007 and our modern will.[349]

English jurists recognised the intellectual merit of the civil law and used its principles to supplement the law, address points of law where it was silent, or present it as an ideal to add sophistication to municipal law.[350] The rational and systematic concept of the civil law must

[345] P. Stein, "The Vacarian school" (1992) 13 (1) *The Journal of Legal History*, 23 at 23 P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 176 – 177, 185.

[346] C. P. Sherman, "Salient Features of the Reception of Roman Law into the Common Law of England and America" (1928) 8 (3) *Boston University Law Review*, 183 at 184; H. D. Hazeltine, "Vacarius as Glossator and Teacher" (1928) 44 (3) *Law Quarterly Review*, 344 at 346; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 93; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 109; P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 167; W. Blackstone, *Discourse on the Study of Law being an Introductory Lecture, Read in the Public Schools, October 25, 1758* (Clarendon Press, Oxford 1758) at *17*; W. Senior, *Doctors' Commons and the old Court of Admiralty: A Short History of the Civilians in England* (Longmans, Green and Co, London 1922) at 3

[347] C. P. Sherman, "Salient Features of the Reception of Roman Law into the Common Law of England and America" (1928) 8 (3) *Boston University Law Review*, 183 at 184; H. D. Hazeltine, "Vacarius as Glossator and Teacher" (1928) 44 (3) *Law Quarterly Review*, 344 at 346; J. Selden, D. Ogg (trans), *Ad Fletam Dissertatio*, (Wm. W. Gaunt & Sons, Inc, Holmes Beach 1986) at 135; W. Blackstone, *Discourse on the Study of Law being an Introductory Lecture, Read in the Public Schools*, October 25, 1758 (Clarendon Press, Oxford 1758) at 17; but see W. S. Holdsworth, *A History of English Law*, third edition, volume 2, (Methuen & Co, London 1923) at 148.

[348] J. J. Selden, D. Ogg (trans), *Ad Fletam Dissertatio*, (Wm. W. Gaunt & Sons, Inc, Holmes Beach 1986) at 109.

[349] P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 182; W. Senior, *Doctors' Commons and the old Court of Admiralty: A Short History of the Civilians in England* (Longmans, Green and Co, London 1922) at 2.

[350] J. L. Barton, "The Study of Civil law before 1380" in T. H. Aston (ed), J. I. Catto (ed), *The history of the University of Oxford: The early Oxford schools,* volume 1, (Oxford University Press, Oxford 1984) at 520; H. Brown, "Mediaeval Jurists: Bracton" (1936) 1 *The Woolsack*, 52 at 53; P. Du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 385; J. Selden, D. Ogg (trans), *Ad Fletam Dissertatio*, (Wm. W. Gaunt & Sons, Inc, Holmes Beach 1986) at xxxiii; J. Reeves, W. F. Finlason, *Reeves's History of the English Law: From the Time of the Romans of the End of the Reign of Elizabeth*, volume 1, (M. Murphy, Philadelphia 1880) at cxvi; D. J. Seip, "Roman Legal Categories in the Early Common Law" in T. G. Watkin (ed), *Legal Record and Historical Reality: Proceedings of the Eighth British Legal History Conference Cardiff 1987*, (The Hambledon Press, London 1989) at 34; J. Walton, "Notes on the Early History of Legal Studies in England" (1899) *22nd Annual Report of the American Bar Association*, 605; Anonymous, *Humble Proposals to the Parliament now Assembled.* (Printed for E.C. for R. Royston at the Angel in Ivielane, London

have been a dramatic contrast to a common law only learnable from attending its courts.[351] English courts even utilised Latin maxims either directly derived from the civil law, modified to suit local conditions, or were completely indigenous to municipal law.[352] This is indicative of the strength of the reception of the civil law and its influence on English law.[353] However, English jurists applied local law where the systems diverged or used civil law analogy to strengthen a pre-existing rule.[354] Therefore, their treatment went beyond merely reproducing the substance of the civil law.[355] They used its vocabulary to describe unique English concepts and the fact both systems shared a term did not necessitate a common meaning and they felt free to move beyond the natural interpretation.[356] Furthermore, the maxims could possess a superficial likeness only and be used to express concepts foreign to the civil law. [357]

1656) at 4; R. H. Helmholz, "Continental Law and Common Law: Historical Strangers or Companions?" (1990) 1990 (6) *Duke Law Journal*, 1207 at 1228.

[351] R. W. Southern "From Schools to University" in T. H. Aston (ed), J. I. Catto (ed), *The history of the University of Oxford: The early Oxford schools*, volume 1, (Oxford University Press, Oxford 1984) at 519

[352] J. Selden, D. Ogg (trans), *Ad Fletam Dissertatio*, (Wm. W. Gaunt & Sons, Inc, Holmes Beach 1986) at xliv; J. G. Phillimore, *Principles and Maxims of Jurisprudence*, (J. W. Parker and Son, London, 1856) at 7; J. Reeves, W. F. Finlason, *Reeves's History of the English Law: From the Time of the Romans of the End of the Reign of Elizabeth*, volume 1, (M. Murphy, Philadelphia 1880) at cxvi.

[353] J. L. Barton, "The Study of Civil law before 1380" in T. H. Aston (ed), J. I. Catto (ed), *The history of the University of Oxford: The early Oxford schools*, volume 1, (Oxford University Press, Oxford 1984) at 520; J. Selden, D. Ogg (trans), *Ad Fletam Dissertatio*, (Wm. W. Gaunt & Sons, Inc, Holmes Beach 1986) at xv.

[354] J. Selden, D. Ogg (trans), *Ad Fletam Dissertatio*, (Wm. W. Gaunt & Sons, Inc, Holmes Beach 1986) at 39; F. Bacon, *The Elements of the Common Lawes of England, Branched Into a Double Tract: The One Containing a Collection of Some Principal Rules and Maximes of the Common Law, with Their Latitude and Extent. Explicated for the more Facile Introduction of Such as are Studiously Addicted to that Noble Profession. The other the Use of the Common Law for Preservation of Our Persons Goods and Good Names. According to the Lawes and Customes of this Land*, (Printed by the Assignes of John More ESQ., London, 1629) at pref.; F. Pollock, F. Maitland, *The history of English Law before the Time of Edward I,* second edition, volume 1, (Cambridge University Press, Cambridge 1898) at xxxiv.

[355] D. J. Seip, "Roman Legal Categories in the Early Common Law" in T. G. Watkin (ed), *Legal Record and Historical Reality: Proceedings of the Eighth British Legal History Conference Cardiff 1987*, (The Hambledon Press, London 1989) at 30.

[356] D. J. Seip, "Roman Legal Categories in the Early Common Law" in T. G. Watkin (ed), *Legal Record and Historical Reality: Proceedings of the Eighth British Legal History Conference Cardiff 1987*, (The Hambledon Press, London 1989) at 13, 29; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 12; D. J. Seipp, "Bracton, the Year Books, and the "Transformation of Elementary Legal Ideas" in the Early Common Law" (1989) 7 (1) *Law and History Review*, 175 at 178, 198

[357] D. J. Seip, "Roman Legal Categories in the Early Common Law" in T. G. Watkin (ed), *Legal Record and Historical Reality: Proceedings of the Eighth British Legal History Conference Cardiff 1987*, (The Hambledon Press, London 1989) at 35; H. Goudy, "Two Ancient Brocards I: actio personalis moritur cum persona" in P. Vinogradoff (ed), *Essays in Legal History Read before the International Congress of Historical Studies Held in London in 1913*, (Oxford University Press, London 1913) at 222 216; J. Selden, D. Ogg (trans), *Ad Fletam Dissertatio*, (Wm. W. Gaunt & Sons, Inc, Holmes Beach 1986) at xv, 159; D.R. Coquillette, *The Civilian Writers of Doctors Commons, London: Three Centuries of Jurisdiction Innovation and Comparative, Commercial and International Law*, (Duncker & Humblot, Berlin, 1988) at 17; W. S. Holdsworth, *A History of English Law*, third edition, volume 2, (Methuen & Co, London 1923) at 192.

This use of the civil law reveals English jurists were capable of using its principles in a sophisticated manner to frame testamentary law to meet local needs.[358]

Legal historians recognise the absence of a full reception of the civil law, despite England's long acquaintance with the *ius commune*, as a testament to the strength of the municipal common law system.[359] The orthodox approach is that the civil law exerted little influence over the common law's development.[360] However, the modern approach suggests the civil law had a profound influence on early common law jurists who adopted its methods, structure, and vocabulary to bring form to the common law and lawyers versed in its principles even cited it as authoritative in the Royal courts.[361] This influence is evident in early common law treatise.[362] Henry de Bracton, the father of the common law, and his *De Legibus et Consuetudinibus Angliae*, has been subject to a number of studies seeking to

[358] R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 13; D. J. Seipp, "Bracton, the Year Books, and the "Transformation of Elementary Legal Ideas" in the Early Common Law" (1989) 7 (1) *Law and History Review*, 175 at 202; N. Jansen, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 31; D. J. Seipp, "Bracton, the Year Books, and the "Transformation of Elementary Legal Ideas" in the Early Common Law" (1989) 7 (1) *Law and History Review*, 175 at 183.

[359] J.C. Tate, "Ownership and Possession in the Early Common Law" (2006) 48 (3) *American Journal of Legal History*, 280 at 281.

[360] C. P. Sherman, "Salient Features of the Reception of Roman Law into the Common Law of England and America" (1928) 8 (3) *Boston University Law Review*, 183 at 190; C. Donahue Jr. "*Ius commune*, Canon and Common Law in England" (1992) 66 (6) *Tulane Law Review*, 1745 at 1758.

[361] R. V. Turner, "Roman Law in England before the Time of Bracton" (1975) 15 (1) *Journal of British Studies*, 1 at 106; D. J. Seip, "Roman Legal Categories in the Early Common Law" in T. G. Watkin (ed), *Legal Record and Historical Reality: Proceedings of the Eighth British Legal History Conference Cardiff 1987*, (The Hambledon Press, London 1989) at 9; T. C. Williams, "History of English law" (1895) 7 (3) *Judicial Review*, 260 at 267; R. V. Turner, "Who was the Author of Glanvill? Reflections on the Education of Henry II's Common Lawyers" (1990) 8 (1) *Law and History Review*, 97 at 106, 108; C. P. Sherman, "The Romanization of English Law" (1914) 23 (4) *The Yale Law Journal* 318 at 324; P. Du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 384; P. Stein, The *Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 209; J. Reeves, W. F. Finlason, *Reeves's History of the English Law: From the Time of the Romans of the End of the Reign of Elizabeth*, volume 1, (M. Murphy, Philadelphia 1880) at cxvii; J. L. Barton, "The Study of Civil law before 1380" in T. H. Aston (ed), J. I. Catto (ed*), The history of the University of Oxford: The early Oxford schools*, volume 1, (Oxford University Press, Oxford 1984) at 519; D. J. Seipp, "The Concept of Property in the Early Common Law" (1994) 12 (1) *Law and History Review*, 29 at 34; A. Lyon, "A Recent History of English Law" (1910) 9 (1) *Michigan Law Review*, 1 at 9; but see J. C. Tate, "Ownership and Possession in the Early Common Law" (2006) 48 (3) *American Journal of Legal History*, 280 at 313; D. J. Seipp, "Bracton, the Year Books, and the "Transformation of Elementary Legal Ideas" in the Early Common Law" (1989) 7 (1) *Law and History Review*, 175 at 175.

[362] P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 184; J. Selden, D. Ogg (trans), *Ad Fletam Dissertatio*, (Wm. W. Gaunt & Sons, Inc, Holmes Beach 1986) at xlvi, 23; C. Guterbock, B. Coxe (Trans) *Bracton and His Relation to the Roman Law: A Contribution to the History of the Roman Law in the Ages*, (Fred B. Rothman & Co, Littleton 1979) at iii; R. H. Helmholz, "Magna Carta and the *Ius commune*" (1999) 66 (2) *The University of Chicago Law Review*, 297 at 365.

unravel the civil law influence on the work and its author(s).[363] Bracton structured his work after the *Institutes,* also utilised in Glanville's great treatise, drew on a number of principles from the *Corpus Iuris Civilis*, and utilised civil law commentary to explain complex legal principles behind English law.[364] He treats civil law principles as equal to municipal law in a manner similar to continental usages indicating English jurists considered themselves part of the *ius commune* tradition.[365] Dr. Phillimore makes the particular poignant observation that

[363] J. L. Barton, "Bracton as a Civilian" (1968) 42 (3) *Tulane Law Review*, 555 at 555; J. L. Barton, "The Authorship of Bracton: Again" (2009) 30 (2) *The Journal of Legal History*, 117 at 122; H. Brown, "Mediaeval Jurists: Bracton" (1936) 1 *The Woolsack*, 52 at 53; R. H. Helmholz, "Magna Carta and the *Ius commune*" (1999) 66 (2) *The University of Chicago Law Review*, 297 at 365, 368; W. Holdsworth, *Some Makers of English Law: The Tagore Lectures*, (Cambridge University Press, Cambridge, 1938) at 15, 18; T. E. Scrutton, *The Influence of the Roman Law on the Law of England. Being the Yorke Prize Essay of the University of Cambridge for the Year 1884*, (Cambridge University Press, Cambridge 1885) at 78; C. P. Sherman, "Salient Features of the Reception of Roman Law into the Common Law of England and America" (1928) 8 (3) *Boston University Law Review*, 183 at 188; P. Vinogradoff, "The Roman Elements in Bracton" (1923) 32 (8) *The Yale Law Journal*, 751 at 751; H. Goudy, "Two Ancient Brocards I: Actio Personalis Moritur Cum Persona" in P. Vinogradoff (ed), *Essays in Legal History Read before the International Congress of Historical Studies Held in London in 1913*, (Oxford University Press, London 1913) at 222 - 223; J. Reeves, W. F. Finlason, *Reeves's History of the English Law: From the Time of the Romans of the End of the Reign of Elizabeth*, volume 1, (M. Murphy, Philadelphia 1880) at cxvi - cxvii; C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 187- 188, 206; C. Donahue Jr. "*Ius commune*, Canon and Common Law in England" (1992) 66 (6) *Tulane Law Review*, 1745 at 1753; A. Lyon, "A Recent History of English Law" (1910) 9 (1) *Michigan Law Review*, 1 at 9; P. H. Winfield, *The Chief Sources of English Legal History*, (Harvard University Press, Cambridge 1925) at 60 – 61; G. E. Woodbine, "The Roman Element in Bracton's De Adquirendo Rerum Dominio" (1922) 31 (8) *Yale Law Journal*, 827 at 828.

[364] R. V. Turner, "Roman Law in England before the Time of Bracton" (1975) 15 (1) *Journal of British Studies*, 1 at 106; D. J. Seip, "Roman Legal Categories in the Early Common Law" in T. G. Watkin (ed), *Legal Record and Historical Reality: Proceedings of the Eighth British Legal History Conference Cardiff 1987*, (The Hambledon Press, London 1989) at 11; J. L. Barton, "Bracton as a Civilian" (1968) 42 (3) *Tulane Law Review*, 555 at 564- 565; P. Du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 385; H. Goudy, "Two Ancient Brocards I: actio personalis moritur cum persona" in P. Vinogradoff (ed), *Essays in Legal History Read before the International Congress of Historical Studies Held in London in 1913*, (Oxford University Press, London 1913) at 222; R. H. Helmholz, "Magna Carta and the *Ius commune*" (1999) 66 (2) *The University of Chicago Law Review*, 297 at 365, 368; C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 188; C. P. Sherman, "Salient Features of the Reception of Roman Law into the Common Law of England and America" (1928) 8 (3) *Boston University Law Review*, 183 at 206; W. Senior, *Doctors' Commons and the old Court of Admiralty: A Short History of the Civilians in England* (Longmans, Green and Co, London 1922) at 8; G. E. Woodbine, "The Roman Element in Bracton's De Adquirendo Rerum Dominio" (1922) 31 (8) *Yale Law Journal*, 827 at 829; J. Cowell, M. Thomas (ed), *A Law Dictionary; or, The Interpreter of Words and Terms*, second edition, (Printed by E. and R. Nutt Gosling, London, 1727) at (Br); D. J. Seipp, "Bracton, the Year Books, and the "Transformation of Elementary Legal Ideas" in the Early Common Law" (1989) 7 (1) *Law and History Review*, 175 at 183; A. J. Duggan, "Roman, Canon and Common Law in Twelfth-Century England: The Council of Northampton (1164) Re-examined" (2010) 83 (221) *Historical Research*, 379 at 404.

[365] J. L. Barton, "The Study of Civil law before 1380" in T. H. Aston (ed), J. I. Catto (ed), *The history of the University of Oxford: The early Oxford schools*, volume 1, (Oxford University Press, Oxford 1984) at 520; S. Worby, "Kinship: The Canon Law and the Common Law in Thirteenth-Century England" (2007) 80 (210) *Historical Research,* 443 at 461; W. Holdsworth, *Some Makers of English Law: The Tagore Lecture*s, (Cambridge University Press, Cambridge, 1938) at 21; C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 188; D. J. Seip, "Roman Legal Categories in the Early Common Law" in T. G. Watkin (ed), *Legal Record and Historical Reality: Proceedings of the Eighth British Legal History Conference Cardiff 1987*, (The Hambledon Press, London 1989) at 11; W. S. Holdsworth, *A History of English Law*, third edition, volume 2, (Methuen & Co, London 1923) at 267; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to*

"any person reading this Latin text on English law is able to appreciate the civil law influence".[366] However, Henry III abruptly halted the influence of the civil law on the common law by banning the formers study in London, which ensured subsequent jurists were largely isolated from learning the two systems together.[367] This act is likely the reason why the civil law never superseded municipal law nor exercised the same authority as it did on the continent, and its direct influence on the common law had waned by the end of the thirteenth century.[368]

The civil law and canon law had a profound relationship because both systems gave authority to juristic legal sources and each system formed part of the wider *ius commune*, which encouraged English ecclesiastical courts to refer to the former's principles when developing their testamentary jurisdiction and other unique areas of English law.[369] Canonists studied the civil law more fervently than common lawyers did because Oxford University followed the European model that presented it as preparatory study for the canon law, even over an

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Testamentary Law, (Libreria Ateneo Salesiano, Rome 1996) at 11; F. Wieacker, "The Importance of Roman Law for Western Civilization and Western Legal Thought" (1981) 4 (2) *Boston College International and Comparative Law*, 257 at 260.

[366] J. G. Phillimore, *Principles and Maxims of Jurisprudence*, (J. W. Parker and Son, London, 1856) at 6.

[367] J. L. Barton, "The Study of Civil law before 1380" in T. H. Aston (ed), J. I. Catto (ed), *The history of the University of Oxford: The early Oxford schools*, volume 1, (Oxford University Press, Oxford 1984) at 521

[368] C. Donahue Jr. "*Ius commune*, Canon and Common Law in England" (1992) 66 (6) *Tulane Law Review*, 1745 at 1748; D. J. Seip, "Roman Legal Categories in the Early Common Law" in T. G. Watkin (ed), *Legal Record and Historical Reality: Proceedings of the Eighth British Legal History Conference Cardiff 1987*, (The Hambledon Press, London 1989) at 15; R. W. Lee, "The Interaction of Roman and Anglo-Saxon law" (1944) 61 *South African Law Journal*, 155 at 162; J. Selden, D. Ogg (trans), *Ad Fletam Dissertatio*, (Wm. W. Gaunt & Sons, Inc, Holmes Beach 1986) at xv – xvi, xlvi, 35; T. C. Williams, "History of English law" (1895) 7 (3) *Judicial Review*,260 at 269; J. G. Phillimore, *Principles and Maxims of Jurisprudence*, (J. W. Parker and Son, London, 1856) at 7; A. Lyon, "A Recent History of English Law" (1910) 9 (1) *Michigan Law Review*, 1 at 7; J. C. Tate, "Ownership and Possession in the Early Common Law" (2006) 48 (3) *American Journal of Legal History*, 280 at 313; P. H. Winfield, *The Chief Sources of English Legal History*, (Harvard University Press, Cambridge 1925) at 61; W. Senior, *Doctors' Commons and the old Court of Admiralty: A Short History of the Civilians in England* (Longmans, Green and Co, London 1922) at 7; F. W. Maitland, "Canon law in England" in F.W. Maitland, *Roman Canon Law in the Church of England: Six Essays*, (Methuen & Co, London 1898) at 4.

[369] *Reformatio Legum Ecclesiasticarum*, pef; *R v The Archbishop of Canterbury* (1807) 8 East. 213 at 214; 103 Eng. Rep. 323 at 324; *Moore v Moore* (1817) 1 Phill. Ecc. 406 at 434; 161 Eng. Rep. 1026 at 1035; P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 182, 184; F. Wieacker, T. Weir (trans), *A history of Private Law in Europe*, (Clarendon Press, Oxford 1995) at 54, 61; J. A. Brundage, *Medieval Canon Law*, (Longman, New York 1995) at 61; C. J. Reid, *Power over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon law*, (Wm B. Eerdmans Publishing Co, Grand Rapids 2004) at 15; A. Winroth, *The Making of Gratian's Decretum*, (Cambridge University Press, Cambridge 2002) at 147; A. Wijffels "The Civil Law" in L. Hellinga, J. B. Trapp (eds), *The Book in Britain 1400 – 1557*, volume 3, (Cambridge University Press, Cambridge, 1999) at 403; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 70; T. C. Williams, "History of English law" (1895) 7 (3) Judicial Review, 260 at 266 – 267; R. H. Helmholz "The Canon Law" in L. Hellinga, J. B. Trapp (eds), *The Book in Britain 1400 – 1557*, volume 3, (Cambridge University Press, Cambridge, 1999) at 387; H. S. G. Halsbury (ed), J.P.H Mc Kay (ed), *Halsbury's Law of England*, *Wills and Intestacy*, fifth edition, volume 34, (LexisNexis Butterworths, London 2011) at [5].

understanding of theology, because "everything is found in the *Corpus Iuris Civilis*".[370] The canon law's relationship with the civil law resembled the common law position because canonists also borrowed terminology, structure, legal analysis, and drew freely from its principles as a supplementary source of law.[371] Furthermore, the civil law's authority depended on the permission granted by the ecclesiastical courts to admit its principles, and it received no force if it conflicted with the canon law in the same manner as the common law.[372] The canon law remained a distinct system derived from unique ecclesiastical authority, and the civil law sat alongside theological and municipal sources of law as a secondary source for the spiritual courts.[373] The *Corpus Iuris Civilis* itself did contain elements of the classical canon law but canonists also addressed issues like baptism, ordination, and clerical dress that were purely ecclesiastical in nature.[374]

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[370] T. C. Williams, "History of English law" (1895) 7 (3) *Judicial Review*, 260 at 266; J. W. Jones, *A Translation of all the Greek, Latin, Italian, and French quotations which occur in Blackstone's Commentaries on the laws of England, and also in the notes of the editions by Christian, Archbold, and Williams* (T. & J.W. Johnson & co, Philadelphia 1889) at 2; J. Brundage, "Canon law and the law schools" in W. Hartmann (ed), K. Pennington (ed), *The History of Medieval Canon Law in the Classical Period, 1140 – 1234. From Gratian to the Decretals of Pope Gregory IX*, (The Catholic University Press, Washington D.C. 2008) at 105- 106; F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at xiv; P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 174; D. M. Owen, *The Medieval Canon Law: Teaching, Literature and Transmission*, (Cambridge University Press, Cambridge 1990) at 2; J. P. McIntyre, *Customary Law in the Corpus Iuris Canonici*, (Mellen University Press, San Francisco, 1990) at 165.

[371] A. Wijffels "The Civil Law" in L. Hellinga, J. B. Trapp (eds), *The Book in Britain 1400 – 1557*, volume 3, (Cambridge University Press, Cambridge, 1999) at 403; P. Stein, T*he Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 182, 184; J. Selden, D. Ogg (trans), *Ad Fletam Dissertatio*, (Wm. W. Gaunt & Sons, Inc, Holmes Beach 1986) at 43; J. A. Brundage, *Medieval Canon Law*, (Longman, New York 1995) at 12; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Cour*ts, (Chicago University Press, Chicago 2008) at 75; R. E. Rodes, Jr., E*cclesiastical Administration in Medieval England: The Anglo-Saxons to the Reformation*, (University of Notre Dame Press, Notre Dame, 1977) at 66; A. J. Duggan, "Roman, Canon and Common Law in Twelfth-Century England: The Council of Northampton (1164) Re-examined" (2010) 83 (221) *Historical Research*, 379 at 386.

[372] *Beeby v Beeby* (1799) 1 Hagg. Ecc. 789 at 790; 162 Eng. Rep. 755 at 755; P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 174; W. Blackstone, *Discourse on the Study of Law being an Introductory Lecture, Read in the Public Schools, October 25, 1758* (Clarendon Press, Oxford 1758) at 13; J. Selden, D. Ogg (trans), *Ad Fletam Dissertatio*, (Wm. W. Gaunt & Sons, Inc, Holmes Beach 1986) at 43; J. Dodd, *A History of Canon Law in Conjunction with other Branches of Jurisprudence with Chapters on the Royal Supremacy and the Report of the Commission on Ecclesiastical Courts*, (Parker, London 1884) at 164; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 80.

[373] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 263; H. J. Berman , C. J. Reid, "Roman law in Europe and the *Ius commune*: A Historical Overview with Emphasis on the New Legal Science of the 16th century" (1994) 20 *Syracuse Journal of International Law and Commerce*, 1 at 10; T. D. Fergus, W. M. Gordon, *European Legal History*, third edition, (Butterworths, London 2000) at 5; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at xxxvi.

[374] R. H. Helmholz, *The Spirit of Classical Canon law*, (University of Georgia Press, Athens 1996) at 4, 87.

The civil law formed part of the English legal system on its own merits and a professional class of civilians had arisen by 1250 that abided by a code of legal ethics and required admission to the courts.[375] Their organisation provided a model for the inns of the common law and physicians to follow, and their fiduciary duties form part of modern legal ethics today.[376] Civilians were a class of English lawyers who aspired to work in the spiritual courts, giving them direct access to shape testamentary law, and other courts following civil law procedure.[377] In *R v Tollin*, the Royal court noted "when any matter touching the civil law comes into question, the justices are accustomed to call on civilians to inform them", and Thomas Eden notes the same is true for common law aspects arising in ecclesiastical causes.[378] English civilians also had many opportunities to work in governmental positions, diplomatic positions, ecclesiastical positions, as one of the twelve officials to the royal chancellor, or any other jurisdiction where the *ius commune* applied.[379] The *Corpus Iuris Civilis* and the *ius commune* commentary, alongside the *Corpus Iuris Canonici*, were the foremost tools of the civilian jurist and their profession continued to develop after the fourteenth century.[380] Civilians could also practice in the courts of Admiralty, which also

[375] B. P. Levack, *The Civil Lawyers In England 1603-1641, The Political Study*, (Clarendon Press, Oxford 1973) at 146; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 2; J. A. Brundage, "The Rise of the Professional Jurist in the Thirteenth Century" (1994) 20 *Syracuse Journal of International Law and Commerce*, 185 at 185; P. Brand, *The Making of the Common Law*, (The Hambledon Press, London 1992) at 2, 5.

[376] J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 3.

[377] B. P. Levack, *The Civil Lawyers In England 1603-1641, The Political Study*, (Clarendon Press, Oxford 1973) at 128; D. R. Coquillette, "Legal ideology and Incorporation I: The English Civilian Writers 1523 – 1607" (1981) 61 (1) *Boston University Law Review*, 1 at 19; W. S. Holdsworth, *A History of English Law*, volume 12, (Methuen & Co, London 1938) at 605; P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 210; J. Selden, D. Ogg (trans), *Ad Fletam Dissertatio*, (Wm. W. Gaunt & Sons, Inc, Holmes Beach 1986) at 43; Anonymous, *Humble Proposals to the Parliament now Assembled.* (Printed for E.C. for R. Royston at the Angel in Ivielane, London 1656) at 5; R. H. Helmholz, *The Ius commune in England: Four Studies*, (Oxford University Press, Oxford 2001) at 5.

[378] *Roy v Tollin*, 1 Rolle 10 at 10; 191 Eng. Rep. 290 at 290; 158. The Notebook of Dr Thomas Eden (1610) in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 116 see *Hurst v Beach* (1820) 5 Madd 351 at 356; 56 Eng. Rep. 929 at 931; *Wright v Doe Tatham* (1837) 7 AD. & E. 313 at 329; 112 Eng. Rep. 488 at 495; C. Donahue Jr. "Why the History of Canon law is not Written" in Selden Society, *The Selden Society Lectures: 1951 – 2001*, (William S. Hein & Co, New York 2003) at 688 – 689.

[379] F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at 17, 22; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 4; D. R. Coquillette, "Legal ideology and Incorporation I: The English Civilian Writers 1523 – 1607" (1981) 61 (1) *Boston University Law Review*, 1 at 20; P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 200; B. P. Levack, *The Civil Lawyers In England 1603-1641, The Political Study*, (Clarendon Press, Oxford 1973) at 27; F. W. Maitland, "Canon law in England" in F.W. Maitland, *Roman Canon Law in the Church of England: Six Essays*, (Methuen & Co, London 1898) at 5; A. J. Duggan, "Roman, Canon and Common Law in Twelfth-Century England: The council of Northampton (1164) re-examined" (2010) 83 (221) *Historical Research*, 379 at 386 at 397.

[380] J. Cowell, M. Thomas (ed), *A Law Dictionary; or, The Interpreter of Words and Terms*, second edition, (Printed by E. and R. Nutt Gosling, London, 1727) at 4; A. Wijffels "The Civil Law" in L. Hellinga, J. B. Trapp

followed civil law procedure and principles related to maritime issues, prize, and commercial matters containing a foreign element.[381] Furthermore, civilians could find work in England's university courts and military tribunals similarly governed by civil law principles.[382]

The Church provided civilians with the best opportunities for employment, particularly in the provincial courts of York and Canterbury, and they could expect roles in the judiciary, to act as advocates and proctors, notaries, or undertake some other administrative function.[383] Proctors assisted litigants to bring causes or the probate of wills in an analogous manner to solicitors; advocates were doctors of the civil law and, like barristers, acted on behalf of the litigant in court.[384] Civilians were required to join the collegiate Doctors Commons in

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(eds), The Book in Britain 1400 – 1557, volume 3, (Cambridge University Press, Cambridge, 1999) at 402; C. P. Sherman, "A Brief History of Medieval Roman Canon Law in England" (1919) 68 (3) *University of Pennsylvania Law Review and American Law Register*, 233 at 234; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at 128; J. Selden, D. Ogg (trans), *Ad Fletam Dissertatio*, (Wm. W. Gaunt & Sons, Inc, Holmes Beach 1986) at L.

[381] Nov. 23; *The 'Ulster'* (1862) Lush 424 at 425 - 426; 164 Eng. Rep. 186 at 187 - 188 (PC); *R v The Archbishop of Canterbury* (1807) 8 East. 213 at 218; 103 Eng. Rep. 323 at 326; F. Clerke, *Praxis Curiae Admiralitatis Angliae* (Impensis Guilel. Crooke, London 1679) at 1; T. E. Scrutton, *The Influence of the Roman Law on the Law of England. Being the Yorke Prize Essay of the University of Cambridge for the Year 1884*, (Cambridge University Press, Cambridge 1885) at 132; P. Du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 385; P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 210; W. S. Holdsworth, *A History of English Law*, volume 12, (Methuen & Co, London 1938) at 606; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 3 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 69 – 70;); S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at xv; Anonymous, *Humble Proposals to the Parliament now Assembled.* (Printed for E.C. for R. Royston at the Angel in Ivielane, London 1656) at 4; R. H. Helmholz, *The Ius commune in England: Four Studies*, (Oxford University Press, Oxford 2001) at 5; J. Chamberlayne, *Magnae Britannia Notitia: or the Present State of Great Britain*, (Printed for Timothy Goodwin, London 1718) at 181

[382] T. E. Scrutton, *The Influence of the Roman Law on the Law of England. Being the Yorke Prize Essay of the University of Cambridge for the Year 1884*, (Cambridge University Press, Cambridge 1885) at 141; J. Chamberlayne, *Magnae Britannia Notitia: or the Present State of Great Britain*, (Printed for Timothy Goodwin, London 1718) at 181.

[383] F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at 18; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 23.

[384] *R v The Archbishop of Canterbury* (1807) 8 East. 213 at 214; 103 Eng. Rep. 323 at 324; P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at 2; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 379; W. S. Holdsworth, *A History of English Law*, volume 12, (Methuen & Co, London 1938) at 701; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records* (Lochin Publishing, Dursley 1992) at 33; J. H. Baker, *An Introduction to English Legal History*, fourth edition, (Reed Elsevier (UK) Ltd, London, 2002) at 169; D. R. Coquillette, *The Civilian Writers of Doctors Commons, London: Three Centuries of Jurisdiction Innovation and Comparative*, Commercial and International Law, (Duncker & Humblot, Berlin, 1988) at 24; B. P. Levack, *The Civil Lawyers In England 1603-1641, The Political Study*, (Clarendon Press, Oxford 1973) at 16; R. B. Outhwaite, *The Rise and Fall of The English Ecclesiastical Courts, 1500 – 1860*, (Cambridge University Press, Cambridge 2006) at 65; N. Cox, "The influence of the Common law on the Decline of the Ecclesiastical Courts of the Church of England" (2002) 2 (2) *Rutgers Journal of Law and Religion*, 1 at 17; R.

London to acquire practical experience in the same manner as the Inns of Common law to reinforce their academic knowledge.[385] There was fierce competition amongst practising civilians and the remainder had to occupy notarial or administrative roles.[386] Notaries occupied an important role in the testamentary jurisdiction of the spiritual courts because the managed documents, achieved records, and acted as scribes, and their mismanagement often led to poorly written or lost wills that were the chief causes of litigation.[387] After the Reformation, Henry VIII halted canon law study and parliament granted civilians a monopoly over all ecclesiastical causes and application of the remaining canons that formed part of customary ecclesiastical law.[388]

Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 3, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 375; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 54.

[385] R. B. Outhwaite, *The Rise and Fall of The English Ecclesiastical Courts, 1500 – 1860*, (Cambridge University Press, Cambridge 2006) at 65; J.H. Baker, A*n Introduction to English Legal History,* fourth edition, (Reed Elsevier (UK) Ltd, London, 2002) at 169; E. A. Haertle, "The History of the Probate Court" (1962) 45 (4) *Marquette Law Review*, 546 at 548; D.R. Coquillette, The *Civilian Writers of Doctors Commons, London: Three Centuries of Jurisdiction Innovation and Comparative, Commercial and International Law*, (Duncker & Humblot, Berlin, 1988) at 24; B. P. Levack, *The Civil Lawyers In England 1603-1641, The Political Study*, (Clarendon Press, Oxford 1973) at 18, 20; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 2, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 220g; N. Cox, "The influence of the Common law on the Decline of the Ecclesiastical Courts of the Church of England" (2002) 2 (2) *Rutgers Journal of Law and Religion*, 1 at 18; R. H. Helmholz, "Ecclesiastical Lawyers and the English Reformation" (1995) 3 (17) *Ecclesiastical Law Journal*, 360 at 361.

[386] F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at 24.

[387] J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (University Press, Chicago 2008) at 395, 401; F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at 24; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 3, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 2.

[388] 37 Hen. VIII. c 17; 163. The Notebook of Dr Thomas Eden (1610) in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 104; *R v The Archbishop of Canterbury* (1807) 8 East. 213 at 214; 103 Eng. Rep. 323 at 324; M. Hale, *The History of the Common Law of England: Divided into Twelve Chapters*, (Printed by E. Nutt, London 1713) at 29; P. Stein, T*he Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 210; R. B. Outhwaite, *The Rise and Fall of The English Ecclesiastical Courts, 1500 – 1860*, (Cambridge University Press, Cambridge 2006) at 22; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 1; R. Phillimore, *The Practice and Courts of Civil and Ecclesiastical Law, and the Statements in Mr. Bouverie's Speech on the Subject*, (W. Benning & Co, London 1848) at 118; F. De Zulueta, P. Stein, The teaching of Roman law in England around 1200, (Selden Society, London, 1990) at 16, 45; P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 210; D. R. Coquillette, *The Civilian Writers of Doctors Commons, London: Three Centuries of Jurisdiction Innovation and Comparative, Commercial and International Law*, (Duncker & Humblot, Berlin, 1988) at 24; C. P. Sherman, "A Brief History of Medieval Roman Canon Law in England" (1919) 68 (3) *University of Pennsylvania Law Review and American Law Register*, 233 at 240; N. Cox, "The influence of the Common law on the Decline of the Ecclesiastical Courts of the Church of England" (2002) 2 (2) *Rutgers Journal of Law and Religion*, 1 at 5; J. Walton, "Notes on the Early History of Legal Studies in England" (1899) *22nd Annual Report of the American Bar Association*, 601 at 606; R. Grey, *A System of English Ecclesiastical Law*, fourth edition, (Printed by Henry Lintot, Savoy 1743) at 9; W. Stubbs, *Seventeen Lectures on the Study of Medieval and Modern History and Kindred Subjects Delivered at Oxford, under Statutory Obligation in the Years 1867-1884*, (Clarendon Press, Oxford 1887) at 367.

During the fifteenth and sixteenth centuries, English law experienced a smaller second reception of the civil law founded on humanist political philosophy derived from classical literature that advocated strong governmental control.[389] This view became particularly poignant during the Civil war and interregnum periods when the common law lawyers accused civilians of attempting to supplant English law with the *Corpus Iuris Civilis*, which they associated with papalism, imperialism, and the supreme power of the crown.[390] Civilians responded by using their juristic talents to produce legal commentary to defend the role of civil law in the English legal system.[391] Civilians were more proficient, prolific, and better equipped in this area than their common law counter-parts who could only boast a handful of exceptional works.[392] However, common lawyers could boast a greater collection of case law and statutes as a source of law.[393] Nevertheless, these civilians aimed to enrich English law, rather than supplant it, and believed the quality of the principle outweighed its continental source.[394] Therefore, the second reception did not threaten England's constitutional framework or the strong position of the common law despite its positive treatment by ruling monarchs.[395] In the nineteenth century, the civilian profession succumbed to the reforms

[389] R. J. Terrill, "The Application of the Comparative Method by English Civilians: The Case of William Fulbecke and Thomas Ridley" (1981) 2 (2) *The Journal of Legal History*, 169 at 175; D. R. Coquillette, "Legal ideology and Incorporation I: The English Civilian Writers 1523 – 1607" (1981) 61 (1) *Boston University Law Review*, 1 at 31; W. Holdsworth, *Some Makers of English Law: The Tagore Lectures*, (Cambridge University Press, Cambridge, 1938) at 75; R. Phillimore, *The Practice and Courts of Civil and Ecclesiastical Law, and the Statements in Mr. Bouverie's Speech on the Subject*, (W. Benning & Co, London 1848) at 118; G. E. Woodbine, "The Roman Element in Bracton's De Adquirendo Rerum Dominio" (1922) 31 (8) *Yale Law Journal*, 827 at 827; W.S. Holdsworth, "The Reception of Roman Law in the Sixteenth Century I" (1911) 27 (4) *The Law Quarterly Review*, 387 at 387.

[390] Dd 9.57 *Bagshaw's Argument Against the Canons* (1640) in J. H. Baker (ed), J. S. Ringrose (ed), *Catalogue of English Legal Manuscripts in Cambridge University Library*, (The Boydell Press, Woodbridge 1996) at 104; D. R. Coquillette, "Legal ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law" (1987) 67 (1) *Boston University Law Review*, 877 at 879; *B. P. Levack, The Civil Lawyers In England 1603-1641, The Political Study*, (Clarendon Press, Oxford 1973) at 86, 158; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 52; D. J. Seipp, "Bracton, the Year Books, and the "Transformation of Elementary Legal Ideas" in the Early Common Law" (1989) 7 (1) *Law and History Review*, 175 at 177; R. H. Helmholz, "Continental Law and Common Law: Historical Strangers or Companions?" (1990) 1990 (6) *Duke Law Journal*, 1207 at 1217

[391] D. R. Coquillette, "Legal ideology and Incorporation I: The English Civilian Writers 1523 – 1607" (1981) 61 (1) *Boston University Law Review*, 1 at 35, 879.

[392] D. R. Coquillette, "Legal ideology and Incorporation I: The English Civilian Writers 1523 – 1607" (1981) 61 (1) *Boston University Law Review*, 1 at 35.

[393] F. W. Maitland, *Why the History of English Law is not Written* (C. J. Clay & Sons, London: 1888) at 4 – 6.

[394] D. R. Coquillette, "Legal ideology and Incorporation I: The English Civilian Writers 1523 – 1607" (1981) 61 (1) *Boston University Law Review*, 1 at 4; D.R. Coquillette, *The Civilian Writers of Doctors Commons, London: Three Centuries of Jurisdiction Innovation and Comparative, Commercial and International Law*, (Duncker & Humblot, Berlin, 1988) at 21; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 391.

[395] P. Du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 386; P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, (The Hambledon Press, London 1988) at 209; B. P. Levack, *The Civil Lawyers In England 1603-1641*, *The Political Study*,

made in the Probate Act 1857, which had sections providing for the disbandment of the Doctors Commons that ended the civilians' direct influence on English testamentary development.[396] Nonetheless, the civil law continued to be a vibrant source of law, and modern scholars owe a profound debt to the resurgence of civilian scholarship during the nineteenth century for illuminating its role in shaping the law and the practice of the ecclesiastical courts.[397] Civilians played a prominent and useful role in developing English legal thought and later jurists adapted their methods to give shape to the common law.[398] Their efforts also yielded a will that survives as a native part of New Zealand law with civil law principles largely unaltered despite recent statutory alterations.[399]

(Clarendon Press, Oxford 1973) at 128; D. R. Coquillette, "Legal ideology and Incorporation I: The English Civilian Writers 1523 – 1607" (1981) 61 (1) *Boston University Law Review*, 1 at 35; G. E. Woodbine, "The Roman Element in Bracton's De Adquirendo Rerum Dominio" (1922) 31 (8) *Yale Law Journal*, 827 at 827; S. Randazzo, "Roman Legal Tradition and American Law" (2002) 1 (1) *Roman Legal Tradition*, 123 at 128

[396] B. P. Levack, *The Civil Lawyers In England 1603-1641, The Political Study*, (Clarendon Press, Oxford 1973) at 201; J.H. Baker, *An Introduction to English Legal History*, fourth edition, (Reed Elsevier (UK) Ltd, London, 2002) at 169; N. Cox, "The influence of the Common law on the Decline of the Ecclesiastical Courts of the Church of England" (2002) 2 (2) *Rutgers Journal of Law and Religion*, 1 at 43; A. H. Manchester, "The Reform of the Ecclesiastical Courts" (1966) 10 (1) *The American Journal of Legal History*, 51 at 75; J. H. Baker, *Monuments of Endlesse Labours: English Canonists and their Work 1300 – 1900*, (The Hambledon Press, London, 1998) at 144; A. Lewis, "What Marcellus says is against you" in A.D.E Lewis (ed), D.J. Ibbetson (ed), *The Roman Law Tradition*, (Cambridge University Press, Cambridge 1994) at 207.

[397] F. De Zulueta, P. Stein, The teaching of Roman law in England around 1200, (Selden Society, London, 1990) at 62; A. Lewis, "What Marcellus says is against you" in A.D.E Lewis (ed), D.J. Ibbetson (ed), *The Roman Law Tradition*, (Cambridge University Press, Cambridge 1994) at 208; T.W. Marshall, "Roman law: Its Study in England" (1901) 26 (3) *Law Magazine & Quarterly Review of Jurisprudence 5th Series*, 288 at 289.

[398] P. Du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 386.

[399] N. Cox, "The influence of the Common law on the Decline of the Ecclesiastical Courts of the Church of England" (2002) 2 (2) *Rutgers Journal of Law and Religion*, 1 at 5; R. H. Helmholz, "Ecclesiastical Lawyers and the English Reformation" (1995) 3 (17) *Ecclesiastical Law Journal*, 360 at 364.

6. The Canonical Will

The basic structure of the modern New Zealand will stems from the canon law rather than the highly formalistic civil law testament. Roman testamentary law did not necessitate a separate canon law development during the early stages of the Church's history.[400] Nonetheless, the Edict of Milan 313 A.D. granted the Church proprietary rights and it developed a natural interest in succession law because of its involvement in burial and as a recipient of testamentary gifts.[401] The church also set up a number of charitable institutions administrated by Bishops to care for the poor and secure the release of captives.[402] The duty of charity was a basic doctrine of the apostles and theologians encouraged testators, with support from the state, to leave bequests to the Church for charitable purposes in recognition that their worldly possessions were best utilised to aid them in the afterlife.[403] Luke 11:41 urged people to "give charity of such things as you have; and behold all things are clean unto you". St. Augustine encouraged testators to make a gift to charity as part of their final act of confession to clean their soul to secure salvation according to this tenet and avoid damnation.[404] He implored

[400] M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 126; H. J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, Harvard 1983) at 231.

[401] S. MacCormack, "Sin, Citizenship, and the Salvation of Souls: The Impact of Christian Priorities on Late-Roman and Post-Roman Society" (1997) 39 (4) *Comparative Studies in Society and History*, 644 at 659; C. E. F. Rickett, "Charitable Giving in English and Roman Law: A Comparison of Method" (1979) 38 (1) *The Cambridge Law Journal*, 118 at 140; T. W. D., "The Jurisdiction of the Court of Chancery to Enforce Charitable Uses" (1862) 10 (3) *The American Law Register*, 129 at 130.

[402] C. E. F. Rickett, "Charitable Giving in English and Roman Law: A Comparison of Method" (1979) 38 (1) *The Cambridge Law Journal*, 118 at 143; T. W. D., "The Jurisdiction of the Court of Chancery to Enforce Charitable Uses" (1862) 10 (3) *The American Law Register*, 129 at 130.

[403] Codex Theodosius. 16.2.4; Proverbs 11:4, 14:31; 19:17; 28:27; Matthew 25:31- 46; St. Ambrose, H. De Romestein (Trans), "The duty of the Clergy" in *Nicene and Post-Nicene Fathers of the Christian Church: The Principal Works of St. Ambrose,* volume 10, (James Parker and Company, Oxford 1896) at 25 – 27; St. Augustine, P. Schaff (ed) *Nicene and Post-Nicene Fathers of the Christian Church: City of God,* volume 2, (W.M. B. Eerdmans Publishing Company, Michigan 1956) at 41, 401; W. Assheton, *A Theological Discourse of Last Wills and Testaments*, (Printed for Brab, Aylmer, London 1696) at 43 -44; C. E. F. Rickett, "Charitable Giving in English and Roman Law: A Comparison of Method" (1979) 38 (1) *The Cambridge Law Journal*, 118 at 129, 142; R. A Houlbrooke, *Death, Religion and the Family in England, 1480 – 1750*, (Oxford University Press, Oxford 1998) at 81.

[404] St. Augustine "On forgiveness of Sins and Baptism" in St. Augustine, H. De Romestein (ed), *Nicene and Post-Nicene Fathers of the Christian Church: Anti-Pelagian Writings,* volume 5, (James Parker and Company, Oxford 1896) at 21; St. Augustine, P. Schaff (ed) *Nicene and Post-Nicene Fathers of the Christian Church: City of God,* volume 2, (W.M. B. Eerdmans Publishing Company, Michigan 1956) at 1011, 1124; S. MacCormack, "Sin, Citizenship, and the Salvation of Souls: The Impact of Christian Priorities on Late-Roman and Post-Roman Society" (1997) 39 (4) *Comparative Studies in Society and History*, 644 at 671; H. S. Maine, *Dissertations on Early Law and Custom*, (Henry Holt and Company, New York 1883) at 79; E. Jenks (ed), H. O. Danckwerts, J. S. Stewart Wallace, *Stephen's Commentaries,* seventeenth edition, volume 2 (Butterworth & Co., Bell Yard, Temple Bar, London 1922) at 613; N. Jansen, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 31 see J. G. Nichols, J. Bruce (eds), *Wills*

Christians to treat Christ as an heir alongside their natural children.[405] Priests often attended the testator's deathbeds, according to the custom of administering last rites and hearing final confessions, to remind them of their charitable duty.[406] However, the clergy also appear to have prevalently engaged in the stigmatised practice of legacy hunting to such an extent that necessitated an imperial rescript addressed to the Pope to prohibit vulnerable people from making bequests to the church in an effort to preserve the estate for expectant heirs.[407] The tension between the duties to provide for family and to give charitably became a prominent issue amongst jurists.[408] Nevertheless, the fostered spirit of charitable giving would survive into the medieval period and continue to remain poignant in the ethos of English will making as a final act of repentance.[409]

Germanic law itself never furnished an analogous concept of testate succession until the Church encouraged the invading tribes to recognise the Roman law testament within their legal systems.[410] In the IV Council of Orleans, in Frankish Gaul, the Church took an interest

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from Doctors Commons: A Selection from the Wills of Eminent Persons proved in the Prerogative Court of Canterbury 1495 – 1695 (Printed for the Camden Society, London 1863) at 80 (Will of Isaac Casaubon, 1595).

[405] St. Augustine, P. Schaff (ed) *Nicene and Post-Nicene Fathers of the Christian Church: Contents of Christian Doctrine,* volume 2, (W.M. B. Eerdmans Publishing Company, Michigan 1956) at [86.13]; St, Augustine, W. Watts (Trans), *St. Augustine's Confessions*, volume 2, (William Heinemann, London 1912) at 10.4; S. MacCormack, "Sin, Citizenship, and the Salvation of Souls: The Impact of Christian Priorities on Late-Roman and Post-Roman Society" (1997) 39 (4) *Comparative Studies in Society and History*, 644 at 660; E. Champlin, "Creditur Vulgo Testamenta Hominum Speculum Esse Morum: Why the Romans Made Wills" (1989) 84 (3) *Classical Philology*, 198 at 199.

[406] *R v Raines*, 1 Ld. Raym. 361 at 361; 91 Eng. Rep. 1138 at 1138; H. J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, Harvard 1983) at 234; S. Coppel, "Willmaking on the Deathbed" (1988) 40 (1) *Local Population Studies* 37 at 37; M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century, (Pontifical Institute of Mediaeval Studies*, Toronto 1963) at 180 see Canon 84, Canons of 1603 (1604).

[407] Codex Theodosius. 16.2.20; S. MacCormack, "Sin, Citizenship, and the Salvation of Souls: The Impact of Christian Priorities on Late-Roman and Post-Roman Society" (1997) 39 (4) *Comparative Studies in Society and History*, 644 at 661; K. Hopkins, D*eath and Renewal: Sociologically Studies in Roman History 2*, (Cambridge University Press, Cambridge 1983) at 239; E. Champlin, "Creditur Vulgo Testamenta Hominum Speculum Esse Morum: Why the Romans Made Wills" (1989) 84 (3) *Classical Philology*, 198 at 212; R. Hooker, I. Walton, *Of the Laws of Ecclesiastical Polity: Introductions; Commentary, Preface and Books V- VII*, (Medieval & Renaissance Texts & Studies, Binghamton 1993) at 1067.

[408] S. MacCormack, "Sin, Citizenship, and the Salvation of Souls: The Impact of Christian Priorities on Late-Roman and Post-Roman Society" (1997) 39 (4) *Comparative Studies in Society and History*, 644 at 661.

[409] W. Assheton, *A Theological Discourse of Last Wills and Testaments*, (Printed for Brab, Aylmer, London 1696) at 20; C. E. F. Rickett, "Charitable Giving in English and Roman Law: A Comparison of Method" (1979) 38 (1) *The Cambridge Law Journal*, 118 at 142; S. Coppel, "Willmaking on the Deathbed" (1988) 40 (1) *Local Population Studies* 37 at 37.

[410] W. W. Buckland, "The Comitial Will" (1916) 32 (1) *Law Quarterly Review*, 97 at 115; H. Spelman, *Reliquiae Spelmannianae: The Posthumous Works of Sir Henry Spelman Relating to the Laws and Antiquities of England*, (Printed for D. Brown, W. Mears, F. Clay, London, 1723) at 127; F. P. Walton, *Historical Introduction to the Roman Law*, fourth edition, (W. Green & Son, Edinburgh 1920) at 156; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 13; M. M. Bigelow, "The Rise of the English Will" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston 1909) at 778; O. K.

in the legal structure of the will and held that the absence of any formal requirements of a testament did not invalidate bequests *ad pias causas*, which is indicative of an early interest in retracting from Roman formalism.[411] Testators also continued to listen to the advice of theologians about the dispositions they should leave in their wills.[412] The principal motivation behind charity to purify the testator's soul remained behind Lombard testamentary patterns demonstrating the concept could sit alongside Germanic kinship and familial obligations.[413] The strength of this motive developed to encourage testators to favour a broader range of charitable objects, supervised by the Church, and they began to leave gifts to monasteries, disadvantaged widows, and other vulnerable members of society.[414] However, it carried over the same issue of balancing the duty to give charitably and the rights of natural heirs, which prompted secular enactments to restrict the size of these bequests that theologians supported by repeating the advice of St. Augustine that testator's ought to provide for Christ after their children.[415] Nevertheless, the Church's involvement in securing and promoting charitable bequests, recognised by both the secular and canon law, strengthened its interest in the

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McMurray, *Liberty of Testation and some Modern Limitations Thereon*, in *Celebration Legal Essays, By Various Authors To Mark the Twenty-fifth Year of Service of John H. Wigmore*, (North Western University Press, Chicago 1919) at 540; J. A. Brundage, *Medieval Canon Law*, (Longman, New York 1995) at 88; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 279; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 15; K. S. Spaht, K. V. Lorio, C. Picou, C. Samuel, F. W. Swaim, Jr., "The New Forced Heirship Legislation: A Regrettable 'Revolution'" (1990) 50 (3) *Louisiana Law Review*, 411 at 486; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch, and James Williams, Dublin 1771) at 491; P. Vinogradoff, "Transfer of Land in Old English Law" (1907) 20 (7) *Harvard Law Review*, 532 at 532; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 27.

[411] J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 535; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 271- 272; S. MacCormack, "Sin, Citizenship, and the Salvation of Souls: The Impact of Christian Priorities on Late-Roman and Post-Roman Society" (1997) 39 (4) *Comparative Studies in Society and History*, 644 at 665.

[412] S. MacCormack, "Sin, Citizenship, and the Salvation of Souls: The Impact of Christian Priorities on Late-Roman and Post-Roman Society" (1997) 39 (4) *Comparative Studies in Society and History*, 644 at 664, 665; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 273.

[413] S. MacCormack, "Sin, Citizenship, and the Salvation of Souls: The Impact of Christian Priorities on Late-Roman and Post-Roman Society" (1997) 39 (4) *Comparative Studies in Society and History*, 644 at 668, 673; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 279.

[414] Dist. 88, c 1; Dist. 88, c 7; S. MacCormack, "Sin, Citizenship, and the Salvation of Souls: The Impact of Christian Priorities on Late-Roman and Post-Roman Society" (1997) 39 (4) *Comparative Studies in Society and History*, 644 at 669; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 528.

[415] Sext. 3.11.1; S. MacCormack, "Sin, Citizenship, and the Salvation of Souls: The Impact of Christian Priorities on Late-Roman and Post-Roman Society" (1997) 39 (4) *Comparative Studies in Society and History*, 644 at 666 – 668; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at534; W. Assheton, *A Theological Discourse of Last Wills and Testaments*, (Printed for Brab, Aylmer, London 1696) at 84 – 85.

testament's development as a vehicle for charity.[416] This obligation initially possessed moral force, although it ceased to have a voluntary nature and existed alongside the compulsory mortuary fee to ensure a Churchyard burial.[417] Priests in attendance of the dying actively reminded them of the necessity to give charitably after death became so important that by 1000 A.D. it became associated with the final confession and absolution.[418]

The canon law furnished a number of important principles shaping the modern will that scholars ought to appreciate.[419] Wiseman's observation that "there is a strange concept that has got into the heads of some men, that the civil and canon law are one and the same, that they cannot be severed" appears applicable to modern New Zealand academics.[420] Its study has suffered similar neglect to the civil law due to its complexity, the fact its sources are difficult to acquire or unpublished, and because of its role as an indirect source of English law.[421] Nonetheless, the canon law flourished during the twelfth century renaissance and

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[416] Bernard, *Quinque Compilationes Antiquae*, Comp. 5, 3.13; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 528; N. Jansen, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 31; S. Coppel, "Willmaking on the Deathbed" (1988) 40 (1) *Local Population Studies* 37 at 37.

[417] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 16; C. J. Reid, P*ower over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon law*, (Wm B. Eerdmans Publishing Co, Grand Rapids 2004) at 153; D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at 31 (Will of Elfhelm), 53 (Will of Elfric).

[418] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 13; G. W. Beyer, C. G. Hargrove, "Digital Wills: Has the Time come for Wills to Join the Digital Revolution" (2007) 33 (3) *Ohio Northern University Review*, 865 at 868; W. S. Holdsworth, C. W. Vickers, *The law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 9; C. P. Sherman, "A Brief History of Medieval Roman Canon Law in England" (1919) 68 (3) *University of Pennsylvania Law Review and American Law Register*, 233 at 252.

[419] R. H. Helmholz, *The Spirit of Classical Canon law*, (University of Georgia Press, Athens 1996) at 1; J. Dodd, *A History of Canon Law in Conjunction with other Branches of Jurisprudence with Chapters on the Royal Supremacy and the Report of the Commission on Ecclesiastical Courts*, (Parker, London 1884) at 1; G. Bowyer, *Readings Delivered Before the Honourable Society of the Middle Temple in the Year 1850*, (V. & RI. Stevens and G. S. Norton, London, 1851) at 168.

[420] R. Wiseman, *The Law of Laws: Or Excellency of the Civil Law* (Printed for R. Royston, London 1664) at 184; R. H. Helmholz, *The Spirit of Classical Canon law*, (University of Georgia Press, Athens 1996) at 2; J. Dodd, *A History of Canon Law in Conjunction with other Branches of Jurisprudence with Chapters on the Royal Supremacy and the Report of the Commission on Ecclesiastical Courts*, (Parker, London 1884) at 25 see P. Spiller, J. Finn, R. Boast, *A New Zealand Legal History*, second edition, (Brookers Ltd, Wellington 2001) at 27; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at i.

[421] J. A. Brundage, *Medieval Canon Law*, (Longman, New York 1995) at x; J. Dodd, *A History of Canon Law in Conjunction with other Branches of Jurisprudence with Chapters on the Royal Supremacy and the Report of the Commission on Ecclesiastical Courts*, (Parker, London 1884) at 1; R. H. Helmholz, T*he Spirit of Classical Canon law*, (University of Georgia Press, Athens 1996) at 2; C. Donahue Jr. "Why the History of Canon law is not Written" in Selden Society, *The Selden Society Lectures: 1951 – 2001*, (William S. Hein & Co, New York 2003) at 547, 551; J. H. Baker (ed), J. S. Ringrose (ed), *Catalogue of English Legal Manuscripts in Cambridge*

defined its own jurisprudence alongside a number of civil law concepts.[422] The first text of the *Corpus Iuris Canonici* is Gratian's *Concordia Discordantium Canonum*, or *Decretum*, is a collection of earlier canon law principles and apostolic sources that the author(s) arranged independent of the civil law but with reference to its principles.[423] The early canon law did not develop testamentary principles that departed from the substantive civil law because its interest in the subject was indirect and focussed on the contents of a will and the ability to contribute to religious life by giving charitably rather than questions concerning its legal validity.[424] However, the canon law itself was a living source of law, unlike the civil law,

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University Library, (The Boydell Press, Woodbridge 1996) at vii; C. Donahue, Jr (ed), *The Records of the Mediaeval Ecclesiastical Courts, part II, England*, (Duncker & Humblot, Berlin 1994) at 23, 26; H. S. G. Halsbury (ed), J.P.H Mc Kay (ed), *Halsbury's Law of England*, *Wills and Intestacy*, fifth edition, volume 34, (LexisNexis Butterworths, London 2011) at [4].

[422] "Ivo of Chartres", pref. in R. Somerville, B. C. Brasington, *Prefaces to Canon Law Books in Latin Christianity, selected translations, 500 -1245*, (Yale University Press, New Haven 1998) at 134; S*umma Antiquitate et Tempore* pref. in R. Somerville, B. C. Brasington, *Prefaces to Canon Law Books in Latin Christianity, selected translations, 500 -1245*, (Yale University Press, New Haven 1998) at 201; H. J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, Harvard 1983) at 236; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 390; M. H. Hoeflich, J. M. Grabher, "The establishment of normative legal texts: The beginning of the jus commune" in W. Hartmann (ed), K. Pennington (ed), *The History of Medieval Canon Law in the Classical Period, 1140 – 1234. From Gratian to the Decretals of Pope Gregory IX*, (The Catholic University Press, Washington D.C. 2008) at 8; R. H. Helmholz, *The Spirit of Classical Canon law*, (University of Georgia Press, Athens 1996) at 4, 6; J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, (Chicago University Press, Chicago 2008) at 75; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 79; H. J. Berman , C.J Reid, "Roman law in Europe and the *Ius commune*: A Historical Overview with Emphasis on the New Legal Science of the 16th century" (1994) 20 *Syracuse Journal of International Law and Commerce*, 1 at 8; A. Winworth, "The Legal Underpinnings of the Western Church" in M. Rubin (ed), W. Simons (ed), *The Cambridge History of Christianity: Christianity in Western Europe c. 1100–c. 1500*, volume 4, (Cambridge University Press, Cambridge 2009) at 90.

[423] Dist. 16; Dist. 16, c 2; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at 66; J. A. Brundage, Medieval Canon Law, (Longman, New York 1995) at 43, 47; J. P. McIntyre, *Customary Law in the Corpus Iuris Canonici*, (Mellen University Press, San Francisco, 1990) at 68 - 69, 71; C. J. Reid, P*ower over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon law*, (Wm B. Eerdmans Publishing Co, Grand Rapids 2004) at 12; J. J. Coughlin, "Canon Law and the Human Person" (2004) 19 (1) *Journal of Law and Religion*, 1 at 25 - 26; R. H. Helmholz, *The Spirit of Classical Canon law*, (University of Georgia Press, Athens 1996) at 7 - 8; G. Bowyer, *Readings Delivered Before the Honourable Society of the Middle Temple in the Year 1850*, (V. & RI. Stevens and G. S. Norton, London, 1851) at 157, 159 - 160; T. F. T. Plucknett, *A Concise History of the Common Law*, second edition, (The Lawyers Co-operative Publishing Co, New York 1936) at 268; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999) at 49; W. S. Holdsworth, *A History of English Law*, third edition, volume 2, (Methuen & Co, London 1923) at 138- 140; A. Winroth, *The Making of Gratian's Decretum*, (Cambridge University Press, Cambridge 2002) at 146, 157; P. Landau, "Gratian and the *Decretum Gratiani*" in W. Hartmann (ed), K. Pennington (ed), *The History of Medieval Canon Law in the Classical Period, 1140 – 1234. From Gratian to the Decretals of Pope Gregory IX*, (The Catholic University Press, Washington D.C. 2008) at 26 see Nov. 131.1.

[424] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 120, 127; H. J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, Harvard 1983) at 236 – 237; N. Jansen, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 31.

which experienced unprecedented development during the twelfth century resulting in a separate theory of testamentary succession.[425] By 1234, Pope Gregory IX authorised the *Liber Extravagantium Decretalium* or *Liber Extra* that consolidated the canon law published after the *Decretum* and his collection contains the most detailed title on the canonical will.[426] The *Liber Sextus Decretalium* is a third major collection published in 1298 to update the canon law but it only contains only a brief statement on the canonical will and executors without developing the law further.[427]

Gratian's *Decretum* reveals the mid-twelfth century canon law did not possess an extensive theory of succession, its law of things focussing on piety and the duty of charity, which required the author to refer to the civil law and secular custom.[428] Furthermore, the canon law

[425] R. H. Helmholz, *The Spirit of Classical Canon law*, (University of Georgia Press, Athens 1996) at 6; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999) at 49; W. S. Holdsworth, *A History of English Law*, third edition, volume 2, (Methuen & Co, London 1923) at 142; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 364; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 120.

[426] R. H. Helmholz, *The Spirit of Classical Canon law*, (University of Georgia Press, Athens 1996) at 12; C. J. Reid, *Power over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon law*, (Wm B. Eerdmans Publishing Co, Grand Rapids 2004) at 14; P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999) at 50 - 51; T. F. T. Plucknett, *A Concise History of the Common Law*, second edition, (The Lawyers Co-operative Publishing Co, New York 1936) at 269; W. S. Holdsworth, *A History of English Law*, third edition, volume 2, (Methuen & Co, London 1923) at 140; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 1, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at xx; G. Bowyer, *Readings Delivered Before the Honourable Society of the Middle Temple in the Year 1850*, (V. & RI. Stevens and G. S. Norton, London, 1851) at 160; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at 68; O. F. Robinson, T. D. Fergus, W. M. Gordon, *European Legal History*, third edition, (Butterworths, London 2000) at 77; A. J. Carlyle, R. W. Carlyle, *A History of Mediaeval Political Theory in the West*, volume 2, (William Blackwood & Sons, Edinburgh 1909) at 196; D. Luscombe, J. Riley-Smith, *The new Cambridge Mediaeval History IV: c 1024 – c 1198 Part One*, (Cambridge University Press, Cambridge 2004) at 134; F. W. Maitland, "Canon law in England" in F.W. Maitland, *Roman Canon Law in the Church of England: Six Essays*, (Methuen & Co, London 1898) at 3; A. Winworth, "The Legal Underpinnings of the Western Church" in M. Rubin (ed), W. Simons (ed), *The Cambridge History of Christianity: Christianity in Western Europe c. 1100–c. 1500*, volume 4, (Cambridge University Press, Cambridge 2009) at 93.

[427] P. Stein, *Roman Law in European History*, (Cambridge University Press, Cambridge 1999) at 51; T. F. T. Plucknett, *A Concise History of the Common Law*, second edition, (The Lawyers Co-operative Publishing Co, New York 1936) at 269; W. S. Holdsworth, *A History of English Law*, third edition, volume 2, (Methuen & Co, London 1923) at 141; G. Bowyer, *Readings Delivered Before the Honourable Society of the Middle Temple in the Year 1850*, (V. & RI. Stevens and G. S. Norton, London, 1851) at 164; F. W. Maitland, "Canon law in England" in F.W. Maitland, *Roman Canon Law in the Church of England: Six Essays*, (Methuen & Co, London 1898) at 2; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 389.

[428] S*umma Antiquitate et Tempore* pref in R. Somerville, B. C. Brasington*, Prefaces to Canon Law Books in Latin Christianity, selected translations, 500 -1245*, (Yale University Press, New Haven 1998) at 204; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 121; C. J. Reid, P*ower over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon law*, (Wm B. Eerdmans Publishing Co, Grand Rapids 2004) at 162.

attempted to limit clerical involvement in household affairs, mercantile business, and testamentary litigation that were associated with secular activities.[429] Dist. 88, c 6 indicates Bishops ought to have a passive role on a person's deathbed that is limited to reciting the bible and offering prayers of salvation rather than supervising testamentary dispositions.[430] However, C 13, q 1 permitted each diocese to derive a lawfully assigned benefit, which included mortuary fees and bequests of charity that came under the supervision of the church.[431] Gratian adopts St. Augustine's argument prioritising natural heirs over charitable bequest and cites Nov. 123.1 to support his proposition that a *paterfamilias* who enters a monastery, undergoing a civil death, should not defraud their children by giving their entire estate to the church.[432] Gratian also furnished the beginnings of a canon law testamentary theory and his C 13, q 2, c 4 states "the last will of the deceased must be". The paramount importance of testamentary freedom in the canon law developed to permit Bishops to enforce charitable bequests through pain of excommunication for those attempting to hinder the deceased's will.[433]

The *Decretum* provided a starting point for the emerging canonists to develop a theory of succession within the canon law, which sat alongside the Church's interest in charitable bequests.[434] Furthermore, the continental ecclesiastical courts were defining their jurisdiction

[429] Dist. 88, c 5; Dist. 88, c 10; Dist. 88, c 11 Dist. 88, c 12; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 126.
[430] J. D'Achery, *Spicilegium sive collectio veterum aliquot scriptorum qui in Galliae Bibliothecis delituerant* 3.133 (Apud Montalant, ad Ripam PP. Augustinianorum, prope Pontem S. Michaelis, Paris 1723) at 560.
[431] C 13; C 13, q 2, c 4; C 13, q 2, c 11; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 123.
[432] C 19, q 3, c 9; Nov. 5.5; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 123-125, 127; C. J. Reid, Power over the Body, *Equality in the Family: Rights and Domestic Relations in Medieval Canon law*, (Wm B. Eerdmans Publishing Co, Grand Rapids 2004) at 162.
[433] C 13, q 2, c 11; *Reformatio Legum Ecclesiasticarum,* 27.1, 27.39; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 124, 125- 126; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) (2) *The Jurist*, 632 at 644; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 390 see W. Lyndwood, *Constitutions Provincialles and of Otho and Octhobone, translated in to Englyshe*, (Robert Redman, London 1534) at 5.12.1.
[434] C. 12. q.5 c.2; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 120, 124 - 126; C. J. Reid, *Power over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon law*, (Wm B. Eerdmans Publishing Co, Grand Rapids 2004) at 162; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 389; H. Consett, *The Practice of the Spiritual or Ecclesiastical Courts*, (Printed for W. Battersby, London 1700) at 17.

and the need to replace the passive interest in charitable gifts with a more sophisticated approach became evident when administrative purposes necessitated a clearer distinction between gifts *inter vivos* and *mortis causa*.[435] C 13, q 2, c 4 also introduced important questions concerning testamentary freedom and its enforcement inspired later commentators to discuss the theoretical and socio-political nature of a person's last will.[436] The notion of testamentary freedom required reconciliation with the duty to provide for children and canonists even suggested St. Augustine's argument is advisory rather than prohibitive.[437] The emphasis placed on the relationship between these concepts created a general interest in the legal nature of will as a distinct topic that attracted the interest of decretalists.[438] Bernard's *Quinque Compilationes Antiquae*, the first decretal collection to devote a title to the topic of wills, indicated that arrangements for property after death were a spiritual rather than secular concern.[439] Further attention devoted to the legal nature of C 13, q 2, c 4 led to the development of a canonical will to sit alongside the civil law testament by the close of the twelfth century.[440]

The *Liber Extra* consolidated the legal theory behind the last will to produce the title *De testamentis et ultimis voluntatibus*, following Bernard's compilation, which established the canonical will.[441] The canonists introduced their own form of will, following the nature of a

[435] Hostiensis, *Summa Aurea*, Liber 3, (Venice 1574) at 1031; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 129; C. J. Reid, *Power over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon law*, (Wm B. Eerdmans Publishing Co, Grand Rapids 2004) at 162, 164.
[436] C. J. Reid, *Power over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon law*, (Wm B. Eerdmans Publishing Co, Grand Rapids 2004) at 162; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 153.
[437] C. J. Reid, *Power over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon law*, (Wm B. Eerdmans Publishing Co, Grand Rapids 2004) at 6, 162.
[438] C. J. Reid, *Power over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon law*, (Wm B. Eerdmans Publishing Co, Grand Rapids 2004) at 163 see Glanville, *Tractatus de legibus et consuetudinibus regni Angliae*, 7.5.
[439] Bernard, *Quinque Compilationes Antiquae*, Comp. 1, 3.22; C. J. Reid, *Power over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon law*, (Wm B. Eerdmans Publishing Co, Grand Rapids 2004) at 163.
[440] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 122; N. Jansen, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 31; H. J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, Harvard 1983) at 233.
[441] X. 3.26; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 273; C. J. Reid, *Power over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon law*, (Wm B. Eerdmans Publishing Co, Grand Rapids 2004) at 163; J. Reeves, W. F. Finlason, *Reeves's History of the English Law: From the Time of the Romans of the End of the Reign of Elizabeth*, volume 2, (M. Murphy, Philadelphia 1880) at 103.

testament, although the Church did not perceive itself as bound to follow the civil law principles and freely departed from them to develop its own rules to achieve its interests.[442] These canonists perceived the civil law requirements as too stringent and the complex nature of the testament's formalism demanded a high degree of preparation and professional involvement, which conflicted with the canon law's aim to facilitate the ease of final charitable donations on the deathbed.[443] Furthermore, the institution of an heir, fundamental to the testament, is a background concern in the canon law, instead emphasising the importance of legacies for pious purposes, and the absence of a rule preventing partial intestacies allowed the canonical will to remain valid without one.[444] The modern will is similarly more concerned with the creation of gifts than instituting an heir.[445] Therefore, the different function of the canonical will required the Canon law to develop unique provisions concerning the definition of a will, number of witnesses, testamentary capacity, revocation, legacies, and ecclesiastical enforcement.[446]

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[442] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 390; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 220.

[443] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 390; N. Jansen, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 31- 32; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 128, 132; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 529; W. Nelson, *Lex Testamentaria: Or, A Compendious System of all the laws of England, as well before the statute of Henry VIII as since, concerning last wills and testaments* (London, Printed by E. and R. Nutt Gosling 1727) at 576; H. J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, Harvard 1983) at 233; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 274; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 280; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 537; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at 121; J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 118.

[444] Dig. 29.1.6; J. M. Novarri, *De Privilegiis Miserabilium Personarum Tractatus* (Sumptibus Marci-Michaelis Bosquet & Sociorum, Colonia Allobrogum, 1739) at 211- 212; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 134; N. Jansen, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 31; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 280, 285; H. J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, Harvard 1983) at 231; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 3.

[445] C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 253.

[446] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 132; N. Jansen, "Testamentary

The canonical will's foremost characteristic is that it remained valid even if it lacked the attestation requirements imposed by the secular law provided two or three suitable witnesses could attest it represented the will-maker's final testamentary intentions.[447] Matthew 18:16 holding that "in the mouth of two or three shall every word be established" provided the canonists with theological authority for this figure.[448] Pope Alexander III rescript to the Bishop of Ostia is an attempt to establish two or three witnesses, without limiting it to pious causes, were sufficient for wills *ad pias causas* and counteract the perception they required seven witnesses according to civil law requirements.[449]

> X. 3.26.10 reads: "by which those constituted in authority rescind wills made without the subscription of seven or five witnesses as the civil law's decree. But since that is more rigorous than the requirements of the divine law, of the precepts of the Fathers, and of the customary law of the law of the Church, since it is written, "In the mouth of two or three witnesses every word may stand" we condemn the new custom. We decree as permanently valid the wills which your subjects may make in the presence of their priest and of three or two other suitable persons, and we forbid that such wills be henceforth rescinded under penalty of excommunication".[450]

Alexander's rescript explicitly adopts the theological authority that indicated no other formal requirements, including the institution of an heir, were necessary to sustain the canonical

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formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 31.

[447] X. 3.26.10; X. 3.26.11; Hostiensis, *Summa Aurea*, Liber 3, (Venice 1574) at 1037; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 8 see 2 Cor 13:1.

[448] *summa* Stephen of Tournai" pref. in R. Somerville, B. C. Brasington*, Prefaces to Canon Law Books in Latin Christianity, selected translations, 500 -1245*, (Yale University Press, New Haven 1998) at 201; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 195; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 390; H. Swinburne*, A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 45.

[449] J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 537; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 128, 134; N. Jansen, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 32; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 274 – 275; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at 121 see Dig. 22.5.1.2.

[450] X. 3.26.10 translated in J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 536.

will.[451] Furthermore, the decretal may have been reinforcing a reduced number of witnesses, following earlier Church and secular custom, in an attempt to preserve the law from civil law encroachment.[452] Isidore's *Etymologies* indicate that the theological standard applied as part of the nature of legal instruments.[453]

Pope Gregory XI had to reiterate the departure by commanding ecclesiastical judges not to invalidate wills because they did not follow the civil law requirements under pain of excommunication.[454] Dig. 22.5.12 appears to support this position by providing: "If the number of 'witnesses' is not mentioned, two are enough, since the plural is satisfied by two". Furthermore, a prominent exception to testation requirements is the rule reducing the number of witnesses from seven to five in rural areas and in times of pestilence, which also indicates the number of witnesses were not essential provided a will manifested.[455] X. 3.26.10 gave priests a special role to safeguard the will-maker's intent without resolving the question

[451] N. Jansen, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 32; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 134.
[452] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 177; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 282; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 280; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 535.
[453] Isidore *Etymologies* 5.24.29.
[454] X.3.26.11.
[455] Cod. 6.23.8; Cod. 6.23.9; Cod. 6.23.31.3; *Whitchurch v Whitchurch* (1721) 1 Gilb Rep 168 at 171; 25 Eng. Rep. 118 at 120; *Allen v Hill* (1725) 1 Gilb Rep 257 at 261; 25 Eng. Rep. 177 at 180; Goffredus de Trano, *Summa Super Titulis Decretalium* (Neudruck Der Ausgabe Lyon, 1519) at 143; Hostiensis, *Summa Aurea*, Liber 3, (Venice 1574) at 1033; J. F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphanotrophei, Halae Magdeburgicae 1769) at 434; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 259; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 286; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 548 – 549; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 220; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 46; W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 235; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 526; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 129 – 130; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 23; G. J. McGinley, "Roman law and its influence in America" (1928) 3(2) *The Notre Dame Lawyer*, 70 at 78.

whether a priest was part of the formal requirements.[456] The canon law also directed the payment of debts before the distribution of the estate on pain of excommunication, which gave debt a prominent place in the canonical will alongside charitable bequests.[457] Nonetheless, the continental temporal courts retained their jurisdiction to develop testamentary law and followed the civil law principles rather than those propounded by canonists.[458] This limited the interpretation of his decretal to the Holy See and the secured jurisdiction of wills *ad pias causas* resulting in two separate modes of testate succession in Europe.[459] However, X. 3.26.17 captures the sentiment in C 13, q 2, c 4 and restates that "a person's last will must be followed", which expresses testamentary freedom in a manner that accommodates future elaboration.[460] English ecclesiastical courts appear to have already adopted the standard in X. 3.26.10 and Glanville indicated the English will only required two witnesses before Pope Gregory XI's reiteration.[461] Bracton was also aware of the witness requirements in X. 2.22.12.[462] Ultimately, the ecclesiastical courts, guided by the canon law, were responsible for elaborating the canonical will's role in England rather than the temporal courts.[463]

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[456] J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 276; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 13; J. Perkins, M. Walbanck (trans), *A profitable book of Mr. John Perkins*, (Printed for Matthew Walbanck, London 1657) at 178; J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 118; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 87.

[457] Bernard Compostellanus, *Compilatio Romana*, 3.20; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 456; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 129; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 205

[458] J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 225; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 537; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 14.

[459] J. M. Novarri, *De Privilegiis Miserabilium Personarum Tractatus* (Sumptibus Marci-Michaelis Bosquet & Sociorum, Colonia Allobrogum, 1739) at 304; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 537; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 283; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 528.

[460] Bernard *Summa Decretalium* 3.22.8; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 392.

[461] Glanville, *Tractatus de legibus et consuetudinibus regni Angliae*, 7.6; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 126; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 537; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 136.

[462] Bracton, G. E. Woodbine (ed), S. E. Thorne (trans), *De legibus et consuetudinibus Angliae*, volume 4, (Harvard University Press, Cambridge, 1968 – 1977) at 118; C. Guterbock, B. Coxe (Trans) *Bracton and His Relation to the Roman Law: A Contribution to the History of the Roman Law in the Ages*, (Fred B. Rothman & Co, Littleton 1979) at 156.

[463] J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 537; N. Jansen, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative*

1. The Reception of the Unsolemn Canonical Will

The reception of the canonical will and the legal changes brought by the Anglo-Norman period allowed the civil law to exercise influence on England's testamentary development. The Norman Conquest introduced two prominent divisions that profoundly shaped the course of the will's evolution in English legal history and its reception of *ius commune* jurisprudence.[464] William I introduced an ordinance in 1072 A.D. that removed the mixed character of Anglo-Saxon courts and reproduced the jurisdictional divide between the temporal and spiritual courts that existed in Normandy.[465] The ordinance of William I states:

> "Wherefore I command, and by royal authority decree, that no bishop or archdeacon shall any longer hold, in the hundred court, pleas pertaining to the Episcopal laws, nor shall they bring before the judgment of secular men any case which pertains to the rule of souls; but whoever shall be summoned, according to the Episcopal laws, in any case or for any fault, shall come to the place which the bishop shall choose or name for this

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Succession Law: Testamentary Formalities, volume 1, (Oxford University Press, Oxford 2011) at 54; W. Roberts, *A Treatise on the Statute of Frauds as it regards Declarations in Trusts, Contracts, Surrenders, Conveyances, and the Execution and Proof of Wills and Codicil* (Uriah Hunt, Philadelphia 1838) at 448; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 7; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 119; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 428; J. M. Torron, *Comparative studies and Continental in Anglo-American legal history: Anglo-American law and Canon law: Canonical roots of the common law tradition*, (Duncker & Humblot, Berlin 1998) at 113.

[464] E. Jenks (ed), H. O. Danckwerts, J. S. Stewart Wallace, *Stephen's Commentaries,* seventeenth edition, volume 2 (Butterworth & Co., Bell Yard, Temple Bar, London 1922) at 611; F. Pollock, F. Maitland, *The history of English Law before the Time of Edward I,* second edition, volume 1, (Cambridge University Press, Cambridge 1898) at 79; C. P. Sherman, "Salient Features of the Reception of Roman Law into the Common Law of England and America" (1928) 8 (3) *Boston University Law Review*, 183 at 183; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 4 -5; C. P. Sherman, "Salient Features of the Reception of Roman Law into the Common Law of England and America" (1928) 8 (3) *Boston University Law Review*, 183 at 184; J. Reeves, W. F. Finlason, *Reeves's History of the English Law: From the Time of the Romans of the End of the Reign of Elizabeth*, volume 1, (M. Murphy, Philadelphia 1880) at 283; C. P. Sherman, "The Romanization of English Law" (1914) 23 (4) *The Yale Law Journal* 318 at 322; N. Jansen, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 31.

[465] A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 4, 195; C. P. Sherman, "Salient Features of the Reception of Roman Law into the Common Law of England and America" (1928) 8 (3) *Boston University Law Review*, 183 at 184; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 3 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 62; N. Cox, "The influence of the Common law on the Decline of the Ecclesiastical Courts of the Church of England" (2002) 2 (2) *Rutgers Journal of Law and Religion*, 1 at 7; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 108.

purpose, and shall there answer in his case or for his fault, and shall perform his law before God and his bishop not according to the hundred court, but according to the canons and the Episcopal laws".[466]

The growing conflict between church and state during the eleventh century provided the impetus for reform and defined the reach of spiritual power in England by making clear distinctions between temporal and spiritual jurisdiction.[467] The ordinance provided the groundwork for the Church to establish a separate system of ecclesiastical courts administering spiritual law under canonical procedure, which provided a forum for the civil law to exert a powerful influence on English testamentary developments by the beginning of the twelfth century and beyond.[468]

William I also introduced feudal concepts into the legal fabric of Anglo-Norman society that fundamentally changed the framework of English legal history and testamentary succession because ownership of all land vested in the crown.[469] His ordinance combined with the

[466] E. F. Henderson, *Select Historical Documents of the Middle Ages*, (George Bell and Sons, London 1896) at 9.

[467] A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 4; 2, C. P. Sherman, "Salient Features of the Reception of Roman Law into the Common Law of England and America" (1928) 8 (3) *Boston University Law Review*, 183 at 184; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records* (Dursley, Lochin Publishing, 1992) at 8; R. B. Outhwaite, *The Rise and Fall of The English Ecclesiastical Courts, 1500 – 1860*, (Cambridge University Press, Cambridge 2006) at 1; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 3 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 62; A. Thierry, *History of the conquest of England by the Normans: With its Causes and Consequences to the Present Time*, (Whittaker and Co., London 1841) at 170; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records*, Lochin Publishing, Dursley 1992 at 8; E. Maxey, "The Ecclesiastical Jurisdiction in England" (1905) 3 (5) *Michigan Law Review*, 360 at 360; E. Coke, *The Fourth Part of the Institutes of the Laws of England*; *Concerning the Jurisdiction of Courts*, (E. and R. Brooke, London 1797) at 321 see *Case De Modo Decimandi, and of Prohibitions Debated Before The King's Majesty* 13 Co. Rep. 37 at 37; 77 Eng. Rep. 1448 at 1449.

[468] *The Case of Premunire* 1 Davis 84 at 88; 80 Eng. Rep. 567 at 572; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 5, 25; Anonymous, "The origin and progress of *The Ecclesiastical law* in England" (1845) 2 (1) *The Law Magazine or Quarterly Review of Jurisprudence*, 1 at 5; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 427; P. D. Jason, "The Courts Christian in Medieval England", (1997) 37 (4) *Catholic Lawyer*, 339 at 341; C. Morris, "William I and the Church Courts" (1967) 82 (324) *The English Historical Review*, 449 at 449; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 191; E. Coke, *The Fourth Part of the Institutes of the Laws of England*; *Concerning the Jurisdiction of Courts*, (E. and R. Brooke, London 1797) at 321; A. T. Vanderbilt, "The Reconciliation of the Civil Law and the Common Law" in B. Schwartz (ed), *The Code Napoleon and the Common Law World: The Sesquicentennial Lectures Delivered at the Law Centre of New York University December 13 – 15, 1954*, (The Law Book Exchange Ltd, Union 1998) at 390; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 426.

[469] O. F. Robinson, T. D. Fergus, W. M. Gordon, *European Legal History*, third edition, (Butterworths, London 2000) at 131; C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property*, seventh edition,

effects of feudal concepts resulted in succession of real and personal property descending through separate channels.[470] The basic distinction between these kinds of property is that personalty encompassed chattels and real property concerned lands, hereditaments, and tenements.[471] Their separate treatment is a unique and fundamental feature of English law that recognised the different qualities of these types of property in contrast to the civil law that made no such distinction for the purpose of succession.[472] Nevertheless, both the civil law and English law recognised the difference between movables that consisted of things capable of delivery and immovable property comprised of real property.[473] The distinction

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(Sweet & Maxwell, London, 2008) at 20; A. Reppy, *The Ordinance of William the Conqueror* (1072) - *Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 7, 194; G. W. Beyer, C. G. Hargrove, "Digital Wills: Has the Time come for Wills to Join the Digital Revolution" (2007) 33 (3) *Ohio Northern University Review*, 865 at 868; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 48; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 108.

[470] A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 7- 8; E. Jenks (ed), H. O. Danckwerts, J. S. Stewart Wallace, *Stephen's Commentaries,* seventeenth edition, volume 2 (Butterworth & Co., Bell Yard, Temple Bar, London 1922) at 614; W. M. McGovern Jr., "Contract in Medieval England: Wager of Law and the Effect of Death" (1969) 54 (1) *Iowa Law Review*, 19 at 38; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 302; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 291; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 384.

[471] *Moore v Moore* (1783) 1 Bro. C. C. 127 at 127; 28 Eng. Rep. 1030 at 1030; W. F. Walsh, *Outlines of the History of English and American Law*, (New York University Press, New York 1924) at 169

[472] Inst. 2.20. 21; *Kendall v Kendall* (1828) 4 Russ. 360 at 369 - 370; 38 Eng. Rep. 841 at 844; *Dowson v Gaskoin* (1837) 2 Keen 14 at 19; 48 Eng. Rep. 533 at 535 (ed); *Crichton v Symes* (1743) 3 ATK 61 at 61; 26 Eng. Rep. 838 at 838; *Hogan v Jackson* (1775) 1 Cowp 299 at 303; 98 Eng. Rep. 1099; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 300; W. F. Walsh, *Outlines of the History of English and American Law*, (New York University Press, New York 1924) at 169; M. Hale, *The History of the Common Law of England: Divided into Twelve Chapters*, (Printed by E. Nutt, London 1713) at 208; A. Watson, *Roman Law & Comparative Law*, (University of Georgia Press, Athens, 1991) at 139 – 140 see Inst. 2.24.

[473] Inst. 2.1.40; Inst. 2.2.1; Inst. 2.2.2; Dig. 50.16.93; *Hunt v Berkley* (1728) 1 Mosely 47 at 49; 25 Eng. Rep. 263 at 264; *Anonymous* (1714) 1 P. WMS. 268 at 268; 24 Eng. Rep. 384 at 384; *Britton* 2.2; 2.2.1; 2.2.7; Bracton, G. E. Woodbine (ed), S. E. Thorne (trans), *De legibus et consuetudinibus Angliae*, volume 2, (Harvard University Press, Cambridge, 1968 – 1977) at 39; W. F. Walsh, *Outlines of the History of English and American Law*, (New York University Press, New York 1924) at 170; E. Jenks (ed), H. O. Danckwerts, J. S. Stewart Wallace, *Stephen's Commentaries,* seventeenth edition, volume 2 (Butterworth & Co., Bell Yard, Temple Bar, London 1922) at 4; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 186; O. K. McMurray, *Liberty of Testation and some Modern Limitations Thereon*, in *Celebration Legal Essays, By Various Authors To Mark the Twenty-fifth Year of Service of John H. Wigmore*, (North Western University Press, Chicago 1919) at 545; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 392; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 168; W. Roberts, *A Treatise on the Statute of Frauds as it regards Declarations in Trusts, Contracts, Surrenders, Conveyances, and the Execution and Proof of Wills and Codicil* (Uriah Hunt, Philadelphia 1838) at 295; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 60; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 304; W. W. Buckland, *A Text-Book of Roman Law: From*

between realty and personalty made testamentary succession one of the most complex and varied branches of English law because it is the production of the common law, canon law, civil law, equity, and customary law controlled by both spiritual and temporal courts.[474] Eventually, the recognition that succession possessed mixed temporal and spiritual elements subjected the will's development to separate systems with diverse and sometimes conflicting principles.[475]

The gradual settlement of Anglo-Norman law left a residual ability for donors to control succession of real property until the reign of Henry II when the establishment of centralised Royal courts curbed this power.[476] The rules surrounding livery of seisin meant only the heir of the last person seised took possession of land and required an actual conveyance of land, which precluded succession arising from testamentary intent alone.[477] The common law

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Augustus to Justinian, (Cambridge University Press, London 1921) at 187- 188; A. Watson, *Roman Law & Comparative Law*, (University of Georgia Press, Athens, 1991) at 139; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 120; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 15; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 16, 384 – 385; M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century, (Pontifical Institute of Mediaeval Studies*, Toronto 1963) at 305; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 143, 149.

[474] *Withy v Mangles* (1843) 10 Clark & Finnelly 214 at 329; 8 Eng. Rep. 724 at 733; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 534 – 535; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 48; W. S. Holdsworth "The Ecclesiastical Courts and their Jurisdiction" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 2, (Little, Brown and Company, Boston 1908) at 301.

[475] *Fox v Marston* (1837) 1 Curt. 494 at 497; 163 Eng. Rep. 173 at 174; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 2; A. Reppy, The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession, (Oceana Publications, New York 1954) at 7; C. P. Sherman, "A Brief History of Medieval Roman Canon Law in England" (1919) 68 (3) *University of Pennsylvania Law Review and American Law Register*, 233 at 252; R. Grey, *A System of English Ecclesiastical Law*, fourth edition, (Printed by Henry Lintot, Savoy 1743) at 2.

[476] A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 198; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 44; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 32; C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property*, seventh edition, (Sweet & Maxwell, London, 2008) at 46, 85, 88; F. Bacon, *Reading Upon the Statute of Uses*, (Printed for E. Brooke, London 1785) at 551.

[477] *Allen v Hill* (1725) 1 Gilb Rep 257 at 260; 25 Eng. Rep. 177 at 179; 1 Eq. Ca. Ab. 401; C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property*, seventh edition, (Sweet & Maxwell, London, 2008) at 46, 85, 88; F. Bacon, *Reading Upon the Statute of Uses*, (Printed for E. Brooke, London 1785) at v; M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century, (Pontifical Institute of Mediaeval Studies*, Toronto 1963) at 270, 305; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 311; E. Coke, *The First Part of the Institutes of the Laws of England*; *or a Commentary upon*

courts viewed the concepts of descent and succession as interchangeable despite the English heir not being a universal successor.[478] In *Ex Parte Bellett,*[479] the court noted, "as far as the civil law has been adopted in this case by our law, it is to be observed, that in the civil law the word "*haeres*" applied just as much to a person claiming by purchase as by descent".[480] Nevertheless, the heir that occupied a pivotal role in succession to real property was not the civil law *haeres* that would become associated with personalty.[481] Livery of seisin transformed the post-obit gift into an *inter vivos* conveyance enacted through a transfer of possession to the donee followed by a subsequent grant back to the donor for their life.[482] Donors required the heir's permission to leave a post-obit gift of land and it is unlikely a *verba novissima* could accomplish the requisite conveyance.[483] The post-obit gift was also utilised to convey land to the Church that it held in mortmain.[484] Royal courts opposed the post-obit gift because it upset the uniform rules of succession and feudal tenure despite being no more objectionable than other forms of alienation.[485] It is notable the use developed through similar motives to control succession to property.[486]

Littleton; *Not the Name of the Author only, but of the Law itself*, sixteenth edition, volume 1, (Fleming and Phelan, London 1809) at 11b; Bracton, G. E. Woodbine (ed), S. E. Thorne (trans), *De legibus et consuetudinibus Angliae*, volume 2, (Harvard University Press, Cambridge, 1968 – 1977) at 124 – 125.

[478] E. Coke, *The First Part of the Institutes of the Laws of England*; *or a Commentary upon Littleton*; *Not the Name of the Author only, but of the Law itself*, 16th edition, volume 2, (Fleming and Phelan, London 1809) at 237b; M. Hale, *The History of the Common Law of England: Divided into Twelve Chapters*, (Printed by E. Nutt, London 1713) at 208; W. M. McGovern Jr., "Contract in Medieval England: Wager of Law and the Effect of Death" (1969) 54 (1) *Iowa Law Review*, 19 at 38; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965), at 147; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 68-70; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 200; J. Cowell, M. Thomas (ed), *A Law Dictionary; or, The Interpreter of Words and Terms*, second edition, (Printed by E. and R. Nutt Gosling, London, 1727) at (He)

[479] (1786) 1 Cox 297; 29 Eng. Rep. 1174.

[480] (1786) 1 Cox 297 at 298; 29 Eng. Rep. 1174 at 1175.

[481] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 151.

[482] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 114; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 198; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 315.

[483] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 111, 119; F. Pollock, F. Maitland, *The history of English Law before the Time of Edward I*, second edition, volume 2, (Cambridge University Press, Cambridge 1898) at 272 – 273, 323.

[484] F. Pollock, F. Maitland, *The history of English Law before the Time of Edward I*, second edition, volume 2, (Cambridge University Press, Cambridge 1898) at 325; J. Williams, *Wills and Intestate Succession*, (Adam and Charles Black, London 1891) at 15; T. F. T. Plucknett, *A Concise History of the Common Law*, second edition, (The Lawyers Co-operative Publishing Co, New York 1936) at 484; P. Brand, *The Making of the Common Law*, (The Hambledon Press, London 1992) at 240 see 9 Hen III, c 36.

[485] F. Pollock, F. Maitland, *The history of English Law before the Time of Edward I*, second edition, volume 2, (Cambridge University Press, Cambridge 1898) at 325 – 326; M. M. Sheehan, *The Will in Medieval England:*

The centralised Royal courts carefully controlled succession as prescribed by the automatic rules of inheritance that determined how land descended to the proper heir under the feudal system.[487] These rules determined that a person seised of land could not appoint a successor because the common law heir was 'made by God' and natural law preferred descent by blood.[488] In *Wyndham v Chetwynd*[489], Mansfield CJ stated:

> "The power of devising ought to be favoured: it is a natural consequence of property, and of the right a man has over his own. It was a right, by the law of this country, before the Conquest, and subsisted down to about the reign of Hen. 2. It ceased then, consequentially only, by the introduction of the feudal tenures; because every alienation was contrary to that, except inter vivos".[490]

The inability to vary the rules of descent under the common law withdrew real property from testamentary development because a will lacked the ability to transfer possession in the manner of a conveyance, and the Royal courts could prohibit any cause touching land even

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From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 137.

[486] A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 207; E. Jenks (ed), H. O. Danckwerts, J. S. Stewart Wallace, *Stephen's Commentaries,* seventeenth edition, volume 2 (Butterworth & Co., Bell Yard, Temple Bar, London 1922) at 612; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 323.

[487] *R v Boreston* 1 Noy 159 at 160; 74 Eng. Rep. 1119 at 1120; S. F. C. Milsom, *Cambridge studies and English legal history*, (Cambridge University Press, Cambridge 1976) at 154; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 205; C. Harpum, S. Bridge, M. Dixon, Megarry & Wade: *The Law of Real Property*, seventh edition, (Sweet & Maxwell, London, 2008) at 46; M. C. Mirow, "Coke's advice on executing wills of land" (2009) *Florida International University Legal Studies Research Paper No. 09*-09, 239 at 240; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 319.

[488] Bracton, G. E. Woodbine (ed), S. E. Thorne (trans), *De legibus et consuetudinibus Angliae*, volume 2, (Harvard University Press, Cambridge, 1968 – 1977) at 184; *Cranmer, Archbishop of Canterbury's Case*. 3 Dyer 309a at 310a; 73 Eng. Rep. 699 at 700; *Darbison v Beaumont*, Fortescue 18 at 21; 92 Eng. Rep. 743 at 744; *R v Boreston* 1 Noy 159 at 160; 74 Eng. Rep. 1119 at 1120; *Doe'd. Birtwhitle v Vardill*(1840) 6 Bing (N.C.) 385 at 387; 133 Eng. Rep. 148 at 149; *Birtwhistle v Vardill* (1840) 7 Clark & Finnelly 895 at 926; 7 Eng. Rep. 1308 at 1319 M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 151; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 67; J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 128; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 77.

[489] (1757) 2 Keny. 121; 96 Eng. Rep. 1128.

[490] (1757) 2 Keny. 121 at 146; 96 Eng. Rep. 1128 at 1136; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 112.

when devises became possible.[491] However, the customary exceptions concerning land situated in certain boroughs fell outside the common law rules of succession.[492] Boroughs held in burgage-tenure allowed the person seised to bequeath customary land in either written or oral wills.[493] Their relaxed rules developed prior to primogeniture's extension to lands held

[491] Anon (1527) Y.B. Trin. 19 Hen. VIII. fo. 9. pl. 4 in J. Baker, *Baker and Milsom's Sources of English Legal History: Private Law to 1750*, second edition (Oxford University Press, Oxford 2010) at 121; *Cranmer, Archbishop of Canterbury's Case*. 3 Dyer 309a at 310a; 73 Eng. Rep. 699 at 700; *Darbison v Beaumont*, Fortescue 18 at 21; 92 Eng. Rep. 743 at 744; *R v Boreston* 1 Noy 159 at 160; 74 Eng. Rep. 1119 at 1120; *Doe'd. Birtwhitle v Vardill*(1840) 6 Bing (N.C.) 385 at 387; 133 Eng. Rep. 148 at 149; *Birtwhistle v Vardill* (1840) 7 Clark & Finnelly 895 at 926; 7 Eng. Rep. 1308 at 1319; *Betsworth v Betsworth* 1 Style 10 at 10; 82 Eng. Rep. 490 at 490; *Twaites v Smith* (1696) 1 P. WMS. 10 at 12; 24 Eng. Rep. 274 at 274; *Roberts' Case* 12 Co. Rep. 65 at 68; 77 Eng. Rep. 1345; *Langdale's Case* 12 Co. Rep. 58 at 58; 77 Eng. Rep. 1338 at 1338; *Arthur v Bockenham*, Fitz-G. 232 at 233; 94 Eng. Rep. 734 at 734; *Sherwood v Ray* (1837) 1 Moore 351 at 389; 12 Eng. Rep. 848 at 863; M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 151; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 67; J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 128; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 77; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 205; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 528; O. K. McMurray, *Liberty of Testation and some Modern Limitations Thereon*, in *Celebration Legal Essays, By Various Authors To Mark the Twenty-fifth Year of Service of John H. Wigmore*, (North Western University Press, Chicago 1919) at 546; F. Pollock, F. Maitland, *The history of English Law before the Time of Edward I*, second edition, volume 2, (Cambridge University Press, Cambridge 1898) at 326; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 501; F. Bacon, *Reading Upon the Statute of Uses*, (Printed for E. Brooke, London 1785) at v; E. Coke, *The First Part of the Institutes of the Laws of England*; *or a Commentary upon Littleton*; *Not the Name of the Author only, but of the Law itself*, sixteenth edition, volume 1, (Fleming and Phelan, London 1809) at 111b; R. H. Helmholz, *The Ius commune in England: Four Studies*, (Oxford University Press, Oxford 2001) at 6; P. Brand, *The Making of the Common Law*, (The Hambledon Press, London 1992) at 264.

[492] *Withy v Mangles* (1843) 10 Clark & Finnelly 214 at 329; 8 Eng. Rep. 724 at 733; *Arthur v Bokenham* 11 Mod 148 at 163; 88 Eng. Rep. 957 at 964; F. Pollock, F. Maitland, *The history of English Law before the Time of Edward I*, second edition, volume 2, (Cambridge University Press, Cambridge 1898) at 256; J. Williams, Wills and Intestate Succession, (Adam and Charles Black, London 1891) at 10; T. F. T. Plucknett, *A Concise History of the Common Law*, second edition, (The Lawyers Co-operative Publishing Co, New York 1936) at 473; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 206; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 74; E. Coke, *The First Part of the Institutes of the Laws of England*; *or a Commentary upon Littleton*; *Not the Name of the Author only, but of the Law itself*, sixteenth edition, volume 1, (Fleming and Phelan, London 1809) at 111b; C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property*, seventh edition, (Sweet & Maxwell, London, 2008) at 46, 85, 88; F. Bacon, *Reading Upon the Statute of Uses*, (Printed for E. Brooke, London 1785) at 551.

[493] *Allen v Hill* (1725) 1 Gilb Rep 257 at 260; 25 Eng. Rep. 177 at 179; E. Coke, *The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton; Not the Name of the Author only, but of the Law itself*, sixteenth edition, volume 1, (Fleming and Phelan, London 1809) at 111b, section 167 (Littleton); T. F. T. Plucknett, *A Concise History of the Common Law*, second edition, (The Lawyers Co-operative Publishing Co, New York 1936) at 473; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 140; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 1; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 118; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple

in socage, which allowed will-makers to bequeath customary land according to the rules of manorial and borough courts.[494] Therefore, a limited power to bequeath real property did exist in English law despite the control exercised by the Royal courts.[495] The tension between the common law and an individual's desire to control succession to free tenure and attempts to bequeath it, encouraged by the ecclesiastical courts, remained a prominent feature of English succession until the sixteenth century.[496]

The ecclesiastical court system itself is native to English law, boasting a longer heritage than the common law courts and Chancery, and its notoriously complex arrangement divides its courts into provincial, diocesan, archdeaconry, rural deanery, and peculiar jurisdictional boundaries.[497] Ecclesiastical courts adopted the civil law distinction between an 'ordinary', or the name given to an ecclesiastical judge, and a person exercising 'extraordinary' jurisdiction over a particular cause.[498] The early ecclesiastical courts did not operate completely

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Bar 1763) at 379; E. Jenks (ed), H. O. Danckwerts, J. S. Stewart Wallace, *Stephen's Commentaries,* seventeenth edition, volume 2 (Butterworth & Co., Bell Yard, Temple Bar, London 1922) at 614; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 12; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 225; P. Brand, *The Making of the Common Law*, (The Hambledon Press, London 1992) at 225.

[494] J. Reeves, W. F. Finlason, *Reeves's History of the English Law: From the Time of the Romans of the End of the Reign of Elizabeth*, volume 1, (M. Murphy, Philadelphia 1880) at 258; M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 274.

[495] M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 274.

[496] J. Williams, *Wills and Intestate Succession*, (Adam and Charles Black, London 1891) at 10; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 206; S. T. Miller, "The reasons for some Legal Reforms" (1910) 8 (8) *Michigan Law Review*, 623 at 626; M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 278 - 279; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 313.

[497] A. T. Carter, *Outlines of English Legal History* (Butterworth & Co, London 1989) at 147; R. H. Helmholz, *Marriage Litigation in Medieval England*, (Cambridge University Press, Cambridge 1974) at 1; W. S. Holdsworth "The Ecclesiastical Courts and their Jurisdiction" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 2, (Little, Brown and Company, Boston 1908) at 255; C. Donahue (ed), *The Records of the Mediaeval Ecclesiastical Courts, part II, England*, (Duncker & Humblot, Berlin 1994) at 23; Anonymous, "The origin and progress of *The Ecclesiastical law* in England" (1845) 2 (1) *The Law Magazine or Quarterly Review of Jurisprudence*, 1 at 25; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 192 – 193; R. Bartlett, *England under the Norman and Angevin Kings 1075 – 1225*, (Clarendon Press, Oxford 2000) at 389; H. S. G. Halsbury (ed), J.P.H Mc Kay (ed), *Halsbury's Law of England*, *Wills and Intestacy*, fifth edition, volume 34, (LexisNexis Butterworths, London 2011) at [3].

[498] *Reformatio Legum Ecclesiasticarum,* 37.1; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 3, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 72; J. E. Sayers, *Papal Judges Delegate in the Province of Canterbury 1198 – 1254, A Study in Ecclesiastical Jurisdiction and Administration*, (Oxford University Press, Oxford 1971) at 100; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 115; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 64; J. Reeves, W. F. Finlason, *Reeves's History of the English Law: From the Time of the Romans of the End of*

independent from Rome and the papal *curia* acted as a final court of appeal and a court of first instance for English testamentary causes.[499] Their sources derived from the *ius commune* include the *ius naturale*, *ius gentium*, human and divine ordinances, canon law, papal decretals, general and provincial councils, Church customs, and the civil law sources outlined in the *Decretum*.[500] After the Reformation, the High Court of Delegates replaced the papal *curia* and sat as an ad hoc tribunal to hear final appeals arising from testamentary causes.[501] Gibson's authoritative *Codex Iuris Ecclesiastici Anglicani* indicates the canon law received

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the Reign of Elizabeth, volume 4, (M. Murphy, Philadelphia 1880) at 69; J. Chamberlayne, *Magnae Britannia Notitia: or the Present State of Great Britain*, (Printed for Timothy Goodwin, London 1718) at 61.

[499] *John St. John c Executors of Paty* (1294) in N. Adams (ed), C. Donahue Jr (ed), *Select Cases from the Ecclesiastical Courts of the Province of Canterbury c. 1200 – 1301,* volume 95, (Selden Society, London 1981) at 410; *Veley v Burder* (1839) 12 AD. & E. 265 at 289; 113 Eng. Rep. 813 at 821; R. H. Helmholz, *Roman Canon Law in England*, (Cambridge University Press, Cambridge 1990) at 5; J. E. Sayers*, Papal Judges Delegate in the Province of Canterbury 1198 – 1254, A Study in Ecclesiastical Jurisdiction and Administration*, (Oxford University Press, Oxford 1971) at 5, 583; C. 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" (1974) 72 (4) *Michigan Law Review*, 647 at 670; M. M. Knappen, *Constitutional and Legal History of Britain* (Harcourt, Brace, New York 1942) at 37; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 3 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 66; N. Cox, "The influence of the Common law on the Decline of the Ecclesiastical Courts of the Church of England" (2002) 2 (2) *Rutgers Journal of Law and Religion*, 1 at 8; W. S. Holdsworth "The Ecclesiastical Courts and their Jurisdiction" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 2, (Little, Brown and Company, Boston 1908) at 259 but see Constitutions of Clarendon (1164), c 8.

[500] Dist. 1; Dist. 2; Dist. 3; Dist. 10; Dist. 17; Dist. 18; Dist. 19; G. Bowyer, *Readings Delivered Before the Honourable Society of the Middle Temple in the Year 1850*, (V. & RI. Stevens and G. S. Norton, London, 1851) at 168; A. J. Carlyle, R. W. Carlyle, *A History of Mediaeval Political Theory in the West*, volume 2, (William Blackwood & Sons, Edinburgh 1909) at 165, 169, 172; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at 66; E. Gibson, *Codex Juris Ecclesiastici Anglicani*, (Printed by J. Baskett, London1713) at x; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at vii; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 2, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 30b; A. Gauthier, *Roman Law and its Contribution to the Development of the Canon Law*, second edition, (Faculty of Canon Law Saint Paul University, Ottawa 1996) at 28; Gratian, A. Thompson (trans), J. Gordley, *The treatise on laws (Decretum DD. 1- 20) with the Ordinary Gloss*, (The Catholic University of America Press, Washington D.C., 1993) at xxi - xxiv see Dig. 1.1.1; Dig. 1.1.6; Dig. 1.1.7; Dig. 1.1.9; Dig. 1.2.2.35; Dig. 1.3.1; Dig. 1.3.9; Dig. 1.3.32; Dig. 1.4.1.

[501] 24 Hen. VIII, c. 12; 25 Hen. VIII, c. 21; *Veley v Burder* (1839) 12 AD. & E. 265 at 289; 113 Eng. Rep. 813 at 821; *Moore v Moore* (1817) 1 Phill. Ecc. 406 at 431; 161 Eng. Rep. 1026 at 1034; R. H. Helmholz, *Roman Canon Law in England*, (Cambridge University Press, Cambridge 1990) at 38. R. H. Helmholz, *Canon Law in Protestant Lands*, (Duncker & Humblot, Berlin 1992) at 205, 211 R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 4; R. B. Outhwaite, *The Rise and Fall of The English Ecclesiastical Courts, 1500 – 1860*, (Cambridge University Press, Cambridge 2006) at 4; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 116 - 117; E. A. Haertle, "The History of the Probate Court" (1962) 45 (4) *Marquette Law Review*, 546 at 548; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records* (Dursley, Lochin Publishing, 1992) 18; J. E. Sayers, *Papal Judges Delegate in the Province of Canterbury 1198 – 1254, A Study in Ecclesiastical Jurisdiction and Administration*, (Oxford University Press, Oxford 1971) at xix; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 3 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 66; N. Cox, "The influence of the Common law on the Decline of the Ecclesiastical Courts of the Church of England" (2002) 2 (2) *Rutgers Journal of Law and Religion*, 1 at 6; F. Plowden, *The Jura Anglorum: The Rights of Englishmen* (E& R Brookes, London 1792) at 250.

from the continent remained in force as part of ecclesiastical custom and adds rubricks, legatine and provincial constitutions, convocations presided over by the monarch that required the consent of parliament, and case law from both temporal and spiritual courts governed ecclesiastical practice.[502] The Reformation did not drastically alter the ecclesiastical court system and testamentary causes remained cognisable in those courts, despite Chancery's encroachment, until the Court of Probate Act 1857 transferred its jurisdiction to a single Court of Probate and Divorce as part of the reforms that characterised the nineteenth century.[503] Finally, the Judicature Act 1873 preserved the testamentary jurisprudence developed by the ecclesiastical courts for the benefit of New Zealand law by amalgamating the Court of Probate, Divorce, and Admiralty into a Supreme Court of Judicature.[504]

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[502] E. Gibson, *Codex Juris Ecclesiastici Anglicani*, (Printed by J. Baskett, London1713) at ix – xiii see *Middleton v Crofts* (1736) 2 ATK 650 at 654 - 657; 26 Eng. Rep. 788 at 790 - 792; J. Dodd, *A History of Canon Law in Conjunction with other Branches of Jurisprudence with Chapters on the Royal Supremacy and the Report of the Commission on Ecclesiastical Courts*, (Parker, London 1884) at 163; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 1, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at xxii – xiii; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at xxxiv; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records* (Lochin Publishing, Dursley 1992) at 5; R. Grey, *A System of English Ecclesiastical Law*, fourth edition, (Printed by Henry Lintot, Savoy 1743) at 340, 343- 344; Anonymous, *A glance on the Ecclesiastical Commission: Being A Discourse Concerning the Power of making and altering Ecclesiastical Laws and the Settling Religion; Whether it Belongs to our Kings Alone And Convocation*, (Printed for W. Alchorne, London 1690) at 4; H. S. G. Halsbury (ed), J.P.H Mc Kay (ed), *Halsbury's Law of England*, *Wills and Intestacy*, fifth edition, volume 34, (LexisNexis Butterworths, London 2011) at [9] - [10].

[503] 24 Hen. VIII, c. 12; 3 & 4 Edw. VI, c. 11; 1 Eliz. I, c. 1; (R. B. Outhwaite, *The Rise and Fall of The English Ecclesiastical Courts, 1500 – 1860*, (Cambridge University Press, Cambridge 2006) at 15, 33, 139; G. Bray (ed) *The Anglican Canons 1529 - 1947*, (The Boydell Press, Woodbridge, 1998) at xcvii; J. Biancalana, "Testamentary cases in fifteenth-century Chancery" (2008) 76 (3 – 4) *Tijdschrift voor Rechtsgeschiedenis*, 283 at 283, 300; F. Plowden, *The Jura Anglorum: The Rights of Englishmen (*E& R Brookes, London 1792) at 251; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 124; R. B. Outhwaite, *The Rise and Fall of The English Ecclesiastical Courts, 1500 – 1860*, (Cambridge University Press, Cambridge 2006) at 139; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records* (Dursley, Lochin Publishing, 1992) 18; see P. A. Howell, *The Judicial Committee of the Privy Council 1833- 1876*, (Cambridge University Press, Cambridge 1979) at 34; C. P. Sherman, "A Brief History of Medieval Roman Canon Law in England" (1919) 68 (3) *University of Pennsylvania Law Review and American Law Register*, 233 at 253; N. Cox, "The influence of the Common law on the Decline of the Ecclesiastical Courts of the Church of England" (2002) 2 (2) *Rutgers Journal of Law and Religion*, 1 at 22, 41; A. H. Manchester, "The Reform of the Ecclesiastical Courts" (1966) 10 (1) *The American Journal of Legal History*, 51 at 52; H. Broom, E. A. Hadley, *Commentaries of the Laws of England*, volume 2, (John D. Parsons, JR., New York 1875) at 299; E. Jenks (ed), A. D. McNair, *Stephen's Commentaries,* seventeenth edition, volume 3, Butterworth & Co., Bell Yard, Temple Bar, London 1922) at 473; W. M. Geldart, *Elements of English Law*, (Williams & Norgate, London 1911) at 69; W. S. Holdsworth "The Ecclesiastical Courts and their Jurisdiction" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 2, (Little, Brown and Company, Boston 1908) at 309; W. Pritchard, *Reform of the Ecclesiastical Courts: An Analysis of the Present State of the Questions and Evidence Before Parliament, With an Examination of the Several Propositions of Reform Resulting Therefrom*, (W. G. Beening & Co, London 1853) at 1.

[504] *Public Trustee v Sheath* [1918] NZLR 129 at 147; A. T. Carter, *Outlines of English Legal History* (Butterworth & Co, London 1989) at 148; F. W. Maitland, Francis C. Montague, J. F. Colby (ed), *A sketch of English Legal History*, (G.P. Putnam's Sons, New York 1915) at 166; E. Jenks (ed), A. D. McNair, *Stephen's Commentaries,* seventeenth edition, volume 3, Butterworth & Co., Bell Yard, Temple Bar, London 1922) at 597; A. T. Vanderbilt, "The Reconciliation of the Civil Law and the Common Law" in B. Schwartz (ed), *The Code Napoleon and the Common Law World: The Sesquicentennial Lectures Delivered at the Law Centre of*

Ecclesiastical courts remain operative in New Zealand and England and still have jurisdiction over spiritual causes although they no longer influence testamentary development.[505]

The separation of temporal and spiritual jurisdiction continues to resonate in the modern era because it permitted the ecclesiastical courts to develop a true will to replace Anglo-Saxon methods and introduce civil law principles.[506] The 'causes' cognisable in a court Christian included purely spiritual matters pertaining to ecclesiastical persons, heresy, apostasy, adultery and fornication, tithes, benefices, simony, ordination, and other matters concerning the Church; and it exercised jurisdiction over intestacy, *fidei laesio*, grammar schools, defamation, marriage, pious uses, and testamentary causes that possessed mixed temporal and spiritual qualities.[507] Perkins, a common lawyer, provides the rationale behind the spiritual courts testamentary jurisdiction:

New York University December 13 – 15, 1954, (The Law Book Exchange Ltd, Union 1998) at 392; H. E. Holmes, "The debt of the Common law to the Civil law" (1912) 6 (2) *Maine Law Review*, 57 at 63.

[505] *R v St Edmundsbury and Ipswich Diocese (Chancellor) and Another: Ex Parte White and Another* (1947) 2 ALL ER 170 at 171; N. Cox, "Ecclesiastical Jurisdiction in the Church of the Province of Aotearoa, New Zealand and Polynesia" (2001) 6 (2) *Deakin Law Review*, 262 at 281; N. Cox, "The Symbiosis of Secular and Spiritual Influences upon the Judiciary of the Anglican Church in New Zealand" (2004) 9 (1) *Deakin Law Review*, 145 at 146, 165 - 166; R. B. Outhwaite, *The Rise and Fall of The English Ecclesiastical Courts, 1500 – 1860*, (Cambridge University Press, Cambridge 2006) at 1; N. Cox, "The influence of the Common law on the Decline of the Ecclesiastical Courts of the Church of England" (2002) 2 (2) *Rutgers Journal of Law and Religion*, 1 at 1 – 4, 42.

[506] *Atkins v Hill* (1775) 1 Cowp 284 at 285; 98 Eng. Rep. 1088 at 1088; *Moore v Moore* (1817) 1 Phill. Ecc. 406 at 432; 161 Eng. Rep. 1026 at 1034; *Arthur v Bokenham* 11 Mod 148 at 163; 88 Eng. Rep. 957 at 963; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 8, 198; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 427; F. Makower, *The Constitutional History and Constitution of the Church of England*, (Swan Sonnenschein & Co, London, 1895) at 417; A. Thierry, *History of the conquest of England by the Normans: With its Causes and Consequences to the Present Time*, (Whittaker and Co., London 1841) at 170; N. Jansen, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 31.

[507] *Reformatio Legum Ecclesiasticarum,* 37.17; *Ex Parte the Bishop of Exeter* (1850) 10 C.B. 102 at 110; 138 Eng. Rep. 41 at 45; *Cox's Case* (1700) 1 P. WMS. 29 at 29; 24 Eng. Rep. 281 at 281; *Dobie v Masters* (1820) 3 Phill. Ecc. 171; 161 Eng. Rep. 1291; T. Oughton, J. T. Law (Trans), *Forms of Ecclesiastical Law: Being a Translation of the First Part of Oughton's Ordo Judiciorum*, (Saunders and Benning, London 1831) at 41; T. Smith, *De Republica Anglorum*, (Printed by Henrie Midleton for George Seton, London 1583) at 142; Anonymous, "The origin and progress of *The Ecclesiastical law* in England" (1845) 2 (1) *The Law Magazine or Quarterly Review of Jurisprudence*, 1 at 7; R. H. Helmholz, *Marriage Litigation in Medieval England*, (Cambridge University Press, Cambridge 1974) at 12; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 10, 21; D. Millon, "Ecclesiastical Jurisdiction in Medieval England" (1984) 1984 (3) *University of Illinois Law Review*, 621 at 621; R. H. Helmholz "The Canon Law" in L. Hellinga, J. B. Trapp (eds), The Book in Britain 1400 – 1557, volume 3, (Cambridge University Press, Cambridge, 1999) at 387; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at xl also see J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at xl for *fideicomissa*.

> "Wills should be before the ordinary because the ordinary has a better conscience than a layman and knows more about the good of the soul of the testator than lay people and they look more closely to ensure that the debts of the deceased are paid out of the goods and will see them performed".[508]

The courts settled their respective jurisdiction and any controversies arising from the separate channels of succession by the thirteenth century.[509] The distinct separation between temporal and spiritual jurisdiction is unique to English law that allowed the ecclesiastical courts to exercise control over the development of the will for a longer period that those on the continent.[510] The distinction between real and personal property did not create procedural difficulties once devises became possible and in *Moore v Moore*[511], Dr. Phillimore noted:

> [432] The evil and inconvenience arising from the diversity of testamentary law in the Temporal and Ecclesiastical Courts is imaginary; the diversity exists to a great extent already; the will which can pass personal property to the greatest amount which the talent and industry of a British subject can accumulate it, may have no effect, and in practice frequently has none, over landed property.[512]

[508] J. Perkins, M. Walbanck (trans), *A profitable book of Mr. John Perkins*, (Printed for Matthew Walbanck, London 1657) at 182.
[509] A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 7, 11; T. F. T. Plucknett, *A Concise History of the Common Law*, second edition, (The Lawyers Co-operative Publishing Co, New York 1936) at 449; J. E. Sayers, *Papal Judges Delegate in the Province of Canterbury 1198 – 1254, A Study in Ecclesiastical Jurisdiction and Administration*, (Oxford University Press, Oxford 1971) at 167; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 21; C. P. Sherman, "A Brief History of Medieval Roman Canon Law in England" (1919) 68 (3) *University of Pennsylvania Law Review and American Law Register*, 233 at 252; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 138.
[510] A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 194; C. J. Reid Jr., J. Witte, "In the Steps of Gratian: Writing the history of canon law in the 1990s" (1999) 48 (2) *Emory Law Journal*, 647 at 649; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s*, (Oxford University Press, Oxford 2004) at 388; D. J. Seipp, "The Reception of Canon Law and the Civil Law on the Common Law Courts Before 1600" (1983) 13 (3) *Oxford Journal of Legal Studies*, 388 at 401.
[511] (1817) 1 Phill. Ecc. 406; 161 Eng. Rep. 1026.
[512] (1817) 1 Phill. Ecc. 406 at 432; 161 Eng. Rep. 1026 at 1034.

Therefore, the William I's ordinance allowed the civil law to influence the evolution of the English will for personalty despite the absence of an explicit grant of testamentary jurisdiction.[513]

The canonical will's introduction into English law was a gradual process and no timeline concerning its arrival is ascertainable.[514] It appears to have followed the developments on the continent and the Church's control over intestate succession as a spiritual matter. The rule of thirds dictated the customary distribution of an estate during the Anglo-Norman period, which divided personalty between the spouse, issue, and property administered for the deceased's soul.[515] Failing spouse or issue, the property is divisible in half; or if neither exists, the entire estate may be freely disposed.[516] The final third is customarily referred to the 'dead man's share', which acknowledges the ordinary's role to apply it to pious causes for the benefit of the deceased's soul if they died intestate.[517] Therefore, the canonical will

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[513] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 430.

[514] *Dyke v Walford* (1846) 5 Moore 434 at 434; 13 Eng. Rep. 557at 557; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 120, 140.

[515]Canon 14, Constitution of Othobone; *Reformatio Legum Ecclesiasticarum,* 27.10; Henrician Canons, 31.11; *La Cloche v La Cloche* (1870) 6 Moore N.S. 383 at 392; 16 Eng. Rep. 770 at 773;*Pickford v Brown* (1856) 2 K. & J. 426 at 430; 69 Eng. Rep. 849 at 851; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 220; G. W. Keeton, L. C. B. Gower, "Freedom of Testation in English Law" (1935) 20 (2) *Iowa Law Review*, 326 at 337; P. Lovelass, A. Barron (ed) *The Law's Disposal of a Person's Estate Who Dies without Will or Testament; to Which Is Added the Disposal of a Person's Estate by Will and Testament; with an Explanation of the Mortmain Act*, twelve edition, (J. S. Littell, Philadelphia 1839) at 107; R. E. Mathews, "Trends in the Power to Disinherit Children" (1930) 16 (1) *American Bar Association Journal*, 293 at 293; J. Reeves, W. F. Finlason, *Reeves's History of the English Law: From the Time of the Romans of the End of the Reign of Elizabeth*, volume 1, (M. Murphy, Philadelphia 1880) at 365; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 199; E. Jenks (ed), H. O. Danckwerts, J. S. Stewart Wallace, *Stephen's Commentaries,* seventeenth edition, volume 2 (Butterworth & Co., Bell Yard, Temple Bar, London 1922) at 614; H. Horwitz, "Testamentary Practice, Family Strategies and the Last Phases of the Custom of London 1660- 1725" (1984) 2 (2) *Law and History Review*, 223 at 223; M. M. Bigelow, "Theory of Post-Mortem Disposition: Rise of the English Will" (1897) 11 (2) *Harvard Law Review*, 69 at 77; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 14; Glanville, *Tractatus de legibus et consuetudinibus regni Angliae*, 7.5.

[516] *Reformatio Legum Ecclesiasticarum,* 27.10; Glanville, *Tractatus de legibus et consuetudinibus regni Angliae*, 7.5; *Matthews v Newby* (1682) 1 Vern 133 at 134; 23 Eng. Rep. 134 at 134; J. Reeves, W Finlason *Reeves's History of the English Law: From the Time of the Romans of the End of the Reign of Elizabeth*, volume 1, (M. Murphy, Philadelphia 1880) at 366; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 199; E. Jenks (ed), H. O. Danckwerts, J. S. Stewart Wallace, *Stephen's Commentaries,* seventeenth edition, volume 2 (Butterworth & Co., Bell Yard, Temple Bar, London 1922) at 614; M. M. Bigelow, "Theory of Post-Mortem Disposition: Rise of the English Will" (1897) 11 (2) *Harvard Law Review*, 69 at 77.

[517] Henrician Canons, 31.11; *Dyke v Walford* (1846) 5 Moore 434 at 461; 13 Eng. Rep. 557at 568; *Pickford v Brown* (1856) 2 K. & J. 426 at 430; 69 Eng. Rep. 849 at 851; P. Lovelass, A. Barron (ed) *The Law's Disposal of a Person's Estate Who Dies without Will or Testament; to Which Is Added the Disposal of a Person's Estate by Will and Testament; with an Explanation of the Mortmain Act*, twelve edition, (J. S. Littell, Philadelphia 1839)

provided an instrument to control this remaining third, and allowed will-makers to make provision for their souls under the same rationale underpinning Anglo-Saxon testamentary methods already in use.[518] Priests continued to take an active role witnessing lasts wishes, and administering gifts as part of their customary duties but their absence never affected the will's validity.[519] The strong belief emerged that will-makers ought to avoid intestacy by making prudent provision for their souls in their wills arose during this period and continued to form the spiritual element of ecclesiastical jurisdiction.[520]

The early jurists introduced the canonical will to manage a third of the will-maker's estate for pious causes, and likely did not envision the full extent of England's testamentary development.[521] Sheehan notes the contractual elements of Anglo-Saxon methods appear in some early wills that suggests early jurists transposed the concept of personal obligation associated with earlier methods onto the canonical will.[522] This did not become a feature of the canonical will because it was a much more sophisticated form of disposition, possessing a unilateral and ambulatory character, which made it a more popular method of managing the

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at 110; L. Shelford, *A Practical Treatise of the Law of Mortmain, and Charitable Uses and Trusts* (J. S. Littell, Philadelphia 1842) at 357; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 198.

[518] J. M. Torron, *Comparative studies and Continental in Anglo-American legal history: Anglo-American law and Canon law: Canonical roots of the common law tradition*, (Duncker & Humblot, Berlin 1998) at 112; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 125, 135, 231; R. E. Rodes, Jr., E*cclesiastical Administration in Medieval England: The Anglo-Saxons to the Reformation*, (University of Notre Dame Press, Notre Dame, 1977) at 57; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 430; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s*, (Oxford University Press, Oxford 2004) at 388.

[519] H. J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, Harvard 1983) at 234; M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century,* (*Pontifical Institute of Mediaeval Studies*, Toronto 1963) at 181; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 62; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 276 – 277; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 13 but see W. Lyndwood, *Constitutions Provincialles and of Otho and Octhobone, translated in to Englyshe*, (Robert Redman, London 1534) at 3.13.3.

[520] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at, at 232; W. Assheton, *A Theological Discourse of Last Wills and Testaments*, (Printed for Brab, Aylmer, London 1696) at 92; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 199; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 66; S. Coppel, "Willmaking on the Deathbed" (1988) 40 (1) *Local Population Studies* 37 at 39

[521] Glanville, *Tractatus de legibus et consuetudinibus regni Angliae*, 7.8; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at, at 135, 162.

[522] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 139, 141.

estate than the Anglo-Norman instruments it eclipsed.[523] The English ecclesiastical courts held a wider jurisdiction than their continental counter-parts and permitted will-makers to use the canonical will as a vehicle for leaving property to friends and family as well as charitable legacies.[524] The expansive jurisdiction enabled jurists to shape the canonical will in a manner that contradicted the canon law to suit the demands of will-makers.[525] Nonetheless, the *Decretum* recognised deviation from the letter of the canon law because practices varied throughout ecclesiastical provinces, and acknowledged local customs as a source of law provided they were 'good' and not contrary to fundamental tenets of Church doctrine.[526] Therefore, the unique evolution of the English will agreed with this canon.

[523] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at, at 140- 141, 162; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 69; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 316.

[524] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at, at 231; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 88; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 644; R. E. Rodes, Jr., E*cclesiastical Administration in Medieval England: The Anglo-Saxons to the Reformation*, (University of Notre Dame Press, Notre Dame, 1977) at 57.

[525] W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 31; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 88; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s*, (Oxford University Press, Oxford 2004) at 392; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 6; R. H. Helmholz, "Conflicts between Religious and Secular Law: Common Themes in the English Experience, 1250 – 1640" (1991) 12 (3) *Cardozo Law Review*, 707 at 715; F. W. Maitland, "Canon law in England" in F.W. Maitland, *Roman Canon Law in the Church of England: Six Essays*, (Methuen & Co, London 1898) at 2.

[526] Dist. 8, c. 2; Dist. 8, c. 2; Dist. 8; c. 4; Dist. 8, c. 5; Dist. 8, c 6; X. 1.4.1; X. 1.4.9; X. 1.4.10; Cod. 8.52.2; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 195; G. Bowyer, *Readings Delivered Before the Honourable Society of the Middle Temple in the Year 1850*, (V. & RI. Stevens and G. S. Norton, London, 1851) at 171; J. Dodd, *A History of Canon Law in Conjunction with other Branches of Jurisprudence with Chapters on the Royal Supremacy and the Report of the Commission on Ecclesiastical Courts*, (Parker, London 1884) at 133, 161; A. J. Carlyle, R. W. Carlyle, *A History of Mediaeval Political Theory in the West*, volume 2, (William Blackwood & Sons, Edinburgh 1909) at 166; T. F. T. Plucknett, *A Concise History of the Common Law*, second edition, (The Lawyers Co-operative Publishing Co, New York 1936) at 269; H. F. Jolowicz, *Roman Foundations of Modern Law*, (Clarendon Press, Oxford 1957) at 31 but see F. W. Maitland, "Canon law in England" in F.W. Maitland, *Roman Canon Law in the Church of England: Six Essays*, (Methuen & Co, London 1898) at 51; C. 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" (1974) 72 (4) *Michigan Law Review*, 647 at 651; A. Gauthier, *Roman Law and its Contribution to the Development of the Canon Law*, second edition, (Faculty of Canon Law Saint Paul University, Ottawa 1996) at 22 see Dig. 1.3.32.

Early references to the civil law's testamentary jurisprudence utilised its vocabulary to express local ideas rather than attempt to import the testament in English law.[527] A prominent example is the use of term *donatio* to identify gifts *inter vivos* and *mortis causa*; and the word *testamentum* only became associated with gifts *mortis causa* to distinguish them from a charter containing *inter vivos* donations.[528] English jurists refused to import the civil law testament as an instrument designed to facilitate the universal succession to the estate.[529] Bracton's description of the will indicates it consisted of a number of different unilateral transfers, accommodating customary exactions, which allowed the will-maker to control bequests of chattels.[530] His description does not include a requirement to institute an heir fundamental to the civil law testament.[531] Bracton reveals the canonical will, designed to manage small transfers, was perfect for English testamentary succession in the absence of a concept of universal succession. Therefore, the canonical will, not the Roman testament, provided the framework for the importation of the civil law principles necessary to extrapolate its nature.[532] Bracton also indicates the ecclesiastical courts possessed a secure jurisdiction to determine testamentary causes by 1220 A.D. as part of their spiritual jurisdiction and issues surrounding real property were cognisable by the Royal courts.[533]

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[527] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 120, 138.
[528] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 139.
[529] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 123.
[530] Bracton, G. E. Woodbine (ed), S. E. Thorne (trans), *De legibus et consuetudinibus Angliae*, volume 2, (Harvard University Press, Cambridge, 1968 – 1977) at 178.
[531] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 145.
[532] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at, at 120, 140, 144 - 145; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 31.
[533] Bracton, G. E. Woodbine (ed), S. E. Thorne (trans), *De legibus et consuetudinibus Angliae*, volume 4, (Harvard University Press, Cambridge, 1968 – 1977) at 282; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at, at 138; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 7; C. P. Sherman, "A Brief History of Medieval Roman Canon Law in England" (1919) 68 (3) *University of Pennsylvania Law Review and American Law Register*, 233 at 252; R. Hooker, I. Walton, *Of the Laws of Ecclesiastical Polity: Introductions; Commentary, Preface and Books V- VII*, (Medieval & Renaissance Texts & Studies, Binghamton 1993) at 1068; H. Spelman, "Of the Original of Testaments and Wills, And of their Probate to Whom Anciently Belonged (1633)" in H. Spelman, *Reliquiae Spelmannianae: The Posthumous Works of Sir Henry Spelman Relating to the Laws and Antiquities of England*, (Printed for D. Brown, W. Mears, F. Clay, London, 1723) at 132 see *Coppyndale c Burton* (1338) CP.E.34.

English jurists followed *ius commune* jurisprudence and began to import the civil law directly into testamentary law to sit alongside the canon law and local customs.[534] The most authoritative Swinburne begins his treatise on wills by reminding the reader:

> "Whereas also the Civil law ever since the Ecclesiastical law was made, had been deemed and judged for part and parcel of the same Ecclesiastical law in cases wherein it dooth not differ from the same. For where these two laws be not contrary, the one is suppletory of the other, and being mutually incorporated do both make one body, otherwise the Civil law being contradicted by the ecclesiastical law, ought to be silent in the Ecclesiastical courts".[535]

The author adds that the civil law principles on testamentary succession introduced into English law were "not repugnant to the laws, statutes, and customs of the realm".[536] The need to deviate from the canon law recognised that the *Liber Extra* did not furnish an alternative to the extensive treatment on testamentary succession by the *Corpus Iuris Civilis*, which the jurists utilised to define the will's character in English law.[537]

English courts recognised principles imported by civilian jurists and deferred to the civil law as the proper law of testamentary succession.[538] The spiritual jurisdiction of the ecclesiastical courts and the civilians practising within them are largely responsible for the civil law's influence on the evolution of testamentary succession. English will-makers followed the spirit of the canon law by invoking God to protect their bequests, and included introductory statements to indicate that they were making a will and commend their souls to the Lord in a Christian manner.[539] Nonetheless, Canon 32.1, reflecting the Church's attitude to the civil law states:

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[534] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 390; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 50; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at, at 135 - 136, 140.
[535] H. Swinburne, *A Treatise of Testaments and Last Wills*, (Printed by John Windet, London 1590) at iii (B2).
[536] H. Swinburne, *A Treatise of Testaments and Last Wills*, (Printed by John Windet, London 1590) at iii (B2).
[537] J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at vii, 50.
[538] *Fox v Marston* (1837) 1 Curt. 494 at 498; 163 Eng. Rep. 173 at 174; *Lord Walpole v Lord Cholmondeley* (1796) 7 T.R. 138 at 146; 101 Eng. Rep. 897 at 902; *Twaites v Smith* (1696) 1 P. WMS. 10 at 12; 24 Eng. Rep. 274 at 274; G. Bray (ed) *The Anglican Canons 1529 - 1947*, (The Boydell Press, Woodbridge, 1998) at xxx – xxxi, cxxxix.
[539] G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J.

"and because in reality there are more things concerning Testaments and last Wills, not to mention the administration of the goods of those dying intestate, and legacies, accounts and other things depending on them, that our aforesaid constitutions include, it is our command and will that all and singular additional matters concerning the aforesaid, about which is no definite instruction and our constitutions, shall be examined, discussed and defined according to the civil laws, in so far as they are not opposed to the laws of our kingdom or repugnant to our aforesaid constitutions".[540]

Therefore, the complex nature of the civil law principles produced a will that allowed will-makers to include burial arrangements, proper provision for their souls, mortuary, legacies, revocation clauses, witness lists, and requests for diligent conduct by their executors.[541] The modern will is the product of this interaction between the canonical will and civil law principles.

Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 10; L. M. McGranahan, "Charity and the Bequest Motive: Evidence from seventeenth-Century Wills" (2000) 108 (6) *The Journal of Political Economy*, 1270 at 1273; W. Assheton, *A Theological Discourse of Last Wills and Testaments*, (Printed for Brab, Aylmer, London 1696) at 16 - 18; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 193; S. Coppel, "Willmaking on the Deathbed" (1988) 40 (1) *Local Population Studies* 37 at 37; The Virginia Magazine of History and Biography, "Two Wills of the seventeenth Century" (1894) 2 (2) *The Virginia Magazine of History and Biography*, 174 at 174, 176 (Wills of Richard Kemp and Rev. John Lawrence); A. Ogle, *The Canon Law in Mediaeval England An Examination of William Lyndwood's Provinciale in Reply to the Late F. W. Maitland* (J. Murray, London 1912) at 197 (Will of William Lyndwood); P. R. Watts "An Elizabethan Will" (1943) 16 (5) *The Australian Law Journal* 353 at 353 (Will of John Hyde); J. G. Nichols, J. Bruce (eds), *Wills from Doctors Commons: A Selection from the Wills of Eminent Persons proved in the Prerogative Court of Canterbury 1495 – 1695* (Printed for the Camden Society, London 1863) at 1 (Will of Cecily Duchess of York, 1495), 9 (Will of Dame Maude Parr, 1529), 21 (Will of Archbishop Warham, 1530), 28 (Will of Charles Brandon, 1544), 42 (Will of Bishop Stephen Gardiner, 1545), 54 (Will of Duchess Elizabeth, 1558), 57 (Will of Thomas Gresham, 1575), 69 (Will of Francis Walsingham, 1590), 73, 77 (Will of Sir Francis Drake (1595), 80 (Will of Isaac Casaubon, 1614), 83 (Will of Isaac Oliver, 1617), 87 (Will of John Davies, 1618), 90 (Will of Duke George Buckingham, 1627), 92 (Will of Hugh Middleton, 1631); Church of England. Diocese of Durham, J. Raine, *Depositions and other Ecclesiastical Proceedings from the Courts of Durham extending from 1311 to the Reign of Elizabeth* (J. B. Nichols and Son, London 1845) at 150 (Will of William Knight, 1533), 152 (Will of William Wolhede, 1533).

[540] See *Reformatio Legum Ecclesiasticarum,* 27.43.

[541] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 194 – 195 see Will of John Clark (1661) CP.H.5169 at 3.

7. Unprivileged Wills

1. The English Canonical Will

English testamentary succession is characterised by two seemingly conflicting instruments with differing objectives derived from separate systems. Civilians distinguished the solemn testament made in the presence of seven witnesses and with the institution of an heir, occasionally followed by will-makers, from 'un-solemn testaments' made without the civil law formalities.[542] Swinburne declares all English wills to be un-solemn testaments because they followed the canonical formalities focussing on the bequest of legacies rather than the civilian ceremony instituting an heir.[543] He reasoned English 'un-solemn testaments' or 'wills' were not void because the only difference between them is the observance of solemnities and these did not affect their testamentary character.[544] English wills were more than mere wishes and further recourse to the civil law was unnecessary because the absence

[542] Dig. 28.2.30; Dig. 28.3.1; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 45, 47; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 384; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 525, 530; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 6, 9; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 57; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 178; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 399; J. G. Nichols, J. Bruce (eds), *Wills from Doctors Commons: A Selection from the Wills of Eminent Persons proved in the Prerogative Court of Canterbury 1495 – 1695* (Printed for the Camden Society, London 1863) at 21, 27 (Will of Archbishop Warham, 1530), 53 (Will of Cardinal Pole, 1558), 69 (Will of Francis Walsingham, 1590), 71 (Will of Francis Walsingham, 1590), 98 (Will of Hugh Middleton, 1631); *Coppyndale c Burton* (1338) CP.E.34.

[543] H. Swinburne, *A Treatise of Testaments and Last Wills*, (Printed by John Windet, London 1590) at 2 see *Eagleton v Kingston* (1803) 8 Ves. Jun. 438 at 454; 32 Eng. Rep. 425 at 431; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 47, 351; H. Consett, *The Practice of the Spiritual or Ecclesiastical Courts*, (Printed for W. Battersby, London 1700) at 12; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 70; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 525, 530; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 7; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 32; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 399.

[544] *Ross v Ewer* (1744) 3 ATK 156 at 163; 26 Eng. Rep. 892 at 897; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 5, 48-49; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 384; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 9- 10; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 399.

of formal elements did not defeat the testamentary intent behind them.[545] Dr. Smith compared the English canonical will to civil law military testaments because of their apparent absence of formalities.[546] The popular statement "every testament is a last will but not every last will is a testament" highlights the difference that a 'testament' is an instrument instituting an heir, and a 'will' that does not is merely a species of 'testament'.[547] The expression 'last' did not prohibit the execution of another will or imbue it with any unique qualities beyond the function of a testamentary instrument.[548] A narrower interpretation of the terms is that the civil law 'testament' is a just sentence of a will, in the metaphysical sense, which is distinguishable from a 'will' as a legitimate disposition of a will.[549] Therefore, a 'testament' *contains* the will of the testator and a 'will' *is* the will of the will-maker, which is a distinction indicative of the former's obsolete character.[550]

English jurists included an additional layer to the definition that distinguished a will touching real property cognisable in borough and common law courts from testaments containing bequests of personalty under the jurisdiction of the ecclesiastical courts.[551] Perkins devotes

[545] *Moore v Moore* (1817) 1 Phill. Ecc. 406 at 426; 161 Eng. Rep. 1026 at 1032; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 1, 8; H. Consett, *The Practice of the Spiritual or Ecclesiastical Courts*, (Printed for W. Battersby, London 1700) at 12; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 69- 70.

[546] *Allen v Hill* (1725) 1 Gilb Rep 257 at 260; 25 Eng. Rep. 177 at 179; T. Smith, *De Republica Anglorum*, (Printed by Henrie Midleton for Gregorie Seton, London 1583) at 3.7.

[547] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 2-3, 50; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 53; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 43; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 530p; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 5; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 62.

[548] *Cutto v Gilbert* (1854) 9 Moore 130 at 147; 14 Eng. Rep. 247 at 254; *Lord Walpole v Lord Cholmondeley* (1796) 7 T.R. 138 at 146; 101 Eng. Rep. 897 at 902.

[549] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 2; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 56.

[550] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 399.

[551] E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 1; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 53; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 43; A. N. Localizado, *Modern Probate of Wills, Containing an Analysis of the Modern Law of Probate in England and America, with Numerous References to the English and American Cases, and Copious Extracts from the Leading Cases*, (Charles C Little and James Brown, Boston 1846) at 1; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 4; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 56; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their*

separate titles to testaments and devises, once the latter power arose, which suggests jurists' conceptualised these classes as distinct methods of distribution from an early period.[552] English civilians begrudgingly acknowledged this trend, and the common lawyers confusing the terms, to treat the terms as analogous to each other.[553] New Zealand will-makers, analogous to English testators, continue to refer to their wills using the historic expression "this is my last will and testament" despite the fact the term 'will' has long supplanted the 'testament' and the latter is no longer a reference to the civil law *testamentum*.[554] This followed the trend in the *ius commune* to treat them together in a single title '*De testamentis et ultimis voluntatibus*' that formed part of canonist treatments on the will. In *Cutto v Gilbert*[555], the court stated it would be difficult to suggest construction of this phrase ought to differ in the Royal courts.[556] Modern courts followed this lead and do not draw a distinction between 'will' and 'testament' and treat the terms as synonymous.[557]

Understanding how the civilians developed the canonical will is essential to the evolution of testamentary succession. The will is conceptualised in three stages: inception or the time of

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Records (Lochin Publishing, Dursley 1992) at 49' B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 61- 62; R. B. Outhwaite, *The Rise and Fall of The English Ecclesiastical Courts, 1500 – 1860*, (Cambridge University Press, Cambridge 2006) at 33.

[552] J. Perkins, M. Walbanck (trans), *A profitable book of Mr. John Perkins*, (Printed for Matthew Walbanck, London 1657) at 186.

[553] R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 53; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 43; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 57.

[554] J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 1- 2; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 1; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 399; H. S. G. Halsbury (ed), J.P.H Mc Kay (ed), *Halsbury's Law of England*, *Wills and Intestacy*, fifth edition, volume 102, (LexisNexis Butterworths, London 2010) at [1]; J. G. Nichols, J. Bruce (eds), *Wills from Doctors Commons: A Selection from the Wills of Eminent Persons proved in the Prerogative Court of Canterbury 1495 – 1695* (Printed for the Camden Society, London 1863) at 40 (Will of Charles Brandon, 1545), 42 (Will of Bishop Stephen Gardiner, 1545), 54 (Will of Duchess Elizabeth, 1558), 56 (Will of Duchess Frances, 1559), 57 (Will of Thomas Gresham, 1575), 70 (Will of Francis Walsingham, 1590), 90 (Will of Duke George Buckingham, 1627), 92 (Will of Hugh Middleton, 1631).

[555] (1854) 9 Moore 130; 14 Eng. Rep. 247.

[556] (1854) 9 Moore 130 at 144; 14 Eng. Rep. 247 at 252.

[557] J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 3; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 53; A. N. Localizado, *Modern Probate of Wills, Containing an Analysis of the Modern Law of Probate in England and America, with Numerous References to the English and American Cases, and Copious Extracts from the Leading Cases*, (Charles C Little and James Brown, Boston 1846) at 1; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 57; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 399.

forming the will; progression, when the will-maker executes it before witnesses; and consummation that occurs when the will become operative upon the will-maker's death.[558] The English canonical will could be either a written or a nuncupative instrument.[559] From the thirteenth century, the written form became a popular method of executing wills alongside the common use of nuncupative declarations.[560] However, the written will was a more secure means of testation and less reliant on memory than a nuncupative declaration, which resulted in fewer evidential problems surrounding the establishment of testamentary intent.[561] English civilians deemed that a will was in writing when the will-maker committed their testamentary intent to a document and subscribed it during their lifetime.[562] The fundamental principle in Inst. 2.10.12 states "It is immaterial whether the will be written on a tablet, paper, parchment, or any other substance". Civilians adopted this principle and treated the canonical will as written irrespective of the medium containing it.[563] The civil law required testators to make their testaments and institute their heirs in either Greek or Latin although they were able to leave *fideicommissa* in any language.[564] English jurists adopted the liberal approach by allowing will-makers to employ any language to express their will.[565] Ecclesiastical courts

[558] *Brett v Rigden* 1 Plowden 343; 75 Eng. Rep. 516 at 521; T. M. Wentworth, *The Office and Duty of Executors*, (Printed by the Assigns of Richard and Edward Atkins, London 1589) at 29; T. Jarman, M. M. Bigelow, *A Treatise on Wills*, fifth edition, volume 1, (Little Brown and Company, Boston 1881) at 341; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 502.
[559] J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 5; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 2
[560] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 187.
[561] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 400.
[562] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 51; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 525.
[563] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 340; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 72; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 10; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 320.
[564] Dig. 32.1.11; *Rymes v Clarkson* (1809) 1 Phill. Ecc. 22 at 29 - 30; 161 Eng. Rep. 901at 904; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 21; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 351; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 212; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 87.
[565] *Darbison v Beaumont*, Fortescue 18 at 21; 92 Eng. Rep. 743 at 744; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 351; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*,

even permitted will-makers to use odd characters provided the will was capable of being understood and demonstrated the will-maker's testamentary intent; otherwise, the court deemed it unwritten.[566]

The ecclesiastical courts followed Cod. 6.23.28 and required English will-makers to complete their wills in *uno contextu actu*, or a single unitary act, which did not include dictating or writing out its contents in advance.[567] Civilians followed the principle in Cod. 6.23.21.2 that states:

> "In all testaments that are dictated either in the presence or the absence of the witnesses, it is superfluous to demand that the testator and witnesses be summoned, and the will be dictated and finished at one and the same time. On the contrary, if a

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third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 10; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 72; E. Jenks, *The Book of English Law: As at the End of the Year 1935*, fourth edition, (John Murray, London, 1936) at 376; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 321; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 87.

[566] Dig. 28.2.13; Dig. 34.8.2; Dig. 50.17.73.3; Dig. 50.17.96; *Broke, Offley et al c Barret* (1584) The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 23; *Masters v Masters* (1717) 1 P. WMS. 421 at 425; 24 Eng. Rep. 454 at 455; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 352- 353, 355; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 72; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 11; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 322; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 13; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 384; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 525; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 63.

[567] Cod. 6.23.21.1; Cod. 6.23.21.2; Dig. 28.1.21.3; Hostiensis, *Summa Aurea*, Liber 3, (Venice 1574) at 1036; *Grayson v Atkinson* (1752) 2 Ves. Sen. 454 at 455; 28 Eng. Rep. 291 at 291; *Hazard c Pike* The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 4; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 82; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 214; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 156; G. J. McGinley, "Roman law and its influence in America" (1928) 3(2) *The Notre Dame Lawyer*, 70 at 78; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 20; F. J. Tomkins, H. D. Jencken, *A Compendium of the Modern Roman Law*, (Butterworths, London 1870) at 221; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 286.

testament is produced which was dictated previously, it will suffice that all the witnesses shall, without any other intervening transaction, at one and the same, and not at different times, subscribe and seal the testament. We direct that the conclusion of a will shall consist of the subscriptions and seals of witnesses. A testament not subscribed and sealed is to be considered as incomplete".

The solemnity of will making did not allow non-testamentary business to be intermingled with the act, although this rule did not exclude brief interruptions by unanticipated events.[568] Witnesses were required to attest the will in the presence of the will-maker and each other to prevent fraud or suppression of wills.[569] The will itself could be contained in more than one document provided they each contained a single testamentary intent made in a one solemn act.[570] In *Sandford v Vaughan*[571], a case in the Prerogative Court of Canterbury involving four documents propounded as wills, Doctors Swabey and Phillimore cited Dig. 31.1.47 to emphasise that only one copy possessed the necessary intent to dispose of their estate.[572] Sir Nicholl noted in *obiter dicta* that four documents could stand together if they comprised a single will.[573] Nonetheless, jurists advised will-makers to write their will on a single document in their handwriting and sign it, or each part of it, to prevent fraud.[574]

The ecclesiastical courts applied the witness requirements enshrined in X. 3.26.10, agreeing with early English custom, concerning the testimony of wills, natural law, and the *ius*

[568] Cod. 6.23.23; Cod. 6.23.23.1; Cod. 6.23.23.2; Cod. 6.23.23.3; Cod. 6.23.23.4; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 350; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 82; F. J. Tomkins, H. D. Jencken, *A Compendium of the Modern Roman Law*, (Butterworths, London 1870) at 221; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 286.

[569] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 350; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 20; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 71.

[570] Dig. 28.1.24; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 230; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 9.

[571] (1809) 1 Phill. Ecc. 39; 161 Eng. Rep. 907.

[572] (1809) 1 Phill. Ecc. 39 at 45; 161 Eng. Rep. 907 at 909.

[573] (1809) 1 Phill. Ecc. 39 at 47; 161 Eng. Rep. 907 at 910.

[574] *Butler v Baker's Case* 3 Co. Rep. 36b; 76 Eng. Rep. 684 at 701 at 710; M. C. Mirow, "Coke's advice on executing wills of land" (2009) *Florida International University Legal Studies Research Paper No. 09*-09, 239 at 244.

commune.[575] This rule followed natural law, *ius gentium*, and the civil law evidentiary requirements that two witnesses were required to prove a fact for the purposes of probate in solemn form or litigation.[576] The civil law maxims that "the testimony of one is the testimony of none" or "one witness alone could not be heard", disqualified the testimony of a single witness, guided the procedure of the ecclesiastical courts.[577] In *Evans v Evans*[578] Sir Fust sitting in the Court of Arches held:

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[575] Henrician Canons, 31.2; *Grayson v Atkinson* (1752) 2 Ves. Sen. 454 at 455; 28 Eng. Rep. 291 at 291; *Ross v Ewer* (1744) 3 ATK 156 at 158; 26 Eng. Rep. 892 at 893; *Butler v Baker's Case* 3 Co. Rep. 36b; 76 Eng. Rep. 684 at 701 at 710; *Holdfast on Demise of Ansty v Dowsing* (1747) 1 Black W. 8 at 10; 96 Eng. Rep. 5 at 6; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 45-46, 351; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 400; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 177; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 258; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 10; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 169, 171; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 387; W. Nelson, *Lex Testamentaria: Or, A Compendious System of all the laws of England, as well before the statute of Henry VIII as since, concerning last wills and testaments* (London, Printed by E. and R. Nutt Gosling 1727) at 576; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 62 - 63; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 279, 282; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 73; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at 121.

[576] Nov. 90.2; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 65; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 387; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 384; R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 156; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 63; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 225, 288; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Statdioners, London 1607) at 122; W. Roberts, *A Treatise on the Statute of Frauds as it regards Declarations in Trusts, Contracts, Surrenders, Conveyances, and the Execution and Proof of Wills and Codicil* (Uriah Hunt, Philadelphia 1838) at 449; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 538; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 13.

[577] Cod. 4.20.4; 91. The Notebook of Dr Thomas Eden (1610) in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 80; *Roberts' Case* 12 Co. Rep. 65 at 65; 77 Eng. Rep. 1344 at 1344;*Prawnce v Hodilow* (1582) 1 Choyce Cases 156 at 156; 21 Eng. Rep. 91 at 91; *Glynn v The Bank of England* (1750) 2 Ves. Sen. 38 at 39; 28 Eng. Rep. 26 at 26; *Twaites v Smith* (1696) 1 P. WMS. 10 at 12; 24 Eng. Rep. 274 at 274; *Farmer v Brock* (1856) Deane. 187 at 190; 164 Eng. Rep. 544 at 545; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 350; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 171; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 70; P. Laurenio, *Forum Ecclesiasticum*, volume 2, (For Martini Veith and Jodici Henrici Muller, Augusta Vindelicorum 1787) at 330.

[578] (1844) 1 Rob Ecc 164; 163 Eng. Rep. 1000.

> [171] "I must look to the source from which the law of these Courts is derived, and on so doing it is clear that neither by the civil nor by the canon law (the principles of which are one and the same) is the evidence of one witness, standing entirely alone, sufficient….. [172] as it is laid down in Ayliffe, there must be something more than the evidence of one witness, even of entire credit, to constitute full proof; and on reference to many decisions in these Courts it will be found that this principle has been maintained".[579]

The courts of the common law did not interfere with this rule when adjudicating testamentary matters despite allowing the testimony of a single witness in their proceedings.[580]

Ecclesiastical courts required witnesses to know the will-maker summoned them for the purposes of attesting a testamentary disposition, and must remain in their presence and the other witnesses throughout the testamentary ceremony.[581] Civilians followed Dig. 28.1.22.4 that demanded witnesses to sign and attach their seals to the exterior of the instrument, in sight of the testator, and further advised them to subscribe their names to every page to prevent fraud.[582] However, the presence requirement and witness knowledge of the will appears to have been contentious issues. Dr. Thomas Eden's *Notebook* addresses the question

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[579] (1844) 1 Rob Ecc 164 at 171; 163 Eng. Rep. 1000 at 1002.

[580] *Lowther v Lowther (Lord)* (1806) 13 Ves. Jun. 95 at 101; 33 Eng. Rep. 230 at 232; *Prince v Hazleton* (1822) 20 Johns 502 at [9]; *Evans v Evans* (1844) 1 Rob Ecc 164 at 174; 163 Eng. Rep. 1000 at 1003; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at 122.

[581] Inst. 2.10.3; Dig. 28.1.20.8; Dig. 28.1.21.2; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 350; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 214; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 63; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 82.

[582] *Reformatio Legum Ecclesiasticarum,* 27.2; Dig. 28.1.22.4; Isidore *Etymologies*. 5.23; *Holdfast on Demise of Ansty v Dowsing*, 2 Strange 1253 at 1255; 93 Eng. Rep. 1164 at 1165; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 47; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 387; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 214; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 286; Will of Dame Maude Parr (1529) in J. G. Nichols, J. Bruce (eds), *Wills from Doctors Commons: A Selection from the Wills of Eminent Persons proved in the Prerogative Court of Canterbury 1495 – 1695* (Printed for the Camden Society, London 1863) at 18 – 20; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 502.

whether a will is valid if the will-maker executed it in the presence of a single witness and then executes the same will before another.[583] The learned civilian does not address whether the witnesses must be in the presence of each other but concluded that two witnesses were necessary to establish a will.[584] In *Hazard c Pike*, the court observed that witnesses must be present throughout the ceremony, agreed they were witnessing the execution of a will, although not required to understand or recall the will's contents.[585] Therefore, the will-maker did not need to 'leave a sound in the witnesses' ears or know the document itself is a will because publication alone is the essential element and not their knowledge.[586] Nonetheless, in *Gosling c Stelwoman*, the court determined a publication of a document was not a will because the witnesses could not testify it possessed "testamentary tenor".[587] The witnesses gave contradictory testimony about the execution of the will, and the court followed the principle in Dig. 22.5.2 to reason it could not accept irreconcilable statements as good evidence and cited X. 2.19.10 to establish it could not accept evidence contrary to a witness's previous testimony.[588]

A witness must be competent, or possess passive testamentary capacity, to act as a credible witness when they attached their seals and not at the time of the will-maker's death.[589] This included people disqualified because of status, mental incapacity, minority, dishonest,

[583] 90. The Notebook of Dr Thomas Eden (1610) in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 80.
[584] 90. The Notebook of Dr Thomas Eden (1610) in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 80.
[585] Dig. 28.1.20.9; *Hazard c Pike* The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 5.
[586] *Ross v Ewer* (1744) 3 ATK 156 at 160; 26 Eng. Rep. 892 at 895; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 354; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 132; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 215.
[587] *Gosling c Stelwoman* The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 7.
[588] *Gosling c Stelwoman* The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 7; see *Glynn v The Bank of England* (1750) 2 Ves. Sen. 38 at 39; 28 Eng. Rep. 26 at 26.
[589] Dig. 28.1.22.1; Inst. 2.10.7; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 115; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 179; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 122; S. Scacciae, *Tractatus De Sententia et Re Iudicata*, (Sumptibus Andreae, Iacobi & Matthaei Prost., Lugdunum (Lyons) 1628) at 649 – 650. gl. 18; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at 121; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 526, 530; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 271, 278; R. B. Outhwaite, *The Rise and Fall of The English Ecclesiastical Courts, 1500 – 1860*, (Cambridge University Press, Cambridge 2006) at 35.

immoral, or the ordinary determines they are in some other way not credible at the time of witnessing.[590] Notably, the ecclesiastical courts did not place an incapacity on women, contrary to C 33, q 5, c 17, and allowed them to act as a witness or an executor.[591] Testamentary succession followed a common principle of property transactions that a person under the will-maker's *potestas* could not be a credible witness because they lacked freedom.[592] In *Gosling c Stelwoman*, the court argued a witness who was a domestic servant could not act as a credible witness because they were under the power of the will-maker.[593] The ecclesiastical courts followed the principle in Inst. 2.10.10 that:

> "No will, again, can be witnessed by the person instituted heir, or by any one in his power, or by a father in whose power he is, or by a brother under the power of the same

[590] Cod. 6.23.1; Dig. 22.5.2; Dig. 22.5.3; Dig. 22.5.3.1; Dig. 22.5.3.4; Dig. 22. 5.14; Dig. 22. 5.14; Dig. 22. 5.15; Dig. 22. 5.21.3; Dig. 28.1.20.4; Dig. 28.1.20.5; Dig. 28.1.20.7; Dig. 28.1.26; Inst. 2.10.6; *Charter and Others v Hawkins, Executor of Hawkins* 3 Lev 426 at 426 - 427; 83 Eng. Rep. 763 at 763 - 764; *R v Samuel Hill* (1851) 2 Den. 254 at 259; 169 Eng. Rep. 495 at 497; *Eagleton v Kingston* (1803) 8 Ves. Jun. 438 at 460; 32 Eng. Rep. 425 at 434; *Holdfast on Demise of Ansty v Dowsing* (1747) 1 Black W. 8 at 10; 96 Eng. Rep. 5 at 6; *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 153; 96 Eng. Rep. 1128 at 1138; P. Laurenio, *Forum Ecclesiasticum*, volume 2, (For Martini Veith and Jodici Henrici Muller, Augusta Vindelicorum 1787) at 305 – 306; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 105; G. J. McGinley, "Roman law and its influence in America" (1928) 3(2) *The Notre Dame Lawyer*, 70 at 78; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 345 – 346; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 74; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 214 - 215; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 157; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 802.

[591] *Coppyndale c Burton* (1338) CP.E.34; *Home c Constable* (1492) CP.F.304; *Twaites v Smith* (1696) 1 P. WMS. 10 at 11; 24 Eng. Rep. 274; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 179; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 534; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 63-65; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 288; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 347; see Will of Thomas Gresham (1575) in J. G. Nichols, J. Bruce (eds), *Wills from Doctors Commons: A Selection from the Wills of Eminent Persons proved in the Prerogative Court of Canterbury 1495 – 1695* (Printed for the Camden Society, London 1863) at 57; R. Grey, *A System of English Ecclesiastical Law*, fourth edition, (Printed by Henry Lintot, Savoy 1743) at 154 also see Dig. 28.1.20.6.

[592] Dig. 22.5.6; Dig. 28.1.20; Dig. 28.1.20.1; Dig. 28.1.20.3; Inst. 2.10.9; James Ram, *A Treatise on the Exposition of Wills of Landed Property*, (J.S. Little, Philadelphia 1835) at 469; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 115; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 309; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 8.

[593] *Gosling c Stelwoman* The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 7; see Dig. 22.5.6; P. Laurenio, *Forum Ecclesiasticum*, volume 2, (For Martini Veith and Jodici Henrici Muller, Augusta Vindelicorum 1787) at 308 but see Dig. 22.5.7.

father: for the execution of a will is considered at the present day to be purely and entirely a transaction between the testator and the heir".[594]

Therefore, civilians applied this rule to executors and people related to the will-maker who share a bond of natural affection.[595] In *Twaites v Smith*[596], Dr. Watkinson stated English law had whole-heartedly accepted the principle prohibiting children from acting as witnesses for their parents because of natural affection and filial duty.[597]

English civilians appear to have gone to lengths to reconcile English law with the principle in Inst. 2.10.11 that states, "Legatees, and persons who take a benefit under a will by way of *fideicommissa*, and those connected with them, we have not forbidden to be witnesses, because they are not universal successors of the deceased". The principle permitted legatees, and others in their power, to act as witnesses because they were not part of the transaction between the testator and the heir outlined in the preceding principle.[598] In *Wyndham v Chetwynd*[599], the court attributed the principle to the unique nature of Roman inheritance that was inapplicable to English testamentary succession.[600] In *Wyndham,* a common lawyer citing Inst. 2.10.7 noted, "The reasons given by the civil, and Roman, lawyers, and from them transplanted into our reports, why the credit should refer to the time of attestation, are, because the witnesses are a kind of a guard [against fraud] over the testator [and must ensure

[594] See Dig. 28.1.20.
[595] Cod. 4.20.3; Dig. 22.5.4; *Prawnce v Hodilow* (1582) 1 Choyce Cases 156 at 156; 21 Eng. Rep. 91 at 91; *Holdfast on Demise of Ansty v Dowsing* (1747) 1 Black W. 8 at 10; 96 Eng. Rep. 5 at 6; D. Gofredus, *Institutiones Iustiniani*, (Apud Iuntas, Venice 1621) at 220 gl.; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 158; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 131.
[596] (1696) 1 P. WMS. 10; 24 Eng. Rep. 274.
[597] Cod. 4.20.6; (1696) 1 P. WMS. 10 at 10, 13; 24 Eng. Rep. 274 at 274, 275; Dig. 22.5.4; Dig. 22. 5.9; *Hatter v Ash*, 1 Ld. Raym. 84 at 85; 91 Eng. Rep. 953 at 953; *Holdfast on Demise of Ansty v Dowsing* (1747) 1 Black W. 8 at 10; 96 Eng. Rep. 5 at 6; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 123; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 346; P. Laurenio, *Forum Ecclesiasticum*, volume 2, (For Martini Veith and Jodici Henrici Muller, Augusta Vindelicorum 1787) at 315.
[598] Cod. 6.23.22; Dig. 22. 5.17; Dig. 28.1.20; *Wyndham v Chetwynd* (1757) 2 Keny. 123 at 155; 96 Eng. Rep. 1128 at 1140; St, Augustine, W. Watts (Trans), *St. Augustine's Confessions*, volume 2, (William Heinemann, London 1912) at 9.12; D. Gofredus, *Institutiones Iustiniani*, (Apud Iuntas, Venice 1621) at 221 gl.; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 594; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 172; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 157; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 157.
[599] (1757) 2 Keny. 121; 96 Eng. Rep. 1128.
[600] (1757) 2 Keny. 121 at 140; 96 Eng. Rep. 1128 at 1134.

their objectivity]".[601] Lord CJ Lee observed Inst. 2.10.10 disqualified heirs from acting as witnesses because the nature of the testamentary action between testator and heir would result in the latter attesting on their own behalf.[602] Therefore, ecclesiastical courts forbade legatees, or those in their power, from witnessing because they were interested and the changed nature of the canonical will gave them a stronger interest in the estate in the absence of universal succession.[603] In *Gosling c Stelwoman*, two of the witnesses were legatees and the court argued the applicability of the maxim in Cod. 4.20.10 that "the laws deprive everyone of the right to give testimony in his own cause".[604]

The English canonical will could be conceptualised as multiple transactions between the will-maker and their legatees rather than a single transaction that characterises the civil law testament. The modern New Zealand wills are conceptualised in the same manner. Subsequent courts adopted this approach to mitigate potential hardship by permitting interested legatees to act as witnesses to the will except for their own legacies.[605] An

[601] (1757) 2 Keny. 121 at 123; 96 Eng. Rep. 1128 at 1128.
[602] *Twaites v Smith* (1696) 1 P. WMS. 10 at 12; 24 Eng. Rep. 274; *Holdfast on Demise of Ansty v Dowsing* (1747) 1 Black W. 8 at 10 - 14; 96 Eng. Rep. 5 at 6 – 7; *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 155; 96 Eng. Rep. 1128 at 1139; *Billinghurst v Vickers* (1810) 1 Phill. Ecc. 187 at 953; 161 Eng. Rep. 956 at 958; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 309; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 124; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 45; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 131; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 107; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 281; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 80; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 594; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 134; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 158.
[603] *Gosling c Stelwoman* The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 7; *Broke, Offley et al c Barret* (1584) The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 24; *Bubye c Smythe and Executors of Goodyear* Bi Trans. Cp. 1562/1 in R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 407; *Hazard c Pike* The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 4; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 346; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 73.
[604] Dig. 22. 5.10; *Gosling c Stelwoman* The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 7.
[605] *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 153; 96 Eng. Rep. 1128 at 1138; *Wyndham v Chetwynd* (1757) 1 Burr. 414 at 47; 97 Eng. Rep. 377 at 384 (ed); T. Rufner, "Testamentary formalities in early modern Europe"

additional protection civilians imported into English law is that an additional witness could supplement the defects of the others to sustain the will.[606] In *Wyndham v Chetwynd*, Sir Llyod argued that:

> [123] The reasons given by the civil, and Roman lawyers, and from them transplanted into our reports, why the credit should refer to the time of attestation, are, because the witnesses are a kind of a guard over the testator, to prevent his being imposed upon: yet… a man may possibly be interested or affected by the will, and yet remain competent, viz. if he knows nothing of it at the time, for then he is under no bias, or temptation… And in Just. Inst. lib. 2, tit. 10, § 7, where having spoken before of slaves, and others being incompetent witnesses, yet he says, if one supposed free at the time he attested the will, afterwards proves not to have been in fact well emanci-[124]-pated, he shall, notwithstanding that, be a competent witness to establish the will.

Mansfield CJ stated that contemporary ecclesiastical courts followed 4 & 5 Ann., c 3, s 16, harmonising the admissibility of testimony with standard applied in common law trials, and the general principles concerning interested witnesses remains part of New Zealand.[607]

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in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 19; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 309; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 124; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 45; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 171; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 106, 114; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 284; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 81; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 67; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 74; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 214 – 215; Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 28; G. F. D., "Wills. Statute of Frauds. Credible Witnesses" (1915) 64 (1) *University of Pennsylvania Law Review and American Law Register* 93 at 94.

[606] *Twaites v Smith* (1696) 1 P. WMS. 10 at 11; 24 Eng. Rep. 274; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 107

[607] (1757) 2 Keny. 121 at 155; 96 Eng. Rep. 1128 at 1134; see Wills Act 2007, s 13; P. Lovelass, A. Barron (ed) *The Law's Disposal of a Person's Estate Who Dies without Will or Testament; to Which Is Added the Disposal of a Person's Estate by Will and Testament; with an Explanation of the Mortmain Act*, twelve edition, (J. S. Littell, Philadelphia 1839) at 181; W. Nelson, *Lex Testamentaria: Or, A Compendious System of all the laws of England, as well before the statute of Henry VIII as since, concerning last wills and testaments* (London, Printed

Nonetheless, it is evident English jurists modified the principle in Inst. 2.10.10 to associate the interested heir with interested legatees, and later treated interested legatees by analogy to incompetent witnesses in Inst. 2.10.7 to allow limited testimony.

Section 14 of the Wills Act 2007 is the most significant change to testamentary succession in New Zealand law.[608] It confers the High Court with the power to make an order declaring a document not complying with the formal requirements to be a valid will if it satisfied the instrument contains an expression of the deceased person's testamentary intentions.[609] The ecclesiastical courts also emphasised the manifestation of intention over strict formalism, an approach agreeing with the *ius naturale* and *ius gentium*, which did not require the will-maker to follow a precise observance of formalities, even witness requirements, if the document had testamentary intent.[610] In *Moore c Paine*[611] the ordinary, somewhat unclearly,

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by E. and R. Nutt Gosling 1727) at 577; G. F. D., "Wills. Statute of Frauds. Credible Witnesses" (1915) 64 (1) *University of Pennsylvania Law Review and American Law Register* 93 at 93; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 500; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 157; W Patterson (ed), A Tipping (ed) *The Laws of New Zealand, Will* (LexisNexis 2012, Wellington) at [39]; see N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [9.8]; N. Peart "Where there is a Will, There is a Way - A New Wills Act for New Zealand" (2007) 15 (1) *Waikato Law Review*, 26 at 37 but see Wills Act 2007, s 13 (2) (d).

[608] N. Richardson, "The Wills Act 2007" (2010) 6 (11) *New Zealand Family Law Journal*, 324 at 328; N. Peart, "New Zealand Report on new Developments in Succession Law" (2010) 14 (2) *Electronic Journal of Comparative Law*, <http://www.ejcl.org/142/art142-3.pdf> at 1.2.6; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [2.0]; N. Peart "Where there is a Will, There is a Way - A New Wills Act for New Zealand" (2007) 15 (1) *Waikato Law Review*, 26 at 32.

[609] N. Richardson, "The Wills Act 2007" (2010) 6 (11) *New Zealand Family Law Journal*, 324 at 328; N. Peart, "New Zealand Report on new Developments in Succession Law" (2010) 14 (2) *Electronic Journal of Comparative Law*, <http://www.ejcl.org/142/art142-3.pdf> at 1.2.6; N. Peart "Where there is a Will, There is a Way - A New Wills Act for New Zealand" (2007) 15 (1) *Waikato Law Review*, 26 at 32.

[610] Dig. 50.17.12; *Seeman v Seeman* (1752) 1 Lee 180 at 186; 161 Eng. Rep. 67 at 69; *Farmer v Brock* (1856) Deane. 187 at 191; 164 Eng. Rep. 544 at 545; *Marston v Roe* (1838) 8 AD. & E. 14 at 46; 112 Eng. Rep. 742 at 754; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 353; R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 – 156; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 400, 401; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 69; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 140; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 384; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 169; A. G. Lang, "Formality v Intention: Wills in an Australian Supermarket" (1986) 15 (1) *Melbourne University Law Review*, 82 at 84; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 63; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 225; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 68; Meriton, *The Touchstone of Wills, Testaments and*

stated "I am of opinion that the solemnity of the civil law is not requisite with us; the proof of our will is by the *jus gentium*, and by that law one witness is sufficient; and of this opinion is Swinburne[s]".[612] In *Hazard c Pike*, the court noted it could save a will in the absence of formalities but not from incompleteness of intent.[613] The courts examined the substance of the will, rather than its form, to ascertain whether the document carried the will-maker's final wishes.[614] In *Antrobus v Nepean*[615], Sir Nicholl held that the question an ordinary must ask themselves is whether "the paper propounded such as ought, in itself, to satisfy the Court that the testator's mind, at the time when he wrote it, was quite made up to the bequests which it purports to contain?"[616]. In *Thorold v Thorold*[617], Drs Swabey and Adams stated the maxim *testamentum est testatio mentis* indicates the ordinary should strive to give effect to defective instruments particularly those favouring spouse and issue.[618] Furthermore, the words contained in the document guide an ordinary to ascertain the testamentary intent that must manifest in the will even if the formalities are present.[619] In *Yelverton c Yelverton*, the court noted even a will executed that followed all formal requirements is still invalid if there is an absence of intent.[620]

Administrations being a Compendium of Cases and Resolutions Touching the Same, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 27; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 501; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 7 see Cod. 6.23.3; Cod. 6.23.7; Cod. 6.23.9.

611 (1728) 2 Lee 595; 161 Eng. Rep. 452.

612 (1728) 2 Lee 595 at 597; 161 Eng. Rep. 452 at 453.

613 R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 4; *Yelverton c Yelverton* in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 36

614 Anon (1527) Y.B. Trin. 19 Hen. VIII. fo. 9. pl. 4 in J. Baker, *Baker and Milsom's Sources of English Legal History: Private Law to 1750*, second edition (Oxford University Press, Oxford 2010) at 121; *Thorold v Thorold* (1809) 1 Phill. Ecc. 1 at 4; 161 Eng. Rep. 894 at 895; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 70; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 32; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 409; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 502.

615 (1823) 1 Add. 399; 162 Eng. Rep. 141.

616 1 Add. 399; 162 Eng. Rep. 141.

617 (1809) 1 Phill. Ecc. 1; 161 Eng. Rep. 894.

618 (1809) 1 Phill. Ecc. 1 at 5; 161 Eng. Rep. 894 at 895; *Ross v Ewer* (1744) 3 ATK 156 at 159; 26 Eng. Rep. 892 at 894 see Dig. 28.3.2.

619 *Eagleton v Kingston* (1803) 8 Ves. Jun. 438 at 460; 32 Eng. Rep. 425 at 434; *Thorold v Thorold* (1809) 1 Phill. Ecc. 1 at 4, 9; 161 Eng. Rep. 894 at 895, 897.

620 R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 27.

The ecclesiastical courts were prepared to ignore formalities to find testamentary intention, contrary to the rigorous form imposed on testators or the practice on the continent, even to the extent of ignoring the papal decretals of the canon law.[621] This approach stretches the justification in Cod. 6.23.15 that held "since it is undignified that testaments and last wishes of decedents should become invalid through useless, formalities, the value of which is imaginary".[622] Nonetheless, executors frequently admitted imperfect or unexecuted wills in an attempt to obtain a grant of probate arguing that the instrument possessed the will-maker's testamentary intention.[623] In *Montefiore v Montefiore*[624], Sir Nicholl presiding over the Prerogative Court of Canterbury held:

> [357] The term "imperfect" as applied to an instrument of this description is carefully to be distinguished from the word "unexecuted." Not every "imperfect" paper is "unexecuted:" nor is every "unexecuted" paper "imperfect"…. if unexecuted, as, for instance, by wanting the deceased's signature, it is, in a certain sense of the word, though in a certain sense of the word only, an imperfect paper. But in applying the term imperfect to the present paper, the Court means that it is imperfect in every sense of the word: it is one that on the face of it was manifestly in progress only; it is unfinished and incomplete….. The presumption of law is against every testamentary paper not actually executed by the testator; and so executed, as it is to be inferred, on the face of [358] the paper that the testator meant to execute it. But if the paper be complete in all other respects that presumption is slight and feeble, and one comparatively easily repelled.[625]

Sir Nicholl defines an imperfect paper as one that is in progress only and unfinished at its heart.[626]

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[621] Nov. 90; *Reformatio Legum Ecclesiasticarum,* 27.41; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 7.
[622] See *Reformatio Legum Ecclesiasticarum,* 27.41.
[623] *Forbes v Gordon* (1821) 3 Phill. Ecc. 614 at 628; 161 Eng. Rep. 1431 at 1435; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 127; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 914 -915.
[624] (1824) 2 Add. 354; 162 Eng. Rep. 324.
[625] (1824) 2 Add. 354 at 357 - 358; 162 Eng. Rep. 324 at 325.
[626] (1824) 2 Add. 354 at 357; 162 Eng. Rep. 324 at 325; see R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 127; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 7.

The Doctors Commons directed civilians not to propound drafts or preparatory documents, both imperfect instruments, as valid testamentary instruments and advised ordinaries to guard against granting them probate because nothing is claimable under a testament unless properly executed.[627] These civilians followed the principle in Dig. 28.1.29 that states "On the basis of writing, which was being prepared in order to make a will, not even those provisions which are framed as *fideicommissa* can be claimed, if the will had not been completed in any lawful way". It follows that a mere promise is not sufficient to create a bequest nor could the promisee enforce it against the estate.[628] In *Yelverton c Yelverton*, Dr. Styward states the discovery of an incomplete will had no effect as a testamentary document.[629] Dr. Creake cites Dig. 32.1.11.1 to establish that a draft will not be considered a valid codicil if the will-maker dies before completion.[630] Dig. 32.1.11.1 itself holds, "when someone prepares the draft of a will and dies before he ratifies it, what is written in the draft is not valid, as if it were a codicil, even if the draft is in terms of a *fideicommissum*". Dr. Dun adds an additional rule stating preparatory documents will not be valid, even if they are the same as the final will, because it lacked a definite testamentary intent.[631]

In *Montefiore*, the learned ordinary defined an unexecuted will as an instrument that is incomplete.[632] Civilians acknowledged that a will for personalty never required a signature to be valid although its presence created the inference that the will-maker knew of the will's contents.[633] The ecclesiastical courts liberally construed the rule in Dig. 28.1.29.1 to allow the probate of a will if an ordinary was satisfied the will-maker intended the document to operate as a will and did not abandon their intention for the instrument to represent their final wishes

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[627] *Ross v Ewer* (1744) 3 ATK 156 at 160; 26 Eng. Rep. 892 at 895; *Read v Phillips (*1813) 2 Phill. Ecc. 122 at 122; 161 Eng. Rep. 1096 at 1096; *Rymes v Clarkson* (1809) 1 Phill. Ecc. 22 at 35, 37- 38; 161 Eng. Rep. 901at 906, 907; *Forbes v Gordon* (1821) 3 Phill. Ecc. 614 at 628; 161 Eng. Rep. 1431 at 1436; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 352; B. Beinart, "Some Aspects of Privileged Wills" [1959] *Acta Juridica*, 200 at 200; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 174; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 126; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 920.

[628] Cod. 6.42.26; Dig. 28.1.29; Dig. 28.1.31.

[629] R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 35.

[630] R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 36.

[631] Dig.28.1.25; R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 36

[632] (1824) 2 Add. 354 at 357; 162 Eng. Rep. 324 at 325; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 127; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 914.

[633] *Longchamp v Fish* (1807) 2 Bos & Pul (N. R.) 415 at 418; 127 Eng. Rep. 690 at 691; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 387.

despite its unexecuted state.[634] Form remained an important indicator of intent and the presumption remained against the probate of imperfect and unexecuted wills, and an ordinary required strong proof it represents the will-maker's final testamentary intentions.[635] In *Broke, Offley et al c Barret*, the court cited Dig. 12.1.3 to warn that no act ought to be entertained that goes beyond the intention of the parties.[636] Sir Nicholl held in *Sandford v Vaughan*[637] that "where an unfinished draft is propounded, it must be shewn that the deceased was prevented, by invincible necessity, or by the act of God, from completing it".[638] In *Rockell v Youde*[639], Sir Nicholl made the qualifying statement that "the Court is always anxious to carry into effect the intentions of a party; but it must be when those intentions are shewn in a legal form; it cannot act upon conjectures of its own".[640]

The Wills Act 2007 goes further to find intent than permitted by most other jurisdictions.[641] The High Court can consider a wide range of evidence when exercising this power including parol.[642] The introduction of this section represents a trend in New Zealand law emphasising

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[634] *Marston v Roe* (1838) 8 AD. & E. 14 at 32; 112 Eng. Rep. 742 at 749; *Read v Phillips (*1813) 2 Phill. Ecc. 122 at 123; 161 Eng. Rep. 1096 at 1096; *Sandford v Vaughan* (1809) 1 Phill. Ecc. 39 at 50; 161 Eng. Rep. 907 at 911; *Antrobus v Nepean* (1823) 1 Add. 399 at 406; 162 Eng. Rep. 141 at 143; *Forbes v Gordon* (1821) 3 Phill. Ecc. 614 at 628; 161 Eng. Rep. 1431 at 1436; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 200; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 325; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 127; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 914, 917 – 919.

[635] *Billinghurst v Vickers* (1810) 1 Phill. Ecc. 187 at 954; 161 Eng. Rep. 956 at 959; *Beaty v Beaty* (1822) 1 Add. 154 at 158; 162 Eng. Rep. 54 at 55; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 916.

[636] R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 25

[637] (1809) 1 Phill. Ecc. 39; 161 Eng. Rep. 907.

[638] (1809) 1 Phill. Ecc. 39 at 47; 161 Eng. Rep. 907 at 910; see *Beaty v Beaty* (1822) 1 Add. 154 at 158; 162 Eng. Rep. 54 at 55; *Lamkin v Babb* (1752) 1 Lee 1 at 9; 161 Eng. Rep. 1 at 4; *Antrobus v Nepean* (1823) 1 Add. 399 at 405; 162 Eng. Rep. 141 at 143; *Lewis v Lewis* (1818) 3 Phill. Ecc. 109 at 114; 161 Eng. Rep. 1272 at 1274; *Forbes v Gordon* (1821) 3 Phill. Ecc. 614 at 628; 161 Eng. Rep. 1431 at 1436; *Brown v Hallett* (1757) 2 Lee 418 at 420; 161 Eng. Rep. 390 at 390; *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 494; 161 Eng. Rep. 1039 at 1055; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 51; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 70; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 126; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 916; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 387.

[639] (1819) 3 Phill. Ecc. 141; 161 Eng. Rep. 1281.

[640] (1819) 3 Phill. Ecc. 141 at 145; 161 Eng. Rep. 1281 at 1283.

[641] N. Peart, "New Zealand Report on new Developments in Succession Law" (2010) 14 (2) *Electronic Journal of Comparative Law*, <http://www.ejcl.org/142/art142-3.pdf> at 1.2.6.

[642] *Re Sanson Rejoui* [2010] 3 NZLR 422 at [22]; N. Richardson, "The Wills Act 2007" (2010) 6 (11) *New Zealand Family Law Journal*, 324 at 328; N. Peart, "New Zealand Report on new Developments in Succession Law" (2010) 14 (2) *Electronic Journal of Comparative Law*, <http://www.ejcl.org/142/art142-3.pdf> at 1.2.6; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [2.0].

intent and taking a remedial approach to cure the defects arising from the absence of formalism when there is no suspicion of fraud present and the testamentary intention is clear.[643] An understanding of civilian practice reflected in the ecclesiastical law reports furnishes a much-needed body of precedent that New Zealand courts need to interpret this new power. The paramountcy of intention over formality reflects the relaxation of the civil law solemnities that led to the development of the canonical will and guided the ecclesiastical courts. Section 7 recognises the s 14 dispensing power creates an alternative method that enables a document to obtain validity as a will, which acknowledges New Zealand will-makers are no longer constrained by formal requirements.[644] In *Re Feron*[645], the court considered whether preparatory notes made prior to the February 22 Christchurch Earthquake, which prohibited the completion of the will, could constitute a valid will.[646] Whata J considered the surrounding circumstance to conclude that the deceased intended to make a will and would have executed a document but for the earthquake preventing completion.[647] The judge concluded preparatory notes could constitute a valid will under s 14 of the Act. Nonetheless, the ecclesiastical experience and the civil law are valuable for conceptualising this change in New Zealand law.

2. Statutory Evolution of the Canonical Will

The post-reformation English canonical will garnered greater attention from parliament, which passed a number of statutes altering its character particularly in relation to real property.[648] New Zealand wills are largely conceptualised in light of these statutory developments rather than the practise of the ecclesiastical courts and civilian influence. Prior to this period, the common law did not recognise wills of real property because the power to devise was contrary to feudal tenure.[649] The history behind the power to devise real property

[643] K. Maxton, "Execution of Wills: The Formalities Considered" (1982) 1 (3) *Canterbury Law Review*, 393 at 414.
[644] N. Richardson, "The Wills Act 2007" (2010) 6 (11) *New Zealand Family Law Journal*, 324 at 324.
[645] [2012] 2 NZLR 551.
[646] [2012] 2 NZLR 551 at [2], [19].
[647] [2012] 2 NZLR 551 at [20].
[648] M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 70; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 263.
[649]T. Eden, *The Notebook of Dr Thomas Eden* (1610) at p. 52 in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 61; *Whitchurch v Whitchurch* (1721) 1 Gilb Rep 168 at 171; 25 Eng. Rep. 118 at 120; *Holdfast on Demise of Ansty v Dowsing*, 2 Strange 1253 at 1254; 93 Eng. Rep. 1164 at 1164; *Arthur v Bokenham* 11 Mod 148 at 149; 88 Eng. Rep. 957 at 958; *Hogan v Jackson* (1775) 1 Cowp 299 at

begins when the Statute of Uses 1536[650] curbed the practice of feofee's bequeathing real property in wills through uses, a popular method of mitigating the effects of feudal dues, by transferring legal ownership to its beneficiaries.[651] This unpopular statute became a source of contention within parliament until the enactment of the Statute of Wills 1540[652] enabled will-makers the power to devise certain real property in their will, which aimed to substitute uses in a manner that allowed the retention of feudal incidence.[653] The statute itself states:

> "[every person that has] any Manours landes tenementis or hereditaments, holden in socage or of the nature of socage tenure, and not [knights service or nature thereof] shall have full and free libertie, power and authoritie to geve, dispose, wille and divise, aswell by his laste wille and testament in writing".

This statute only introduced the power to devise certain kinds of real property into common law jurisdiction through a written instrument without affecting ecclesiastical jurisdiction over

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305; 98 Eng. Rep. 1096 at 1100; *Allen v Hill* (1725) 1 Gilb Rep 257 at 259; 25 Eng. Rep. 177 at 179; *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 135; 96 Eng. Rep. 1128 at 1133; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 51; M.C. Mirow, "Bastardy and The Statute of Wills: Interpreting the Sixteenth-Century Statue with Cases and Readings" (2000) 69 (1) *Mississippi Law Journal*, 345 at 346; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 208; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 373.

[650] 27 Hen. VIII, c. 10.

[651] 32 Hen. VIII, c. 1; *Coryton v Helyar* (1745) 2 Cox 340 at 343; 30 Eng. Rep. 156 at 158; *Arthur v Bokenham* 11 Mod 154 at 155; 88 Eng. Rep. 957 at 960; *Holdfast on Demise of Ansty v Dowsing* (1747) 1 Black W. 8 at 9; 96 Eng. Rep. 5 at 5; *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 146; 96 Eng. Rep. 1128 at 1136; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 55; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 26.

[652] 32 Hen. VIII, c. 1.

[653] T. Eden, *The Notebook of Dr Thomas Eden* (1610) at p. 52 in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 61; *Arthur v Bokenham* 11 Mod 154 at 155; 88 Eng. Rep. 957 at 960; *Allen v Hill* (1725) 1 Gilb Rep 257 at 260; 25 Eng. Rep. 177 at 179; *Whitchurch v Whitchurch* (1721) 1 Gilb Rep 168 at 171; 25 Eng. Rep. 118 at 120; *Darbison v Beaumont*, Fortescue 18 at 24; 92 Eng. Rep. 743 at 745; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 57; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 208; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 26; O. K. McMurray, *Liberty of Testation and some Modern Limitations Thereon*, in *Celebration Legal Essays, By Various Authors To Mark the Twenty-fifth Year of Service of John H. Wigmore*, (North Western University Press, Chicago 1919) at 548; J. Stewart, *The principles of the law of real property, according to the text of Blackstone: incorporating the alterations down to the present time,* (Edmund Spettigue, London 1837) at 265; M. C. Mirow, "Coke's advice on executing wills of land" (2009) *Florida International University Legal Studies Research Paper No. 09*-09, 239 at 241; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 375.

personalty.[654] The Statute of Wills did not restrict the devise to a particular form or require attestation of the document or the devisor's signature, and the common law courts accepted a devise's validity provided the devisor had used some form of writing.[655]

The Royal courts conceptualised devises as a form of conveyance rather than a species of testament despite their ambulatory nature and other shared qualities.[656] Mirow notes an examination of the common law power to devise land requires reference to ecclesiastical rules.[657] In *Harwood v Goodright*[658] Lord Mansfield famously stated:

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[654] *Whitchurch v Whitchurch* (1721) 1 Gilb Rep 168 at 171; 25 Eng. Rep. 118 at 120; *Arthur v Bokenham* 11 Mod 148 at 150, 163; 88 Eng. Rep. 957 at 958, 963; *Holdfast on Demise of Ansty v Dowsing* (1747) 1 Black W. 8 at 9; 96 Eng. Rep. 5 at 5; *Pike v White* (1791) 3 Bro. C. C. 286 at 288; 29 Eng. Rep. 540 at 541; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 400; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 140; E. Jenks (ed), H. O. Danckwerts, J. S. Stewart Wallace, *Stephen's Commentaries,* seventeenth edition, volume 2 (Butterworth & Co., Bell Yard, Temple Bar, London 1922) at 612; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 26; A. G. Lang, "Formality v Intention: Wills in an Australian Supermarket" (1986) 15 (1) *Melbourne University Law Review*, 82 at 84; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 72; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 6; R. Grey, *A System of English Ecclesiastical Law*, fourth edition, (Printed by Henry Lintot, Savoy 1743) at 152.

[655] 34 & 35 Hen. VIII, c. 5; *Allen v Hill* (1725) 1 Gilb Rep 257 at 260; 25 Eng. Rep. 177 at 179; *Holdfast on Demise of Ansty v Dowsing* (1747) 1 Black W. 8 at 9; 96 Eng. Rep. 5 at 5; *Thellusson v Woodford* (1798) 4 Ves. Jun. 227 at 250; 31 Eng. Rep. 117 at 127; J. Perkins, M. Walbanck (trans), *A profitable book of Mr. John Perkins*, (Printed for Matthew Walbanck, London 1657) at 178; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 53; C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property*, seventh edition, (Sweet & Maxwell, London, 2008) at 558; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 220, 237; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 374; O. K. McMurray, *Liberty of Testation and some Modern Limitations Thereon*, in *Celebration Legal Essays, By Various Authors To Mark the Twenty-fifth Year of Service of John H. Wigmore*, (North Western University Press, Chicago 1919) at 549; W. Nelson, *Lex Testamentaria: Or, A Compendious System of all the laws of England, as well before the statute of Henry VIII as since, concerning last wills and testaments* (London, Printed by E. and R. Nutt Gosling 1727) at 576; A. G. Lang, "Formality v Intention: Wills in an Australian Supermarket" (1986) 15 (1) *Melbourne University Law Review*, 82 at 84; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 72; see Will of Charles Brandon (1545) in J. G. Nichols, J. Bruce (eds), *Wills from Doctors Commons: A Selection from the Wills of Eminent Persons proved in the Prerogative Court of Canterbury 1495 – 1695* (Printed for the Camden Society, London 1863) at 41.

[656] *Attorney General v Heartwell* (1764) 1 AMB 451 at 452; 27 Eng. Rep. 298 at 299; *Habergham v Vincent* (1793) 4 Bro. C. C. 353 at 360; 29 Eng. Rep. 931 at 935; *Arthur v Bokenham* 11 Mod 148 at 150, 153 – 156; 88 Eng. Rep. 957 at 958, 959 – 960; *Hogan v Jackson* (1775) 1 Cowp 299 at 306; 98 Eng. Rep. 1096 at 1100; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 226; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 265; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 28.

[657] M.C. Mirow, "Monks and Married Women: The Use of the Yearbooks defining Testamentary Capacity in the Sixteenth and Seventeenth-Century Readings on Wills" (1997) 65 (1) *Tijdschrift voor Rechtsgeschiedenis*, 19 at 20.

"A devise of lands, in England, is considered in a different light from a Roman will, for a will… was an institution of the heir, but a devise… is an appointment of particular lands, to a particular devisee and is considered in the nature of a conveyance by way of appointment".[659]

The common law imposed the rule a devisor must own the land at the time of making the devise, akin to a deed, and must devise the entire property or otherwise it would revert to the heir.[660] The association with the conveyance led to a number of problems. The common law courts did not have the civil law evidential rule requiring two witnesses and permitted unattested documents as valid devises.[661] Dr. Eden indicates the temporal courts only required production of the original copy, with bond delivered to the ordinary, as evidence of the devise.[662] This practice allowed common law courts to admit documents with *prima facie* testamentary characteristics, without the benefit of probate, merely as a simple deed to convey property provided it satisfied the statutory requirement of writing.[663] The common law courts and the Statute of Wills came under criticism because "bare notes in another's hand-writing were allowed as wills of real property".[664]

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[658] (1774) 1 Cowp 87; 98 Eng. Rep. 981.
[659] *Harwood v Goodright* (1774) 1 Cowp 87 at 89; 98 Eng. Rep. 981 at 982 see *Arthur v Bokenham* 11 Mod 154 at 155; 88 Eng. Rep. 957 at 960; *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 159; 96 Eng. Rep. 1128 at 1141; *Hogan v Jackson* (1775) 1 Cowp 299 at 305; 98 Eng. Rep. 1096 at 1100; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 265; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 27; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 115.
[660] *Butler v Baker's Case* 3 Co. Rep. 32a; 76 Eng. Rep. 684 at 701; *Arthur v Bokenham* 11 Mod 148 at 150 - 151; 88 Eng. Rep. 957 at 957; *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 159; 96 Eng. Rep. 1128 at 1141; *Hogan v Jackson* (1775) 1 Cowp 299 at 306; 98 Eng. Rep. 1096 at 1100; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 265; O. K. McMurray, *Liberty of Testation and some Modern Limitations Thereon*, in *Celebration Legal Essays, By Various Authors To Mark the Twenty-fifth Year of Service of John H. Wigmore*, (North Western University Press, Chicago 1919) at 549; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 72- 73.
[661] *Whitchurch v Whitchurch* (1721) 1 Gilb Rep 168 at 171; 25 Eng. Rep. 118 at 120.
[662] 53. The Notebook of Dr Thomas Eden (1610) in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 61.
[663] *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 136; 96 Eng. Rep. 1128 at 1133; H. Broom, E. A. Hadley, *Commentaries of the Laws of England*, volume 1, (John D. Parsons, JR., New York 1875) 720; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 225.
[664] *Holdfast on Demise of Ansty v Dowsing* (1747) 1 Black W. 8 at 9; 96 Eng. Rep. 5 at 5; *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 136; 96 Eng. Rep. 1128 at 1133; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 140; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 373; W. S. Holdsworth, C. W. Vickers, *The Law of*

The absence of formalities and deficient procedures gave rise to a number of frauds associated with the common law's approach to the statutory method of devising real property.[665] Prior to the Statute of Frauds and Perjuries 1677[666] revolution of testamentary practice, two statutes enacted during Elizabeth I's reign attempted to address fraudulent conveyances of real property by deed and devise, alongside the forgeries of court rolls, which persisted in the Royal courts.[667] The Statute of Frauds was the next major statutory development in English testamentary law that courts interpreted it as part of its predecessor.[668] Section 5 of the Act states:

> "All Devises and Bequests of any Lands or Tenements devisable either by force, of the Statute of Wills or by this Statute or by force of the Custome of Kent or the Custome of any Burrough or any other perticular Custome shall be in Writeing and signed by the partie soe deviseing the same or by some other person in his presence and by his expresse directions and shall be attested and subscribed in the presence of the said Devisor by three or fower credible Witnesses or else they shall be utterly void and of none effect"

Succession, Testamentary, and Intestate, (B. H. Blackwell, Oxford 1899) at 30; O. K. McMurray, *Liberty of Testation and some Modern Limitations Thereon*, in *Celebration Legal Essays, By Various Authors To Mark the Twenty-fifth Year of Service of John H. Wigmore*, (North Western University Press, Chicago 1919) at 549; A. G. Lang, "Formality v Intention: Wills in an Australian Supermarket" (1986) 15 (1) *Melbourne University Law Review*, 82 at 84; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 225; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 6; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 376.

[665] *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 136; 96 Eng. Rep. 1128 at 1133; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 351; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 376; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 220; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 5; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 141.

[666] 29 Car. II, c 3.

[667] 5 Eliz. I, c. 14; 13 Eliz. I, c. 5; H. Broom, E. A. Hadley, *Commentaries of the Laws of England*, volume 1, (John D. Parsons, JR., New York 1875) at 723; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 374.

[668] *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 136; 96 Eng. Rep. 1128 at 1133; *Wallgrave v Tebbs* (1855) 2 K. & J. 313 at 321; 69 Eng. Rep. 800 at 804; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 376; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 229; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 72.

Therefore, the Act added to the Statute of Wills by including all devises of land, including those divisible by custom, and introduced formalities designed to prevent fraud.[669]

The Statute of Wills and Statute of Frauds both profoundly altered the English canonical will by further separating the channels for real and personal property, which left the latter largely untouched except for the restrictions placed on nuncupative wills.[670] In *Ash v Abdy*[671], Lord Nottingham famously asserted his role as the father of the Act to state its purpose was to ensure nuncupative declarations and parol evidence could no longer revoke devises, and he noted the important contributions of the civilians Mathew Hale and Leoline Jenkins.[672] He stated:

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[669] *Grayson v Atkinson* (1752) 2 Ves. Sen. 454 at 456; 28 Eng. Rep. 291 at 292; *Holdfast on Demise of Ansty v Dowsing*, 2 Strange 1253 at 1254; 93 Eng. Rep. 1164 at 1164; *Whitchurch v Whitchurch* (1721) 1 Gilb Rep 168 at 169; 25 Eng. Rep. 118 at 119; *Ellis v Smith* (1754) 1 Ves. Jun. 11 at 18; 30 Eng. Rep. 205 at 209; *Holdfast on Demise of Ansty v Dowsing* (1747) 1 Black W. 8 at 9; 96 Eng. Rep. 5 at 5; *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 136; 96 Eng. Rep. 1128 at 1133; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 46; C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property*, seventh edition, (Sweet & Maxwell, London, 2008) at 559; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 45; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 119, 126; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 388; E. Jenks (ed), H. O. Danckwerts, J. S. Stewart Wallace, *Stephen's Commentaries,* seventeenth edition, volume 2 (Butterworth & Co., Bell Yard, Temple Bar, London 1922) at 613; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 30; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 93- 94; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 932; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 387; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 375.

[670] *Whitchurch v Whitchurch* (1721) 1 Gilb Rep 44; 25 Eng. Rep. 118 at 119; *Ross v Ewer* (1744) 3 ATK 156 at 159; 26 Eng. Rep. 892 at 894; *Ellis v Smith* (1754) 1 Ves. Jun. 11 at 18; 30 Eng. Rep. 205 at 209; *Twaites v Smith* (1696) 1 P. WMS. 10 at 12; 24 Eng. Rep. 274 at 274; *Fox v Marston* (1837) 1 Curt. 494 at 498; 163 Eng. Rep. 173 at 174; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 1; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 120; C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property*, seventh edition, (Sweet & Maxwell, London, 2008) at 559; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 155; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 383; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 123; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 225.

[671] (1678) 3 Swans 664 (App); 36 Eng. Rep. 1014.

[672] (1678) 3 Swans 664 at 665 (App); 36 Eng. Rep. 1014 at 1014; *Matthews v Warner* (1798) 4 Ves. Jun. 186 at 211; 31 Eng. Rep. 97 at 107; *Brudenell v Boughton* (1741) 2 ATK 268 at 270; 26 Eng. Rep. 565 at 566; *Ex*

"[664] And I said that I had some reason to know the meaning of this law; for it had its first rise from me, who brought in the bill into the Lords' House, though it afterwards received [665] some additions and improvements from the Judges and the civilians".[673]

The attention of these jurists focussed on improving devises rather than the developed ecclesiastical jurisprudence, and the evidence suggests civilians had already advocated three or four witnesses prior to the Statute.[674] The separate treatment of personal property permitted a will to remain valid for personalty, even if it failed to follow the solemnities prescribed by statute, because a bequest only required clear testamentary intent despite the fact it was an invalid instrument to pass any devises contained within.[675] Nevertheless, the introduction of stricter formalities brought devises closer to the civil law testament than the canonical will for personalty.[676]

English jurists perceived the statutory introduction of formalities for wills of real property as a necessity to give effect to the will-maker's intentions, and in recognition that the devise disinherited the common law heir whom ought to have succeeded by law.[677] This is similar to the rationale guiding Roman testamentary development. In *Allen v Hill*[678], the court explicitly

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parte Ilchester (Earl of) (1803) 7 Ves. Jun. 348 at 362; 32 Eng. Rep. 142 at 147; *Drummond v Parish* (1843) 3 Curt. 522 at 528; 163 Eng. Rep. 812 at 814; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 472; E. C. G., "Wills: Revocation by Judicial Legislation" (1919) 17 (4) *Michigan Law Review*, 331at 332; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 251; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 1411 W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 155.

[673] (1678) 3 Swans 664 at 664- 665 (App); 36 Eng. Rep. 1014 at 1014.

[674] J. G. Nichols, J. Bruce (eds), *Wills from Doctors Commons: A Selection from the Wills of Eminent Persons proved in the Prerogative Court of Canterbury 1495 – 1695* (Printed for the Camden Society, London 1863) at 55 (Will of Duchess Elizabeth, 1558), 68 (Will of Thomas Gresham, 1575), 104, 105 (Will of John Hampden, 1636).

[675] *Marston v Roe* (1838) 8 AD. & E. 14 at 56; 112 Eng. Rep. 742 at 757; *Brudenell v Boughton* (1741) 2 ATK 268 at 270 at 272; 26 Eng. Rep. 565 at 567; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 45; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 98.

[676] Nov. 73.2; Dig. 28.3.1; *Allen v Hill* (1725) 1 Gilb Rep 257 at 261; 25 Eng. Rep. 177 at 180; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 273

[677] *Whitchurch v Whitchurch* (1721) 1 Gilb Rep 168 at 170; 25 Eng. Rep. 118 at 119; *Arthur v Bokenham* 11 Mod 154 at 162; 88 Eng. Rep. 957 at 963; *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 135; 96 Eng. Rep. 1128 at 1133; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 126 see *Brook's New Cases*, 1651, 73 Eng. Rep.925.

[678] (1725) 1 Gilb Rep 257; 25 Eng. Rep. 177.

noted the drafters chose the civilian solemnities for wills over the common law method of sealing and delivering deeds because the latter procedure would not result in the discovery of any fraud.[679] Notably, this represented the same concerns attached to unattested holographic wills.[680] The Statute of Frauds changed how the common law courts conceptualised devises, despite the remaining view they were in the nature of a conveyance, and the court in *Habergham v Vincent*[681] rejected an argument that a *prima facie* testamentary instrument was treatable as a deed to convey copyhold.[682] Mansfield replied by referring to the Lord Chancellor's statement in *Adlington v Cann*[683] that "no deed can operate as a testamentary disposition, without being attested by three witnesses".[684] Wilson J agreed and suggested allowing a deed to have testamentary effect would render the Statute of Frauds "utterly void".[685] Buller J distinguished the instruments further by stating a deed must convey immediate possession rather than take effect after death.[686] In *Wyndham v Chetwynd*, Mansfield CJ suggested "the power to devise became more reasonable than both the Civil law testament and the Anglo-Saxon methods of distribution", which indicates the statutory formalities were a welcomed addition to English testamentary practice.[687]

The most significant statutory introduction to the evolved form of the English will was the requirement that the will-maker must sign the will, or direct another to in their presence, and have the act attested to by witnesses.[688] Civilians introduced the principles in Cod. 6.23.21

[679] Nov. 73.2; (1725) 1 Gilb Rep 257 at 261; 25 Eng. Rep. 177 at 180; *Whitchurch v Whitchurch* (1721) 1 Gilb Rep 168 at 171; 25 Eng. Rep. 118 at 120; *Brudenell v Boughton* (1741) 2 ATK 268 at 270; 26 Eng. Rep. 565 at 566; *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 146; 96 Eng. Rep. 1128 at 1137; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 125
[680] H. Swinburne, *A Treatise of Testaments and Last Wills, seventh edition*, volume 1, (Elisabeth Lynch, Dublin 1793) at 353; R. H. Helmholz, "The Origin of Holographic Wills in English law" (1994) 15 (2) *The Journal of Legal History*, 97 at 97.
[681] (1793) 4 Bro. C. C. 353.
[682] (1793) 4 Bro. C. C. 353 at 360; 29 Eng. Rep. 931 at 935; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 378.
[683] (1798) 1 Barn. C. 130; 27 Eng. Rep. 583.
[684] *Habergham v Vincent* (1793) 4 Bro. C. C. 353 at 366; 29 Eng. Rep. 931 at 937; *Adlington v Cann* (1798) 1 Barn. C. 130 at 134; 27 Eng. Rep. 583 at 585.
[685] (1793) 4 Bro. C. C. 353 at 382; 29 Eng. Rep. 931 at 945; *Attorney General v Jones* (1817) 3 Price 368 at 383 - 386; 146 Eng. Rep. 291 at 296; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 378.
[686] (1793) 4 Bro. C. C. 353 at 384; 29 Eng. Rep. 931 at 946.
[687] *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 146; 96 Eng. Rep. 1128 at 1137.
[688] 29 Car. II, c 3, s; Dig. 28.1.30; *Holdfast on Demise of Ansty v Dowsing* (1747) 1 Black W. 8 at 9; 96 Eng. Rep. 5 at 5; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 43; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New

and Cod. 6.23.21.1 that adds another may sign on their behalf. English courts construed s 5 in light of these principles and required the will-maker's signature to appear on the will, in the presence of the witnesses or later acknowledged by them, and followed Cod. 6.23.21.2 that required the testamentary act, not necessary in other forms of conveyance, to end by the subscription of witnesses.[689] The statute permitted the will-maker to sign any part of the document.[690] Nonetheless, the courts held, contrary to previous practice, that a will-maker could dispense with the signature requirement if they sealed the will to manifest their intent.[691] In *Hudson v Parker*[692], Dr. Lushington criticised the liberal practice of English courts for interpreting the statute to include sealing as equivalent to signing.[693] Furthermore, he adds the witness requirements "[were] completely obliterated from the statute, even before the declaration that "this is my will" was held sufficient. As to the word "attest", it would puzzle the ingenuity of any man to say what meaning was left to that word in the Statute of

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York 1954) at 230; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 97; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 287; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 233; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 71 -72; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 352.

[689] *Ellis v Smith* (1754) 1 Ves. Jun. 11 at 14; 30 Eng. Rep. 205 at 207; 2 Eq. Ca. Ab.764; 22 Eng. Rep. 649; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 20; C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property*, seventh edition, (Sweet & Maxwell, London, 2008) at 559; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 237; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 212; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 124; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 94, 113; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 378 – 379.

[690] *Lemayne v Stanley* 3 Lev 1 at 1; 83 Eng. Rep. 545 at 546; *Ellis v Smith* (1754) 1 Ves. Jun. 11 at 15; 30 Eng. Rep. 205 at 207; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 164; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 125; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 376; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 925 – 926; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 38; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 236.

[691] *Ross v Ewer* (1744) 3 ATK 156 at 158; 26 Eng. Rep. 892 at 893; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 93-94; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 191.

[692] (1844) 1 Rob. Ecc. 14; 163 Eng. Rep. 948.

[693] (1844) 1 Rob. Ecc. 14 at 34; 163 Eng. Rep. 948 at 955; *Ellis v Smith* (1754) 1 Ves. Jun. 11 at 15; 30 Eng. Rep. 205 at 207.

Frauds".[694] In *Ellis v Smith*, Sir Strange MR possessed strong reservations about the opportunity for fraud that arose with the relaxed interpretation of the statute's formalities, especially in light of allowing witnesses to attest the will at different times.[695]

The Real property commissioner's fourth report on the Statute of Frauds and its liberal interpretation by the courts prompted the enactment of its successor.[696] The Wills Act 1837[697] represents the final stage of the English canonical will's evolution by harmonising wills of personalty and realty through the imposition of a uniform standard of formal requirements.[698] Section 9 of the Wills Act provides:

> "No will shall be valid unless in writing and signed at the foot or end by the testator, or by some other person in his presence by his direction, [which is] made or acknowledged in the presence of two or more witnesses present and [who] attest and subscribe the will in the presence of the testator".

This brought the English will even closer to the civil law testament.[699] The requirement that the will-maker signs at the foot or end, not required by its predecessor, enacts Cod. 6.23.21 that states "[The testator must] sign the testament at its conclusion with his own hand in the

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[694] (1844) 1 Rob. Ecc. 14 at 34; 163 Eng. Rep. 948 at 955.
[695] *Ellis v Smith* (1754) 1 Ves. Jun. 11 at 14; 30 Eng. Rep. 205 at 207; *Ellis v Smith* (1754) 1 Ves. Jun. 11 at 15, 18 - 19; 30 Eng. Rep. 205 at 207, 209; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 98; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 287.
[696] A. G. Lang, "Formality v Intention: Wills in an Australian Supermarket" (1986) 15 (1) *Melbourne University Law Review*, 82 at 85.
[697] 1 Vic. c 26.
[698] C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property*, seventh edition, (Sweet & Maxwell, London, 2008) at 559; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 263; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 203; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 312, 389; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 33; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 58; O. K. McMurray, *Liberty of Testation and some Modern Limitations Thereon*, in *Celebration Legal Essays, By Various Authors To Mark the Twenty-fifth Year of Service of John H. Wigmore*, (North Western University Press, Chicago 1919) at 549; A. G. Lang, "Formality v Intention: Wills in an Australian Supermarket" (1986) 15 (1) *Melbourne University Law Review*, 82 at 85; S. F. C. Milsom, *Historical Foundations of the Common Law*, second edition, (Butterworths, London 1981) at 232.
[699] O. K. McMurray, *Liberty of Testation and some Modern Limitations Thereon*, in *Celebration Legal Essays, By Various Authors To Mark the Twenty-fifth Year of Service of John H. Wigmore*, (North Western University Press, Chicago 1919) at 549 see Dig. 28.1.20.8.

presence of the witnesses".[700] The Act includes the ecclesiastical requirement that two witnesses were required to establish a will.[701] In *Hudson*[702], Dr. Lushington praised the Wills Act and emphasised the responsibility rested on civilians to recognise its remedial nature and avoid the liberal constructions of previous practice.[703] The ecclesiastical courts appear to have listened to this advice and strictly interpreted the statutory requirement, to the consternation of later courts, that the will-maker must place their signature at the foot or end of the will to demonstrate they approved of its contents.[704]

The Wills Act 2007 addressed the concerns associated with the rigour of the strict formalism imposed by its predecessor with the aim to give greater effect to intention.[705] Section 11 (1) to (4) prescribes the formal requirements, retaining the essential features of the English canonical will, which requires an unprivileged will to be in writing, the will-maker to sign the will or direct another to on their behalf, and witnesses who must observe the will-maker sign and themselves sign in the will-maker's presence.[706] Section 11 (6) states, "No particular form of words is required for the purposes of subsection". The rise of digital technologies

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[700] *Hudson v Parker* (1844) 1 Rob. Ecc. 14 at 17, 27; 163 Eng. Rep. 948 at 950, 953; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 263; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 232; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 35.

[701] Wills Act 2007, s 11 (4); T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 258; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 233; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 365; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 41; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 72.

[702] 1 Rob. Ecc. 14; 163 Eng. Rep. 948.

[703] 1 Rob. Ecc. 14 at 18, 34; 163 Eng. Rep. 948 at 950. 956; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 164.

[704] *Holbech v Holbech* (1849) 2 Rob. Ecc. 126 at 126; 163 Eng. Rep. 1265 at 1265; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 263; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 377; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 925; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 35; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 345 – 348.

[705] K. Maxton, "Execution of Wills: The Formalities Considered" (1982) 1 (3) *Canterbury Law Review*, 393 at 393; N. Peart, "New Zealand Report on new Developments in Succession Law" (2010) 14 (2) *Electronic Journal of Comparative Law*, <http://www.ejcl.org/142/art142-3.pdf> at 1.2.6; N. Peart "Where there is a Will, There is a Way - A New Wills Act for New Zealand" (2007) 15 (1) *Waikato Law Review*, 26 at 30.

[706] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 348.

challenge the modern definition of a 'document' in light of increased reliance on text messages, Word documents, CD- Rom, and other analogous incorporeal documents that ought to be recognised as wills.[707] In *Re Feron*[708], Whata J concluded an email or some other kind of electronic document satisfied the written requirement and capable of constituting a will.[709] Inst. 2.10.12 remains an important starting point and its principle remains valid regardless of whether it pertains to a corporeal or incorporeal document. Furthermore, the Act retains the solemnities laid down in X. 3.26.10 that a will requires two witnesses to be valid.[710] The absence of any capacity requirements prompts Dr. Richardson to advise will-makers to choose witnesses who possess a sound mind.[711] This appears to ignore the legal requirement previously held under ecclesiastical law that a witness must have testamentary capacity. Finally, s 13 retains the creative interpretation of Inst. 2.10.7 and goes further by introducing s 13 (2) (d) that allows a court to permit the legacy if it is satisfied to be a voluntary disposition.[712] A will executed with the formal requirements remains the foremost method of demonstrating a will-maker intends to give the document testamentary effect.[713] Nevertheless, an understanding of the civil law principles underpinning the Wills Act 2007 elucidates how modern jurists ought to interpret its provisions.

3. Nuncupative Wills

The emphasis on the metaphysical elements of the canonical will permitted will-makers to make nuncupative declarations of their wishes, in the manner of civil law testators, which possessed the same validity as written wills.[714] Inst. 2.10.14 states the civil law accepted the

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[707] N. Richardson, "The Wills Act 2007" (2010) 6 (11) *New Zealand Family Law Journal*, 324 at 324; G. W. Beyer, C. G. Hargrove, "Digital Wills: Has the Time come for Wills to Join the Digital Revolution" (2007) 33 (3) *Ohio Northern University Review*, 865 at 866; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 349; but see N. Peart "Where there is a Will, There is a Way - A New Wills Act for New Zealand" (2007) 15 (1) *Waikato Law Review*, 26 at 33.
[708] [2012] 2 NZLR 551.
[709] [2012] 2 NZLR 551 at [14].
[710] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 354.
[711] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 354.
[712] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 355.
[713] N. Peart, "New Zealand Report on new Developments in Succession Law" (2010) 14 (2) *Electronic Journal of Comparative Law*, <http://www.ejcl.org/142/art142-3.pdf> at 1.2.6; N. Peart "Where there is a Will, There is a Way - A New Wills Act for New Zealand" (2007) 15 (1) *Waikato Law Review*, 26 at 31.
[714] Dig. 22.4.5; J. Schouler, "Oral Wills and Deathbed Gifts", (1886) 2 (4) *Law Quarterly Review*, 444 at 444; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 400; M. C. Mirow, "Last Wills

validity of the testator's oral declaration as a testament, without requiring them to reduce it to writing, if they executed it before seven witnesses.[715] By the thirteenth century, civilians were already familiar with this principle and English law had already admitted *verba novissima* before the canonical will's introduction indicating oral dispositions held a prominent place in testamentary practice.[716] Civilians adopted the civil law *nuncupatio*, or naming, which is characterised by the oral appointment of an heir or executor and a declaration of their will before witnesses.[717] Nov. 1.4.2 distinguishes between nuncupative and written wills but states both possess identical characteristics and holds: "There are two kinds of testaments, written and nuncupative, we ordain that all these provisions shall apply equally to written testaments and to every kind of last wish, and to all persons whether they are in private station or are soldiers". Bernard's *Summa Decretalium* indicates the canon law's definition of the will, which reserves a special place for nuncupative wills that requires separate treatment from the

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and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 69; A. N. Localizado, *Modern Probate of Wills, Containing an Analysis of the Modern Law of Probate in England and America, with Numerous References to the English and American Cases, and Copious Extracts from the Leading Cases*, (Charles C Little and James Brown, Boston 1846) at 305; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 526.

[715] Cod. 6.23.31.4; *Prince v Hazleton* (1822) 20 Johns 502 at [9]; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 446; J. Schouler, "Oral Wills and Deathbed Gifts", (1886) 2 (4) *Law Quarterly Review*, 444 at 445 R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 400; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 83, 98; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 310; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 216; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 23.

[716] *Lectura* in F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at 43; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 190; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 59; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 446.

[717] Dig. 28.1.21; *Prince v Hazleton* (1822) 20 Johns 502 at [9]; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 58; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 100; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 445; P. Lovelass, A. Barron (ed) *The Law's Disposal of a Person's Estate Who Dies without Will or Testament; to Which Is Added the Disposal of a Person's Estate by Will and Testament; with an Explanation of the Mortmain Act*, twelve edition, (J. S. Littell, Philadelphia 1839) at 181; E. Gibson, *Codex Juris Ecclesiastici Anglicani*, (Printed by J. Baskett, London1713) at 555; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 45; A. G. Lang, "Formality v Intention: Wills in an Australian Supermarket" (1986) 15 (1) *Melbourne University Law Review*, 82 at 84; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 73; R. Grey, *A System of English Ecclesiastical Law*, fourth edition, (Printed by Henry Lintot, Savoy 1743) at 154.

principal.[718] Ecclesiastical courts classified oral declarations as nuncupative wills even if an executor reduced them to writing so the ordinary could affix their seal for probate purposes.[719]

Will-makers made nuncupative wills by verbal declarations of their final wishes, or through the interrogation of another assisting them to verbalise their intent before a sufficient number of witnesses, which had the same force as a written instrument.[720] The ecclesiastical courts followed the civil law requirement that the will-maker must manifest testamentary intent by clearly stating their institution of an heir, or executor, and any legacies they wish to bequeath.[721] Gestures commonly formed part of nuncupative wills, and civilians even

[718] Bernard's *Summa Decretalium* 3.22.2.
[719] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 51, 59; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 71; T. M. Wentworth, *The Office and Duty of Executors*, (Printed by the Assigns of Richard and Edward Atkins, London 1589) at 9; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 122; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 377; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 11.
[720] X. 3.26.13; *Baptista et Alexando Fratibus de Somilianis v Herculem amos Somilianum et Amantium Piperellum* in B. Bersano, *De Ultimis Voluntatibus* (Typis Petri-Mariae Montii, Bononiae 1707) at 103; *Yelverton c Yelverton* (1588) The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 34; *Drummond v Parish* (1843) 3 Curt. 522 at 524; 163 Eng. Rep. 812 at 813; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 70; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 447, 465; R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 156; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 136; A. G. Lang, "Formality v Intention: Wills in an Australian Supermarket" (1986) 15 (1) *Melbourne University Law Review*, 82 at 84 H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 58 - 59; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 400; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 379; Anonymous (A Gentleman of Doctors Commons), *The Clerk's Instructor in the Ecclesiastical Courts*, (Printed for E. and R. Nutt, and Gosling, London 1711) at 91- 92.
[721] Dig. 28.5.63.1; *Hazard c Pike* The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 4; F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphannotrophei, Halae Magdeburgicae 1769) at 411; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 378; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 59, 354; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 98, 101; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 216; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 447.

permitted them to comprise the whole will, provided testamentary intent manifested.[722] Civilians also adopted Dig. 29.7.20, identifying the form nominating an heir characterises the disposition, which states:

> "If the heir has been declared openly, but the legacies have not been put into tablets, Julian says that the tablets in which the heir has not been appointed are not understood to be the tablets of a will so that they are to be regarded as a codicil rather than a will; and I think that is the more correct statement".

In *Hazard c Pike*, the court referred to Bartolus *Commentaria* and Dig. 39.5.16 to indicate a will-maker who had gestured towards a person present and stated, "I made her my executor" had made a nuncupative will because the nomination of an executor defines its character.[723]

English civilians recognised will-makers often made their nuncupative wills on their deathbeds *in extremis*, analogous to *verba novissima*, which presented additional problems despite being preferable to dying intestate.[724] These jurists bemoaned the fact people often delayed making a will until their deathbeds or even died suddenly without leaving a will.[725]

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[722] R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 156; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 136.

[723] *Hazard c Pike* The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 3 see Dig. 28.5.59; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 76, 83; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 59.

[724] X. 3.26.13; *Prince v Hazleton* (1822) 20 Johns 502 at [22]; *Hungerford v Nosworthy* (1694) Shower PC 146 at 147; 1 Eng. Rep. 99 at 100; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 58; W. Assheton, *A Theological Discourse of Last Wills and Testaments*, (Printed for Brab, Aylmer, London 1696) at 10; J. Perkins, M. Walbanck (trans), *A profitable book of Mr. John Perkins*, (Printed for Matthew Walbanck, London 1657) at 178; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 71; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 13; Anonymous (A Gentleman of Doctors Commons), *The Clerk's Instructor in the Ecclesiastical Courts*, (Printed for E. and R. Nutt, and Gosling, London 1711) at 53; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 65; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 406; S. Coppel, "Willmaking on the Deathbed" (1988) 40 (1) *Local Population Studies* 37 at 39; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 500.

[725] W. Assheton, *A Theological Discourse of Last Wills and Testaments*, (Printed for Brab, Aylmer, London 1696) at 3- 4; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 381; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of

Will-makers often delayed making their wills because they hoped to improve their estate or believed the nature of the will-making ceremony invited death.[726] This delay resulted in many written wills executed as simple instruments or important elements relegated to oral dispositions.[727] Assheton's practical treatise '*A Theological discourse of last Wills and Testaments*' gives the following advice to will-makers:

> "So and consider other generality of men that they do not wholly neglect to make their wills (which too often happens) they then clattered in haste and do it in a hurry and admits the pains and distractions of a sick bed; whereby such a will is not only an imperfect and effective in itself but very disturbing to the dying testator".[728]

Assheton emphasises the significance of the undertaking, particularly as a final confession to God, and the author's foremost advice to will-makers is to make their wills in periods of good-health rather than to defer it.[729]

Richard and Edward Atkins, London, 1701) at 15; R. Hooker, I. Walton, *The Works of that Learned and Judicious Divine Mr. Richard Hooker, Containing Books of the Laws of Ecclesiastical Polity and Several other Treatises*, volume 2, (Clarendon Press, Oxford 1820) at 567 – 568; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 397, 406; S. Coppel, "Willmaking on the Deathbed" (1988) 40 (1) *Local Population Studies* 37 at 40; L. Shelford, *Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of Unsound Mind with an Appendix of the Statutes of England, Ireland, and Scotland, Relating to Such Persons; and Precedents and Bills of Costs*, (J. S. Littell, Philadelphia 1833) at 202; M. C. Mirow, "Coke's advice on executing wills of land" (2009) *Florida International University Legal Studies Research Paper No. 09*-09, 239 at 242.

[726] W. Assheton, *A Theological Discourse of Last Wills and Testaments*, (Printed for Brab, Aylmer, London 1696) at 7 – 10 see H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 58; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 527; S. Coppel, "Willmaking on the Deathbed" (1988) 40 (1) *Local Population Studies* 37 at 37; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 395.

[727] R. A Houlbrooke, *Death, Religion and the Family in England, 1480 – 1750*, (Oxford University Press, Oxford 1998) at 28, 127; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 200; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 381; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 15.

[728] W. Assheton, *A Theological Discourse of Last Wills and Testaments*, (Printed for Brab, Aylmer, London 1696) at 12.

[729] W. Assheton, *A Theological Discourse of Last Wills and Testaments*, (Printed for Brab, Aylmer, London 1696) at 2, 3 see J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 15; S. Coppel, "Willmaking on the Deathbed" (1988) 40 (1) *Local Population Studies* 37 at 40 – 41; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 58; G.W. Keeton, "The Canon law and its influence", (1903) 19 (1) *Loyola law review*, 1 at 12.

Early ecclesiastical courts preferred written wills to nuncupative wills, despite the popularity of the latter, because the former had the advantages of preventing fraud and concealing its contents to prevent disappointing expectant beneficiaries.[730] The civil law held the same preference and civilians suggest written wills did not suffer from the same evidential issues as their oral counterparts particularly if witnesses die.[731] Nonetheless, will-makers were often illiterate and considered oral declarations as the best form of evidence, which left notaries or curates with the task of reducing the will to writing.[732] The civil law nuncupative testament had the same number of witnesses as a written will and Inst. 2.10.14 provides:

> "When one wishes to make a will binding by the civil law, but not in writing, he may summon seven witnesses, and in their presence orally declare his wishes; this, it should be observed, being a form of will which has been declared by constitutions to be perfectly valid by civil law."

However, canonical nuncupative wills did not adopt the same number of witnesses as required by the civil law. The ecclesiastical courts interpreted X. 3.26.11 in its stricter sense to require three witnesses, rather than two, to attest a nuncupative will although this may have varied to two in practice.[733] Canon 27.3 of the *Reformatio Legum Ecclesiasticarum* holds that "as someone departs this life suddenly, the common testimony of three witnesses of proved trustworthiness shall be accepted if no testament has been committed to writing". The

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[730] *Reformatio Legum Ecclesiasticarum,* 27.3; *Lemann v Bonsall* (1823) 1 Add. 274 at 389; 162 Eng. Rep. 137 at 137; F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at 43; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 398; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 6.

[731] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 52; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 69, 71; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 216; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 200; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 21.

[732] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 398; L. M. McGranahan, "Charity and the Bequest Motive: Evidence from seventeenth-Century Wills" (2000) 108 (6) *The Journal of Political Economy*, 1270 at 1273.

[733] *Prince v Hazleton* (1822) 20 Johns 502 at [9]; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 200; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 106.

requirement of a third witness to protect the will is reminiscent of the principle in Cod. 6.22.8 that a notary, or eighth witness, must attest a blind testator's nuncupative will. Nonetheless, this requirement is dispensable upon satisfactory proof of its validity.[734]

The power to bequeath real property introduced by the Statute of Wills challenged the use of nuncupative wills. A will-maker could not make a nuncupative will to devise real property under the common law unless they held land already bequeathable through customary law.[735] However, a will-maker could still devise real property in an oral trust or if an executor reduced a nuncupative will into writing within six days of its execution.[736] These methods contributed to the criticism that the statute had created an environment conducive to fraud.[737] The King's Bench's discovery in *Cole v Morduant* that a wife had propounded a nuncupative will to probate, supported by the testimony of nine perjured witnesses, highlighted the need for legislative intervention.[738] The Statute of Frauds condemned the uncertainty created by its predecessor, abolished residual methods of devising real property, and restricted nuncupative

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[734] R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 7.

[735] *Allen v Hill* (1725) 1 Gilb Rep 257 at 260; 25 Eng. Rep. 177 at 179; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 13; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 51; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 448; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 2; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 373; S. Coppel, "Willmaking on the Deathbed" (1988) 40 (1) *Local Population Studies* 37 at 38.

[736] *Allen v Hill* (1725) 1 Gilb Rep 257 at 260; 25 Eng. Rep. 177 at 179; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 51, 58; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 373.

[737] *Allen v Hill* (1725) 1 Gilb Rep 257 at 260; 25 Eng. Rep. 177 at 179; *Drummond v Parish* (1843) 3 Curt. 522 at 530; 163 Eng. Rep. 812 at 815; P. Lovelass, A. Barron (ed) *The Law's Disposal of a Person's Estate Who Dies without Will or Testament; to Which Is Added the Disposal of a Person's Estate by Will and Testament; with an Explanation of the Mortmain Act*, twelve edition, (J. S. Littell, Philadelphia 1839) at 181; A. N. Localizado, *Modern Probate of Wills, Containing an Analysis of the Modern Law of Probate in England and America, with Numerous References to the English and American Cases, and Copious Extracts from the Leading Cases*, (Charles C Little and James Brown, Boston 1846) at 305; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 226; A. G. Lang, "Formality v Intention: Wills in an Australian Supermarket" (1986) 15 (1) *Melbourne University Law Review*, 82 at 84; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 500.

[738] *Matthews v Warner* (1798) 4 Ves. Jun. 186 at 211; 31 Eng. Rep. 97 at 107; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 200; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 449; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 141.

wills to personalty not exceeding thirty pounds or *bona notablia* to limit their use.[739] Will-makers could make nuncupative military wills and bequeath estates of personal property not exceeding thirty pounds according to the requirements before the statute.[740] In *Ellis v Smith*[741], Lord Hardwicke indicates introducing civil law solemnities to allow nuncupative wills of real property may have been an alternative option to their outright removal.[742] Nonetheless, the statute introduced a strict requirement that a will-maker must have spent ten days during their last sickness in the same residence before making their nuncupative will unless surprised by illness on a journey.[743] Furthermore, the statute placed restrictions on probate procedure.[744]

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[739] 29 Car. II, c 3, s 18; *Walter v Hodge* (1818) 2 Swans. 92 at 99; 36 Eng. Rep. 549 at 551; *Ellis v Smith* (1754) 1 Ves. Jun. 11 at 18; 30 Eng. Rep. 205 at 209; *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 132; 96 Eng. Rep. 1128 at 1131; *Ellis v Smith* (1754) 1 Ves. Jun. 11 at 18; 30 Eng. Rep. 205 at 209; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 59, 355; J. Schouler, "Oral Wills and Deathbed Gifts", (1886) 2 (4) *Law Quarterly Review*, 444 at 445; C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property*, seventh edition, (Sweet & Maxwell, London, 2008) at 559; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 201; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 450; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 142; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 2; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 120; P. Lovelass, A. Barron (ed) *The Law's Disposal of a Person's Estate Who Dies without Will or Testament; to Which Is Added the Disposal of a Person's Estate by Will and Testament; with an Explanation of the Mortmain Act*, twelve edition, (J. S. Littell, Philadelphia 1839) at 182; A. N. Localizado, *Modern Probate of Wills, Containing an Analysis of the Modern Law of Probate in England and America, with Numerous References to the English and American Cases, and Copious Extracts from the Leading Cases*, (Charles C Little and James Brown, Boston 1846) at 305; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 32; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 924; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 229; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 71, 75.

[740] A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 202; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 3; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 377; P. Lovelass, A. Barron (ed) *The Law's Disposal of a Person's Estate Who Dies without Will or Testament; to Which Is Added the Disposal of a Person's Estate by Will and Testament; with an Explanation of the Mortmain Act*, twelve edition, (J. S. Littell, Philadelphia 1839) at 182; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 32; A. G. Lang, "Formality v Intention: Wills in an Australian Supermarket" (1986) 15 (1) *Melbourne University Law Review*, 82 at 84.

[741] (1754) 1 Ves. Jun. 11; 30 Eng. Rep. 205.

[742] (1754) 1 Ves. Jun. 11 at 18; 30 Eng. Rep. 205 at 209.

[743] 29 Car. II, c 3, s 18; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 59, 355; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 201- 202; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 450; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 142; E.

After the statute's passage, English courts generally treated nuncupative wills more cautiously and jurists strongly urged will-makers to execute written instruments.[745] Section 19 imposed a six-month limitation on the acceptance of witness testimony except when they reduced it to writing within six days after witnessing the will.[746] In *Lemann v Bonsall*[747], Sir Nicholl stated:

Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 2; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 382; P. Lovelass, A. Barron (ed) *The Law's Disposal of a Person's Estate Who Dies without Will or Testament; to Which Is Added the Disposal of a Person's Estate by Will and Testament; with an Explanation of the Mortmain Act*, twelve edition, (J. S. Littell, Philadelphia 1839) at 182; A. N. Localizado, *Modern Probate of Wills, Containing an Analysis of the Modern Law of Probate in England and America, with Numerous References to the English and American Cases, and Copious Extracts from the Leading Cases*, (Charles C Little and James Brown, Boston 1846) at 306; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 527; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 75.

[744] 29 Car. II, c 3, s 20; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 355; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 450; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 383; A. N. Localizado, *Modern Probate of Wills, Containing an Analysis of the Modern Law of Probate in England and America, with Numerous References to the English and American Cases, and Copious Extracts from the Leading Cases*, (Charles C Little and James Brown, Boston 1846) at 306; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 75.

[745] *Lemann v Bonsall* (1823) 1 Add. 274 at 389; 162 Eng. Rep. 137 at 137; *Ellis v Smith* (1754) 1 Ves. Jun. 11 at 18; 30 Eng. Rep. 205 at 209; *Prince v Hazleton* (1822) 20 Johns 502 (NY) at [9]; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 201; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 924; J. Schouler, "Oral Wills and Deathbed Gifts", (1886) 2 (4) *Law Quarterly Review*, 444 at 444; C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property*, seventh edition, (Sweet & Maxwell, London, 2008) at 559; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 467, 499; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 3.

[746] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 355; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 142l; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 3; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 120; P. Lovelass, A. Barron (ed) *The Law's Disposal of a Person's Estate Who Dies without Will or Testament; to Which Is Added the Disposal of a Person's Estate by Will and Testament; with an Explanation of the Mortmain Act*, twelve edition, (J. S. Littell, Philadelphia 1839) at 182; Anonymous (A Gentleman of Doctors Commons), *The Clerk's Instructor in the Ecclesiastical Courts*, (Printed for E. and R. Nutt, and Gosling, London 1711) at 54; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 135; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 924.

[747] (1823) 1 Add. 274; 162 Eng. Rep. 137.

> "[389] In the first place, numerous restrictions are imposed upon such wills by the Statute of Frauds (29 Car 2, c 3, s 19); the provisions of which must be, it is held, strictly complied with to entitle any nuncupative will to probate. Consequently, the absence of due proof of strict compliance with any one of these (that enjoining a *rogatio testium*, for instance (b)) is fatal, at once, to a case of this species. But, added to this, and independent of the Statute of Frauds altogether, the factum of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one, in every single particular".[748]

Section 18 appears to enact the canon law requirement that three credible witnesses must attest a nuncupative will.[749] However, Powell Jr. J noted in *Hatter v Ash*[750] that the third witness could be an interested legatee "because two only were required by the spiritual law, and the third was a good witness within the intent of the Act of Frauds" indicating the ecclesiastical courts often accepted the testimony of two witnesses according to the civil law.[751] Furthermore, the statute encouraged a *rogatio testium* test, imported from the civil law, which suggested witnesses ask the will-maker whether their words represented their final wishes to ensure their statements carry testamentary intention.[752]

Nuncupative wills remained in general usage until the Wills Act 1837 removed the power to make nuncupative wills of personalty, and constrained their use to military privileged wills.[753] New Zealand law also limited their use to military privilege, and acknowledged the

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[748] (1823) 1 Add. 274 at 389; 162 Eng. Rep. 137 at 138 see Dig. 22.4.4.
[749] See *Ellis v Smith* (1754) 1 Ves. Jun. 11 at 18; 30 Eng. Rep. 205 at 209; *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 131; 96 Eng. Rep. 1128 at 1131; *Phillips v St. Clement Danes Parish* 1 Eq. Ca. Abr. 404 at 404; 21 Eng. Rep. 1135 at 1135; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 2; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 527.
[750] 1 Ld. Raym. 84; 91 Eng. Rep. 953.
[751] *Hatter v Ash*, 1 Ld. Raym. 84 at 85; 91 Eng. Rep. 953 at 953.
[752] *Lemann v Bonsall* (1823) 1 Add. 274 at 398-399; 162 Eng. Rep. 137 at 141; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 463; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 136; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 924; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 595; see Dig. 22.5.1.
[753] Wills Act 1837, s 9; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 328, 446, 450; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 203; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 271; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 45; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 58; J. Schouler, "Oral Wills and Deathbed

evidential difficulties associated with nuncupative wills that required a tentative approach.[754] In *Mackie v Brown*[755], the Supreme Court carefully distinguished the will-maker's ability to leave a *donatio mortis causa*, having a different set of requirements, from the power to make nuncupative will despite the comparison between the instruments.[756] The Wills Act 2007 continues to make nuncupative wills unavailable for unprivileged will-makers and s 35 (2) restricts their use as privileged instruments by limiting their duration to one year after execution in a manner reminiscent of Dig. 29.1.21.[757] However, s 35 (2) goes further than Dig. 29.1.21 and introduces the uncertain effect of including "changes, revoking and reviving a will". This section *prima facie* creates the undesirable result of reviving a previous disposition contrary to the will-maker's clear intention that they desired it revoked. Notably, s 35 (4) (b) extends the privilege to prisoners of war, disqualified under the civil law, under the same conditions.[758] The uncertainty surrounding the privileged military will have rendered the New Zealand nuncupative will a less attractive form than previous practice.

New Zealand's customary law furnished a unique experience with the oral form, referred to as ōhākī or last words, which consist of a formal declaration of the person's wishes, testamentary or otherwise, in the presence of friends and family.[759] New Zealand law treats ōhākī as an invalid testamentary action and the absence of formal requirements are comparable to *verba novissima* rather than a true nuncupative will requiring solemnities.[760] Dr. Pita Sharples suggested parliament ought to include ōhākī by extending the privilege for general use and the introduction of a nuncupative will could introduce the formalities needed

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Gifts", (1886) 2 (4) *Law Quarterly Review*, 444 at 445; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 203

[754] *Gartside v Sheffield* [1981] 2 NZLR 547 at 565 see *Re Beaumont* [1916] NZLR 1002; *Re Hunter* [1919] NZLR 95; *Will of Desmond* [1921] NZLR 300; K. Maxton, "Execution of Wills: The Formalities Considered" (1982) 1 (3) *Canterbury Law Review*, 393 at 395.

[755] [1921] NZLR 651.

[756] [1921] NZLR 651 at 654; see *Ward v Turner* (1752) 1 Dickens 170 at 173; 21 Eng. Rep. 234 at 235; *Ward v Turner* (1752) 2 Ves. Sen. 431 at 443; 28 Eng. Rep. 275 at 283; J. Schouler, "Oral Wills and Deathbed Gifts", (1886) 2 (4) *Law Quarterly Review*, 444 at 450.

[757] N. Richardson, "The Wills Act 2007" (2010) 6 (11) *New Zealand Family Law Journal*, 324 at 324; W. Patterson (ed), A. Tipping (ed), *The Laws of New Zealand, Will,* (LexisNexis 2012, Wellington) at [65]; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [4.1].

[758] See Inst. 2.12.3; Dig. 49.15.12.5.

[759] *Brown v Pourau* [1995] 1 NZLR 352 at 366; Re *Hokimate Davis* (Deceased) [1925] NZLR 18 at 21; *Izard v Tamahau Mahupuku* (1902) 22 NZLR 418 at 420; (10 October 2006) 624 NZPD at 19676 per Dr. Pita Sharples; (22 August 2007) see (22 August 2007) 641 NZPD at 11456 per Tariana Turia (Third Reading).

[760] *Re Hokimate Davis* (Deceased) [1925] NZLR 18 at 20; *Brown v Pourau* [1995] 1 NZLR 352 at 366; *zard v Tamahau Mahupuku* (1902) 22 NZLR 418 at 424; A. Herbert, "Protocols and Customs at the Time of A Maori Death" (2001) available online at http://www.whakawhetu.co.nz/assets/files/pdf/Grief/Protocols%20&%20Customs%20at%20the%20Time%20of%20a%20Maori%20Death.pdf (accessed: 20/12/12) at 6.

to give effect to this unique custom.[761] Nonetheless, any form of oral testamentary declaration suffers from similar concerns of proving the will-makers intent. Professor Maxton's article in the Canterbury Law Journal discusses the place of the nuncupative will before the Wills Act 2007 and advocates their extension for general use, alongside holographic wills, subject to an expression of testamentary intent, the testimony of disinterested witnesses, and freedom from outside pressure.[762] The author compares the nuncupative will's evidentiary deficiencies to the holographic will now admitted into New Zealand law.[763] However, modern technology appears to have furnished a solution to the evidentiary uncertainties surrounding nuncupative wills and academics have proposed a view consistent with modern public perception that the video ought to be included in the definition will to follow developments in other jurisdictions.[764] Current will-makers, or possibly the executor, must reduce a nuncupative will executed in this manner to writing before the court could declare it valid and any oral elements are likely treatable as evidence of the nature of the written document.[765] Nevertheless, the extension of the power to make nuncupative wills, guided by previous practice, appears to be a natural next step in a legal environment emphasising testamentary intent.

4. Testamentary Capacity

The civil law principles touching testamentary capacity are a prominent part of New Zealand law and their study is essential to understanding the intention requirement, or metaphysical elements, underpinning the Wills Act 2007. English law permitted every person to make a

[761](10 October 2006) 624 NZPD at 19676 per Dr. Pita Sharples; (22 August 2007).
[762] K. Maxton, "Execution of Wills: The Formalities Considered" (1982) 1 (3) *Canterbury Law Review*, 393 at 395, 400 – 401 see A. G. Lang, "Formality v Intention: Wills in an Australian Supermarket" (1986) 15 (1) *Melbourne University Law Review*, 82 at 90.
[763] K. Maxton, "Execution of Wills: The Formalities Considered" (1982) 1 (3) *Canterbury Law Review*, 393 at 395, 398.
[764] K. Grant, 'Shattering and moving beyond the Gutenberg Paradigm: The Dawn of the Electronic Will' (2008) 42 (1) *University of Michigan Journal of Law Reform* 105 at 115; G. W. Beyer, C. G. Hargrove, "Digital Wills: Has the Time come for Wills to Join the Digital Revolution" (2007) 33 (3) *Ohio Northern University Review*, 865 at 884; J. C. Smiley, "The Enforcement Of Un-Written Wills. The estate of Reed 672 P.d 829(wyo. 1983)" (1985) 20 (1) *Land and Water Law Review*, 279 at 283; see Nevada Revised Statutes (Wills) 133.085 (2006); N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [4.7].
[765] W Patterson (ed), A Tipping (ed) *The Laws of New Zealand, Will* (LexisNexis 2012, Wellington) at [7]; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [4.7], [10.6]; N. Peart "Where there is a Will, There is a Way - A New Wills Act for New Zealand" (2007) 15 (1) *Waikato Law Review*, 26 at 33 see H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 56.

will unless prohibited by law or custom.[766] The civil law aimed to furnish a starting point to identify who had testamentary capacity; and canonists introduced their own categories, which notably included those under excommunication anathema.[767] Nevertheless, the canon law agreed with the fundamental principle in the civil law that only a person *pubes* and *sui iuris* could make a valid will or testament, even following the formalities, if they had testamentary capacity afforded to their person.[768] The legal expression *testamenti factio* describes the will-maker's capacity to make, alter, or revoke a will.[769] A will-maker must have capacity at the time of making their will or otherwise they die intestate.[770] Dig. 28.1.4 provided that the

[766] Inst. 2.12; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 395; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 67; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 73; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 81; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 43; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 21; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 4; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 496

[767] Bernard's *Summa Decretalium* 3.22.4; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 255; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 100; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 395; T. M. Wentworth, *The Office and Duty of Executors*, (Printed by the Assigns of Richard and Edward Atkins, London 1589) at 21; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 76.

[768] Inst. 2.12; H. Consett, *The Practice of the Spiritual or Ecclesiastical Courts*, (Printed for W. Battersby, London 1700) at 12; C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property*, seventh edition, (Sweet & Maxwell, London, 2008) at 556; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 233; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 530; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 133; O. F. Robinson, *Person*s in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 18; A. Watson, *The Law of Succession in the later Roman Republic*, (Clarendon Press, Oxford 1971) at 22; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 213; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 402; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 158; G. J. McGinley, "Roman law and its influence in America" (1928) 3(2) *The Notre Dame Lawyer*, 70 at 78; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 39; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 541 see Bracton, G. E. Woodbine (ed), S. E. Thorne (trans), *De legibus et consuetudinibus Angliae*, volume 2, (Harvard University Press, Cambridge, 1968 – 1977) at 34, 59.

[769] *Andrews v Powis* (1728) 1 Lee 242 at 257; 161 Eng. Rep. 90 at 95; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 287; E. R. Humpreys, *Manual of Civil Law: For the use of Schools, and more especially Candidates of the Civil Service*, (Longman, Brown, Green and Longmans, London 1854) at 102; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 100, 238; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 794.

[770] Gaius 2.114; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Capetown 1975) at 115; J. F. Grimke, *The Duty of Executors and Administrators* (T. and

starting point to determine a will's validity is to ascertain whether the testator possessed *testamenti factionem* before examining whether they followed the formalities.[771] Civilians held that *testamenti factio* is not restricted to the will-maker's active capacity and includes the passive capacity of heirs, witnesses, legatees, and other parties engaged or benefitting from testamentary business.[772] The surviving records from the ecclesiastical courts do not present a clear picture of these principles in practice.[773] However, civilians recognised five major classes of persons who lack capacity: those who lack discretion or judgement, lack full liberty, deprived of their principal senses, guilty of a major crime, and those under some other legal impediment.[774]

J. Swords, New York 1797) at 43; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 141; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 41; R. B. Outhwaite, *The Rise and Fall of The English Ecclesiastical Courts, 1500 – 1860*, (Cambridge University Press, Cambridge 2006) at 3.

[771] Gaius 2.114; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 213; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 222; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 128.

[772] Inst. 2.19.4; Inst. 2.20. 24; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 289; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 131; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 30; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 388; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 21; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 281; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 593; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 253; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 30; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 213; A. Watson, *The Law of Succession in the Later Roman Republic*, (Clarendon Press, Oxford 1971) at 26; Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 28.

[773] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 402.

[774] Dig. 28.1.6; Dig. 28.1.8.4; Dig. 28.3.6.5; Dig. 28.3.6.6; Bernard's *Summa Decretalium* 3.22.4; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 73 – 74; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 18, 159; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 257; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 47; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 525, 530; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 222; J. Godolphin, *The Orphans Legacy*, fourth

Civilians accepted a person's status might disqualify them from making a testamentary distribution despite a *prima facie* ability to manifest a will.[775] English law included people guilty of major secular or spiritual crimes, and those who lacked full liberty, which included slaves, villeins, monks, papists, heretics, apostates, captives, and people in *potestas* under this category.[776] This kind of legal incapacity is largely limited to historical interest in New Zealand law although modern law disqualifies certain groups from acting as executors or

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edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 22; E. R. Humpreys, *Manual of Civil Law: For the use of Schools, and more especially Candidates of the Civil Service*, (Longman, Brown, Green and Longmans, London 1854) at 103; J. F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphanotrophei, Halae Magdeburgicae 1769) at 405; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 402; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 4, 13; S. Blumenthal, "The Deviance Of The Will: Policing The Bounds Of Testamentary Freedom In Nineteenth-Century America" (2006) 119 (4) *Harvard Law Review*, 960 at 967; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 492.

[775] J. F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphanotrophei, Halae Magdeburgicae 1769) at 405; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 81; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 402; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 497; R. Grey, *A System of English Ecclesiastical Law*, fourth edition, (Printed by Henry Lintot, Savoy 1743) at 153.

[776] *Reformatio Legum Ecclesiasticarum,* 27.7; Inst. 2.12; Dig. 28.1.6; *Britton* 2.3.5; H. Swinburne *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 73 -109; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 46; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 391, 400; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 56; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 225 – 226; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 36- 38; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 126; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 81; T. M. Wentworth, *The Office and Duty of Executors*, (Printed by the Assigns of Richard and Edward Atkins, London 1589) at 22; J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 133; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 238; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 40; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 395; M.C. Mirow, "Monks and Married Women: The Use of the Yearbooks defining Testamentary Capacity in the Sixteenth and Seventeenth-Century Readings on Wills" (1997) 65 (1) *Tijdschrift voor Rechtsgeschiedenis*, 19 at 20.

receiving legacies.[777] The testamentary capacity of married women illustrates the complex interchange of the temporal and spiritual jurisdiction concerning who could make a will.[778] Early tension existed between the ecclesiastical courts asserting a wife's right to bequest her personal property for the benefit of her soul and the feudal fabric of Anglo-Norman society vesting property in males.[779] Ecclesiastical law, expressed in a constitution of John Stratford, followed the civil law principle permitting a married woman to make a will and excommunicated anyone, including her husband, if they interfered.[780] Lynwood drew on the *ius commune* to assert this right as late as the fourteenth century and evidence from contemporaneous ecclesiastical sources reveals admission of these wills to probate remained prominent until the fifteenth century when they become rare in the act books.[781]

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[777] *Reformatio Legum Ecclesiasticarum,* 27.14; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 163; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 358 – 560.

[778] *Scammell v Wilkinson* (1802) 2 East. 552 at 556; 102 Eng. Rep. 481 at 483; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 403; J. Doods, "The impact of Roman law of Succession and Marriage on Women's Property and Independence", (1992) 18 (4) *Melbourne University Law Review*, 899 at 902.

[779] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 234, 305; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 26; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 135; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 61; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 543.

[780] W. Lyndwood, *Constitutions Provincialles and of Otho and Octhobone, translated in to Englyshe*, (Robert Redman, London 1534) at 3.13.5; W. M. Gordon, *Succession* in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 89; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 257; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 82; J. Doods, "The impact of Roman law of Succession and Marriage on Women's Property and Independence", (1992) 18 (4) *Melbourne University Law Review*, 899 at 901 – 902; R. H. Helmholz, "Married Woman's Wills in Later Medieval England" in S. S. Walker (ed), *Wife and Widow in Medieval England* (Michigan University Press, Michigan 1997) at 166; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 133; A. Watson, *Roman Law & Comparative Law*, (University of Georgia Press, Athens, 1991) at 143; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 61; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 795; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 542; M. M. Sheehan, *The Will in Medieval Britain: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century, (Pontifical Institute of Mediaeval Studies*, Toronto 1963) at 305; see Dig 29.6.3; but see C 33, q 5, c 4.

[781] *Ex Parte Tucker* (1840) 1 Man & G. 519 at 528; 133 Eng. Rep. 437 at 440; *Scammell v Wilkinson* (1802) 2 East. 552 at 558; 102 Eng. Rep. 481 at 483; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 67, 131; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 403 – 404; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 236; M. M. Sheehan, J. K.

The common law courts objected to this ecclesiastical encroachment on the custom of coverture, which held a feme covert formed part of her husband's person by their marital union.[782] This custom placed a wife and her property under the control of her husband in a manner analogous to the Roman *cum manu* marriage.[783] The Royal courts denied the wife any form of proprietary rights, including the capacity to make a will, to ensure she did not make 'injurious dispositions' against her husband and the Explanation of the Statute of Wills[784] confirms this position.[785] The introduction of the power to dispose of property in a

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Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 27 – 28; R. H. Helmholz, "Married Woman's Wills in Later Medieval England" in S. S. Walker (ed), *Wife and Widow in Medieval England* (Michigan University Press, Michigan 1997) at 167, 170; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 134; Will of Duchess Frances (1559) in J. G. Nichols, J. Bruce (eds), *Wills from Doctors Commons: A Selection from the Wills of Eminent Persons proved in the Prerogative Court of Canterbury 1495 – 1695* (Printed for the Camden Society, London 1863) at 56.

[782] R. S. Donnison Roper, *A Treatise of the Law of Property Arising from the Relation Between Husband and Wife*, second edition, volume 1, (Joseph Butterworth and Son, London 1826) at 53; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 82; J. Doods, "The impact of Roman law of Succession and Marriage on Women's Property and Independence" (1992) 18 (4) *Melbourne University Law Review*, 899 at 902; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 62; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 5412; E. Coke, *The First Part of the Institutes of the Laws of England*; *or a Commentary upon Littleton*; *Not the Name of the Author only, but of the Law itself*, sixteenth edition, volume 1, (Fleming and Phelan, London 1809) at 112a; C. J. Reid Jr., "'So it will be found that the Right of Women in many Cases is of Diminished Condition': Rights and the Legal Equality of Men and Women and Twelfth and Thirteenth Century Canon law" (2002) 35 (2) *Loyola of Los Angeles Law Review*, 471 at 480.

[783] Gaius 1. 137; Glanville, *Tractatus de legibus et consuetudinibus regni Angliae*, 6.3; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 389; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 145; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 239; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 88; R. H. Helmholz, "Married Woman's Wills in Later Medieval England" in S. S. Walker (ed), *Wife and Widow in Medieval England* (Michigan University Press, Michigan 1997) at 165; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 258; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 498.

[784] 34 & 35, Hen. VIII, c 5.

[785] S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 524; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 257; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 199; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records* (Lochin Publishing, Dursley 1992) at 49; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 26; R. H. Helmholz, "Married Woman's Wills in Later Medieval England" in S. S. Walker (ed), *Wife and Widow in Medieval England* (Michigan University Press, Michigan 1997) at 165; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 133; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 909; R. S. Donnison Roper, *A Treatise of the Law*

use, popular in the fifteenth century, avoided the question of capacity and settled the conflict without definitive result.[786] Nevertheless, the conflicting doctrines promoted by the temporal and spiritual courts did result in a tense compromise and grant of limited capacity. English law accepted a wife had a limited ability to dispose of her paraphernalia, chattels in her possession not forming part of the matrimonial property, and she could make a will of other personalty with her husband's consent.[787] Ultimately, the civilian view that a husband's consent was not essential for a wife's ability to make a will prevailed over the common lawyers and English law extinguished the custom.[788] However, English law only permitted a feme covert the same property rights as feme sole after the decline of the civilian profession and its unlikely their view influenced this outcome.[789] Nonetheless, it highlights the value of the civil law to furnish principles that are relevant to societal developments considered modern.

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of Property Arising from the Relation Between Husband and Wife, second edition, volume 1, (Joseph Butterworth and Son, London 1826) at 2; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 9; P. Vines, "Land and Royal Revenue: The Statute for the Explanation of the Statute of Wills, 1542 - 1543" (1997) 3 (1) *Australian Journal of Legal History*, 113 at 113; M.C. Mirow, "Monks and Married Women: The Use of the Yearbooks defining Testamentary Capacity in the Sixteenth and Seventeenth-Century Readings on Wills" (1997) 65 (1) *Tijdschrift voor Rechtsgeschiedenis*, 19 at 23.

[786] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 404; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 61

[787] *Reformatio Legum Ecclesiasticarum* 27.7; Cod. 9.34.4; Dig. 32.1.41; Anon (1478) Y.B. Mich. 18 Edw. IV, fo. 11 pl. 4 in J. Baker, *Baker and Milsom's Sources of English Legal History: Private Law to 1750*, second edition (Oxford University Press, Oxford 2010) at 10; *Scammell v Wilkinson* (1802) 2 East. 552 at 556; 102 Eng. Rep. 481 at 482; *Lord Hastings v Sir Archibald Douglas* 1 Cro. Car. 343 at 345; 79 Eng. Rep. 901 at 902; R. F. Atherton, "Expectation was out Right: Testamentary Freedom in the Position of Woman in 19th Century New South Wales" (1988) 11(1) *University of New South Wales Law Journal*, 133 at 135; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 26- 27; R. H. Helmholz, "Married Woman's Wills in Later Medieval England" in S. S. Walker (ed), *Wife and Widow in Medieval England* (Michigan University Press, Michigan 1997) at 166; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 135; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 543; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 403; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 88; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 63; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 908; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 498; R. Grey, *A System of English Ecclesiastical Law*, fourth edition, (Printed by Henry Lintot, Savoy 1743) at 153.

[788] J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at 81; R. H. Helmholz, "Married Woman's Wills in Later Medieval England" in S. S. Walker (ed), *Wife and Widow in Medieval England* (Michigan University Press, Michigan 1997) at 166; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 543.

[789] Married Women's Property Act 1882, s 3; M. Baker, *Families, Labour and Love: Family Diversity in a Changing World* (UBC Press, Vancouver 2001) at 184; R. F. Atherton, "Expectation was out Right: Testamentary Freedom in the Position of Woman in 19th Century New South Wales" (1988) 11(1) *University of New South Wales Law Journal*, 133 at 155.

New Zealand law requires a person to possess sufficient *animus testandi* to make a valid will, which recognises those labouring under some form of mental incapacity cannot manifest sufficient intent.[790] The question of mental capacity is a major subject touching all facets of English law and its courts unanimously held a person is unable to make a will without it.[791] Dr. Richardson notes a will-maker below the age of eighteen can now make a will with approval from the court if they demonstrate sufficient understanding that they are making a will.[792] The *ius commune* disqualified *impubes* from engaging in a number of legal activities, including will making, because their youth presumed an absence of sound judgement and discretion as prescribed by natural law.[793] C 3, q 7, c 1 states an *impubes* lacked sufficient judgement in legal relations. This protects *impubes* by recognising the vulnerability of their position and accommodating the principle that their misjudgements ought not to have the same legal ramifications as adults.[794] The *Corpus Iuris Canonici* related the question of age sufficient to make a will with its inherent jurisdiction over matrimonial sources to conclude that marital and testamentary capacity are benefits afforded to *pubes*.[795] The evidence suggests the *ius commune* association with testamentary capacity and an age sufficient to

[790] Wills Act 2007, s 9 (3) (d); N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 368.
[791] 34 & 35, Hen. VIII, c 5; Bracton, G. E. Woodbine (ed), S. E. Thorne (trans), *De legibus et consuetudinibus Angliae*, volume 2, (Harvard University Press, Cambridge, 1968 – 1977) at 59; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 402; L. Shelford, *Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of Unsound Mind with an Appendix of the Statutes of England, Ireland, and Scotland, Relating to Such Persons; and Precedents and Bills of Costs*, (J. S. Littell, Philadelphia 1833) at 174; C. J. Reid, P*ower over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon law*, (Wm B. Eerdmans Publishing Co, Grand Rapids 2004) at 155; M.C. Mirow, "Monks and Married Women: The Use of the Yearbooks defining Testamentary Capacity in the Sixteenth and Seventeenth-Century Readings on Wills" (1997) 65 (1) *Tijdschrift voor Rechtsgeschiedenis*, 19 at 23.
[792] Wills Act 2007, s 9 (3) (d); N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 368.
[793] Henrician Canons, 31.3; Dig. 22.6.10; Bernard's *Summa Decretalium* 3.22.4; Goffredus de Trano*, Summa Super Titulis Decretalium* (Neudruck Der Ausgabe Lyon, 1519) at 143; J. F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphanotrophei, Halae Magdeburgicae 1769) at 405; *R v Samuel Hill* (1851) 2 Den. 254 at 259; 169 Eng. Rep. 495 at 497; R. Wooddesson, *Lectures on the Law of England*, volume 1, (John S. Littell, Philadelphia 1842) at 226; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 44; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 124, 289; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 47.
[794]C 15, q 1, c 2; X. 5. 23.1; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 47; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 55.
[795] X. 4.1.1; X. 4.1.3; Sext. 4.2; R. H. Helmholz, "Children's rights and the Canon Law: Law and Practice in later Medieval England", (2007) 67 (1) *The Jurist,* 39 at 45; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 44; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 127; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 78

marry persists in New Zealand law. The Wills Act 2007 allows a minor to make a will if they are married or in an analogous relationship.[796]

The English ecclesiastical courts applied the civilian definition of minority to the canonical will provided by Ulpian who states an *impubes* who is *sui iuris* is able to make a will upon reaching the age of puberty, which is set at the age of fourteen for males and twelve for females.[797] Furthermore, a person *impubes* could not make a will because they were also incapable of appointing an heir.[798] Gaius poignantly observes that this rule is one of the rare instances where the law benefitted females before males.[799] This age, young by modern standards, accommodates the reality that over fifty percent of people were *sui iuris* before reaching majority.[800] The common law furnished a distinct age of majority that recognised a minor under the feudal wardship did not have free administration of their affairs until they

[796] Wills Act 2007, s 10; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 368; N. Peart "Where there is a Will, There is a Way - A New Wills Act for New Zealand" (2007) 15 (1) *Waikato Law Review*, 26 at 28 – 29.

[797] Cod. 6.22.4; Dig. 28.1.5; Henrician Canons, 31.1; *Reformato Legum Ecclesiasticarum*. 27.7, 31.4; *Bishop v Sharp* (1704) 2 Vern 469 at 469; 23 Eng. Rep. 902 at 902; J. Perkins, M. Walbanck (trans), *A profitable book of Mr. John Perkins*, (Printed for Matthew Walbanck, London 1657) at 189 Press, New York 1998) at 89; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 257; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 389; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 44; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 23; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 567; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records* (Lochin Publishing, Dursley 1992) at 49; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 23; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 239 - 240; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 50; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 5; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 54; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 908; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 545; R. H. Helmholz, *Marriage Litigation in Medieval England*, (Cambridge University Press, Cambridge 1974) at 98; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 497

[798] T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 257 – 258; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 143.

[799] Gaius 2.113 see Dig. 1.5.9.

[800] E. Champlin, *Final Judgments, Duty and Emotion in Roman Wills, 200 BC – A.D. 250*, (University of California Press, Berkeley and Los Angeles, 1991) at 105; R. P. Saller, *Patriarchy, Property and Death in the Roman Family* (Cambridge University Press, Cambridge 1994) at 160; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 326.

reached twenty-one years.[801] The Explanation to the Statue of Wills enacted a separate age of testamentary capacity of twenty-one years, in favour of the common law, for a will-maker devising real property that existed alongside the existing puberty requirement for wills of personal property.[802] Swinburne suggests the common law preferred eighteen years as the proper age to make a will of personal property.[803] However, the ecclesiastical courts had proper jurisdiction to determine sufficient age to make a will for personalty.[804] In *Hyde v Hyde*[805], Chancery followed the ecclesiastical courts application of the civil law and followed the rule that a person eligible to marry possesses testamentary capacity.[806] The distinction persisted until s 3 of the Wills Act 1837 unified the age requirements by settling on twenty-one years, favouring the common law definition, as the sufficient age of capacity for both sexes.[807] In 1969, New Zealand followed English law and changed the general age of

[801] Bracton, G. E. Woodbine (ed), S. E. Thorne (trans), *De legibus et consuetudinibus Angliae*, volume 2, (Harvard University Press, Cambridge, 1968 – 1977) at 35, 51; C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property*, seventh edition, (Sweet & Maxwell, London, 2008) at 25; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 23; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 239.

[802] 34 & 35 Hen. VIII, c. 5; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 47; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 567; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 82; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 127; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 5; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 908; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 545; C. St. Germain, W. Muchell (ed), *The Doctor and Student or Dialogues between a Doctor of Divinity and a Student in the Laws of England Containing the Grounds of Those Laws Together with Questions and Cases concerning the Equity Thereof Revised and Corrected* (Robert Clarke & Co, Cincinnati, 1874) at 60.

[803] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 75; see R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 53.

[804] J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 44; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 240; L. Shelford, *Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of Unsound Mind with an Appendix of the Statutes of England, Ireland, and Scotland, Relating to Such Persons; and Precedents and Bills of Costs*, (J. S. Littell, Philadelphia 1833) at 196; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 497.

[805] (1711) Pre. Ch. 316; 24 Eng. Rep. 149.

[806] (1711) Pre. Ch. 316 at 316; 24 Eng. Rep. 149 at 149; *Bishop v Sharp* (1704) 2 Vern 469; 23 Eng. Rep. 902; W. Blackstone, *Commentaries on the Laws of England*, volume 1, (Clarendon Press, Oxford 1765) at 424 see R. H. Helmholz, *Marriage Litigation in Medieval England*, (Cambridge University Press, Cambridge 1974) at 98

[807] T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 264; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records* (Lochin Publishing, Dursley 1992) at 49; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 83; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press,

capacity to eighteen years that remains in the present Act.[808] The common thread underlying each age of testamentary capacity is that the law will grant it at a sufficient age when the law deems a person is able to demonstrate sound judgement and discretion.

English and New Zealand law agrees with the civil law requirement that testators must have a sound mind to make a valid testament.[809] Will-makers were also aware of this principle and often assured the reader by thanking God at the beginning of their wills for leaving them with a sound and disposing memory.[810] Civilians followed Dig. 28.1.2 that states: "In the cases of someone who is making his will, at the time when he makes the will, soundness of mind is required, not health of body".[811] Therefore, a sick person can make a will *in extremis* provided they had a sound and disposing mind, which allowed them to make a will on their own or through the interrogation of another.[812] However, a person on their deathbed risked suffering from delusions that could render them unable to make effective dispositions.[813] The

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Philadelphia 1935) at 127; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 26; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 55; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 908; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 545.

[808] Family Law Reform Act 1969, s 1; Wills Amendment Act 1969, s 2; see Age of Majority Act 1970, s 4 (1); A. Iwobi, *Essential Succession*, second edition, (Cavendish Publishing Limited, London 2001) at 53.

[809] Inst. 2.12.1; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 214; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 118; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 76; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 297; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 60; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 368; W. G. H. Cook, "Wills of Lunatics" (1920) 2 (3) *Journal of Comparative Legislation and International Law, Third Series* 317 at 321.

[810] J. G. Nichols, J. Bruce (eds), *Wills from Doctors Commons: A Selection from the Wills of Eminent Persons proved in the Prerogative Court of Canterbury 1495 – 1695* (Printed for the Camden Society, London 1863) at 73 (Will of Sir Francis Drake, 1595), 80 (Will of Isaac Casaubon,1614), 83 (Will of Isaac Oliver, 1617), 87 (Will of John Davies, 1618), 92 (Will of Hugh Middleton, 1631), 99 (Will of John Hampden, 1636).

[811] Cod. 6.22.3; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 213; A. Watson, *The Law of Succession in the Later Roman Republic*, (Clarendon Press, Oxford 1971) at 24; L. Shelford, *Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of Unsound Mind with an Appendix of the Statutes of England, Ireland, and Scotland, Relating to Such Persons; and Precedents and Bills of Costs*, (J. S. Littell, Philadelphia 1833) at 175; W. G. H. Cook, "Wills of Lunatics" (1920) 2 (3) *Journal of Comparative Legislation and International Law, Third Series* 317 at 321; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 497.

[812] Dig. 28.1.17; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 81; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 111 -112; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 906.

[813] Dig. 28.1.17; W. Assheton, *A Theological Discourse of Last Wills and Testaments*, (Printed for Brab, Aylmer, London 1696) at 5; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 89.

canon law advises that the will-maker manifesting a deliberate and disposing mind will consider whom they ought to favour, their dependents and relatives, and the value and condition of their property.[814] Ecclesiastical courts referred to both the common law and civilian sources to determine whether a person possessed a sound memory.[815] In *Andrews v Powis*[816], the High Court of Delegates stated the test is whether the deceased had sufficient *animus testandi* indicative of a sound mind to make a will.[817] The term *animus testandi* itself appears to be an innovation of English practice deriving from Hellenic rather than Roman sources.[818] In *Ex Parte Barnsley*[819], the Lord Chancellor identified the distinct classes of *insanitas mentis*, or 'lunatic', and *infirmitas mentis* or 'idiot' formed a single classification of people unable to make a will because both lacked a sound and disposing mind.[820] Civilians clearly distinguished an idiot *infirmitas mentis* from the lunatic *insanitas mentis* with the ability to possess lucid intervals.[821] Furthermore, the common law classified these people under the general term *non compos mentis*, which included people who lost capacity by accident or resulting from voluntary actions, and held them unable to make valid devises or bequests.[822] Nonetheless, these distinctions resulted in a general principle in New Zealand law that a person must have the capacity to manifest sufficient testamentary intent.[823]

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[814] J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 136; J. G. Phillimore, *Principles and Maxims of Jurisprudence*, (J. W. Parker and Son, London, 1856) at 46 – 47; see N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 370

[815] *Kinleside v Harrison* (1818) 2 Phill. Ecc. 449 at 534; 161 Eng. Rep. 1196 at 1223; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 48; L. Shelford, *Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of Unsound Mind with an Appendix of the Statutes of England, Ireland, and Scotland, Relating to Such Persons; and Precedents and Bills of Costs*, (J. S. Littell, Philadelphia 1833) at 174.

[816] (1728) 1 Lee 242; 161 Eng. Rep. 90.

[817] (1728) 1 Lee 242 at 247, 248; 161 Eng. Rep. 90 at 92, 93.

[818] B. Beinart, "Some Aspects of Privileged Wills" [1959] *Acta Juridica*, 200 at 200.

[819] (1744) 3 ATK 168; 26 Eng. Rep. 899.

[820] (1744) 3 ATK 168 at 171; 26 Eng. Rep. 899 at 900.

[821] Dig. 28.1.6.1; Cod. 5.70.6; *Frasier v Progers*, Skinner 177 at 177; 90 Eng. Rep. 82 at 82; *Dew v Clark* (1826) 3 Add. 79 at 92; 162 Eng. Rep. 415; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 115; L. Shelford, *Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of Unsound Mind with an Appendix of the Statutes of England, Ireland, and Scotland, Relating to Such Persons; and Precedents and Bills of Costs*, (J. S. Littell, Philadelphia 1833) at 185.

[822] *Frasier v Progers*, Skinner 177; 90 Eng. Rep. 82; *Beverley's Case* 4 Co. Rep. 123b at 124b; 76 Eng. Rep. 1118 at 1121; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 26; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 99; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 140; L. Shelford, *Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of Unsound Mind with an Appendix of the Statutes of England, Ireland, and Scotland, Relating to Such Persons; and Precedents and Bills of Costs*, (J. S. Littell, Philadelphia 1833) at 2, 178; J. Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, ninth edition, volume 1 (Boston: C.C. Little and J. Brown, Boston 1866) at 221; J. H. B. Browne, *The Medical Jurisprudence of Insanity*, second edition, (Lindsay & Blakiston, Philadelphia 1876) at 45; W.

The first category of those *insanitas mentis* includes people suffering from insanity or a disorder of the mind who are unable to make a valid will because they do not understand their actions despite reaching full age.[824] The foremost civil law principle, Inst. 2.12.1 provides a person classed as *furiosi* does not possess capacity to make a valid testament, having only *testamenti factio passiva*, unless their disability occurred after they made their will.[825] Civilians classified people suffering insanity into distinct categories: those who were permanently insane that never possessed or lost their reasoning, and those suffering from a temporary affliction, particularly intoxication or sleep deprivation, resulting in delirium.[826] A will executed during either form of insanity is invalid and does not become valid if the will-maker recovers.[827] Nevertheless, the civil law recognised wills were valid if insanity occurred after making the testament.[828] The *ius commune* and English law disqualified *furiosi* from engaging in legal transactions without the supervision of their curators because of their

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Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 497.

[823] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 368.

[824] *Dew v Clark* (1826) 3 Add. 79 at 92; 162 Eng. Rep. 415; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 76; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 44; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 128; J. F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphanotrophei, Halae Magdeburgicae 1769) at 405; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 6.

[825] Dig. 28.1.16.1; Dig. 50.17.40; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 56.

[826] *Wheeler v Alderson* (1831) 3 Hagg. Ecc. 574 at 602; 162 Eng. Rep. 1268 at 1280; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 83; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 135; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 139; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 8; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 57; L. Shelford, *Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of Unsound Mind with an Appendix of the Statutes of England, Ireland, and Scotland, Relating to Such Persons; and Precedents and Bills of Costs*, (J. S. Littell, Philadelphia 1833) at 175; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 906; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 392.

[827] Dig. 28.1.17; Dig. 28.1.20.4; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 76; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 116; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 8.

[828] Inst. 2.12.1; Dig. 28.1.6.1; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 130.

vulnerability.[829] Inst. 2.12.1 compares people who are *furiosi* to *inpubes* because both lack sound judgement.[830] C 3, q 7, c 1 makes the same observation and C 32, q 7, c 26 forbade *furiosi* from contracting marriage suggesting early canonists recognised the civil law principles concerning testamentary capacity prior to the formation of the canonical will.[831] English law required something more than the presence of eccentricity, childishness, debauchery, alcoholism, depression, paranoia, and great irritability to establish insanity.[832] The *ius commune* denied prodigals *testamenti factio*, alongside *furiosi*, because they lacked the ability to manage their own financial affairs.[833] However, English law never placed a prodigal under this disability and granted them capacity despite their impairment.[834]

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[829] Cod. 5.70.6.1; C 16, q 1, c 40; *Reformatio Legum Ecclesiasticarum* 27.7; *Beverley's Case* 4 Co. Rep. 123b at 125b; 76 Eng. Rep. 1118 at 1123; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 57, 119; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 76; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 124.

[830] G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 390; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 143; J. Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, ninth edition, volume 1 (Boston: C.C. Little and J. Brown, Boston 1866) at 216.

[831] X. 4. 1.24; Bernard's *Summa Decretalium* 3.22.4; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 134; W. Blackstone, *Commentaries on the Laws of England*, volume 1, (Clarendon Press, Oxford 1765) at 426.

[832] *Groom v Thomas* (1829) 2 Hagg. Ecc. 433 at 443; 162 Eng. Rep. 914 at 917; *Wheeler v Alderson* (1831) 3 Hagg. Ecc. 574 at 599, 602; 162 Eng. Rep. 1268 at 1278, 1280; *Avrey v Hill* (1823) 2 Add. 206 at 209 - 210; 162 Eng. Rep. 269 at 270 - 271; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 48; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 224; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 162; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 8; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 60; W. G. H. Cook, "Wills of Lunatics" (1920) 2 (3) *Journal of Comparative Legislation and International Law, Third Series* 317 at 319.

[833] Inst. 1.23.3; Inst. 2.12.2; Cod. 5. 70; Bernard's *Summa Decretalium* 3.22.4; Goffredus de Trano*, Summa Super Titulis Decretalium* (Neudruck Der Ausgabe Lyon, 1519) at 143; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 110; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 214; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 224; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 118; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 297; L. Shelford, *Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of Unsound Mind with an Appendix of the Statutes of England, Ireland, and Scotland, Relating to Such Persons; and Precedents and Bills of Costs*, (J. S. Littell, Philadelphia 1833) at 167.

[834] *Ex Parte Barnsley* (1744) 3 ATK 168 at 172; 26 Eng. Rep. 899 at 901; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 110; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 297; L. Shelford, *Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of Unsound Mind with an Appendix of the Statutes of England, Ireland, and Scotland, Relating to Such Persons; and Precedents and Bills of Costs*, (J.

The civil law recognised the validity of testaments commenced and completed during a lucid interval occurring between bouts of insanity because the testator could exercise full management of their affairs.[835] Inst. 2.12.1 provides:

> "A person under the age of puberty is incapable of making a will, because he has no judgement, and so too is a lunatic, because he has lost his reason; and it is immaterial that the one reaches the age of puberty, and the other recovers his faculties, before his decease. If, however, a lunatic makes a will during a lucid interval, the will is deemed valid, and one is certainly valid which he made before he lost his reason: for subsequent insanity never avoids a duly executed testament or any other disposition validly made."

In *Cartwright v Cartwright*[836], the Prerogative Court of Canterbury provided an authoritative judgement concerning the significance of this principle on English law.[837] In this case, Sir Wynne pronounced the validity of a will made by a woman restrained and institutionalised due to ferocious bouts of insanity because she executed it during a lucid interval with the permission of her doctor.[838] Sir Wynne states, "I take it the rule of the law of England is the

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S. Littell, Philadelphia 1833) at 168; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 541.

[835] *Reformatio Legum Ecclesiasticarum,* 27.7; Cod. 6.22.9.1; Cod. 5.70.6; Goffredus de Trano*, Summa Super Titulis Decretalium* (Neudruck Der Ausgabe Lyon, 1519) at 143; *Wheeler v Alderson* (1831) 3 Hagg. Ecc. 574 at 599; 162 Eng. Rep. 1268 at 1278; *Sutton v Sadler* (1857) 3 C.B. (N.S.) 87 at 91; 140 Eng. Rep. 671 at 673; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 76 – 77; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 24; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 118; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 45; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 214; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 297; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 120; L. Shelford, *Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of Unsound Mind with an Appendix of the Statutes of England, Ireland, and Scotland, Relating to Such Persons; and Precedents and Bills of Costs*, (J. S. Littell, Philadelphia 1833) at 187; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 390; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 224; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 128; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 56.

[836] (1793) 1 Phill. Ecc. 90; 161 Eng. Rep. 923.

[837] Phillimore (ed) in (1809) 1 Phill. Ecc. 90; 161 Eng. Rep. 923.

[838] (1793) 1 Phill. Ecc. 90 at 96; 161 Eng. Rep. 923 at 925; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 126; R. Burn, R.

rule of the civil law as laid down in the second book of the *Institutes* (Inst. 2.12) and this is without doubt".[839] The common law agreed with the *ius commune* that a *non compos mentis* lacked the capacity to devise real property except during a lucid interval.[840]

The presumption that the will-maker possessed testamentary capacity if the will was properly executed and rational on its face guided the ecclesiastical practice that placed the onus of proving otherwise on the person alleging insanity.[841] The test remained that a disposing mind is one able to understand the process of making a will, the extent of their property, and the claims of others to avoid an inofficious will according to the civil law.[842] In *Dew v Clark*[843], the learned ordinary held that delusions concerning a particular subject, in this case concerning the will-maker's daughter whom he owed natural affection, were indicative of

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Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 58.

[839] (1793) 1 Phill. Ecc. 90 at 99; 161 Eng. Rep. 923 at 926; *Sutton v Sadler* (1857) 3 C.B. (N.S.) 87 at 90; 140 Eng. Rep. 671 at 673; L. Shelford, *Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of Unsound Mind with an Appendix of the Statutes of England, Ireland, and Scotland, Relating to Such Persons; and Precedents and Bills of Costs*, (J. S. Littell, Philadelphia 1833) at 185; A. N. Localizado, *Modern Probate of Wills, Containing an Analysis of the Modern Law of Probate in England and America, with Numerous References to the English and American Cases, and Copious Extracts from the Leading Cases*, (Charles C Little and James Brown, Boston 1846) at 102.

[840] Bracton, G. E. Woodbine (ed), S. E. Thorne (trans), *De legibus et consuetudinibus Angliae*, volume 2, (Harvard University Press, Cambridge, 1968 – 1977) at 51, 61; *Britton* 2.3.5; *Beverley's Case* 4 Co. Rep. 123b at 126a; 76 Eng. Rep. 1118 at 1124; *Pawlett Marquess of Winchester's* Case 6 Co. Rep. 23a at 23b; 77 Eng. Rep. 287 at 288; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 255; T. M. Wentworth, *The Office and Duty of Executors*, (Printed by the Assigns of Richard and Edward Atkins, London 1589) at 21; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 390; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 531; J. H. B. Browne, *The Medical Jurisprudence of Insanity*, second edition, (Lindsay & Blakiston, Philadelphia 1876) at 45.

[841] *Sutton v Sadler* (1857) 3 C.B. (N.S.) 87 at 90; 140 Eng. Rep. 671 at 673; *Wheeler v Alderson* (1831) 3 Hagg. Ecc. 574 at 588; 162 Eng. Rep. 1268 at 1234; *Cartwright v Cartwright* (1793) 1 Phill. Ecc. 90 at 100, 101; 161 Eng. Rep. 923 at 927; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 25; H. Swinburne *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 77 - 78; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 403; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 143; L. Shelford, *Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of Unsound Mind with an Appendix of the Statutes of England, Ireland, and Scotland, Relating to Such Persons; and Precedents and Bills of Costs*, (J. S. Littell, Philadelphia 1833) at 174; A. N. Localizado, *Modern Probate of Wills, Containing an Analysis of the Modern Law of Probate in England and America, with Numerous References to the English and American Cases, and Copious Extracts from the Leading Cases*, (Charles C Little and James Brown, Boston 1846) at 102 see Dig. 18.3.2.

[842] *Harwood v Baker* (1840) 3 Moore 282; 13 Eng. Rep. 117; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 902; J. H. B. Browne, *The Medical Jurisprudence of Insanity*, second edition, (Lindsay & Blakiston, Philadelphia 1876) at 23.

[843] (1826) 3 Add. 79; 162 Eng. Rep. 410.

partial insanity or monomania, was enough to render the dispositions invalid.[844] In *Banks v Goodfellow*[845], Cockburn CJ noted the common and civil laws did not recognise the difference between total and partial unsoundness indicating it is an ecclesiastical distinction.[846] However, the burden of proof shifts if the ordinary accepts the will-maker suffers from insanity because the presumption is they always lacked capacity unless those propounding the will demonstrate its execution occurred during a lucid interval.[847] In *Kemble v Church*[848], Sir Nicholl stated the Prerogative Court favoured the evidence of disinterested medical professionals when establishing the sanity of the will-maker or a lucid interval.[849] Nonetheless, an ordinary presented with a will made during a lucid interval may examine the contents of the will to determine whether the will-maker has made wise dispositions or engaged in folly, and the onus rests on the party alleging its existence, although they do not need to prove it according to strict medical terms.[850]

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[844] (1826) 3 Add. 79 at 205; 162 Eng. Rep. 414 at 454; see N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 373; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 170; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 59; L. Shelford, *Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of Unsound Mind with an Appendix of the Statutes of England, Ireland, and Scotland, Relating to Such Persons; and Precedents and Bills of Costs*, (J. S. Littell, Philadelphia 1833) at 188, 193; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 904; W. G. H. Cook, "Wills of Lunatics" (1920) 2 (3) *Journal of Comparative Legislation and International Law, Third Series* 317 at 320; J. H. B. Browne, *The Medical Jurisprudence of Insanity*, second edition, (Lindsay & Blakiston, Philadelphia 1876) at 254; S. Blumenthal, "The Deviance Of The Will: Policing The Bounds Of Testamentary Freedom In Nineteenth-Century America" (2006) 119 (4) *Harvard Law Review*, 960 at 983.

[845] (1870) 5 Q.B. 549.

[846] (1870) 5 Q.B. 549 at 561; N. Richardson, "Testamentary Capacity in New Zealand" [2010] *International Family Law*, 279 at 279.

[847] *R v Samuel Hill* (1851) 2 Den. 254 at 260; 169 Eng. Rep. 495 at 497; *Sutton v Sadler* (1857) 3 C.B. (N.S.) 87 at 90; 140 Eng. Rep. 671 at 673; *White v Driver* (1809) 1 Phill. Ecc. 84 at 88; 161 Eng. Rep. 922 at 923; J. H. B. Browne, *The Medical Jurisprudence of Insanity*, second edition, (Lindsay & Blakiston, Philadelphia 1876) at 541.

[848] (1830) 3 Hagg. Ecc. 273; 162 Eng. Rep. 1156.

[849] (1830) 3 Hagg. Ecc. 273 at 276; 162 Eng. Rep. 1156 at 1157; *White v Driver* (1809) 1 Phill. Ecc. 84 at 89; 161 Eng. Rep. 922 at 923; *Hurst v Beach* (1820) 5 Madd 351 at 360; 56 Eng. Rep. 929 at 932; *Gingell v Horne* (1839) 9 Sim 539 at 540; 59 Eng. Rep. 466 at 446; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 133.

[850] *Banks v Goodfellow* (1870) 5 Q.B. 549 at 570; *White v Driver* (1809) 1 Phill. Ecc. 84 at 87; 161 Eng. Rep. 922 at 922; *Sutton v Sadler* (1857) 3 C.B. (N.S.) 87 at 91; 140 Eng. Rep. 671 at 673; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 79; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 390; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 24; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 297; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 91 – 93, 125; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 57; L. Shelford, *Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of Unsound Mind with an Appendix of the Statutes of England, Ireland, and Scotland, Relating to Such Persons; and Precedents and Bills of Costs*, (J. S. Littell,

Banks v Goodfellow remains an authoritative starting point for New Zealand jurists and courts discussing testamentary capacity and the requirement that "will-makers must possess mental faculties with sufficient strength to fully comprehend the testamentary act about to be done".[851] The challenge of identifying whether a will-maker possesses a sound and disposing mind follows the civilian conclusion that capacity is a question of degree in each case and a lucid interval is a real possibility.[852] Furthermore, a civilian standard of inofficiousness remains *prima facie* evidence that a delusion may exist.[853] In *Banks,* Cockburn J lamented the absence of a definitive definition of insanity and stated:

> "The state of our own authorities being such as we have shown, we have turned to the jurisprudence of other countries, as on a matter of common juridical interest, to see whether we could there find any assistance towards the solution of the question. We have, however, derived but little advantage from the inquiry. The Roman law, the great storehouse of juridical science, is as vague and general on the subject as our own… The older jurists were content to say that an insane person was incapable of making a testament, because he has no mind, "quia mente caret," as it is said in the *Institutes* (Inst. 2.12.1) or because he could not have a will, and therefore was incapable of declaring his ultimate will as to the disposal of his property".[854]

Inst. 2.12.1 sought to provide a guiding principle that presumes insanity as a question of fact rather than seeking to establish a definition of insanity, which is part of the Roman genius of furnishing principles that continue to be relevant today.

Philadelphia 1833) at 186; A. N. Localizado, *Modern Probate of Wills, Containing an Analysis of the Modern Law of Probate in England and America, with Numerous References to the English and American Cases, and Copious Extracts from the Leading Cases*, (Charles C Little and James Brown, Boston 1846) at 102 at 103.

[851] *Banks v Goodfellow* (1870) 5 Q.B. 549 at 566; *Woodward v Smith* [2009] NZCA 215, [2009] BCL 494 at [19]; *S v W* CIV-2011-404-003775 at [9]; N. Richardson, "Testamentary Capacity in New Zealand" [2010] *International Family Law*, 279 at 279; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 371.

[852] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 373.

[853] *Dew v Clark* (1826) 3 Add. 79 at 205; 162 Eng. Rep. 414 at 454; *Banks v Goodfellow* (1870) 5 Q.B. 549 at 570; *Woodward v Smith* [2009] NZCA 215, [2009] NZCA 215, [2009] BCL 494 at [19]; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 91; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 373.

[854] *Banks v Goodfellow* (1870) 5 Q.B. 549 at 562- 563 see *R v Samuel Hill* (1851) 2 Den. 254 at 260; 169 Eng. Rep. 495 at 498.

The *ius commune* recognised a related mental incapacity arose from certain disabilities, rendering a person 'deaf and dumb', could leave a person incapable of manifesting a will or *animus testandi*.[855] C 3, q 7, c 1 compares this class of persons to *impubes* or *furiosi* because they lack judgement and a sound and disposing mind. The foremost principle in Inst. 2.12.3 provides:

> The deaf, again, and the dumb cannot always make a will, though here we are speaking not of persons merely hard of hearing, but of total deafness, and similarly by a dumb person is meant one totally dumb, and not one who merely speaks with difficulty; for it often happens that even men of culture and learning by some cause or other lose the faculties of speech and hearing. Hence relief has been afforded them by our constitution, which enables them, in certain cases and in certain modes therein specified, to make a will and other lawful dispositions. If a man, after making his will, becomes deaf or dumb through ill health or any other cause, it remains valid notwithstanding.

Cod. 6.22.10 distinguishes between people born with disabilities from those acquiring them in later life through accident or disease favouring the latter.[856] The term 'deaf and dumb' was a common reference to a person, whom the common law called 'idiot', suffering from a

[855] Dig. 21.1.1.7; Dig. 26.5.8.3; Cod. 6.22.10; Goffredus de Trano*, Summa Super Titulis Decretalium* (Neudruck Der Ausgabe Lyon, 1519) at 143; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 531; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 49; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 34; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 8; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 393; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Capetown 1975) at 119; J. F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphanotrophei, Halae Magdeburgicae 1769) at 405; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 143; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 104.

[856] W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 591; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 531; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 45; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 34; E. R. Humpreys, *Manual of Civil Law: For the use of Schools, and more especially Candidates of the Civil Service*, (Longman, Brown, Green and Longmans, London 1854) at 103; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 110.

disability leaving them unable to speak and hear.[857] Dig. 28.1.6.1 summarised that a testament remained valid if the testator became 'deaf and dumb' after making it.[858]

A person who suffered from a disability could make a will if they manifested sufficient intelligence because the law only presumes they are incapable, and their incapacity was rebuttable by the degree of disability and the wisdom of the will propounded.[859] Civilians considered that the will-maker's 'simple-mindedness' was insufficient to classify someone as dumb provided they demonstrated an understanding of the purpose of their testamentary dispositions.[860] The test developed that a person could make a will provided they were able to count to twenty, identify their parents, recognise their assets, or discern damage from their misuse.[861] The ordinary did not inquire into the nature of the disability except by adding the

[857] *Reformatio Legum Ecclesiasticarum,* 27.5; Cod. 6.22.10; *Beverley's Case* 4 Co. Rep. 123b at 124b; 76 Eng. Rep. 1118 at 1122; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 79 – 80; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 591; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 24; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 531; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 104; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 795.

[858] Dig. 29.7.8.3; H. Swinburne, *A Treatise of Testaments and Last Wills* seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 96; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 795.

[859] *Reformatio Legum Ecclesiasticarum,* 27.7; Cod. 6.22.10.2; Cod. 6.22.10.5; Dig. 50.17.124; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 56; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 591; H. Swinburne, *A Treatise of Testaments and Last Wills* seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 80 - 81; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 531; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 25; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 109; L. Shelford, *Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of Unsound Mind with an Appendix of the Statutes of England, Ireland, and Scotland, Relating to Such Persons; and Precedents and Bills of Costs*, (J. S. Littell, Philadelphia 1833) at 174; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 900; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 129.

[860] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 403; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 80, 95; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 224; T. M. Wentworth, *The Office and Duty of Executors*, (Printed by the Assigns of Richard and Edward Atkins, London 1589) at 21; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 393.

[861] H. Swinburne, *A Treatise of Testaments and Last Wills* seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 79; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 25; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 105; E. Mitford, *The Law of Wills, Codicils and*

law is more likely to accept the capacity of people whose disability arose through accident to those who were disabled from birth.[862] Deafness or some other physical disability brought on by illness did not prohibit a person from making a will.[863] Nonetheless, Cod. 6.22.10.1 states a person who cannot speak and hear in later life might not possess testamentary capacity unless they can write their will or indicate it through gesture.[864] A person with a severe intellectual disability, for example an elderly person inflicted with extreme senility or dementia, did not possess testamentary capacity because sufficient understanding could not manifest.[865] In *Dew v Clark*, the ordinary distinguished between disability and insanity by stating the former did not propose ideas while the latter proposed extreme concepts.[866]

In *Moore c Paine*[867], the Prerogative Court of Canterbury noted the civil law added special provisions to facilitate the execution of wills for blind will-makers.[868] Cod. 6.22.8 states: "persons who are born blind or who become blind through sickness, may make a nuncupative will in the presence of seven witnesses who are lawfully qualified as witnesses of other wills, and in the presence of a notary".[869] The role of the notary, or an eighth witness, was to record

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Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees, (W. Stratford, London 1800) at 7; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 55.

[862] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 81, 95; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 26; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 224.

[863] Cod. 6.22.10.4; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 113.

[864] Cod. 6.22.10.5; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 96; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 224; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 287; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 907.

[865] *Kinleside v Harrison* (1818) 2 Phill. Ecc. 449 at 535; 161 Eng. Rep. 1196 at 1223; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 82; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 391; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 26; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 149, 154; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 497.

[866] (1826) 3 Add. 79 at 93; 162 Eng. Rep. 414 at 415.

[867] (1728) 2 Lee 595; 161 Eng. Rep. 452.

[868] (1728) 2 Lee 595 at 596; 161 Eng. Rep. 452 at 452.

[869] See Inst. 2.12.4; Cod. 6.22.8.2; *Fincham v Edwards* (1842) 3 Curt. 63 at 71; 163 Eng. Rep. 656 at 659; H. Swinburne, *A Treatise of Testaments and Last Wills* seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 96; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 49; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative

the will and read it back to the blind will-maker who acknowledged it in the presence of all witnesses as a true account of their testamentary intentions.[870] A minor change is the presence of an additional third witness to the canonical will replaced the function of the notary and eighth witness of the testament.[871] English courts accepted this principle without imposing the requirement that all witnesses must be present when the will-maker acknowledged their will.[872] However, in *Longchamp v Fish*[873], the court deemed a devise executed before three witnesses valid even though the will-maker confirmed it without attestation.[874] Heath J explicitly rejected the presence requirement in Cod. 6.22.8.1, referring to it as a superfluous requirement, and Chambre J suggested it interfered with the will-maker's right to have their dispositions a secret.[875] In *Fincham v Edwards*[876], the Prerogative Court of Canterbury also indicated English law departed from the civil law on this point and held that proof the blind will-maker confirmed an identical will at some time was sufficient.[877] New Zealand law agrees and only requires someone to read the will to the will-maker who then must state their

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Publishing Co, New York 1938) at 591, 595; E. Mitford, *The Law of Wills, Codicils and Revocations. With Plain and Familiar Instructions for Executors, Administrators, Devisees, and Legatees*, (W. Stratford, London 1800) at 8; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 74; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 129.

[870] Cod. 6.22.8.1; Cod. 6.22.8. 2; *Longchamp v Fish* (1807) 2 Bos & Pul (N. R.) 415 at 420; 127 Eng. Rep. 690 at 692; *Moore v Paine* (1728) 2 Lee 595 at 596; 161 Eng. Rep. 452 at 452; *Fincham v Edwards* (1842) 3 Curt. 63 at 71; 163 Eng. Rep. 656 at 659; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 119; H. Swinburne, *A Treatise of Testaments and Last Wills* seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 96; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 385; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 342; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 49; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 34; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 258; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 907.

[871] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 96.

[872] *Longchamp v Fish* (1807) 2 Bos & Pul (N. R.) 415 at 417; 127 Eng. Rep. 690 at 691; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 96; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 56; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 74; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 907; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 394.

[873] (1807) 2 Bos & Pul (N. R.) 415; 127 Eng. Rep. 690.

[874] (1807) 2 Bos & Pul (N. R.) 415 at 417; 127 Eng. Rep. 690 at 691.

[875] (1807) 2 Bos & Pul (N. R.) 415 at 420; 127 Eng. Rep. 690 at 692.

[876] (1842) 3 Curt. 63; 163 Eng. Rep. 656.

[877] *Fincham v Edwards* (1842) 3 Curt. 63; 163 Eng. Rep. 656.

approval of its contents.[878] Nevertheless, blind will-makers could benefit from an inclusion of nuncupative wills into testamentary succession to avoid any doubts.[879]

The tests for insanity and disability have merged in New Zealand and the principle in *Banks v Goodfellow* remains the starting point that requires a disabled will-maker to demonstrate sufficient testamentary capacity.[880] A more compassionate view to facilitate disabled people to leave wills emerged in late nineteenth century and the law recognised a person unintelligible to others might be inwardly intelligent even if their disability was congenital.[881] This view is poignant in modern New Zealand and modern jurists go to lengths to ensure disabled people can participate in testamentary activities. Dr. Richardson cites *Re O' Dwyer*[882] to state, "In the case of blind will-makers, the attesting witnesses must be in such a position that the will-maker could have seen them if not blind".[883] It is likely they could witness a nuncupative will or a written instrument in Braille. However, there is academic disagreement on their capacity to act as a witness to a written instrument.[884] The ecclesiastical courts reached an opposing view. In *Hudson v Parker*[885], Dr. Nicholl, reasoned a blind witness could not be a witness because they are incapable of acknowledging the presence of the will-maker's signature.[886] Sir Lushington agreed and held mere presence was insufficient attestation and a witness must be capable of witnessing the signing to acknowledge it.[887] He pronounced the will invalid because "the witnesses never saw, or indeed could see, the signature, of which there was no acknowledgment unless constructive".[888] Therefore, the view that a witness could have attested if they were not blind ignores the fact they are incapable of independently acknowledging certain acts and the decision of the ecclesiastical court ought to guide practice in New Zealand.

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[878] *Brown v Pourau* [1995] 1 NZLR 352 at 363 – 364.
[879] J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 112; N. Peart "Where there is a Will, There is a Way - A New Wills Act for New Zealand" (2007) 15 (1) *Waikato Law Review*, 26 at 33.
[880] *Brown v Pourau* [1995] 1 NZLR 362; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at 371.
[881] J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 108; see J. H. B. Browne, *The Medical Jurisprudence of Insanity*, second edition, (Lindsay & Blakiston, Philadelphia 1876).
[882] (1904) 7 GLR 64.
[883] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 357.
[884] A. Iwobi, *Essential Succession*, second edition, (Cavendish Publishing Limited, London 2001) at 34
[885] (1844) 1 Rob Eccl 14; 163 ER 948.
[886] (1844) 1 Rob Eccl 14 at 17; 163 ER 948 at 950.
[887] (1844) 1 Rob Eccl 14 at 37; 163 ER 948 at 957; see A. Iwobi, *Essential Succession*, second edition, (Cavendish Publishing Limited, London 2001) at 34.
[888] (1844) 1 Rob Eccl 14 at 40; 163 ER 948 at 957.

8. Privileged Wills

Privilege is legal recognition that certain individuals are conferred a special freedom or benefit outside the general law.[889] This usually takes the form of a positive privilege, or special rules, which permit a deviation from general principles.[890] Privileged wills are characterised by a minimum of formalities that recognise the special circumstances of the will-maker, executors, or beneficiaries.[891] Swinburne states executors and beneficiaries benefit from the privileged character of the will-maker rather than their own status.[892] Dig. 29.1.24 only required the will-maker to manifest testamentary intent for a privileged will to become operative.[893] Privileged wills usually receive a separate title in scholarly treatment from unprivileged dispositions.[894] Three major types of privileged will dominated testamentary succession in English law.[895] However, it has become modern policy to

[889] Dist 3, c 3; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 61; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 322; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 122; R. H. Helmholz "The Law Of Charity in the Ecclesiastical Courts" in P. Hoskin, C. Brooke, Barrie Dobson (eds.) *Studies in the history of Medieval religion: The Foundations of Mediaeval English Ecclesiastical History. Studies presented to David Smith*, (The Boydell Press, Woolbridge 2005) at Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 16.

[890] H. Swinburne, *A Treatise of Testaments and Last Wills,* seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 72; R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 156.

[891] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 62; Z. Hesse, R. Pawlowski, *Dissertatio Posterior: De Testamento ad Pias Causas*, volume 2, (Regiomonti, Konigsberg 1705) at 26; T. Weisst, "The Formalities of Testamentary Execution by Service Personnel" (1948) 33 (1) *Iowa Law Review* 48 at 48; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 18; R. Parker, "History of the Holograph Testament in the Civil Law" (1943) 3 (1) *The Jurist*, 1 at 2; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 386.

[892] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 62.

[893] B. Beinart, "Some Aspects of Privileged Wills" [1959] *Acta Juridica*, 200 at 201- 202.

[894] F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphannotrophei, Halae Magdeburgicae 1769) at 430; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 458.

[895] *Yelverton c Yelverton* (1588) The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 36; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 61; Z. Hesse, R. Pawlowski, *Dissertatio Posterior: De Testamento ad Pias Causas*, volume 2, (Regiomonti, Konigsberg 1705) at 34; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 15; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 16; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 46; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's

recognise military wills as the only kind of privileged instrument because charitable dispositions are conceptualised under the head of trust.[896] The Wills Act 2007 omits the term 'privilege' and prefers to use the expression 'informal wills' to describe this species of will.[897] There are no present cases on the 'informal will' indicating it is unclear how the courts will treat it.[898] Nonetheless, s 11 appears to have intended to capture the essence of the Wills Act 1837 that defines it as "a will which is expressed in any form of words whether written or spoken and which is not made in accordance with section 9 of the principal Act".[899] The hansard of the first reading reveals parliament aimed to restate the existing law.[900] Therefore, it appears unlikely parliament intended to repeal the substantial principles surrounding the privileged will and the term is still applicable.[901]

1. Military Wills

The privileged military will is, or ought to be, one of the most obvious examples of a civil law institution that has penetrated New Zealand law in the same manner as a number of other jurisdictions.[902] Most jurists freely acknowledge its importation from the civil law without reservation.[903] Dr. Helmholz declares it the clearest example of the civilian testamentary tradition in English law, although he adds jurists have altered the surrounding principles over many centuries to create a more uncertain modern definition.[904] Testamentary privileges to

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Law-Printer, for W. Owen near Temple Bar 1763) at 386; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 58.

[896] J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 459; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 122.

[897] Ss 33 – 38.

[898] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 385.

[899] Wills Amendment Act 1955, s 3.

[900] (10 October 2006) 624 NZPD at 19676 per Dr. Pita Sharples.

[901] W. Patterson (ed), A Tipping (ed) *The Laws of New Zealand, Will* (LexisNexis 2012, Wellington) at [65]; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [10.14].

[902] W. L. Summer, "Wills of Soldiers and Seamen" (1918) 2 (4) *Minnesota Law Review*, 273; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 219; A. N. Localizado, *Modern Probate of Wills, Containing an Analysis of the Modern Law of Probate in England and America, with Numerous References to the English and American Cases, and Copious Extracts from the Leading Cases*, (Charles C Little and James Brown, Boston 1846) at 529; F. C. Hutley, "Privileged Wills" (1949) 23 (2) *The Australian Law Journal*, 118 at 119.

[903] *Drummond v Parish* (1843) 3 Curt. 522 at 531; 163 Eng. Rep. 812 at 815; *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 136; 96 Eng. Rep. 1128; R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 148; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 158.

[904] R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 149, 158.

the soldiery are traceable to the *testamentum in procinctu*, itself a privileged form of *testamentum per comitia calata*.[905] Nonetheless, Ulpian attributes the first *testamentis militum* to a concession Julius Caesar gave to soldiers that developed during the Flavian and Antonine dynasties to form a privileged class of testament.[906] This 'indulgence' acknowledged the inexperience of soldiers in legal matters and recognised the peril of their occupation from constant exposure to life threatening situations.[907] Therefore, soldiers benefited from a number of privileges because their situations did not provide the opportunity of seeking the legal advice necessary to draft a valid testament.[908] These privileges permitted a soldier to make a will in any manner without the necessary formalities, and exempted them from a number of other rules and disqualifications.[909] Roman law had a long-standing acquaintance

[905] *Drummond v Parish* (1843) 3 Curt. 522 at 525; 163 Eng. Rep. 812 at 813; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 17; E. R. Humpreys, *Manual of Civil Law: For the use of Schools, and more especially Candidates of the Civil Service*, (Longman, Brown, Green and Longmans, London 1854) at 98.

[906] Dig. 29.1.1; *Drummond v Parish* (1843) 3 Curt. 522 at 532- 533; 163 Eng. Rep. 812 at 816; W. L. Summer, "Wills of Soldiers and Seamen" (1918) 2 (4) *Minnesota Law Review*, 261 at 261; A. G. Lang, "Privileged Will: The Dangerous Anachronism?" (1986) 8 (2) *University of Tasmania Law Review*, 166 at 167; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 75; R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 148; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 320; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 123; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 17; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 772; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 258; O. Tellegen Couperus, *A Short History of Roman law* (Routledge, Oxon 1993) at 87.

[907] Gaius. 2.109; Inst. 2.11; Dig. 29.1.1; W. L. Summer, "Wills of Soldiers and Seamen" (1918) 2 (4) *Minnesota Law Review*, 261 at 261; C. P. Sherman, "The Modernness of Roman military law" (1944) 24 (1) *Boston University Law Review*, 31 at 40; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 17; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 771; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 217; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 62.

[908] Cod. 6.21.3; Dig. 29.1.2; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 62; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 74; E. R. Humpreys, *Manual of Civil Law: For the use of Schools, and more especially Candidates of the Civil Service*, (Longman, Brown, Green and Longmans, London 1854) at 101; R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 150.

[909] Dig. 29.1.24; Cod. 6.21.15; Cod. 6.21.15.1; D. Gofredus, *Institutiones Iustiniani*, (Apud Iuntas, Venice 1621) at 224 gl.; C. P. Sherman, "The Modernness of Roman military law" (1944) 24 (1) *Boston University Law Review*, 31 at 40; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 258

with military wills before Justinian's reign and the civil law continued its developments with some limitations attached.[910]

There are suggestions the presence of a privileged military will was an unnecessary development in English law that is indicative from their notable absence from ecclesiastical records.[911] The *Liber Extragantium Decretalium* never furnished a separate privileged military will and Bernard's *Summa Decretalium* reveals that canonists drew upon civil law principles in this area.[912] English civilians were acquainted with privileged wills by the thirteenth century and armed the ecclesiastical courts with its principles despite its questionable utility.[913] The civil law permitted a soldier to make a privileged will once they had formally enrolled in the military.[914] Swinburne deviated from the civil law to fit the military testament into the English situation by dividing the English army into three sorts of soldier: armed soldiers, soldiers who are doctors of the law, and celestial soldiers.[915] He also noted that the armed solider must be in actual service and contends that the non-combatants connected to the army also benefitted from the privilege.[916] The civil law did not extend the

[910] Gaius. 2. 109; Gaius. 2.110; Gaius. 2.111; *Drummond v Parish* (1843) 3 Curt. 522 at 532- 533; 163 Eng. Rep. 812 at 816; W. L. Summer, "Wills of Soldiers and Seamen" (1918) 2 (4) *Minnesota Law Review*, 261 at 261; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 357; A. G. Lang, "Privileged Will: The Dangerous Anachronism?" (1986) 8 (2) *University of Tasmania Law Review*, 166 at 167.

[911] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 399; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 74; W. L. Summer, "Wills of Soldiers and Seamen" (1918) 2 (4) *Minnesota Law Review*, 261 at 262.

[912] Bernard's *Summa Decretalium* 3.22.3.

[913] *Lectura* in F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at 44; R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 149; T. E. Atkinson, "Soldier's and Sailor's Wills" (1942) 28 (11) *American Bar Association Journal* 753 at 753; A. G. Lang, "Privileged Will: The Dangerous Anachronism?", (1986) 8 (2) *University of Tasmania Law Review*, 166 at 167; W. L. Summer, "Wills of Soldiers and Seamen" (1918) 2 (4) *Minnesota Law Review*, 261 at 262.

[914] Cod. 6.21; Inst. 2.11; Dig. 29.1; Dig. 29.1.1.42; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 124.

[915] *Drummond v Parish* (1843) 3 Curt. 522 at 538; 163 Eng. Rep. 812 at 817; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 62; T. E. Atkinson, "Soldier's and Sailor's Wills" (1942) 28 (11) *American Bar Association Journal* 753 at 753; A. G. Lang, "Privileged Will: The Dangerous Anachronism?" (1986) 8 (2) *University of Tasmania Law Review*, 166 at 166

[916] *Drummond v Parish* (1843) 3 Curt. 522 at 538; 163 Eng. Rep. 812 at 817; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 63; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 454; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 259; T. E. Atkinson, "Soldier's and Sailor's Wills" (1942) 28 (11) *American Bar Association Journal* 753 at 754.

privilege to garrisoned soldiers.[917] The inclusion of soldiers who are doctors seems unusual because of their limited role to defend clients and their inclusion resulted in disagreement amongst contemporary writers touching their privilege.[918] Finally, Dig. 29.1.21 states a privileged will is valid for a year after the testator's discharge from the army before lapsing.[919] However, the English military will remained valid after discharge until the will-maker revoked it.[920]

The civil law furnished a number of principles demonstrating the significance of privilege on testamentary succession that did not form part of English jurisprudence. Firstly, it modified the rule concerning *testamenti factio* and allowed a soldier to make a will even if they were in another's *potestas*.[921] Furthermore, Inst. 2.11.2 even states, "a soldier too may make a will

[917] M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 125.
[918] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 64.
[919] Inst. 2.11.3; Cod. 6.21.5; Dig. 29.1.26; *Drummond v Parish* (1843) 3 Curt. 522 at 541; 163 Eng. Rep. 812 at 818; T. Weisst, "The Formalities of Testamentary Execution by Service Personnel" (1948) 33 (1) *Iowa Law Review* 48 at 49, 76; A. G. Lang, "Privileged Will: The Dangerous Anachronism?" (1986) 8 (2) *University of Tasmania Law Review*, 166 at 167; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 158; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 292; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 124; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 357; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 125; E. R. Humpreys, *Manual of Civil Law: For the use of Schools, and more especially Candidates of the Civil Service*, (Longman, Brown, Green and Longmans, London 1854) at 102; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 771; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 117; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 145; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 259 see Dig. 29.1.26.
[920] P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 219; A. G. Lang, "Privileged Will: The Dangerous Anachronism?" (1986) 8 (2) *University of Tasmania Law Review*, 166 at 176; W. L. Summer, "Wills of Soldiers and Seamen" (1918) 2 (4) *Minnesota Law Review*, 261 at 271; T. E. Atkinson, "Soldier's and Sailor's Wills" (1942) 28 (11) *American Bar Association Journal* 753 at 755; P. Critchley, "Privileged Wills and Testamentary Formalities: A Time to Die?" (1999) 58 (1) *The Cambridge Law Journal*, 49 at 50.
[921] Cod. 3.28.24; Dig. 29.1.11.1; Dig. 29.1.11.2; Dig. 29.1.12; Inst. 2.11.5; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 291 - 292; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 322; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 126; E. R. Humpreys, *Manual of Civil Law: For the use of Schools, and more especially Candidates of the Civil Service*, (Longman, Brown, Green and Longmans, London 1854) at 102.

though dumb and deaf" before they are discharged from service.[922] This inclusion appears unusual. English civilians followed the *ius gentium* to disqualify a solider without mental capacity.[923] However, the practical effect of the principle prevented a *querela inofficiosi testamenti* arising under the fiction that the testator suffered a delusion by passing over their heirs.[924] Dig. 5.2.8.4 did not permit an action arising for an undutiful military testament or revoke the testament from the birth of a posthumous child.[925] Furthermore, Cod. 6.21.10 allowed a soldier to silently disinherit a *sui et neccessarii* heir unless they did so unaware of a child's existence.[926] Cod. 6.21.12 even permitted the testator to leave legacies in excess of the Falcidian fourth, potentially depriving the heir from accruing any benefit, because the civil law endeavoured to support a soldier's wishes whenever they did not interfere with another's testamentary power.[927] Furthermore, a soldier could institute almost all people disqualified under general principles as an heir unless specifically prohibited or in an attempt to defraud creditors.[928]

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[922] Dig. 29.1.4; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 124; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 357; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 127; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 117; G. Campbell, *A Compendium of Roman Law: Founded on the Institutes of Justinian*, (The Lawbook Exchange, Clark 2008) at 63.

[923] G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 15; W. M. Gordon, *Succession* in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 87.

[924] Dig. 5.2.2; Dig. 5.2.8.4; Dig. 5.2.27.2; *Lectura* in F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at 44; F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphannotrophei, Halae Magdeburgicae 1769) at 117; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 321; W. M. Gordon, *Succession* in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 87; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 218.

[925] Cod. 6.21.5; Dig. 5.2.8.4; Dig. 29.1.7; Dig. 29.1.9; *Lectura* in F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at 44; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 357; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 218

[926] Dig. 29.1.7; Inst. 2.13.6; Dig. 29.1.36.2; *Lectura* in F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at 44; see Cod. 6.21.9.

[927] see Cod. 6.21.7; Cod. 6.21.11; Cod. 6.50.7; Dig. 29.1.18.

[928] Cod. 6.21.5; Dig. 29.1.13.2; Dig. 29.1.15; *Lectura* in F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at 44; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 321; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 16.

Civilians tailored the civil law principles to fit the requirements of English law to benefit all English will-makers in a manner that continues to form part of modern practice.[929] Inst. 2.11.1 provides that whenever a soldier makes their wishes known either in writing or by a nuncupative declaration, preferably before two witnesses as *species facti*, it becomes binding through force of intention.[930] Furthermore, Dig. 29.1.35 permitted incomplete drafts or oral declarations to operate as wills because it did not require form or subscription by witnesses.[931] Cod. 6.21.8 permitted the military testator to appoint an heir for a limited duration contrary to the maxim "once an heir always an heir".[932] Testators were also able to appoint an heir to part of the estate without making an appointment for the remainder, which resulted in a partial intestacy.[933] In *Broke, Offley et al c Barret*, the ecclesiastical court

[929] Dig. 29.1.15.4; Dig. 29.1.17.2; Dig. 29.1.41; *Lectura* in F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at 44; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 219; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 62; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 44; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 54; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 252; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 665.

[930] Dig. 29.1.24; *Prince v Hazleton* (1822) 20 Johns 502 at [9]; T. E. Atkinson, "Soldier's and Sailor's Wills" (1942) 28 (11) *American Bar Association Journal* 753 at 756; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 321; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 123; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 357; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 125; E. R. Humpreys, *Manual of Civil Law: For the use of Schools, and more especially Candidates of the Civil Service*, (Longman, Brown, Green and Longmans, London 1854) at 101; B. Beinart, "Some Aspects of Privileged Wills" [1959] *Acta Juridica*, 200 at 201.

[931] Hostiensis, *Summa Aurea*, Liber 3, (Venice 1574) at 1033; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 62; T. Rufner, "Testamentary formalities in Roman law" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 15; W. L. Summer, "Wills of Soldiers and Seamen" (1918) 2 (4) *Minnesota Law Review*, 261 at 271; T. E. Atkinson, "Soldier's and Sailor's Wills" (1942) 28 (11) *American Bar Association Journal*, 753 at 755 - 756; T. Weisst, "The Formalities of Testamentary Execution by Service Personnel" (1948) 33 (1) *Iowa Law Review* 48 at 49; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 158; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 291; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 771; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 145; B. Beinart, "Some Aspects of Privileged Wills" [1959] *Acta Juridica*, 200 at 201, 203.

[932] Dig. 29.1.15.4; Dig. 29.1.17.2; Dig. 29.1.41; *Lectura* in F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at 44; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 62.

[933] Dig. 29.1.6; Cod. 6.21.8; *Lectura* in F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at 44; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 291; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 321; M. A. Dropsie, *Roman Law of*

referred to Cod. 6.21.1 to state that a will-maker, analogous to a soldier, is not presumed to die partly intestate unless their wish to do so manifests.[934] Furthermore, an adoption of a previously invalid instrument by a privileged testator could make it valid in the same manner as a will-maker.[935]

English law adopted Justinian's most significant innovation to the Roman law that limited the privilege to soldiers on expedition.[936] The Emperor's rescript to the praetorian prefect reads:

> "In order that no one may think that soldiers may at any time whatever make their testaments in any manner they wish, we ordain that the aforesaid privilege in making testaments is extended only to those who are occupied in an expedition".[937]

The controversy this principle has created in a number of common law jurisdictions appears to be attributable to the expression "in actual military service" used in s 22 of the Statute of Frauds. The statute further complicated the issue by including "mariners or seaman at sea", acknowledging the significance of seafaring to English expansion, departing from Dig. 37.13.1.1, which only extended the privilege to naval personnel.[938] Nonetheless, the statute

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Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes), (T. & J.W. Johnson & Co, Philadelphia 1892) at 123; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 126; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 117; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 218; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 54.

[934] *Broke, Offley et al c Barret* (1584) The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 24; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 665; T. Rufner, "Testamentary formalities in Roman law" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 10.

[935] Inst. 2.11.4.

[936] Inst. 2.11; Inst. 2.11.3; D. Gofredus, *Institutiones Iustiniani*, (Apud Iuntas, Venice 1621) at 224 gl; Hostiensis, *Summa Aurea*, Liber 3, (Venice 1574) at 1033; *Drummond v Parish* (1843) 3 Curt. 522 at 534- 536; 163 Eng. Rep. 812 at 816 - 817; T. Weisst, "The Formalities of Testamentary Execution by Service Personnel" (1948) 33 (1) *Iowa Law Review* 48 at 49; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 21; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 217.

[937] Cod. 6.21.17 see Dig. 29.1.21; F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphannotrophei, Halae Magdeburgicae 1769) at 429.

[938] W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 772; T. E. Atkinson, "Soldier's and Sailor's Wills" (1942) 28 (11) *American Bar Association Journal* 753 at 754; T. Weisst, "The Formalities of Testamentary Execution by Service Personnel" (1948) 33 (1) *Iowa Law Review* 48 at 63; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death*

made no substantive changes to the principles surrounding their privilege and retained the power to make nuncupative dispositions despite their growing disfavour.[939] Section 22 states "Provided always that notwithstanding this Act any Soldier being *in actual Military Service* or any Mariner or Seaman being at Sea may dispose of his Moveables, Wages, and Personal Estate as he or they might have done before the making of this Act." Therefore, Godolphin simply restates the civil law to represent English law.[940] The practical effect of this statute is uncertain because no reported cases existed for one hundred and seventy-two years accompanies the absence of evidence from the ecclesiastical courts.[941] Nevertheless, the rules surrounding the privileged will appear settled until s 11 of the Wills Act 1837 provided "any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act".[942] Therefore, s 11 merely repeats s 22 of the Statute of Frauds and indicates no substantial departure had occurred from previous civilian practice.[943]

The question concerning 'on expedition' or 'actual military' service became the most litigated aspect of military wills.[944] In *Drummond v Parish*[945], the Prerogative Court of Canterbury provided the leading judgement on defining the extent of military privilege.[946]

(Mortis Causa Donationes), (T. & J.W. Johnson & Co, Philadelphia 1892) at 124; A. G. Lang, "Privileged Will: The Dangerous Anachronism?" (1986) 8 (2) *University of Tasmania Law Review*, 166 at 166.

[939] W. L. Summer, "Wills of Soldiers and Seamen" (1918) 2 (4) *Minnesota Law Review*, 261 at 262; T. Weisst, "The Formalities of Testamentary Execution by Service Personnel" (1948) 33 (1) *Iowa Law Review* 48 at 49; R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 147; A. G. Lang, "Privileged Will: The Dangerous Anachronism?" (1986) 8 (2) *University of Tasmania Law Review*, 166 at 167; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 75; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 20.

[940] J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 16 – 17.

[941] *Re Wingham (deceased); Andrews and Another v Wingham* [1948] All ER 908 at 912 per Denning LJ

[942] *Drummond v Parish* (1843) 3 Curt. 522 at 523; 163 Eng. Rep. 812 at 812; P. Critchley, "Privileged Wills and Testamentary Formalities: A Time to Die?" (1999) 58 (1) *The Cambridge Law Journal*, 49 at 50; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 258; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 45.

[943] T. Weisst, "The Formalities of Testamentary Execution by Service Personnel" (1948) 33 (1) *Iowa Law Review* 48 at 49; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 258.

[944] T. E. Atkinson, "Soldier's and Sailor's Wills" (1942) 28 (11) *American Bar Association Journal* 753 at 754

[945] (1843) 3 Curt. 522; 163 Eng. Rep. 812.

[946] W. L. Summer, "Wills of Soldiers and Seamen" (1918) 2 (4) *Minnesota Law Review*, 261 at 264; T. E. Atkinson, "Soldier's and Sailor's Wills" (1942) 28 (11) *American Bar Association Journal* 753 at 754; T. Weisst, "The Formalities of Testamentary Execution by Service Personnel" (1948) 33 (1) *Iowa Law Review* 48 at 53; A. N. Localizado, *Modern Probate of Wills, Containing an Analysis of the Modern Law of Probate in England and America, with Numerous References to the English and American Cases, and Copious Extracts*

The Prerogative Court was unaware of any applicable cases concerning these wills except for two touching mariner's wills.[947] These cases were not substantive and Sir Fust did not refer to them. The first merely compared the absence of form required of English soldiers to that enjoyed by Roman legionaries.[948] In the second case, *The Goods of Richard Hayes*[949], the Court addressed the issue of 'actual service', declaring an Admiral's will made on shore valid, and is the first decision to defer to former practice and the Statute of Frauds to define the Wills Act.[950] Nevertheless, Sir Fust credits the prominent civilian Leoline Jenkins, a drafter of the Statue of Frauds, with borrowing from the civil law to ensure English soldiers enjoyed the same testamentary privileges as those in the Roman army.[951] Therefore, he reasoned, "I think it quite clear that the principle of the exception [privilege] was borrowed from the civil law; and that, in order to ascertain the extent and meaning of the exception, the civil law may be fairly resorted to".[952]

Drummond concerned a Major General who acted as a Director-General commissioned to manage military affairs but not on expedition.[953] Sir Fust learnedly proceeded to canvass the commentary surrounding Cod. 6.21.17, including the classifications laid down by Swinburne, which indicated the practice of English law dictated that a soldier must be on expedition before being able to benefit from the privilege.[954] He stated:

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from the Leading Cases, (Charles C Little and James Brown, Boston 1846) at 525; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 272.

[947] (1843) 3 Curt. 522 at 529 - 531; 163 Eng. Rep. 812 at 815.

[948] *Rymes v Clarkson* (1809) 1 Phill. Ecc. 22 at 35; 161 Eng. Rep. 901 at 906.

[949] (1839) 2 Curt. 338; 163 Eng. Rep. 431.

[950] (1839) 2 Curt. 338 at 339; 163 Eng. Rep. 431 at 432.

[951] (1843) 3 Curt. 522 at 531; 163 Eng. Rep. 812 at 815; W. L. Summer, "Wills of Soldiers and Seamen" (1918) 2 (4) *Minnesota Law Review*, 261 at 264; T. Weisst, "The Formalities of Testamentary Execution by Service Personnel" (1948) 33 (1) *Iowa Law Review* 48 at 53; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 219; A. N. Localizado, *Modern Probate of Wills, Containing an Analysis of the Modern Law of Probate in England and America, with Numerous References to the English and American Cases, and Copious Extracts from the Leading Cases*, (Charles C Little and James Brown, Boston 1846) at 525; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 159; D. C. Potter, 'Soldier's Wills' (1949) 12 (2) *The Modern Law Review*, 183 at 184.

[952] (1843) 3 Curt. 522 at 531; 163 Eng. Rep. 812 at 815.

[953] (1843) 3 Curt. 522 at 523, 543; 163 Eng. Rep. 812 at 813, 819.

[954] (1843) 3 Curt. 522 at 530 - 538; 163 Eng. Rep. 812 at 815 - 818; T. E. Atkinson, "Soldier's and Sailor's Wills" (1942) 28 (11) *American Bar Association Journal* 753 at 754; T. Weisst, "The Formalities of Testamentary Execution by Service Personnel" (1948) 33 (1) *Iowa Law Review* 48 at 53; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 219; A. N. Localizado, *Modern Probate of Wills, Containing an Analysis of the Modern Law of Probate in England and America, with Numerous References to the English and American Cases, and Copious Extracts from the Leading Cases*, (Charles C Little and James Brown, Boston 1846) at 525; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 272; P. Critchley, "Privileged Wills and Testamentary Formalities: A Time to Die?"

> "Being of opinion, from the result of the investigation of the authorities, that the principle of the exemption, contained in the 11th section of the Act, was adopted from the Roman law, I think it was adopted with the limitations to which I have adverted, and that, by the insertion of the words 'actual military service', the privilege as respects the British soldier, is confined to those who are on an expedition".[955]

This decision set a strong precedent and subsequent courts followed it to interpret s 11 by limiting the privilege to soldiers 'on expedition' according to the civil law.[956] New Zealand courts followed Jeune P's reference to *Drummond* in *The Goods of Hiscock*[957] that highlighted the English law interpretation of 'on expedition' includes the beginning of a campaign.[958] In *The Estate of Rippon*[959] the court acknowledged the civil law origins of military privilege and applied the definition of 'on expedition' despite departing from existing authority by requiring a state of war to exist.[960] This interpretation of s 11 was adopted by the New Zealand Supreme Court's decision in *Re Rumble*[961], which applied both these English cases and referred to *Drummond* to accept the common law test of 'on expedition' without commenting on its civil law origins.[962]

The issue of defining 'on expedition' once more became a contentious issue when the events of World War II brought military wills back into juridical spotlight, and the test itself came under scrutiny. Denning LJ's decision in *Re Wingham (deceased); Andrews and Another v Wingham*[963] rebuked Sir Fust's decision to resort to civil law principles and alleged his assessment of English law was mistaken.[964] He quotes *Re Booth, Booth v Booth*[965] to

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(1999) 58 (1) *The Cambridge Law Journal*, 49 at 50; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 16.
[955] (1843) 3 Curt. 522 at 531, 542; 163 Eng. Rep. 812 at 815 at 819.
[956] W. L. Summer, "Wills of Soldiers and Seamen" (1918) 2 (4) *Minnesota Law Review*, 261 at 264; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 159.
[957] [1900] P. 78.
[958][1900] P. 78 at 83; T. Weisst, "The Formalities of Testamentary Execution by Service Personnel" (1948) 33 (1) *Iowa Law Review* 48 at 54.
[959] [1943] 1 All ER 676.
[960] [1943] 1 All ER 676 at 678, 680 per Pilcher J; W. L. Summer, "Wills of Soldiers and Seamen" (1918) 2 (4) *Minnesota Law Review*, 261 at 264; T. Weisst, "The Formalities of Testamentary Execution by Service Personnel" (1948) 33 (1) *Iowa Law Review* 48 at 59; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 455.
[961] [1944] NZLR 94.
[962] [1944] NZLR 94 at [98].
[963] [1948] All ER 908.
[964] [1948] All ER 908 at [912].

advocate the removal of the civil law test because "the proposition that the English law as to the soldier's military testamentary privilege is identical with the privilege of the Roman legionary is an entirely mistaken proposition".[966] Denning LJ quite confusingly asserts, "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".[967] This case directs English practice that holds "actual military service" did not invoke civil law principles.[968] Dr. Helmholz observes Lord Denning's statement is a non sequitur because both statutes endorsed the pre-existing practice of the ecclesiastical courts and their civilian jurists.[969] In *Re Berry (deceased), Public Trustee v Berry*[970], North J rejected the 'on expedition' test in favour of 'actual military service' to follow Denning LJ's decision.[971] However, North J uses the terms synonymously in his conclusion that "it is sufficient that a military expedition had been sent from New Zealand to take part in warlike operations".[972]

The Wills Act 2007 has introduced a number of uncertainties concerning military wills. It refers to its predecessor on the topic of privilege.[973] Section 34 states that "Military or seagoing persons may do informal testamentary actions" defined as making, changing, revoking or reviving a will.[974] It defines an informal will as "a will that is not valid" rather than referring to legal privilege.[975] The uncertainty within the Act appears to reflect wider issues surrounding military privilege, which has raised doubts about their place in modern jurisprudence and even doubts about its civil law origins.[976] This misapprehension reflects Sir Fust's closing statement, echoing the concerns of Roman jurists, that a broad interpretation of military privilege could carry a risk of fraud and even create a will from statements without

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[965] [1926] P 118.
[966] *Re Booth, Booth v Booth* [1926] P 118 at [135] Per Lord Merrivale P.
[967] [1948] All ER 908 at [912].
[968] H. S. G. Halsbury (ed), J.P.H Mc Kay (ed), *Halsbury's Law of England*, *Wills and Intestacy*, fifth edition, volume 102, (LexisNexis Butterworths, London 2010) at [79].
[969] R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 151.
[970] [1955] NZLR 1003.
[971] [1955] NZLR 1003 at [1006- 1008].
[972] [1955] NZLR 1003 at [1008].
[973] Wills Amendment Act 1955, s 4; c.f. 7 Will. 4 & 1 Vict. c. 26., s 11.
[974] Wills Act 2007, s 33 (2).
[975] Wills Act 2007, s 33 (2).
[976] R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 152, 158; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 159.

testamentary intent.[977] However, the underlying rationale for the privilege acknowledges a soldiers peril and the conditions of war, which has remained the same since Julius Caesar introduced them with a better understanding of military life than modern lawmakers.[978] Nonetheless, parliament has clearly manifested its desire that the privileged military will continues to occupy a special place in New Zealand testamentary succession.[979]

The civil law provides a valuable aid to conceptualise the law and alleviate the uncertainty surrounding the privilege because its principles address the same considerations that guide modern rules.[980] Section 33 (1) states:

> "*Military or seagoing person* means a person who, at a material date, was (a) a member of the Armed Forces: (i) on operational service; or (ii) at sea; or (b) a seafarer at sea; or (c) a prisoner of war who, immediately before he or she was captured or imprisoned, was described by paragraph (a) or (b)"

Section 34 (1) follows Dig. 29.1.1.42 to allow any person enrolled in the military, even below the age of majority, to make an informal will.[981] Section 35 permits the military or seagoing person to make a nuncupative will, manifesting their testamentary intent, which remains valid

[977] Dig. 29.1.24; *Drummond v Parish* (1843) 3 Curt. 522 at 543; 163 Eng. Rep. 812 at 819; A. G. Lang, "Privileged Will: The Dangerous Anachronism?" (1986) 8 (2) *University of Tasmania Law Review*, 166 at 179, 179; R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 152; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 21; B. Beinart, "Some Aspects of Privileged Wills" [1959] *Acta Juridica*, 200 at 203; F. C. Hutley, "Privileged Wills" (1949) 23 (2) *The Australian Law Journal*, 118 at 119; A. Iwobi, *Essential Succession*, second edition, (Cavendish Publishing Limited, London 2001) at 51.

[978] R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 151; W. L. Summer, "Wills of Soldiers and Seamen" (1918) 2 (4) *Minnesota Law Review*, 261 at 263; T. Weisst, "The Formalities of Testamentary Execution by Service Personnel" (1948) 33 (1) *Iowa Law Review* 48 at 48, 83; N. Jansen, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 30; P. Critchley, "Privileged Wills and Testamentary Formalities: A Time to Die?" (1999) 58 (1) *The Cambridge Law Journal*, 49 at 55.

[979] (22 August 2007) 641NZPD at 11456 per Dr. Richard Worth (Third Reading).

[980] T. E. Atkinson, "Soldier's and Sailor's Wills" (1942) 28 (11) *American Bar Association Journal* 753 at 757; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 46; P. Critchley, "Privileged Wills and Testamentary Formalities: A Time to Die?" (1999) 58 (1) *The Cambridge Law Journal*, 49 at 54.

[981] Defence Act 1990, s 33 (1); W. Patterson (ed), A Tipping (ed) *The Laws of New Zealand, Will* (LexisNexis 2012, Wellington) at [65]; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [10.14] but see Cod. 6.21.4.1; Cod. 6.21.18.

up to one year after its execution.[982] This adopts Dig. 29.1.21 and modern recommendations that privileged wills should follow the civil law restraint of a limited duration.[983] New Zealand law permits military and seagoing will-makers to revoke their will in the manner of a general will-maker.[984] Dig. 29.1.19 permitted soldiers to die with multiple testaments without revocation of the former.[985] The High Court is also able to accept any evidence of intention, even if it contradicts established rules of construction and permissible evidence, and it is likely that they would permit multiple informal wills to stand if the will-maker's intention manifests.[986]

Section 33 (1) replaces the phrase 'actual military service' with 'operational service' defined as "service in a war, armed conflict, peacekeeping force, or other operation".[987] This creates a new issue with an old theme related to identifying when a soldier can make an informal will. This term appears to be synonymous with 'on expedition' and 'actual military service' that are expressions extending to peacekeeping roles and could be extended to anti-terrorism measures.[988] The principal elements appear to remain the same and Cod. 6.21.17 ought to be applicable to 'operational services'. Treating the terms as synonymous is a more faithful return to previous law than discussed in *Re Wingham*, and the test succinctly outlined in *Drummond* with the support of contemporary commentary ought to be strong precedent in the future.[989] A significant departure from the civil law is the innovation permitting prisoners of

[982] W. Patterson (ed), A Tipping (ed) *The Laws of New Zealand, Will* (LexisNexis 2012, Wellington) at [65]; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [10.14]; See Inst. 2.11.1.
[983] P. Critchley, "Privileged Wills and Testamentary Formalities: A Time to Die?" (1999) 58 (1) *The Cambridge Law Journal*, 49 at 56.
[984]Section 16 (g); Section 38 (2), (3) Wills Act 2007.
[985] Dig. 29.1.19; Dig. 29.1.36; H. Swinburne*, A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 62; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 321; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 123; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 16; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 218.
[986] Section 36 Wills Act 2007; W. Patterson (ed), A Tipping (ed) *The Laws of New Zealand, Will* (LexisNexis 2012, Wellington) at [65].
[987] Burial and Cremation Act 1964, s 15 (3).
[988] N. Richardson, "The Wills Act 2007" (2010) 6 (11) *New Zealand Family Law Journal*, 324 at 324; P. Critchley, "Privileged Wills and Testamentary Formalities: A Time to Die?" (1999) 58 (1) *The Cambridge Law Journal*, 49 at 53; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [4.1].
[989] *Re Milling* [1916] NZLR 1174 at 1177; T. E. Atkinson, "Soldier's and Sailor's Wills" (1942) 28 (11) *American Bar Association Journal* 753 at 754; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 455; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 21; A. N. Localizado, *Modern Probate of Wills, Containing an Analysis of the Modern Law of*

war to do informal testamentary actions.[990] The application of this section is unclear although our courts are likely to refer to Article 120 of the Geneva Convention relative to the Treatment of Prisoners of War 1950, which enables prisoners to make wills considered valid in their country of origin. Despite the absence of reported cases, New Zealand courts will likely address one of the most controversial issues surrounding military privilege.[991] This presents an opportunity to get back to statute.

2. Holographic Wills

The Wills Act 2007 has indirectly revived the holographic will for general use without identifying it as a privileged form. The origin of the holographic will in English testamentary jurisprudence is unclear because neither the canon law nor civil law furnished one for general use.[992] During the sixteenth century, English ecclesiastical courts appear to have responded to contemporary issues by granting will-makers the power to make holographic wills.[993] Their inclusion is consistent with ecclesiastical policy of giving force to the will-maker's intent with a minimum of formalities.[994] Scholarly opinion suggests the holographic will may have penetrated English law through the Roman law elements, forming part of the Germanic codes, found in French custom and the Napoleonic code.[995] Roman law itself permitted

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Probate in England and America, with Numerous References to the English and American Cases, and Copious Extracts from the Leading Cases, (Charles C Little and James Brown, Boston 1846) at 526.

[990] Inst. 2.12.5; Dig. 28.1.8; Dig. 29.1.10; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 358; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 246.

[991] N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [4.10].

[992] R. H. Helmholz, "The Origin of Holographic Wills in English law" (1994) 15 (2) *The Journal of Legal History*, 97 at 98; N. Jansen, "Testamentary Formalities and Early Modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 32.

[993] Henrician Canons, 31.3; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 66; R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 153 – 154; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 401; E. Jenks, *The Book of English Law: As at the End of the Year 1935*, fourth edition, (John Murray, London, 1936) at 374; R. H. Helmholz, "The Origin of Holographic Wills in English law" (1994) 15 (2) *The Journal of Legal History*, 97 at 99, 402; see Will of Thomas Gresham (1575) in J. G. Nichols, J. Bruce (eds), *Wills from Doctors Commons: A Selection from the Wills of Eminent Persons proved in the Prerogative Court of Canterbury 1495 – 1695* (Printed for the Camden Society, London 1863) at 57.

[994] R. H. Helmholz, "The Origin of Holographic Wills in English law" (1994) 15 (2) *The Journal of Legal History*, 97 at 102.

[995] Napoleonic code 3.2.5.970; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 19; H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 153; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical*

holographic testaments for general use.[996] However, holographic wills are also connected to the civil law *testamentum parentum inter liberos* or the will of a parent who appoints their lawful and natural children executors and legatee.[997] This form of will benefitted from a favourable construction to carry out the will-maker's intention to honour the expected relationship and natural law duty between a parent and their child.[998]

English civilians appear to have conceptualised the holographic will according to the principle in Nov. 107 that revives the Roman law, as enacted by Constantine, which enabled a parent's bequest to their children to stand despite an apparent invalidity.[999] Nov 107 provides:

> "The law provides that the last will of decedents who are parents shall in every respect be valid as to children, and it displays such reverence for those who are parents, that it permits them to state matters obscurely, providing that though their directions are not clear, but may be found in any signs, indications or writings".

Nov. 107.1 restricted Roman law by only permitting a parent to make a holographic will, without witnesses or any other formalities, if they wrote the names of *sui et necessarii* heirs

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Jurisdiction from 597 to the 1640s, (Oxford University Press, Oxford 2004) at 400, 401; R. H. Helmholz, "The Origin of Holographic Wills in English law" (1994) 15 (2) *The Journal of Legal History*, 97 at 98; S. Clowney, "In their own Hand: An analysis of Holographic wills and Homemade Willmaking" (2009) 43 (1) *Real Property, Trust, and Estate Law Journal*, 27 at 33; J. M. Robinette, "Wills – Holographic Wills and Testamentary Intent – Extrinsic Evidence is inadmissible to prove Testamentary Intent for Holographic Wills Lacking Words of Disposition. *Edmundson v Estate of Fountain*, No. 03 – 1459, 2004 WL 1475423 (Ark. July 1, 2004)." (2004) 27 (4) *University of Arkansas at Little Rock Law Review*, 545 at 552 see Isidore *Etymologies* 5.24.7.

[996] N. Jansen, "Testamentary Formalities and Early Modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 28; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 258.

[997] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 65; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 290; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 286; R. H. Helmholz, "The Origin of Holographic Wills in English law" (1994) 15 (2) *The Journal of Legal History*, 97 at 99, 102.

[998] Nov. 89. 13; *Harvey v Harvey* (1722) 2 P. WMS. 21 at 22; 24 Eng. Rep. 625 at 625; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 74.

[999] Codex Theodosius 2.24.1; R. Parker, "History of the Holograph Testament in the Civil Law" (1943) 3 (1) *The Jurist*, 1 at 3; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 220.

and their intended portions in their own hand.[1000] Civilians accepted the principle in Nov. 107.2 that required revocation to occur either by an express intention in a perfect testament or the destruction of the holographic instrument accompanied by a declaration to revoke made before seven witnesses.[1001] The holographic will is notably absent elsewhere in the *Corpus Iuris Civilis* and its inclusion into the *Novels* indicates a later innovation.[1002]

Civilians appear to grant the privilege of making a holographic will in Nov. 107 to general will-makers, in a similar manner to military privilege, requiring only that they signed the document and wrote it in their own hand.[1003] A holographic will found in the deceased's possession could be declared valid even if it was unattested.[1004] The general will-maker ought to declare the document as a holographic will before two witnesses for evidentiary

[1000]Goffredus de Trano*, Summa Super Titulis Decretalium* (Neudruck Der Ausgabe Lyon, 1519) at 143; J. F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphanotrophei, Halae Magdeburgicae 1769) at 432; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 400; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 17; T. Rufner, "Testamentary Formalities in Roman law" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 19, 22; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 259; R. Parker, "History of the Holograph Testament in the Civil Law" (1943) 3 (1) *The Jurist*, 1 at 4; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 220; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 526; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 219.

[1001] J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 17.

[1002] R. Parker, "History of the Holograph Testament in the Civil Law" (1943) 3 (1) *The Jurist*, 1 at 5; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at 122.

[1003] G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 18; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 17; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 66, 353; R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 148, 153 - 154; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 11; R. H. Helmholz, "The Origin of Holographic Wills in English law" (1994) 15 (2) *The Journal of Legal History*, 97 at 98; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 123; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 501.

[1004] *Re Goods of Mary Keeton* (1832) 4 Hagg. Ecc. 209 at 209; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 65; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 17.

purposes.[1005] However, the will for issue still benefitted from a number of privileged constructions unavailable to general will-makers that were divorced from the holographic will. Firstly, if the executor brings two documents to probate with indeterminable times of publication, the ordinary presumed in favour of the will favouring issue as the last in time, even if the second contained charitable bequests that benefitted from the same privilege.[1006] Both wills were valid if the other was a military testament.[1007] The construction appears to have extended to devises under the presumption the common law heir succeeds to an estate before a stranger.[1008] Secondly, it benefited from the construction in Nov. 107.2 requiring an explicit statement of revocation of the former will in a subsequent instrument to successfully revoke a will for issue.[1009] Therefore, the holographic will is testament to the innovation of English civilians who adopted Nov. 107, separated its elements, and interpreted it in a manner contrary to the civil law.[1010]

The gradual introduction of the holographic will, only appearing frequently in seventeenth century Act books, is indicative of the controversy surrounding its novelty.[1011] Civilians held

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[1005] J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 339.

[1006] *Mills v Farmer* (1811) 19 Ves. Jun. 483 at 486; 34 Eng. Rep. 595 at 596; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 65, 67; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 174; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 17, 20; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 387; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 17.

[1007] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 65; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at20; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 17.

[1008] G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 413.

[1009] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 65; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 17; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 387, 412- 413.

[1010] H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 159; H. Helmholz, "The Origin of Holographic Wills in English law" (1994) 15 (2) *The Journal of Legal History*, 97 at 105.

[1011] H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 154 – 155, 157; R. H. Helmholz, "The Origin of Holographic Wills in English law" (1994) 15 (2) *The Journal of Legal History*, 97 at 99 – 100.

that the rationale for allowing holographic wills is that the will-maker's hand gave validity to the will and takes the place of witnesses.[1012] The Courts Christian controversially employed the method of proving authenticity through *comparatio litterarum* found in Cod. 4.21.20, which is procedural technique utilised in other facets of ecclesiastical law and civil law courts.[1013] The procedure required a comparison of the deceased's handwriting in the will to other documents to determine whether the will-maker wrote it.[1014] *Yelverton c Yelverton* is a cause concerning an incomplete will illustrative of the difficulties disagreement surrounding the holographic will. Dr. Dun, arguing in favour of the will, noted the ordinary recognises the validity of holographic wills for children without the prescribed number of witnesses because common opinion indicated that a comparison of handwriting is evident proof.[1015] However, Dr Creake cites Cod. 6.23.21.3 to argue a holographic will is incomplete, echoing the concerns of other civilians, and states "a comparison of hands is a weak, treacherous, and feeble form of proof".[1016] Furthermore, s 5 of the Statute of Frauds removed the holographic devise because it contained insufficient proof to dispose of realty and limited their utility to personal property in a manner analogous to nuncupative wills.[1017] Nonetheless, the argument

[1012] Nov. 107.1; R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 148; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 400; R. H. Helmholz, "The Origin of Holographic Wills in English law" (1994) 15 (2) *The Journal of Legal History*, 97 at 97; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 501.

[1013] Nov. 73; *Drummond v Parish*, (1843) 3 Curt. 522 at 528; 163 Eng. Rep. 812 at 814; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 401; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 11; R. H. Helmholz, "The Origin of Holographic Wills in English law" (1994) 15 (2) *The Journal of Legal History*, 97 at 100- 101; F. Clerke, *Praxis Curiae Admiralitatis Angliae* (Impensis Guilel. Crooke, London 1679) at 45.

[1014] *Re Goods of Mary Keeton* (1832) 4 Hagg. Ecc. 209 at 209; H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 154; R. H. Helmholz, "The Origin of Holographic Wills in English law" (1994) 15 (2) *The Journal of Legal History*, 97 at 100; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 529; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 67.

[1015] *Yelverton c Yelverton* (1588) The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 36; R. H. Helmholz, "The Origin of Holographic Wills in English law" (1994) 15 (2) *The Journal of Legal History*, 97 at 97.

[1016] *Yelverton c Yelverton* (1588) The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 36; see Nov. 73; R. H. Helmholz, "The Origin of Holographic Wills in English law" (1994) 15 (2) *The Journal of Legal History*, 97 at 103.

[1017] A. Reppy, "The History of the Law of Wills and Testaments in England Book Reviews" (1928) 16 (2) *Georgetown Law Journal*, 194 at 221; H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 148.

in favour of the holographic will as an instrument demonstrating testamentary intent prevailed and they formed part of English testamentary jurisprudence.[1018]

The controversy surrounding holographic wills continued until their abolition despite their inclusion into testamentary practice and the concerns of earlier civilians remained poignant in later practice.[1019] In *Grace v Calemberg*[1020], Sir Lee emphasised the importance that the will-maker writes their will in their own hand and set aside a will that did not have identical handwriting on suspicion of fraud.[1021] Furthermore, the handwriting of the deceased was not enough to establish a will without a clear manifestation of testamentary intent and a court must be satisfied witnesses were not required.[1022] In *Eagleton v Kingston*[1023], Lord Chancellor Eldon noted that an ecclesiastical court could reject a will for want of evidence despite accepting the document having testamentary intent.[1024] In *Harris v Bedford*[1025], the Prerogative Court of Canterbury pronounced a holographic will for issue valid because it followed the civil law rationale that the will-maker would not have intended to leave their natural son without provision.[1026] The Wills Act 1837 ended the trepidation surrounding the holographic will by removing it from general use and restricting it to privileged wills in a manner closer to the civil law.[1027] The unprivileged will-maker could only incorporate a

[1018] H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 156; R. H. Helmholz, "The Origin of Holographic Wills in English law" (1994) 15 (2) *The Journal of Legal History*, 97 at 101.
[1019] F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 928; R. H. Helmholz, "The Origin of Holographic Wills in English law" (1994) 15 (2) *The Journal of Legal History*, 97 at 104.
[1020] (1752) 1 Lee 76; 161 Eng. Rep. 29.
[1021] (1752) 1 Lee 76 at 101; 161 Eng. Rep. 29 at 38; see *Gaze v Gaze* (1843) 3 Curt. 451 at 458; 163 Eng. Rep. 788 at 790; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 400
[1022] *Newton* c. *Brooke* (1597), BL Lansd. MS. 130, f. 136v in R. H. Helmholz, "The Origin of Holographic Wills in English law" (1994) 15 (2) *The Journal of Legal History*, 97 at 101; *Eagleton v Kingston* (1803) 8 Ves. Jun. 438 at 477; 32 Eng. Rep. 425 at 436; *Rhymes v Clarkson* (1809) 1 Phill. Ecc. 22 at 38; 161 Eng. Rep. 901 at 907; *Eagleton v Kingston* (1803) 8 Ves. Jun. 438 at 454, 459; 32 Eng. Rep. 425 at 431- 432.
[1023] (1803) 8 Ves. Jun. 438; 32 Eng. Rep. 425.
[1024] (1803) 8 Ves. Jun. 438 at 480; 32 Eng. Rep. 425 at 440.
[1025] (1814) 2 Phill. Ecc. 177; 161 Eng. Rep. 1112.
[1026] (1814) 2 Phill. Ecc. 177 at 179; 161 Eng. Rep. 1112 at 1113.
[1027] Wills Act 1837, s 9; *Drummond v Parish*, (1843) 3 Curt. 522 at 528; 163 Eng. Rep. 812 at 814; A. Reppy, "The History of the Law of Wills and Testaments in England Book Reviews" (1928) 16 (2) *Georgetown Law Journal*, 194 at 221; R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 148; R. H. Helmholz, "The Origin of Holographic Wills in English law" (1994) 15 (2) *The Journal of Legal History*, 97 at 97; T. Weisst, "The Formalities of Testamentary Execution by Service Personnel" (1948) 33 (1) *Iowa Law Review*, 48 at 50.

holographic document by reference as part of their properly executed will.[1028] Modern jurists are reluctant to recognise holographic wills because of the difficulties of identifying and interpreting the will-maker's handwriting, establishing testamentary intent, the risk of fraud, and other problems associated with the absence of solemnities.[1029] In *Re Milling*[1030], Hosking J's refusal to grant probate to a document in a soldier's handwriting because it failed to manifest sufficient testamentary intent, which exemplary of the high threshold holographic instruments must meet to satisfy the remaining power within the Wills Act 1837 as a privileged will.[1031]

The learned Dr. Helmholz observes holographic wills possess an innate ability to "rekindle like a phoenix" and this appears to be true for New Zealand law.[1032] The Wills Act 2007 recognises holographic instruments as written wills and has once more extended their use to unprivileged will-makers.[1033] The dispensing power under s 14 (2) allows the High Court to admit a holographic instrument, naturally deficient in formalities, if the court is satisfied it expresses a person's final testamentary intentions.[1034] Therefore, modern New Zealand courts face the challenging task of interpreting holographic wills to find an intention without the guidance of formalities or, in some cases, clear testamentary language.[1035] This challenge has arisen in the form of suicide notes.[1036] In *Re MacNeil*[1037], Mackenzie J exercised the

[1028] S. Bates, "Holographic Wills" (1942) 17 (4) *Tennessee Law Review*, 440 at 446; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [2.14]; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 385.
[1029] R. H. Helmholz, "The Origin of Holographic Wills in English law" (1994) 15 (2) *The Journal of Legal History*, 97 at 102; R. L. Brown, "The Holograph Problem – The case against Holographic Wills" (2007) 74 (1) *Tennessee Law Review* 93 at 100 – 123, 126; J. M. Robinette, "Wills – Holographic Wills and Testamentary Intent – Extrinsic Evidence is inadmissible to prove Testamentary Intent for Holographic Wills Lacking Words of Disposition. *Edmundson v Estate of Fountain*, No. 03 – 1459, 2004 WL 1475423 (Ark. July 1, 2004)." (2004) 27 (4) *University of Arkansas at Little Rock Law Review*, 545 at 545.
[1030] [1916] NZLR 1174.
[1031] [1916] NZLR 1174 at 1177 – 1178.
[1032] R. H. Helmholz, "The Origin of Holographic Wills in English law" (1994) 15 (2) *The Journal of Legal History*, 97 at 97.
[1033] *H v P* [2012] NZHC 753 at [7]; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [4.1]; see S 12 (2) Wills Act 1936 (SA) S. N. L. Palk "Informal Wills: From Soldiers to Citizens" (1976) 5 (4) *Adelaide Law Review*, 382 at 384.
[1034] *H v P* [2012] NZHC 753 at [8]; R. L. Brown, "The Holograph Problem – The case against Holographic Wills" (2007) 74 (1) *Tennessee Law Review* 93 at 100 at 124.
[1035] *H v P* [2012] NZHC 753 at [16]; R. L. Brown, "The Holograph Problem – The case against Holographic Wills" (2007) 74 (1) *Tennessee Law Review* 93 at 100 at 126; J. M. Robinette, "Wills – Holographic Wills and Testamentary Intent – Extrinsic Evidence is inadmissible to prove Testamentary Intent for Holographic Wills Lacking Words of Disposition. *Edmundson v Estate of Fountain*, No. 03 – 1459, 2004 WL 1475423 (Ark. July 1, 2004)." (2004) 27 (4) *University of Arkansas at Little Rock Law Review*, 545 at 571.
[1036] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 362 – 363 see Dig. 29.1.34.
[1037] (2009) 10 NZCPR 770.

dispensing power under s 14 (2) to validate a holographic document, in the form of a suicide note, which was written, signed, and inscribed with the words "my last will and testament" by the deceased.[1038] Jurisdictions admitting holographic wills require will-makers to have handwritten the will and ensure no other markings are present on the document[1039] New Zealand law is more liberal with the holographic will and even the presence of a signature, often present on suicide notes, is only evidentiary of the will-maker's intent.[1040] The holographic will is novel to New Zealand law, and the experience of the ecclesiastical courts and civilians could provide valuable precedent for managing this rekindled phoenix. The rationale behind admitting holographic wills is that the handwriting is evidentiary of the will-maker intent, which suggests New Zealand courts ought to include the procedural *comparatio litterarum* in future cases.[1041] Furthermore, our academics will likely raise the same controversies as their civilian counterparts concerning the risk of fraud that characterises the admission of holographic wills.

3. Wills for Pious Causes

The Wills Act 2007 does not include a privileged form of charitable will, which is a notable absence in light of the fact the canonical will was principally a vehicle of charity. Modern legal historians depart from the orthodox view that charitable giving was an unregulated area of law and recognise the Church's role in setting out the principles of a 'law of charity' that resonates with modern legal systems.[1042] English civilians adopted the privileges surrounding charitable bequests benefiting a particular class of person or place from both civil law and canon law rules of construction.[1043] The principal beneficiary of a charitable bequest was the

[1038] (2009) 10 NZCPR 770 at [2 – 6].
[1039] S. Bates, "Holographic Wills" (1942) 17 (4) *Tennessee Law Review*, 440 at 442.
[1040] *Re MacNeil* (2009) 10 NZCPR 770 at [2]; *H v P* [2012] NZHC 753 at [4].
[1041] R. L. Brown, "The Holograph Problem – The case against Holographic Wills" (2007) 74 (1) *Tennessee Law Review* 93 at 100 at 125.
[1042] R. H. Helmholz "The Law Of Charity in the Ecclesiastical Courts" in P. Hoskin, C. Brooke, Barrie Dobson (eds.) *Studies in the history of Medieval religion: The foundations of mediaeval English ecclesiastical history. Studies presented to David Smith*, (The Boydell Press, Woolbridge 2005) at 111- 112.
[1043] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 66; R. Ombres Op, "Charitable Trusts: The Catholic Church in English law" [1995] *Christian Law Review*, 72 at 73; B. Beinart, "Some Aspects of Privileged Wills" [1959] *Acta Juridica*, 200 at 208; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 587; W. R. A. Boyle, *A Practical Treatise on the Law of Charities,* (Saunders and Benning, London 1837) at v; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 220; C. P. Sherman, "A brief History of Imperial Roman Canon Law" (1919) 7 (2) *California Law Review*, 93 at 94.

will-maker because their motive was to benefit their soul and not the object despite the important social function these gifts served in areas neglected by the state.[1044] The canon law distinguished between general or profane bequests from pious legacies that demonstrated the will-maker's reverence of God through masses or charitable work.[1045] Canonists did not negatively distinguish between charitable bequests and general legacies suggesting a view all wills were pious.[1046] These gifts formed part of the evolution of the Church and the Bishop's role to ensure the execution of pious dispositions even if contrary to the will-maker's express will.[1047] Nonetheless, the *ius commune* never furnished a distinct 'law of charity' despite supplying enough principles to consider the subject under a distinct head.[1048] Instead, the ecclesiastical courts followed the trend set by the continental canon law and considered issues of charity under other broader categories particularly the head of testamentary causes.[1049] Civilians appear to have heavily utilised civil law principles in this relationship. Boyle even suggests, "in no one instance have we drawn so largely upon that [Justinian's] code as in the case of Charities".[1050]

The *Corpus Iuris Canonici* provided a number of general principles concerning charitable bequests, a prominent aspect of the canonical will, and the Bishop's interest to ensure their

[1044] W. Assheton, *A Theological Discourse of Last Wills and Testaments*, (Printed for Brab, Aylmer, London 1696) at 80; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 232; R. H. Helmholz "The Law Of Charity in the Ecclesiastical Courts" in P. Hoskin, C. Brooke, Barrie Dobson (eds.) *Studies in the history of Medieval religion: The foundations of mediaeval English ecclesiastical history. Studies presented to David Smith*, (The Boydell Press, Woolbridge 2005) at 112; L. M. McGranahan, "Charity and the Bequest Motive: Evidence from seventeenth-Century Wills" (2000) 108 (6) *The Journal of Political Economy*, 1270 at 1273 see 2 Hen. V, stat1, c 1.

[1045] J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 53; G. Jones, *History of the Law of Charity*, (Cambridge University Press, London 1969) at 3; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 17.

[1046] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 399.

[1047] Cod. 1.3.28.3; Nov. 131.11.2; R. H. McGrath, *The Doctrine of Cy-pres as applied to Charities*, (T & J. W. Johnson & Co, Philadelphia 1887) at 14; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 69; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 334; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 588.

[1048] R. H. Helmholz "The Law Of Charity in the Ecclesiastical Courts" in P. Hoskin, C. Brooke, Barrie Dobson (eds.) *Studies in the history of Medieval religion: The foundations of mediaeval English ecclesiastical history. Studies presented to David Smith*, (The Boydell Press, Woolbridge 2005) at 116.

[1049] R. H. Helmholz "The Law Of Charity in the Ecclesiastical Courts" in P. Hoskin, C. Brooke, Barrie Dobson (eds.) *Studies in the history of Medieval religion: The foundations of mediaeval English ecclesiastical history. Studies presented to David Smith*, (The Boydell Press, Woolbridge 2005) at 111, 117.

[1050] W. R. A. Boyle *A Practical Treatise on the Law of Charities* (Saunders and Benning, London 1837) at v; L. Shelford, *A Practical Treatise of the Law of Mortmain, and Charitable Uses and Trusts* (J. S. Littell, Philadelphia 1842) at 356.

delivery.[1051] The church's interest in the law of charity, alongside doctrinal concerns, forms part of a Bishop's duty to oversee the protection of widows, orphans, and the impoverished.[1052] Dist. 87, c 4 provided a general rule that the church must ensure that vulnerable people were not deprived access to charitable care. Therefore, it is unsurprising that the canonical will with bequests *ad pias causas* benefitted from additional privileges to remain valid despite apparent invalidity.[1053] X. 3.26.17 provides:

> "A Bishop can compel a fideicommissarius [trustee] or a testamentary executor to implement the deceased's pious wills, even if the testator is prohibited." and continues: "Since all pious wills are in the care of local bishops, and as according to the deceased's will that all must proceed, even though the testator happens to be forbidden, we order the executors of the testament to administer the goods faithfully and fully with consideration of the aforementioned or as before be compelled".[1054]

The canon law also recognised will-makers frequently appointed Bishops as executors to administer these gifts.[1055] The *Liber Extra* granted Bishops authority to compel the execution of wills *ad pias causas*, bestowing on them special privileges, without shedding further light on the subject of charity other than repeating the tenor of Episcopal jurisdiction found in the civil law.[1056]

[1051] R. H. Helmholz "The Law Of Charity in the Ecclesiastical Courts" in P. Hoskin, C. Brooke, Barrie Dobson (eds.) *Studies in the history of Medieval religion: The foundations of mediaeval English ecclesiastical history. Studies presented to David Smith*, (The Boydell Press, Woolbridge 2005) at 113.

[1052] Dist. 87; Dist. 87, c 1; Dist. 87, c 2; see Cod. 1.4.1.

[1053] X. 3.26.11; R. H. Helmholz "The Law Of Charity in the Ecclesiastical Courts" in P. Hoskin, C. Brooke, Barrie Dobson (eds.) *Studies in the history of Medieval religion: The foundations of mediaeval English ecclesiastical history. Studies presented to David Smith*, (The Boydell Press, Woolbridge 2005) at 113; B. Beinart, "Some Aspects of Privileged Wills" [1959] *Acta Juridica*, 200 at 210; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 283; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 643.

[1054] "Episcopus compellit fideicommissarios seu executores testamenti ad exsequendas pias voluntates defunctorum, etiamsi testator hoc interdixisset" and "Quum igitur in omnibus piis voluntatibus sit per locorum episcopos providendum, ut secundum defuncti voluntatem universa procedant, licet etiam a testatoribus id contingeret interdici; mandamus, quatenus exsecutores testamentorum huiusmodi, ut bona ipsa fideliter et plenarie in usus praedictos expendant, monitione praemissa compellas".

[1055] J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 523.

[1056] X. 3.26.3; X. 3.26.17; Cod. 1.3. 28; Cod. 1.3.48; Nov. 131.10; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 524; G. Jones, *History of the Law of Charity*, (Cambridge University Press, London 1969) at 4; R. H. Helmholz "The Law Of Charity in the Ecclesiastical Courts" in P. Hoskin, C. Brooke, Barrie Dobson (eds.) *Studies in the history of Medieval religion: The foundations of mediaeval English ecclesiastical history. Studies presented to David Smith*, (The Boydell Press, Woolbridge 2005) at 111, 113, 116; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 390 – 391; R. Hooker, I. Walton, *Of the Laws of Ecclesiastical Polity: Introductions; Commentary, Preface and Books V- VII*, (Medieval & Renaissance Texts & Studies, Binghamton 1993) at 1067.

Papal authority, carried over by the Henrician Canons, enabled the English ecclesiastical courts to shape their extensive jurisdiction over charitable bequests according to *ius commune* principles.[1057] In *Attorney General v Newport*[1058], the court observed:

> "The Bishops of the respective Dioceses should see, that what is given to charitable [purposes] be duly applied, according to the intention of the giver, and that ever since the foundation of Christianity it hath been the peculiar province of Bishops to take care of the due application of things given to charitable purposes".[1059]

The ecclesiastical courts invoked the civil law to breathe shape into their jurisdiction over these bequests and the diverse amount of objects that could benefit from its privilege.[1060] The civil law had already bestowed the Church with a form of juristic personality necessary to act as a form of trustee over charitable gifts before the canon law.[1061] It was the Church's role to receive these gifts and ensure their distribution.[1062] Nov. 131.12 even states: "if the heir fails

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[1057] W. Lyndwood, *Constitutions Provincialles and of Otho and Octhobone, translated in to Englyshe*, (Robert Redman, London 1534) at 3.23.4; Henrician Canons, 31.3; R. H. Helmholz, "The Law Of Charity in the Ecclesiastical Courts" in P. Hoskin, C. Brooke, Barrie Dobson (eds.) *Studies in the history of Medieval religion: The foundations of mediaeval English ecclesiastical history. Studies presented to David Smith*, (The Boydell Press, Woolbridge 2005) at 113; A. Richter, "German and American Law of Charity in the Early 19th Century" in R. Helmholz (ed), R. Zimmermann (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 446.

[1058] (1674) 1 Rep. Temp. Finch. 187; 23 Eng. Rep. 103.

[1059] (1674) 1 Rep. Temp. Finch. 187 at 188; 23 Eng. Rep. 103 at 103.

[1060] J. F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphanotrophei, Halae Magdeburgicae 1769) at 434; Z. Hesse, R. Pawlowski, *Dissertatio Posterior: De Testamento ad Pias Causas*, volume 2, (Regiomonti, Konigsberg 1705) at 27; T. W. D., "The Jurisdiction of the Court of Chancery to Enforce Charitable Uses" (1862) 10 (3) *The American Law Register*, 129 at 131; A. Gauthier, *Roman Law and its Contribution to the Development of the Canon Law*, second edition, (Faculty of Canon Law Saint Paul University, Ottawa 1996) at 51.

[1061] *Case of Sutton's Hospital* 10 Co. Rep. 23a at 29b; 77 Eng. Rep. 960 at 968; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 197- 198; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 294; R. Feenstra "Foundations in Continental Law since the 12th Century: The Legal Person Concept and Trust like Devises" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 309; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 85; C. P. Sherman, "A brief History of Imperial Roman Canon Law" (1919) 7 (2) *California Law Review*, 93 at 94.

[1062] *Reformatio Legum Ecclesiasticarum,* 27.25; Cod. 1.3.45; Nov. 131.10; Nov. 131.11.1; Nov. 131.11.4; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 335; G. Jones, *History of the Law of Charity*, (Cambridge University Press, London 1969) at 4; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 198; S. MacCormack, "Sin, Citizenship, and the Salvation of Souls: The Impact of Christian Priorities on Late-Roman and Post-Roman Society" (1997) 39 (4) *Comparative Studies in Society and History*, 662; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 6; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R.

to devote to pious purposes what has been left… the whole property shall, under the care of the Holy bishop of the place be expended for the purpose which it was left".[1063] The extensive authority granted to the ordinary permitted them to proceed *ex officio* against an executor to compel their performance, and against any other person withholding property or interfering with its execution under pain of excommunication.[1064]

The Reformation heralded important changes to the law surrounding charitable giving, which resulted in the promulgation of a number of statutes addressing the subject throughout the course of the sixteenth and seventeenth centuries.[1065] Nonetheless, the protestant Church of England continued to favour acts of charity, and jurists were quick to assure will-makers that charity remained a Christian duty and not a catholic trick.[1066] The *Reformatio Legum Ecclesiasticarum* provides insight into the Bishop's jurisdiction to compel charitable bequests and the utilisation of the *ius commune* to define charity before and after the Reformation. Canon 27.9 provides:

> "The following may be regarded as pious causes: when someone gives towards the release of captives, to the rehabilitation of the poor, [to] the support of orphans, widows and distressed persons of all kinds, especially and above all when something is designated in a testament for the marriage of poor brides, for the clothing of scholars in the universities and for the repair of the public highways. But when something is left

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Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 273; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 86.

[1063] See Cod. 1.3.45.1; Cod. 1.3.45.3.

[1064] Henrician Canons, 31.4; Canon 6, Canons of the Convocation 1529; *Dr. Hunt's Case* 1 Cro. Eliz. 262 at 262; 78 Eng. Rep. 518 at 518; H. Consett, *The Practice of the Spiritual or Ecclesiastical Courts*, (Printed for W. Battersby, London 1700) at 17; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at 60; T. O. Martin, "The Trust and the *fundatio*" (1955) 15 (1) *The Jurist*, 11 at 14.

[1065] 43 Eliz. I, c. 3, s 2; First Henrician Injunctions in G. Bray (ed) *Documents of the English Reformation*, (James Clarke & Co, Cambridge 1994) at 176; A. Richter, "German and American Law of Charity in the Early 19th Century" in R. Helmholz (ed), R. Zimmermann (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 447; J. Reeves, W. F. Finlason, *Reeves's History of the English Law: From the Time of the Romans of the End of the Reign of Elizabeth* , volume 5, (M. Murphy, Philadelphia 1880) at 218; W. R. A. Boyle, *A Practical Treatise on the Law of Charities,* (Saunders and Benning, London 1837) at 4-8.

[1066] W. Assheton, *A Theological Discourse of Last Wills and Testaments*, (Printed for Brab, Aylmer, London 1696) at 78; B. Beinart, "Some Aspects of Privileged Wills" [1959] *Acta Juridica*, 200 at 211; W. R. A. Boyle, *A Practical Treatise on the Law of Charities,* (Saunders and Benning, London 1837) at 12.

for superstitious rather than for godly reasons, the Bishop shall intervene by his authority and assure that a legacy is distributed to pious causes".[1067]

In *Re the Chelmsford Grammar School*[1068], the court noted the ecclesiastical courts interpreted the principles in Dist. 37, c 10 and X. 5.5.1-5 to include matters surrounding education as spiritual in nature.[1069] Furthermore, the *Reformatio Legum Ecclesiasticarum* repeats the tenor of X. 3.26.17 to permit disqualified will-makers from making a general will to leave bequests for pious causes.[1070]

The monarch, as both the spiritual leader of the Church and *pater patriae,* exercised an inherent jurisdiction over the protection of vulnerable people, which enabled Chancery to encroach on ecclesiastical jurisdiction under the head of charitable uses.[1071] The crown even appointed a commission to oversee charitable operations independent of spiritual supervision.[1072] The most important development was the Statute of Charitable Uses[1073] that remains an often-cited starting point in New Zealand courts for a principle-based approach, reminiscent of civilian practice, towards indentifying what charitable motives ought to benefit from a privileged construction.[1074] The Act states:

[1067] See Nov. 131.11.10; Dist. 87; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 523; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 86; Will of Bishop Stephen Gardiner (1545) in J. G. Nichols, J. Bruce (eds), *Wills from Doctors Commons: A Selection from the Wills of Eminent Persons proved in the Prerogative Court of Canterbury 1495 – 1695* (Printed for the Camden Society, London 1863) at 47; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 418.

[1068] (1854) 1 K & J 543; 69 Eng. Rep. 575.

[1069] (1854) 1 K & J 543 at 549; 69 Eng. Rep. 575 at 577.

[1070] *Reformatio Legum Ecclesiasticarum*, 27.8.

[1071] *Falkland (Lord) v Bertie* (1696) 2 Vern. 333 at 342; 23 Eng. Rep. 814 at 818; *Eyre v Shaftsbury (Countess of)* (1722) 2 P. WMS. 103 at 119; 24 Eng. Rep. 659 at 664; W. R. A. Boyle, *A Practical Treatise on the Law of Charities,* (Saunders and Benning, London 1837) at 12; C. E. F. Rickett, "Charitable Giving in English and Roman Law: A Comparison of Method" (1979) 38 (1) *The Cambridge Law Journal*, 118 at 126; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 2, (Philadelphia J. Laval and Samuel F. Bradford, 1824) at 256; A. Richter, "German and American Law of Charity in the Early 19th Century" in R. Helmholz (ed), R. Zimmermann (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 446; G. Jones, *History of the Law of Charity*, (Cambridge University Press, London 1969) at 6

[1072] Eliz. I, c. 2 (relief of poor), s 1; 1 Eq. Ca. Ab. 94; A. Richter, "German and American Law of Charity in the Early 19th Century" in R. Helmholz (ed), R. Zimmermann (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 446; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 1, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 317; J. Reeves, W. F. Finlason, *Reeves's History of the English Law: From the Time of the Romans of the End of the Reign of Elizabeth*, volume 5, (M. Murphy, Philadelphia 1880) at 227.

[1073] 43 Eliz. I, c. 4.

[1074] *CIR v Medical Council of New Zealand* [1997] 2 NZLR 297 at 299 - 300; 1 Eq. Ca. Ab. 95; A. Richter, "German and American Law of Charity in the Early 19th Century" in R. Helmholz (ed), R. Zimmermann (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 447; N.

> "for Releife of aged impotent and poore people, some for Maintenance of sicke and maimed Souldiers and Marriners, Schools of Learninge, Free Schooles and Schollers in Universities, some for Repaire of Bridges Portes Havens Causwaies Churches seabankes and Highewaies, some for Education and Prefermente of Orphans, some for or towardes Reliefe Stocke or maintenance for Howses of Correction, some for Marriages of poore Maide, some for supportation Ayde and Helpe of younge Tradesmen, Handiecraftesmen and persons decayed, and others for releife or redemption of Prisoners or Captives, and for aide or ease of any poore Inhabitants, settinge out of Souldiers and other Taxes".[1075]

The preamble appears to repeat the *ius commune* influence and is declaratory of its principles rather than innovating practice.[1076] The presence of a principle-based approach to the statute invites future reference to the civil law principles that have shaped the modern charitable trust. In *Morice v Durham* (*The Bishop of*)[1077], the court cited Cicero's '*De Oratore*' to establish that English law distinguished acts of liberality from charitable bequests because they did not carry a public benefit.[1078] Civilians recognised the importance of public benefit as expressed in Cod. 1.3.45.6 that permits "for since charity affects us all, so too, the desire to carry it out should be of common interest. Anyone, therefore, is by this law permitted to bring and prosecute a personal action according to law, so the bequest may be carried out". In *Attorney-General v Lady Downing*[1079] the court cited Dig. 33.2.16 to indicate the Attorney-

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Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 148; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 1, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 308; J. Reeves, W. F. Finlason, *Reeves's History of the English Law: From the Time of the Romans of the End of the Reign of Elizabeth*, volume 5, (M. Murphy, Philadelphia 1880) at 227at 218; W. R. A. Boyle *A Practical Treatise on the Law of Charities* (Saunders and Benning, London 1837) at 10; L. Shelford, *A Practical Treatise of the Law of Mortmain, and Charitable Uses and Trusts* (J. S. Littell, Philadelphia 1842) at 357; C. E. F. Rickett, "Charitable Giving in English and Roman Law: A Comparison of Method" (1979) 38 (1) *The Cambridge Law Journal*, 118 at 123; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 333; W. R. A. Boyle, *A Practical Treatise on the Law of Charities* (Saunders and Benning, London 1837) at 18; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 147; D. Breaden, R. Grey, R. Holmes, C. Kelly, G. Kelly, L. Smith, K. Lord, L. Taylor, K. Davenport (eds), *Law of Trust* (LexisNexis, Wellington 2012) at [8.0]; M. Soper (ed), A Smellie (ed), *The Laws of New Zealand, Charities* (LexisNexis Wellington 2012) at [2.12].

[1075] 43 Eliz. I, c. 4.

[1076] R. S. Donnison Roper, *A Treatise of the Law of Property Arising from the Relation Between Husband and Wife*, second edition, volume 2, (Joseph Butterworth and Son, London, 1826) at 1119; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 1, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 308.

[1077] (1805) 10 Ves. Jun. 522; 32 Eng. Rep. 947.

[1078] (1805) 10 Ves. Jun. 522 at 531, 540; 32 Eng. Rep. 947 at 951, 954; Cicero. *De Oratore*, 1.8; 2.16.

[1079] (1767) Wilm. 1; 97 Eng. Rep. 1.

General is empowered to redirect an illegal charitable legacy to a lawful purpose, reflecting the public interest element, which is a role undertaken by New Zealand's Attorney-General.[1080] The treatment of pious causes under the head of advancement of religion distinguishes the civilian concept of a private bequest *ad pias causas*, benefitting the will-maker, from the modern charitable gift that confers a public benefit.[1081] In *Gilmour v Coats*[1082], their Lordships refused to recognise a charitable bequest for cloistered nuns and adopted a narrower approach to public benefit than previous ecclesiastical practice despite acknowledging the bequest's pious nature.[1083] Lord Simmons acknowledged *pias causas* was too vague and intangible to satisfy the public benefit test that had developed.[1084] Furthermore, Lord Reid explicitly rejected the test *ad pias causas* because the multifaceted nature of religion did not meet the needs of contemporary society.[1085] This more restrictive approach to the nature of charity has not affected its fundamental principles.

Chancery already possessed a traditional jurisdiction over charitable uses before real property became devisable by will, asserted alongside the crown's prerogative, although the exact historical background is unclear.[1086] The Statute of Charitable Uses even gave Chancery the power to supervise the Bishop or executor's application of charitable funds.[1087] It could even be suggested the inclusion of the *fideicommissarius*, or trustee-like office, in X. 3.26.17 almost anticipates the English development. Nonetheless, the legislative intent behind the statute was to provide a remedy for a breach of uses rather than replace the ordinary's

[1080] (1767) Wilm. 1 at 33- 34; 97 Eng. Rep. 1 at 13; see L. Shelford, *A Practical Treatise of the Law of Mortmain, and Charitable Uses and Trusts* (J. S. Littell, Philadelphia 1842) at 204; T. W. D., "The Jurisdiction of the Court of Chancery to Enforce Charitable Uses" (1862) 10 (3) *The American Law Register*, 129 at 136; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 153, 186.
[1081] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 149; D. Breaden, R. Grey, R. Holmes, C. Kelly, G. Kelly, L. Smith, K. Lord, L. Taylor, K. Davenport (eds), *Law of Trust* (LexisNexis, Wellington 2012) at [8.20].
[1082] [1949] 1 All ER 848.
[1083] [1949] 1 All ER 848 at 861; see D. Breaden, R. Grey, R. Holmes, C. Kelly, G. Kelly, L. Smith, K. Lord, L. Taylor, K. Davenport (eds), *Law of Trust* (LexisNexis, Wellington 2012) at [8.20.10].
[1084] [1949] 1 All ER 848 at 855.
[1085] [1949] 1 All ER 848 at 861.
[1086] G. Jones, *History of the Law of Charity*, (Cambridge University Press, London 1969) at 5; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 591 – 592; W. R. A. Boyle, *A Practical Treatise on the Law of Charities,* (Saunders and Benning, London 1837) at 12; T. W. D., "The Jurisdiction of the Court of Chancery to Enforce Charitable Uses" (1862) 10 (3) *The American Law Register*, 129 at 129; J. Biancalana, "Medieval Uses" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 113.
[1087] 43 Eliz. I, c. 4, s 1; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 777.

jurisdiction.[1088] In *Fielding v Bound*[1089], the Lord Keeper stated that the spiritual courts retained proper jurisdiction to compel charitable legacies despite Chancery's concurrent jurisdiction.[1090] In practice, Chancery attracted a large number of petitions filed in the name of the Attorney-General that outweighed the causes brought before the ecclesiastical courts.[1091] However, Chancery followed an important rule determining that if it enjoyed concurrent jurisdiction with the ecclesiastical courts it would follow and apply the same principles to ensure consistent practice.[1092] Therefore, it also acknowledged it received the same civil law principles concerning legacies that civilians had imported in English law.[1093]

Civilians, following the lead of the canon law, afforded the will *ad pias causas* a number of privileges derived from the civil law to ensure that the ecclesiastical courts could make every effort to sustain the gift.[1094] Prior to the *Corpus Iuris Canonici*, Justinian bestowed bequests *ad pias causas* a number of privileges designed to sustain them in an effort to encourage testators to give charitably.[1095] The most significant passage in his *Novels* states "If he does

[1088] 43 Eliz. I, c. 4, s 4; Porter's Case 1 Co. Rep. 22b; 76 Eng. Rep. 50; R. S. Donnison Roper, *A Treatise of the Law of Property Arising from the Relation Between Husband and Wife*, second edition, volume 2, (Joseph Butterworth and Son, London, 1826) at 1119; J. Reeves, W. F. Finlason, *Reeves's History of the English Law: From the Time of the Romans of the End of the Reign of Elizabeth*, volume 5, (M. Murphy, Philadelphia 1880) at 219; W. R. A. Boyle, *A Practical Treatise on the Law of Charities,* (Saunders and Benning, London 1837) at 8, 12; L. Shelford, *A Practical Treatise of the Law of Mortmain, and Charitable Uses and Trusts* (J. S. Littell, Philadelphia 1842) at 357.

[1089] (1682) 1 Vern 230; 23 Eng. Rep. 434.

[1090] (1682) 1 Vern 230 at 231; 23 Eng. Rep. 434; *Attorney General v Pyle* (1738) 1 Atk 435; 26 Eng. Rep. 278; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 530; R. Ombres Op, "Charitable Trusts: The Catholic Church in English law" [1995] *Christian Law Review*, 72 at 73.

[1091] *Eyre v Shaftsbury (Countess of)* (1722) 2 P. WMS. 103 at 119; 24 Eng. Rep. 659 at 664; G. Jones, *History of the Law of Charity*, (Cambridge University Press, London 1969) at 5; R. Ombres Op, "Charitable Trusts: The Catholic Church in English law" [1995] *Christian Law Review*, 72 at 73; W. R. A. Boyle, *A Practical Treatise on the Law of Charities,* (Saunders and Benning, London 1837) at 12; C. E. F. Rickett, "Charitable Giving in English and Roman Law: A Comparison of Method" (1979) 38 (1) *The Cambridge Law Journal*, 118 at 126; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 2, (Philadelphia J. Laval and Samuel F. Bradford, 1824) at 256.

[1092] A. Richter, "German and American Law of Charity in the Early 19th Century" in R. Helmholz (ed), R. Zimmermann (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 446.

[1093] *Re Hart's Trusts* (1858) 3 De. G. & J. 195 at 195; 44 Eng. Rep. 1243 at 1245; R. S. Donnison Roper, *A Treatise of the Law of Property Arising from the Relation Between Husband and Wife*, second edition, volume 2, (Joseph Butterworth and Son, London, 1826) at 1119; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 267; J. Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, ninth edition, volume 2 (Boston: C.C. Little and J. Brown, Boston 1866) at 393.

[1094] *Fielding v Bound* (1682) 1 Vern 230 at 230; 23 Eng. Rep. 434 at 434; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 779; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 523.

[1095] Cod. 1.3.28.1; *Fielding v Bound* (1682) 1 Vern 230; 23 Eng. Rep. 434; *Mills v Farmer* (1811) 19 Ves. Jun. 483 at 485; 34 Eng. Rep. 595 at 596; *Attorney General v Robins* (1722) 2 P. WMS. 24 at 25; 24 Eng. Rep. 627 at 627; G. Jones, *History of the Law of Charity*, (Cambridge University Press, London 1969) at 5; A. Richter, "German and American Law of Charity in the Early 19th Century" *in* R. Helmholz (ed), R. Zimmermann (ed),

not himself state, to the poor of which place this is left, the holy bishop of the city in which the testator had his domicile shall receive it and distribute it among the poor".[1096] This principle granted a privileged construction to ensure charitable bequests did not fail because the will-maker left them to uncertain persons.[1097] English courts cited Nov. 131.11.1 to direct the Bishop to distribute a charitable gift to God or Christ amongst the poor of the will-maker's domicile unless the testator nominated a saint, then it passes to the chapel bearing their name or the poorest if more than one existed.[1098] The ecclesiastical courts did not allow

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Itinera: Trust and Treuhand in Historical Perspective, (Duncker & Humblot, Berlin 1998) at 428; R. Ombres Op, "Charitable Trusts: The Catholic Church in English law" [1995] *Christian Law Review*, 72 at 73; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 20; B. Beinart, "Some Aspects of Privileged Wills" [1959] *Acta Juridica*, 200 at 209; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 588; L. Shelford, *A Practical Treatise of the Law of Mortmain, and Charitable Uses and Trusts* (J. S. Littell, Philadelphia 1842) at 177, 356; M. A. Pock, "The Rule against Perpetuities: A Comparison of Some Common Law and Civil Law Jurisdictions" (1961) 35 (1) *St. John's Law Review*, 62 at 65; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 23; J. Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, ninth edition, volume 2 (Boston: C.C. Little and J. Brown, Boston 1866) at 390; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 273; C. P. Sherman, "A brief History of Imperial Roman Canon Law" (1919) 7 (2) *California Law Review*, 93 at 94.

[1096] Nov. 131.11.1 see Cod. 1.3.28.1.

[1097] Cod. 1.3.24; Cod. 1.3.28; Cod. 1.3.48; Cod. 6.50.1; Cod. 6.48.26; S. MacCormack, "Sin, Citizenship, and the Salvation of Souls: The Impact of Christian Priorities on Late-Roman and Post-Roman Society" (1997) 39 (4) *Comparative Studies in Society and History,* 644 at 663; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 86; Z. Hesse, R. Pawlowski, *Dissertatio Posterior: De Testamento ad Pias Causas*, volume 2, (Regiomonti, Konigsberg 1705) at 22; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 67; B. Beinart, "Some Aspects of Privileged Wills" [1959] *Acta Juridica*, 200 at 209; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 18 see Will of Thomas Gresham (1575) in J. G. Nichols, J. Bruce (eds), *Wills from Doctors Commons: A Selection from the Wills of Eminent Persons proved in the Prerogative Court of Canterbury 1495 – 1695* (Printed for the Camden Society, London 1863) at 63; C. P. Sherman, "A brief History of Imperial Roman Canon Law" (1919) 7 (2) *California Law Review*, 93 at 94; see Inst. 2.20.25.

[1098] Cod. 1.2.25; Cod. 1.2.25.1; Cod. 1.2.25.3; Cod. 1.3.28; Cod. 1.3.48.2; Nov. 131.9; *Attorney General v Platt* (1675) 1 Rep. Temp. Finch. 221 at 221; 23 Eng. Rep. 122 at 122; *Attorney General v Peacock* (1675) 1 Rep. Temp. Finch. 245 at 245; 23 Eng. Rep. 135 at 135; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 294- 295, 597; L. M. McGranahan, "Charity and the Bequest Motive: Evidence from seventeenth-Century Wills" (2000) 108 (6) *The Journal of Political Economy*, 1270 at 1271; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at 60; L. Shelford, *A Practical Treatise of the Law of Mortmain, and Charitable Uses and Trusts* (J. S. Littell, Philadelphia 1842) at 356-357; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 387; S. MacCormack, "Sin, Citizenship, and the Salvation of Souls: The Impact of Christian Priorities on Late-Roman and Post-Roman Society" (1997) 39 (4) *Comparative Studies in Society and History*, 644 at 664; R. S. Donnison Roper, *A Treatise of the Law of Property Arising from the Relation Between Husband and Wife*, second edition, volume 2, (Joseph Butterworth and Son, London, 1826) at 1182; J. Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, ninth edition, volume 2 (Boston: C.C. Little and J. Brown, Boston 1866) at 392; T. W. D., "The

an uncertain appointment of an executor or legatee within the will to affect the charitable portion.[1099] This remains an important part of New Zealand law.[1100] This part of a will or devise remained valid even if the will was illegible provided some form of charitable intent existed.[1101] Cod. 1.3.48 permitted a charitable bequest to override the Falcidian quarter despite the apparent uncertainty of the beneficiaries.[1102] Furthermore, the Ecclesiastical courts directed executors to settle debts from general legacies before charitable bequests if the estate was insufficient to satisfy all claims.[1103] However, Chancery reversed this practice to hold charitable gifts abated alongside unprivileged legacies.[1104]

English civilians furnished the foundational principle for the perpetual existence of a charitable bequest could last forever, which is an exception to the rule of perpetuities that surround trusts and *fideicommissum* because it is abhorrent to general rules surrounding legacies.[1105] They drew upon Cod. 1.3.32.7 that provides "every privilege granted the various

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Jurisdiction of the Court of Chancery to Enforce Charitable Uses" (1862) 10 (3) *The American Law Register*, 129 at 133; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 86; C. P. Sherman, "A brief History of Imperial Roman Canon Law" (1919) 7 (2) *California Law Review*, 93 at 94.

[1099] *Masters v Masters* (1717) 1 P. WMS. 421 at 425; 24 Eng. Rep. 454 at 455; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 20; L. Shelford, *A Practical Treatise of the Law of Mortmain, and Charitable Uses and Trusts* (J. S. Littell, Philadelphia 1842) at 357.

[1100] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 147.

[1101] *Hazard c Pike* The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 4; *Mills v Farmer* (1811) 19 Ves. Jun. 483 at 486; 34 Eng. Rep. 595 at 596; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 17; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 66, 68.

[1102] Nov. 1.2.2; S. MacCormack, "Sin, Citizenship, and the Salvation of Souls: The Impact of Christian Priorities on Late-Roman and Post-Roman Society" (1997) 39 (4) *Comparative Studies in Society and History*, 644 at 663; T. W. D., "The Jurisdiction of the Court of Chancery to Enforce Charitable Uses" (1862) 10 (3) *The American Law Register*, 129 at 135.

[1103] *Reformatio Legum Ecclesiasticarum,* 27.25; W. Lyndwood, *Constitutions Provincialles and of Otho and Octhobone, translated in to Englyshe*, (Robert Redman, London 1534) at 3.13.6; 2 Eq. Ca. Ab. 554; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 335; G. Jones, *History of the Law of Charity*, (Cambridge University Press, London 1969) at 5.

[1104] 2 Eq. Ca. Ab. 193, 554; *Masters v Masters* (1717) 1 P. WMS. 421 at 423; 24 Eng. Rep. 454 at 454; *General v Robins* (1722) 2 P. WMS. 24 at 25; 24 Eng. Rep. 627 at 627; *Jennor v Harper* (1713) 1 Gilb Rep 44 at 44; 25 Eng. Rep. 31 at 32; W. Ward, *A Treatise on Legacies: Or Bequests of Personal Property*, (J. S. Littell, Philadelphia 1837) at 191; L. Shelford, *A Practical Treatise of the Law of Mortmain, and Charitable Uses and Trusts* (J. S. Littell, Philadelphia 1842) at 177.

[1105] W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 623; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 615; T. F. T. Plucknett, *A Concise History of the Common Law*, second edition, (The Lawyers Co-operative Publishing Co, New York 1936) at 533; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 93; Law Commission, *Review of Trust Law in New Zealand,* Issues Paper 19 (Law Commission, Wellington 2010) at [1.3]; C. Stebbings "Charity land: A mortmain confusion" (1991) 12 (1) *The*

churches of the Orthodox faith, the hospitals for strangers, or poor houses, generally or specially, shall be perpetually preserved". The civil law itself developed to repeal the perpetuity granted and restricted these gifts, alongside general legacies, to the fourth degree.[1106] However, the passage in Cod. 1.3.32.7 found favour within the ecclesiastical courts, which granted charitable bequests the same privilege of perpetual existence.[1107] The will-maker's desire to benefit their soul underpinned the rationale behind the perpetuity because the gift reflected the enduring memory of the charitable act.[1108] This is contrary to the doctrine against perpetuities settled in *Duke of Norfolk's Case*[1109] by Lord Nottingham who passionately stated:

> "[31] [Perpetuities] fight against God, for they pretend to such a Stability in human Affairs, as the Nature of them admits not, of, and they are against the Reason and the Policy of the Law, and therefore not to be endured… [33] … I would fain know the Difference why I may not raise a new springing Trust upon the same Term, as well as a new springing Term upon the same Trust; that is such a Chicanery of Law as will be laughed at all over the Christian World".[1110]

The rule of perpetuities applies in New Zealand and charitable trusts remain a privileged exception.[1111]

Journal of Legal History, 7 at 13; M. A. Pock, "The Rule against Perpetuities: A Comparison of Some Common Law and Civil Law Jurisdictions" (1961) 35 (1) *St. John's Law Review*, 62 at 70.

[1106] Nov. 131.13.1; Nov. 159.2; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 623; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 182; M. A. Pock, "The Rule against Perpetuities: A Comparison of Some Common Law and Civil Law Jurisdictions" (1961) 35 (1) *St. John's Law Review*, 62 at 83; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 145 see Will of Thomas Gresham (1575) in J. G. Nichols, J. Bruce (eds), *Wills from Doctors Commons: A Selection from the Wills of Eminent Persons proved in the Prerogative Court of Canterbury 1495 – 1695* (Printed for the Camden Society, London 1863) at 63.

[1107] R. H. Helmholz "The Law Of Charity in the Ecclesiastical Courts" in P. Hoskin, C. Brooke, Barrie Dobson (eds.) *Studies in the history of Medieval religion: The foundations of mediaeval English ecclesiastical history. Studies presented to David Smith*, (The Boydell Press, Woolbridge 2005) at 117; R. A Houlbrooke, *Death, Religion and the Family in England, 1480 – 1750*, (Oxford University Press, Oxford 1998) at 36; J. Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, ninth edition, volume 2 (Boston: C.C. Little and J. Brown, Boston 1866) at 392.

[1108] Nov. 65; Nov. 65.1; T. W. D., "The Jurisdiction of the Court of Chancery to Enforce Charitable Uses" (1862) 10 (3) *The American Law Register*, 129 at 140.

[1109](1682) 3 Ch Cas 1, 22 Eng. Rep. 930.

[1110] (1682) 3 Ch Cas 1 at 31, 33; 22 Eng. Rep. 930 at 949, 951 see Nov. 7.2; *Sir Anthony Mildmay's* Case 6 Co. Rep. 40a at 40a; 77 Eng. Rep. 311 at 311.

[1111] Perpetuities Act 1964, s 4; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 145; B. Patterson, "Charities and the Wills Act" [2009] *New Zealand Law Journal*, 51 at 51; D. Breaden, R. Grey, R. Holmes, C. Kelly, G. Kelly, L. Smith, K. Lord, L. Taylor, K.

The cy-pres doctrine is illustrative of civil law principles followed in English courts that were only applicable to charitable gifts.[1112] The doctrine's purpose is to sustain otherwise defective charitable dispositions and vary their purpose, which is permissible because the will-maker's principal concern is their soul rather than the object.[1113] Nov. 131.11.2 authorises a Bishop to receive property and direct it to some other pious work if they could not sustain the original charitable motive.[1114] The doctrine itself is a privileged construction given to a bequest that allowed an executor to administer it to a varied charitable purpose, acknowledging that human affairs are not perpetual, without following the precise form stipulated within a will.[1115] Dig. 33.2.16 also furnished an important foundational principle for the doctrine, which provides:

> "A legacy was left to a town, so that from the revenues each year a spectacle should be celebrated in that town to keep alive the memory of the deceased, but it was not permitted to celebrate it there; I ask what you think about the legacy. He replied that since the testator wanted a spectacle to be celebrated in the town, but of such kind as could not be legally celebrated there, it was unfair that the sum which the deceased had

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Davenport (eds), *Law of Trust* (LexisNexis, Wellington 2012) at [8.23]; M. Soper (ed), A Smellie (ed), *The Laws of New Zealand, Charities* (LexisNexis 2012, Wellington) at [3.72].

[1112] J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 532; A. Richter, "German and American Law of Charity in the Early 19th Century" *in* R. Helmholz (ed), R. Zimmermann (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 446; W. R. A. Boyle, *A Practical Treatise on the Law of Charities,* (Saunders and Benning, London 1837) at v; J. Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, ninth edition, volume 1 (Boston: C.C. Little and J. Brown, Boston 1866) at 271; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 444.

[1113] Nov. 65; *White v White* (1778) 1 Bro. C. C. 12 at 16; 28 Eng. Rep. 955 at 957; *Moggridge v Thackwell* (1802) 7 Ves. Jun. 35 at 69; 32 Eng. Rep. 15 at 26; R. H. McGrath, *The Doctrine of Cy-pres as applied to Charities*, (T & J. W. Johnson & Co, Philadelphia 1887) at 13; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 588; R. S. Donnison Roper, *A Treatise of the Law of Property Arising from the Relation Between Husband and Wife*, second edition, volume 2, (Joseph Butterworth and Son, London, 1826) at 1181; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 2, (Philadelphia J. Laval and Samuel F. Bradford, 1824) at 256; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 1, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 317a – 317c; T. W. D., "The Jurisdiction of the Court of Chancery to Enforce Charitable Uses" (1862) 10 (3) *The American Law Register*, 129 at 134; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 419.

[1114] Nov. 40; Nov. 65.1.2; *Moggridge v Thackwell* (1802) 7 Ves. Jun. 35 at 69; 32 Eng. Rep. 15 at 26; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 533; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 335.

[1115] W. R. A. Boyle, *A Practical Treatise on the Law of Charities* (Saunders and Benning, London 1837) at 148; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 67; G. Jones, *History of the Law of Charity*, (Cambridge University Press, London 1969) at 5; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 18.

intended for the spectacle should fall to the profit of the heirs. Therefore, the heirs and the chief men of the town should be summoned to discuss how the *fideicommissum* could be transformed so that the testator's memory would be celebrated in some other legal way"

Therefore, English courts were similar empowered to ignore illegal, impossible, or invalid elements that may surround a charitable gift in the same manner as our modern courts.[1116]

Chancery explicitly deferred to the civil law and its commentary to apply the cy-pres doctrine and other facets of charitable uses.[1117] Nov. 7.2.1 itself empowered the secular authority to permit alienation of Church property connected to charitable purposes, recognising the arrangement's perpetual nature is fictitious in practice, if necessary to sustain the gift's charitable intent.[1118] In *White v White*[1119], Lord Chancellor Thurlow construed the doctrine liberally and applied principles "adopted from the civil law, which are very favourable to charities, that legacies given to public uses not ascertained shall be applied to some proper object".[1120] Chancery appear to have tempered the liberal form of the civil law in favour of limiting construction to 'as near as possible' to the will-maker's charitable intention.[1121] In *Morice*, the court held a trust left to a Bishop to apply to any purpose failed because the object was too uncertain for the Chancellor to discern any charitably intention.[1122] However,

[1116] *Reformatio Legum Ecclesiasticarum,* 27.15; Dig. 50.17.188.1; Nov. 131.14; *Reformatio Legum Ecclesiasticarum* 27.9; *Mills v Farmer* (1811) 19 Ves. Jun. 483 at 486; 34 Eng. Rep. 595 at 596; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 533; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 67 see Section 32 (1), Charitable Trusts Act 1967.

[1117] *Mills v Farmer* (1811) 19 Ves. Jun. 483 at 485; 34 Eng. Rep. 595 at 596; R. H. McGrath, *The Doctrine of Cy-pres as applied to Charities*, (T & J. W. Johnson & Co, Philadelphia 1887) at 21; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 777; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 588.

[1118] Nov. 65.1.2; T. W. D., "The Jurisdiction of the Court of Chancery to Enforce Charitable Uses" (1862) 10 (3) *The American Law Register*, 129 at 137.

[1119] (1778) 1 Bro. C. C. 12; 28 Eng. Rep. 955.

[1120] (1778) 1 Bro. C. C. 12 at 16; 28 Eng. Rep. 955 at 957.

[1121] Nov. 131.9; *Attorney General v Pyle* (1738) 1 Atk 435 at 436; 26 Eng. Rep. 278 at 279; *Moggridge v Thackwell* (1802) 7 Ves. Jun. 35 at 69, 77, 83; 32 Eng. Rep. 15 at 26, 29, 31; *Mills v Farmer* (1811) 19 Ves. Jun. 483 at 488; 34 Eng. Rep. 595 at 596; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 1, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 317b; W. R. A. Boyle, *A Practical Treatise on the Law of Charities,* (Saunders and Benning, London 1837) at 148; R. S. Donnison Roper, *A Treatise of the Law of Property Arising from the Relation Between Husband and Wife*, second edition, volume 2, (Joseph Butterworth and Son, London, 1826) at 1181; W. R. A. Boyle *A Practical Treatise on the Law of Charities* (Saunders and Benning, London 1837) at 147- 148.

[1122] (1805) 10 Ves. Jun. 522 at 525; 32 Eng. Rep. 947 at 948; *Mills v Farmer* (1811) 19 Ves. Jun. 483 at 491; 34 Eng. Rep. 595 at 597; J. Powell, T. Jarman (ed), *An Essay on Devises*, volume 2, (J. S. Littell, Philadelphia 1838) at 12.

Gilbert identifies that a gift left without directions to a Bishop, whom would have applied it to a charitable purpose, ought to be sufficient under ecclesiastical law.[1123] In the leading case, *Paice v Archbishop of Canterbury*[1124], Lord Chancellor Eldon acknowledged he possessed jurisdiction to provide an alternative construction to give effect to the will-maker's charitable intentions but required the will's executors to present a charitable scheme before exercising his discretion.[1125] Nevertheless, the cy-pres doctrine continues to exist as an important part of modern judicial practice and the 'near as possible' test persists in New Zealand alongside statutory introductions.[1126] The Charitable Trusts Act 1957 constrains the High Court to considering modifications present within the charitable scheme and limits an exercise of its inherent jurisdiction when the purpose fails to come into existence.[1127] Nonetheless, the civil law profoundly influenced the shape of New Zealand's charitable bequests as a testamentary institution despite their absence from the Wills Act 2007 and the restrictions placed by modern law.

[1123] G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 387 see *Dyke v Walford* (1846) 5 Moore 434 at 434; 13 Eng. Rep. 557 at 573; *Hopkinson v Ellis* (1846) 10 Beav 169 at 176; 50 Eng. Rep. 547 at 550; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 126; Will of Bishop Stephen Gardiner (1545) in J. G. Nichols, J. Bruce (eds), *Wills from Doctors Commons: A Selection from the Wills of Eminent Persons proved in the Prerogative Court of Canterbury 1495 – 1695* (Printed for the Camden Society, London 1863) at 47.

[1124] (1807) 14 Ves. 364; 33 Eng. Rep. 560.

[1125] (1807) 14 Ves. 364 at 371 - 372; 33 Eng. Rep. 560 at 563; *Re The Chelmsford Grammar School* (1854) 1 K & J 543 at 571; 69 Eng. Rep. 575 at 587; R. S. Donnison Roper, *A Treatise of the Law of Property Arising from the Relation Between Husband and Wife*, second edition, volume 2, (Joseph Butterworth and Son, London, 1826) at 1181.

[1126] Perpetuities Act 1964, s 10; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 188, 190 - 191; B. Patterson, "Charities and the Wills Act" [2009] *New Zealand Law Journal*, 51 at 51; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 334; T. W. D., "The Jurisdiction of the Court of Chancery to Enforce Charitable Uses" (1862) 10 (3) *The American Law Register*, 129 at 132; R. H. Helmholz "The Law Of Charity in the Ecclesiastical Courts" in P. Hoskin, C. Brooke, Barrie Dobson (eds.) *Studies in the history of Medieval religion: The foundations of Mediaeval English Ecclesiastical History. Studies presented to David Smith*, (The Boydell Press, Woolbridge 2005) at 121; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [10.14].

[1127] Charitable Trusts Act 1957, s 32, N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 190; M. Soper (ed), A Smellie (ed), *The Laws of New Zealand, Charities* (LexisNexis 2012, Wellington) at [7.194].

9. The Executor

The executor is a person appointed in a will who acts as the deceased's personal representative to oversee the distribution of the estate for the payment of debts and legacies.[1128] Jurists identify the office as an indispensable part of the will's effectiveness, and the essential elements of the office were common throughout the *ius gentium*.[1129] Dig. 29.3.1 held that the execution of the last will is in the public interest, resonating with the message in C 13, q 2, c 4, and civilians turned to the executor the canonical will the fluidity necessary to realise this canon.[1130] English law placed the executor in the position of the will-maker and enabled them to hold personalty and binding them to perform the contents of the will as far as permitted by law.[1131] The executorship is divisible into the following stages: Probate and presentation of the inventory, recovery of the deceased's assets, distribution of property according to the will-maker's intentions, accounting for their actions, and receiving acquittal from the court upon completion.[1132] The principal forum of the executor was the

[1128] *Miller v Sheppard* (1758) 2 Lee 506 at 507; 161 Eng. Rep. 421 at 421; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 67; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 79.

[1129] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 238, R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 267; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 201; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 746.

[1130] M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 76, 78; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 677; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 59, 88; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 35.

[1131] *Wankford v Wankford*, 1 Salkeld 299 at 307; 91 Eng. Rep. 265 at 270; *Shaw v Pritcard* (1829) 10 B. & C. 241 at 244; 109 Eng. Rep. 440 at 441; *Arthur v Bokenham* 11 Mod 154 at 162; 88 Eng. Rep. 957 at 963; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 238; C.M. Brune, "Origin and History of Succession in Roman Law" (1911) 36 (4) *Law Magazine & Quarterly Review of Jurisprudence 5th Series*, 429 at 441; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 10, 73; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 119; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 420; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 212; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 415.

[1132] M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 78; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 73; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected*

ecclesiastical courts that granted probate, exercised the principal supervision, enforced the procedure, and kept records until the nineteenth century.[1133] The English executor is an office defined by an interchange between the civil law, canon law, common law, and custom.[1134] Ultimately, the executor is a product of the same forces that shaped the canonical will. The Wills Act 2007 itself does not include a section addressing the executor and reference to previous practice is necessary to define the office's significance to the evolution of testamentary succession.

1. Emergence of the Executor

The significance of the executor's role indicates the office's development and their administration played an essential role in the evolution of testamentary power. The inspiration for the office is an uncertain question in legal history and the role played by the civil law, Roman law, canon law, Germanic law, and local custom remains extensively debated.[1135] The most prominent candidate for the origins of the office lies in the civil law heir that represents a crucial stage in the development of the executor.[1136] The significance of their respective roles encouraged both testators and will-makers to deliberate carefully on their choice of a trust-worthy individual to carry out their wishes.[1137] Notably, the office does not appear within the *Corpus Iuris Civilis* despite its attribution to that system.[1138] Nonetheless, there are principles that come close. Cod. 1.3.28.1 provides:

Studies, (University of Toronto Press, Toronto 1996) at 201; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 59.

[1133] E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 135; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 201.

[1134] R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 282.

[1135] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 391.

[1136] W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 747, 755; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 604; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 317; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 3.

[1137] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 161.

[1138] G. Bray (ed) *Tudor church reform: The Henrician Canons of 1535 and the Reformatio Legum Ecclesiasticarum*, (Boydell Press, Woodbridge 2000) at 736; A. Browne, *A Compendious View of the Civil Law,*

> "And if the testator has designated any one through who he desires the redemption of captives to be made, such person so specially designated shall have the right of demanding such legacy or *fideicommissum*, and so carry out scrupously the wish of the testator. If, however, the testator has not designated any person, but has only named the amount of the legacy or *fideicommissum* that should go for the benefit of the purpose mentioned, then the reverend bishop of the city, where the testator was born, shall have power to demand what was left for that purpose to carry out without delay, as is proper, the pious purpose of the deceased".

English civilians identified this as the foundational title for both the executor and administrator because it identifies a person *loco haeredis* who is administering these gifts for pious causes that may sue, and be sued, in the manner of an heir without the benefit of the Lex Falcidia.[1139]

The Roman law furnished a number of offices, including the *familiae emptor* and the *fideicomissarius,* who acted as independent third parties under a non-legal moral obligation or *fides* reposed by the testator to carry out a specific task or deliver property to a nominated beneficiary.[1140] The *necessarii heres* forcedly instituted to manage an insolvent estate is comparable to the executor because it involves a person managing the estate solely for the

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and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin, (Halsted and Voorhies, New York 1840 at 311.

[1139] Cod. 1.3.49; Cod. 4.11.1.2; Nov. 131.12; Nov. 131. 10; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 264; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 381; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 635 - 636; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 80 – 81; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 269, 273; B. Beinart, "Heir and Executor" [1960] *Acta Juridica*, 223 at 225, 226; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 309.

[1140] Inst. 2.23.1; Inst. 2.23.12; Isidore *Etymologies* 5.24.17; R. Zimmermann, "Heir fiduciarius: Rise and Fall of the Testamentary Executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective,* (Duncker & Humblot, Berlin 1998) at 273; B. Beinart, "Heir and Executor" [1960] Acta Juridica, 223 at 223; A. Watson, *The Law of Succession in the Later Roman Republic*, (Clarendon Press, Oxford 1971) at 35; D. Johnston, *The Roman Law of Trusts*, (Clarendon press, Oxford 1988) at 23; D. Johnston, "Trust and Trust-like Devices in Roman Law" in *Itinera: Trust and Treuhand in Historical Perspective,* (Duncker & Humblot, Berlin 1998) at 46, 54.

benefit of third party creditors.[1141] Nonetheless, the *ius commune* furnished the office of *heres fiduciarius* who acquired title as an heir with the legal obligation of *fides* to deliver the property to a beneficiary, akin to the civil law *fideicommissum*, which became strongly associated with the role of executor.[1142] Despite the presence of *fides*, the civil law does not appear to have developed an 'executor' in the modern sense.[1143] In *Freyhaus v Cramer*[1144], Dr. Lushington restates an oft-cited view that the executor is a modern institution unknown to the civil law and the proper term employed by civilians is *heres testamentarius* or *heres scriptus* to define the office.[1145] Nonetheless, an attempt to define the executor as a civil law heir ignores essential qualities that make the latter more than a personal representative.[1146] Therefore, the evidence suggests Roman testamentary evolution did not furnish the modern concept of an executor.

An alternative view propounded by authoritative scholarship dismisses the civil law heir and presents the Germanic *salmann* of the *Lex Salicia*, arising in the eighth century, as the more

[1141] Inst. 2.14.1; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 271; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 128; W. M. Gordon, *Succession* in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 82; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 166.

[1142] E. Champlin, *Final Judgments, Duty and Emotion in Roman Wills, 200 BC – A.D. 250*, (University of California Press, Berkeley and Los Angeles, 1991) at 109; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 281; M. Graziadei, "The Development of Fiducia in Italian and French Law From The 14th Century to the end of the *Ancien Regime*" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 327, 343; D. Johnston, "Trust and Trust-like Devices in Roman Law" in *Itinera: Trust and Treuhand in Historical Perspective,* (Duncker & Humblot, Berlin 1998) at 54 see Dig. 36.1.69.3.

[1143] R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 1, 9; R. Zimmermann, "*Heir fiduciarius*: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 267; D. Johnston, "Trust and Trust-like Devices in Roman Law" in *Itinera: Trust and Treuhand in Historical Perspective,* (Duncker & Humblot, Berlin 1998) at 54.

[1144] (1829) 1 Knapp 108; 12 Eng. Rep. 261.

[1145] (1829) 1 Knapp 108 at 111; 12 Eng. Rep. 261 at 263; see *Reformatio Legum Ecclesiasticarum,* 55.19; *Androvin v Poilblanc* (1745) 3 ATK 299 at 300 - 301; 26 Eng. Rep. 974 at 975; *Lynch v Bellew* (1820) 3 Phill. Ecc. 424 at 430; 161 Eng. Rep. 1372 at 1374; *Wood v Medley* (1828) 1 Hagg. Ecc. 645 at 649; 162 Eng. Rep. 705 at 706; *Bouchier v Taylor* (1776) 4 Brown 708 at 718 2 Eng. Rep. 481 at 488; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 11; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 909; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 72; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 110.

[1146] R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 2.

likely ancestor of the English office.[1147] This view of the executor's origins emerged in the nineteenth century following research by German legal scientists guided by the absence of a universal heir in the Germanic succession.[1148] The early *salmann* appears to have acquired an irrevocable right to the entirety of the donor's property until they delivered, *inter vivos* or *mortis causa*, the property to the donee according to the terms of a bilateral agreement.[1149] However, the *salmann*'s appointment appears to have developed into a custodial role over unilaterally given property.[1150] It resembled the Germanic offices of *vormund* or guardian, and the *treuhand* or trustee that occupied analogous custodial roles over persons and property.[1151] The resemblance to the executor became stronger when the *salmann* evolved beyond a simple delivery of property to undertake a variety of legal functions, including carrying out testamentary instructions, and the nominated donee could compel them to

[1147] R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 275; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 563; J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 526; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 24 – 25; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 749; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 132; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 110.

[1148] R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 36.

[1149] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 149; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 24, 26; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 564; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 110; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 561 R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 278.

[1150] R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 24, 55; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 561 R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 278; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 149; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 564.

[1151] R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 275; R. Hubener, F.S. Philbrick, P. Vinogradoff, W. E. Walz, *The Contienental Legal Series, volume Four: A History of Germanic Private Law*, (Little, Brown, and Company, Boston 1918) at 666; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 33; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 132; S. F. C. Milsom, *Historical Foundations of the Common Law*, second edition, (Butterworths, London 1981) at 200.

execute their office according to the donor's wishes.[1152] Furthermore, the *salmann* performed the necessary function of carrying out a *Vergabung von Todes wegen*, a will-like device forming part of German custom, in a manner analogous to an executor.[1153] Hannan compares the Germanic ceremony of taking a spear or document and delivering it to a chosen heir, manifesting a transfer of the estate, to the role of the *familiae emptor* in the fictitious sale of the Roman mancipatory will.[1154] Nonetheless, a more restrained approach, recognising the open-ended nature of medieval law, suggests the presence of the *salmann* in German law did not become part of English law.[1155] Furthermore, the term executor is also notably absent from the early Germanic codes.[1156]

The rise of the executor is attributable to the canon law and likely developed alongside the canonical will to oversee the execution necessary to give effect to the will-maker's intentions.[1157] The institution of an heir to oversee its execution is not a characteristic of the canonical will and the consequences of this omission did not expunge its effectiveness as an instrument because it allowed the executor to assume the heir's role.[1158] There is evidence to suggest the canon law adopted characteristics of the *Vergabung von Todes wegen*, rather than the Roman testament, and repurposed the bilateral appointment of *salmann* to become the unilaterally appointed executor to ensure the former office remained prominent in continental

[1152] W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 564 - 565; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 276; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 25.

[1153] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 149; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 24.

[1154] J. D. Hannan, "*The Canon Law of Wills*" (1944) 4 (4) *The Jurist*, 522 at 526; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 27; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 278.

[1155] R. Zimmermann, "Heir fiduciarius: Rise And Fall of the Testamentary Executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 276.

[1156] E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 129.

[1157]; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 132; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 280.

[1158] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 148; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 280; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 390- 391.

customary law.[1159] Scholars have also suggested the Byzantine office of *epitropos* and a number of other weaker candidates are the source of the office.[1160] The canon law itself possessed other offices with the title of 'executor' that undertook obligations outside of the law of succession including the executor or bailiff attached to the court who carried out sentences, which arguably could have been repurposed to carry out the will-maker's last will.[1161] However, the *Decretum* itself is silent concerning the executor and Dist. 88, c 1 prohibits clergy from undertaking financial obligations except for the care of widows and orphans. Furthermore, Dist. 88, c 5 states "Episcopal protection of testaments is not welcome" and indicates the duty rests with the person in charge of household affairs or heir.[1162] This suggests the canon law only permitted the bishop to exercise a passive supervisory role over bequests *ad pias causa* that did not interfere with the heir's execution of the will.[1163]

Bernard's *Quinque Compilationes Antiquae* cites an edict by Fredrick I that reveals by 1188 that Bishops took a more active role to administer estates for *ad pias causas* on behalf of intestates.[1164] Afterwards, X. 3.26.19 makes direct reference to the *exsecutor testamentarius*, or the testamentary executor, and sanctions the role of an appointed third party to carry out the canonical will and ensure the provision of the will-maker's soul.[1165] It does not recall a

[1159] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 149; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 31- 32; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 278 – 280; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 132.

[1160] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 391; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 747; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 275.

[1161] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 391; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 564; see C 2, q 6, c 41; C 3 q 3, c 4;Nov. 96; Cod. 3.2.

[1162] "Episcopus tuicionem testamentorum non suscipiat".

[1163] Dist. 88, c 5; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 125; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 390.

[1164] Bernard, *Quinque Compilationes Antiquae*, Comp. 5. 3.13.

[1165] X. 3.26.17; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 391; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 747; R. Zimmermann,

salmann in its treatment. In *Hill v Mills*[1166] the court noted, "the canon law looks upon an executor in general, as one that hath no interest, whose province is only to execute the will".[1167] Sheehan states there is no evidence to suggest canonists drew upon the civil law during this process.[1168] However, a natural reading of X. 3.26.19 states, "after the mandate has been received from the diocesan, they [the executors of the last will] ought to be compelled to fulfil the testator's last will" conjures the principle Inst. 2.19.5 concerning refusals.[1169] Furthermore, Bernard's *Summa Decretalium* repeats the civil law and states the heir was bound to carry out the last testament indicating that canonists were conceptualising the executor in civilian terms during this period.[1170] Therefore, the evidence suggests the testamentary executor, alongside the canonical will, owes its origins to the canon law developments rather than Germanic custom.

The English experience is distinguishable from the continent, where the entwining fates of the canonical will and its executor did not receive the same favourable environment because of universal succession.[1171] The absence of the civil law heir in English jurisprudence permitted jurists to confer the executor with substantially more rights to administer the deceased's entire estate.[1172] The office itself is a creature of the ecclesiastical courts to

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"Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 280; B. Beinart, "Heir and Executor" [1960] *Acta Juridica*, 223 at 226.

[1166] 1 Show. K.B. 293; 89 Eng. Rep. 582.

[1167] 1 Show. K.B. 293 at 295; 89 Eng. Rep. 582 at 584.

[1168] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 149.

[1169] post mandatum susceptum per dioecesanum, [exsecutores ultimae voluntatis] cogi debent testatoris explere ultimam voluntatem; see Henrician Canons, 31.4; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 80.

[1170] Bernard, *Summa Decretalium* 3.22.12.

[1171] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 391; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 152; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 1; B. Beinart, "Heir and Executor" [1960] *Acta Juridica*, 223 at 226; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 129; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 227; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 301; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 750; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 565.

[1172] *Graysbrook v Fox* 1 Plowden 275 at 277; 75 Eng. Rep. 419 at 423; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal*

administer the estate for the deceased's soul.[1173] However, the early stage of the office's development followed English custom rather than the civil law.[1174] Glanville's tract, contemporaneous with Bernard's compilation, is the earliest mention of the executor in English law and *ius commune* commentary.[1175] Glanville provides:

> "The Testament ought to be made in the presence of two or more lawful Men, either clergy or lay, and such as can be proper witnesses of it. The Executors of a Testament should be such persons, as the Testator has chosen for that purpose, and to whom he has committed the charge. But, if he should not nominate any person for this purpose, the nearest of Kin and Relatives of the deceased may take upon them the charge; and this, so effectually, that should they find the Heir or any other person detaining the effects of the deceased, they shall have the King's Writ directed to the Sheriff".[1176]

Glanville's passage demonstrates the executor had penetrated English law and possessed a writ enabling them to compel the common law heir who held the deceased's chattels to deliver them to the intended beneficiary alongside a cause available in the spiritual courts.[1177] He acknowledges the executor's presence in his treatise despite their minor role to supervise

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History, volume 3, (Little, Brown and Company, Boston ,1909) at 764; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 129.

[1173] *Stampe v Hutchins* (1515) 1 Dyer 2a at 2b; 73 Eng. Rep. 5 at 6;*Hunt v Berkley* (1728) 1 Mosely 47 at 49; 25 Eng. Rep. 263 at 264; *Norwood v Read* 1 Plowden 180 at 182; 75 Eng. Rep. 277 at 280; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 216; B. Beinart, "Heir and Executor" [1960] *Acta Juridica*, 223 at 230; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 113; C. P. Sherman, "A Brief History of Medieval Roman Canon Law in England" (1919) 68 (3) *University of Pennsylvania Law Review and American Law Register*, 233 at 252.

[1174] R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 767.

[1175] *La Cloche v La Cloche* (1870) 6 Moore N.S. 383 at 391; 16 Eng. Rep. 770 at 773; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 33.

[1176] Glanville, *Tractatus de legibus et consuetudinibus regni Angliae*, 7.6.

[1177] Glanville, *Tractatus de legibus et consuetudinibus regni Angliae,* 7.7; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 140, 152; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 38 - 39; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 130; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 69; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 428; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 111.

the third part of the deceased's chattels bequeathed in a will.[1178] Sheehan doubts whether Glanville gave an accurate statement about the heir's relationship with the executor and suggest the latter took over if the deceased lacked an heir.[1179]

Glanville's passage also demonstrates the ecclesiastical court's testamentary jurisdiction was still emerging and does not provide enough evidence to determine how the executor became the deceased's personal representative.[1180] It remained the heir's role to administer the entirety of the estate, both real and personal property, which included actions for the recovery of assets.[1181] In *Coleman v Winch*[1182], the Lord Chancellor noted the heir "imitated the civil law" because they remained liable for debts even beyond the value of the estate.[1183] However, a fundamental development occurred after Glanville's treatise that enabled the executor to assume the heir's responsibility to distribute the deceased's chattels before the Magna Carta 1215 strengthened their position further.[1184] The Magna Carta introduced a common law writ

[1178] B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 69; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 148; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 36 – 37; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 111.
[1179] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 152 – 153.
[1180] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 148.
[1181] B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 69; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 155; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 39.
[1182] (1721) 1 P. WMS. 775; 24 Eng. Rep. 609.
[1183] (1721) 1 P. WMS. 775 at 777; 24 Eng. Rep. 609 at 610; *Kinderley v Jervis* (1856) 22 Beav 1 at 5; 52 Eng. Rep. 1007 at 1009; *Knight v Knight* (1734) 3 P. WMS. 331 at 333; 24 Eng. Rep. 1088 at 1089; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 69; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 37; O.W. Holmes, C*ollected Legal Papers*, (Peter Smith, New York 1952) at 141 – 142; W. M. McGovern Jr., "Contract in Medieval England: Wager of Law and the Effect of Death" (1969) 54 (1) *Iowa Law Review*, 19 at 38; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 573; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 121; W. S. Holdsworth "The Ecclesiastical Courts and their Jurisdiction" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 2, (Little, Brown and Company, Boston 1908) at 305 – 306.
[1184] B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 70; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 148 - 149, 155; R. H. Helmholz, "Writs of Prohibition and Ecclesiastical Sanctions in the English Courts Christian" (1976) 60 (5) *Minnesota Law Review*, 1011 at 1016; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 36; C. St. Germain, W. Muchell (ed), *The Doctor and Student or Dialogues between a Doctor of Divinity and a Student in the Laws of England Containing the Grounds of Those Laws Together with*

enabling the sheriff to secure chattels for the deceased's debts and leaving the administration of the residue to the executor under the directions of the will.[1185] The instrument provided the deceased's chattels passed to the executor to perform the last will after payment of prioritised royal debts, private debts, and provision for spouse and issue.[1186] This change is significant because the statute admits the executor, and not the heir, acts for the deceased rather than occupying a passive supervisory position.[1187]

By the early thirteenth century, the executor dealt almost exclusively with the ecclesiastical courts because they had acquired a wider jurisdiction over testamentary causes.[1188] Cod. 1.3.28 provides the foundation of the jurisdiction that the church could claim over executors in the *ius commune* authorising the bishop to intervene when an heir failed to follow a charitable bequest.[1189] Nonetheless, the role of the executor remained in its infancy and the

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Questions and Cases concerning the Equity Thereof Revised and Corrected (Robert Clarke & Co, Cincinnati, 1874) at 21.

[1185] Magna Carta, John, c 7 (1215), c 26; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 152, 162; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 392; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 44.

[1186] *Hughes v Hughes*, Carter. 125 at 127; 124 Eng. Rep. 867 at 868; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 455; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 392; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 130; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 444; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 216 – 217; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 80; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 156, 225; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 170; J. Perkins, M. Walbanck (trans), *A profitable book of Mr. John Perkins*, (Printed for Matthew Walbanck, London 1657) at 182; R. H. Helmholz, "Continental Law and Common Law: Historical Strangers or Companions?" (1990) 1990 (6) *Duke Law Journal*, 1207 at 1210.

[1187] B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 68, 70; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 155; B. Beinart, "Heir and Executor" [1960] *Acta Juridica*, 223 at 231; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 869; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 753; W. S. Holdsworth "The Ecclesiastical Courts and their Jurisdiction" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 2, (Little, Brown and Company, Boston 1908) at 306.

[1188] R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 40; J. Reeves, W. F. Finlason, *Reeves's History of the English Law: From the Time of the Romans of the End of the Reign of Elizabeth*, volume 2, (M. Murphy, Philadelphia 1880) at 237.

[1189] B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 647; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular*

legal relationship between the office and the common law heir were uncertain.[1190] The spiritual courts asserted the view that executors possessed a right to collect or satisfy debts as a proper part of its probate jurisdiction.[1191] On the other hand, Bracton, publishing in the 1230s, reports that the heir remained liable for the deceased's debts although their legal liability had become restricted to the estate's assets.[1192] However, an executor could only involve themselves in the management of debts if the will-maker acknowledged them within their will and were only able to satisfy them with the chattels in their control.[1193] English law reckoned acknowledged debts amongst chattels cognisable in the ecclesiastical courts; while unacknowledged descended to the heir in the King's courts.[1194] The additional advantage attached to acknowledged debts is an instruction to pay it may be included for the benefit of the will-maker's soul rather than in satisfaction of a legal obligation, which resulted in its performance becoming a matter of faith despite the absence of an obligation at common law.[1195] The ecclesiastical courts heard these causes under the heads of *causa testementaria et*

Reference to Testamentary Law, (Libreria Ateneo Salesiano, Rome 1996) at 91; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 152; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 75

[1190] R. H. Helmholz, "Magna Carta and the *Ius commune*" (1999) 66 (2) *The University of Chicago Law Review*, 297 at 332.

[1191] *La Cloche v La Cloche* (1870) 6 Moore N.S. 383 at 391; 16 Eng. Rep. 770 at 773; R. H. Helmholz, "Writs of Prohibition and Ecclesiastical Sanctions in the English Courts Christian" (1976) 60 (5) *Minnesota Law Review,* 1011 at 1016; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 93; W. S. Holdsworth "The Ecclesiastical Courts and their Jurisdiction" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 2, (Little, Brown and Company, Boston 1908) at 304.

[1192] Bracton, G. E. Woodbine (ed), S. E. Thorne (trans), *De legibus et consuetudinibus Angliae*, volume 2, (Harvard University Press, Cambridge, 1968 – 1977) at 178; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 70; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 159; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston1909) at 754; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 132.

[1193] B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 71, 93; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 573; W. M. McGovern Jr., "Contract in Medieval England: Wager of Law and the Effect of Death" (1969) 54 (1) *Iowa Law Review*, 19 at 39; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 121; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 84.

[1194] *Weston v Wymblethorp* (1296) in D. Millon (ed), *Select Ecclesiastical Cases from the King's Courts, 1272 – 1307*, volume 126, (Selden Society , London 2009) at 49; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 44; W. M. McGovern Jr., "Contract in Medieval England: Wager of Law and the Effect of Death" (1969) 54 (1) *Iowa Law Review*, 19 at 39; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 573; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 73.

[1195] *Eales v England* (1702) Pre. Ch. 200 at 202; 24 Eng. Rep. 96 at 98; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire*

fidei lesionis, notwithstanding opposition from the Royal courts, as a necessity for the efficient administration of the estate and in recognition of oaths made to perform the will.[1196]

The common law courts perceived causes touching unacknowledged debts as an ecclesiastical encroachment on their jurisdiction and resisted recognising the executor.[1197] They reasoned that the Royal courts were the proper forum if the deceased had commenced suit during their lifetime and were opposed the executor having a cause in the ecclesiastical courts, unavailable to the deceased, because it placed them in a better position than the will-maker.[1198] The common law courts, armed with the writ of prohibition, could prevent an executor from pursuing a cause in the spiritual courts to recover an unacknowledged debt, which forced them to work through the heir, to recover the assets necessary to execute the will.[1199] Nevertheless, a person whom could have purchased a prohibition did not necessarily

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Comparative des Institutions, 47 at 79; C. St. Germain, W. Muchell (ed), *The Doctor and Student* (Robert Clarke & Co, Cincinnati, 1874) at 128; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 132; R. H. Helmholz, "Bankruptcy and Probate Jurisdiction Before 1571" (1979) 48 (2) *Missouri Law Review*, 416 at 416; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 79.

[1196] *Riceborough c Thorp* (1326) CP.E.17; *Tomlinson c Colyngham* (1390) CP.E.176; *Harding c Kitson* (1393) CP.E.197; *Hazel c Brigham* (1393) CP.E.194; *Chapman c Thoresby* (1416) CP.F.45; *Featherston c Owbre* (1468) CP.F.245; *Buttercombe c Clark* (1390) CP.E.174; R. H. Helmholz, "Writs of Prohibition and Ecclesiastical Sanctions in the English Courts Christian" (1976) 60 (5) *Minnesota Law Review*, 1011 at 1016; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 650; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 760; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 132; R. H. Helmholz, "Debt Claims and Probate Jurisdiction in Historical Perspective" (1979) 23 (1) *The American Journal of Legal History*, 68 at 72; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 358; R. H. Helmholz, "Conflicts between Religious and Secular Law: Common Themes in the English Experience, 1250 – 1640" (1991) 12 (3) *Cardozo Law Review*, 707 at 718 – 719.

[1197] Constitutions of Clarendon (1164), c 15; R. H. Helmholz, "Writs of Prohibition and Ecclesiastical Sanctions in the English Courts Christian" (1976) 60 (5) *Minnesota Law Review*, 1011 at 1016; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 23; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 45; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 762; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 69; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 122.

[1198] Dig. 50.17.120; R. H. Helmholz, "Magna Carta and the *Ius commune*" (1999) 66 (2) *The University of Chicago Law Review*, 297 at 332; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 760; R. H. Helmholz, "Writs of Prohibition and Ecclesiastical Sanctions in the English Courts Christian" (1976) 60 (5) *Minnesota Law Review*, 1011 at 1016.

[1199] *Home c Constable* CP.F 304 (1491-1492); *Stropham c Executors of Stropham* (1293) in N. Adams (ed), C. Donahue Jr (ed), *Select Cases from the Ecclesiastical Courts of the Province of Canterbury c. 1200 – 1301,* volume 95, (Selden Society, London 1981) at 627; *Premunire* 12 Co. Rep 37 at 37; 77 Eng. Rep. 1319 at 1319;

purchase it for practical reasons and because Royal courts did not strictly issue prohibitions even if the cause fell outside the major heads.[1200] Furthermore, even if a party purchased a writ of prohibition and the ecclesiastical court did not hear the testamentary element touching the debt; the alleged breach of faith or *fidei laesio* remained cognisable.[1201] This cumbersome position surrounding debts prejudiced the execution of wills, which prompted Bishops to petition the crown to extend the executor's powers to include unacknowledged debts.[1202] The ecclesiastical courts were also the proper forum for legacies and the common law did not permit legatees an action for recovery.[1203]

The Second Statute of Westminster 1285 settled the struggle between the temporal and spiritual courts in favour of the latter and the common law courts yielded to admit the

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Earl of Cornwell v Dean of Arches (1275) in D. Millon (ed), *Select Ecclesiastical Cases from the King's Courts, 1272 – 1307*, volume 126, (Selden Society , London 2009) at 3; *The King and Earl of Cornwell v Beatrice,Queen Dowager of Germany* (1277) in D. Millon (ed), *Select Ecclesiastical Cases from the King's Courts, 1272 – 1307*, volume 126, (Selden Society , London 2009) at 4; *Honylane v De Nassington* (1296) in D. Millon (ed), *Select Ecclesiastical Cases from the King's Courts, 1272 – 1307*, volume 126, (Selden Society , London 2009) at 31; Bracton, G. E. Woodbine (ed), S. E. Thorne (trans), *De legibus et consuetudinibus Angliae*, volume 4, (Harvard University Press, Cambridge, 1968 – 1977) at 282; R. H. Helmholz, "Writs of Prohibition and Ecclesiastical Sanctions in the English Courts Christian" (1976) 60 (5) *Minnesota Law Review*, 1011 at 1017; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 206; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 71; J. Reeves, W. F. Finlason, *Reeves's History of the English Law: From the Time of the Romans of the End of the Reign of Elizabeth*, volume 2, (M. Murphy, Philadelphia 1880) at 236; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 41; N. Adams, "The Writ of Prohibition to Court Christian", (1936) 20 (3) *Minnesota Law Review*, 272 at 288.

[1200] B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 659; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 76; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 412.

[1201] R. Cosin, *An Apologie for Sundrie Proceedings by Jurisdiction Ecclesiasticall* (Printed by the Deputies of Christopher Baker, London 1591) at 23; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 101; R. H. Helmholz, "Debt Claims and Probate Jurisdiction in Historical Perspective" (1979) 23 (1) *The American Journal of Legal History*, 68 at 71; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 359; D. Millon, "Ecclesiastical Jurisdiction in Medieval England" (1984) 1984 (3) *University of Illinois Law Review*, 621 at 624; W. Devine, "Ecclesiastical Antecedents to Secular Jurisdiction over the Feoffment to the Uses to Be Declared in Testamentary Instructions" (1986) 30 (4) *The American Journal of Legal History*, 295 at 299.

[1202] M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 206; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 70-71.

[1203] R. Cosin, *An Apologie for Sundrie Proceedings by Jurisdiction Ecclesiasticall* (Printed by the Deputies of Christopher Baker, London 1591) at 23; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 70, 88; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 113.

essentials of the executor, an office of the ecclesiastical court, as the deceased's representative rather than the common law heir.[1204] This enactment freed the heir from the deceased's debts, unless specifically charged, and instead imbued the executor with the ability to sue within the mechanisms of the Royal courts.[1205] It also reduced the heir's role in succession to inheriting the deceased's real property, which remained outside the administrative sphere of the executor.[1206] The admission of the executor in both the temporal and spiritual courts, alongside the separation of real and personal property, secured the office a prominent place in English jurisprudence that was unparalleled on the continent.[1207] Despite

[1204]13. Edw. I, c. 19; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 633; W. M. McGovern Jr., "Contract in Medieval England: Wager of Law and the Effect of Death" (1969) 54 (1) *Iowa Law Review*, 19 at 39; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 760-762; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 132, 134; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 148, 230; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 69, 72; L. E. Hay, "Executorship Reporting: Some Historical Notes" (1961) 36 (1) *The Accounting Review*, 100 at 100; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 121 - 122; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 205; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 43, 45; O.W. Holmes, C*ollected Legal Papers*, (Peter Smith, New York 1952) at 143; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 573; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 79.

[1205] 13. Edw. I, c. 23; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 132; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 72; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 113; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 385; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 122; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 761; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 132; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 227- 228 also see 4 Edw.III, c 7 see 21 Hen. VIII, c 4.

[1206] W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 574; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 161; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 51; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 752 B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 69.

[1207] *La Cloche v La Cloche* (1870) 6 Moore N.S. 383 at 391; 16 Eng. Rep. 770 at 773; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 159; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 208; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular*

the concession of the common law courts, prominent scholarship concludes the evidence from Act books demonstrate the ecclesiastical courts remained a forum for causes concerning debt, enforced through excommunication, until the sixteenth century when the Royal courts asserted their jurisdiction as the proper forum.[1208] Litigants likely found it undesirable to bring a separate action for debt in a separate forum, incurring additional costs, and found the ecclesiastical courts more convenient, particularly for creditors who were restricted in suing executors in the Royal courts before the sixteenth century.[1209] Dr. Helmholz asserts that bankruptcy law may even had origins in the canon law because the ecclesiastical courts were providing for the deficiencies of the common law that permitted this intrusion into its jurisdiction because custom permitted the ordinary to make a proclamation to call for creditors in testamentary causes.[1210]

The English will owes its effectiveness and flexibility to the presence of the executor, whose appointment became common throughout the *ius commune,* which was a necessary development to realise the will-maker's testamentary freedom.[1211] At the close of the

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Reference to Testamentary Law, (Libreria Ateneo Salesiano, Rome 1996) at 71, 77; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 565; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 633.

[1208]27 Edw. III, stat 1, c 1; 16 Ric. II, c 5; *Jackson v Wilson* (1838) 2 Moore 178 at 194; 13 Eng. Rep. 75 at 84; R. Cosin, *An Apologie for Sundrie Proceedings by Jurisdiction Ecclesiasticall* (Printed by the Deputies of Christopher Baker, London 1591) at 23; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 206; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 75; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 413; R. H. Helmholz, "Debt Claims and Probate Jurisdiction in Historical Perspective" (1979) 23 (1) *The American Journal of Legal History*, 68 at 70 – 73. 77 – 80; R. H. Helmholz, "Bankruptcy and Probate Jurisdiction Before 1571" (1979) 48 (2) *Missouri Law Review*, 416 at 416; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 23 but see *Foxgell c Wightman* (1594) CP.G.2762; *Ward c Ward* (1667) CP.H.5910; *Leonard c Darling* (1681) CP.H.5851; *Tilney c Howard* (1700) TEST.CP.1701/3; *Brown c Brown* (1717) TEST.CP.1723/3;

[1209] R. H. Helmholz, "Debt Claims and Probate Jurisdiction in Historical Perspective" (1979) 23 (1) *The American Journal of Legal History*, 68 at 74- 75; D. Millon, "Ecclesiastical Jurisdiction in Medieval England" (1984) 1984 (3) *University of Illinois Law Review*, 621 at 636.

[1210] R. H. Helmholz, "Bankruptcy and Probate Jurisdiction Before 1571" (1983) 48 (2) *Missouri Law Review*, 416 at 416; R. H. Helmholz, "Debt Claims and Probate Jurisdiction in Historical Perspective" (1979) 23 (1) *The American Journal of Legal History*, 68 at 73; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 412; R. H. Helmholz, "Canon Law and English Common Law" in Selden Society, *The Selden Society Lectures: 1951 – 2001*, (William S. Hein & Co, New York 2003) at 521.

[1211] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 148, 215; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 68, 77; B. Beinart, "Heir and Executor" [1960] *Acta Juridica*, 223 at 226; C. St. Germain, W. Muchell (ed), *The Doctor and Student or Dialogues between a Doctor of Divinity and a Student in the Laws of England Containing the Grounds of Those Laws Together with Questions and Cases concerning the Equity Thereof Revised and Corrected* (Robert Clarke & Co, Cincinnati,

thirteenth century, having untangled the jurisdictional problems faced in English law, the ecclesiastical courts turned their attention to refining the legal position of the executor as the deceased's personal representative, and jurists turned to the civil law and the developments on the continent.[1212] The most striking feature of the executor's origins in English law is that despite a firm acquaintance with the civil law heir; civilians did not shape the office in civil law terms.[1213] Dr. Helmholz's analysis of Magna Carta leads him to conclude there is an absence of civil law terminology despite its fundamental role in shaping the office.[1214] The early English jurists' poignantly did not treat the executor's institution as a characteristic of universal succession.[1215] It is likely that the emphasis of customary law and the absence of the same civil law influences on the continent allowed the executor to surpass the heir in this manner.[1216] However, the reception of the civil law breathed life into the executor and the

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1874) at 129; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 267, 280; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 548; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 112; J. Biancalana, "Medieval Uses" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 117; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 391.

[1212] *Jackson v Wilson* (1838) 2 Moore 178 at 194; 13 Eng. Rep. 75 at 84; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 756; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 129; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 573; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 72, 77; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 303; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 161, 215; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 392; B. Beinart, "Heir and Executor" [1960] *Acta Juridica*, 223 at 231; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 633; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 565; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 113.

[1213] F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at lxix; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 111.

[1214] R. H. Helmholz, "Magna Carta and the *Ius commune*" (1999) 66 (2) *The University of Chicago Law Review*, 297 at 332.

[1215] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 145; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 69.

[1216] B. Beinart, "Heir and Executor" [1960] *Acta Juridica*, 223 at 230.

ecclesiastical courts would define their office as close to the heir as possible and couch the office in its terms.[1217]

2. Civil law nature of the Executor

Rather than continue to place reliance on English custom, the ecclesiastical courts decided to turn to the body of civil law principles absent from the canon law, particularly the law of persons and the law of things, to furnish the particulars of the executor.[1218] The decision is evident in the statement made in *Bank of Montreal v Simson*[1219], that "in fact, the principles of the English law which govern the duty of an Executor are drawn from the Civil law", which indicates understanding the civil law is essential to appreciating the features of the office that remain applicable to New Zealand law.[1220] The control of the deceased's personal property and debts brought the executor closer to the universal successor than the English heir because it was they who 'stepped into the shoes of the will-maker'.[1221] This enabled the executor to surpass the common law heir as the deceased's personal representative that continues to characterise modern succession.[1222] However, the executor was not the universal

[1217] R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 1; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 235.
[1218] B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 633, 655.
[1219] (1861) 14 Moore 419; 15 Eng. Rep. 363.
[1220] (1861) 14 Moore 419 at 429; 15 Eng. Rep. 363 at 368.
[1221] Dig. 50.17.193; *Lynch v Bellew* (1820) 3 Phill. Ecc. 424 at 430; 161 Eng. Rep. 1372 at 1374; J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at 560; C. St. Germain, W. Muchell (ed), *The Doctor and Student or Dialogues between a Doctor of Divinity and a Student in the Laws of England Containing the Grounds of Those Laws Together with Questions and Cases concerning the Equity Thereof Revised and Corrected* (Robert Clarke & Co, Cincinnati, 1874) at 129; O.W. Holmes, *Collected Legal Papers*, (Peter Smith, New York 1952) at 143; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 763; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 72; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 583; J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 128; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965), at 148; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 433; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 133; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 112.
[1222] W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 574; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 72.

successor and English law never furnished an equivalent to the civil law heir.[1223] This forced civilians to reconcile the executor and the heir in the same manner that characterised the reconciliation of the will with the testament. Nonetheless, the executor developed into a more flexible office to achieve the will-maker's wishes than the civil law heir.[1224] English jurists followed the *ius commune* to treat the executor differently from the civil law heir and were reluctant to apply the civil law principles too stringently on the executor who administered rather than inherited the estate.[1225]

Civilians equated the executor with the heir and cited Dig. 28.3.1 to establish that the executor's institution is "*caput et fundamentum testamenti*" or the 'head and foundation of the will'.[1226] The legal identities of the executor and the heir, expressed together in the will of Cardinal Pole as *heredis et excutoris*, would become so close that the terms were synonymous in English usage.[1227] Furthermore, the presence of a universal executor in

[1223] *Lynch v Bellew* (1820) 3 Phill. Ecc. 424 at 430; 161 Eng. Rep. 1372 at 1374; A. Kocourek, J. H. Wigmore, *Primitive and Ancient Legal Institutions* (Little, Brown, and Company, Boston 1915) at 557; O.W. Holmes, C*ollected Legal Papers*, (Peter Smith, New York 1952) at 143; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 636; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 183; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 68.

[1224] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 216.

[1225] *Freyhaus v Cramer* (1829) 1 Knapp 108 at 114; 12 Eng. Rep. 261 at 264; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840 at 310; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 133.

[1226] *Chadron v Harris* 1 Noy 12 at 12; 74 Eng. Rep. 983 at 983; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 7; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 62, 101; B. Beinart, "Heir and Executor" [1960] *Acta Juridica*, 223 at 224; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 867; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 73; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 395; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 75.

[1227] *Hogan v Jackson* (1775) 1 Cowp 299 at 305; 98 Eng. Rep. 1096 at 1100; *Ackers v Phipps* (1835) 3 Clark & Finnelly 665 at 666; 6 Eng. Rep. 1586 at 1598; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 264; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 75; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 84; J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 118; O.W. Holmes, *Collected Legal Papers*, (Peter Smith, New York 1952) at 143; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 636; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 563; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 183; B. E. Ferme, *Canon Law in Late Medieval*

English law permitted the application of this principle without defining the type of executor as obliged on the continent.[1228] In *Androvin v Poilblanc*[1229], Lord Hardwicke famously asserted:

> "For the proper term in the civil law, as to goods, is *haeres testamentarius,* and executor is a barbarous term unknown to that law, therefore, a person named as *universal heir* in a will, in my opinion, would have a right to go to the ecclesiastical court for the probate".[1230]

In *Jackson v Kelly*[1231], the Lord Chancellor noted "the word *heir,* in the civil law…. is applied to both real and personal property" and represented the appointment of a universal successor.[1232] Nonetheless, civilian jurists recognised the term 'heir' referred to the representative of the deceased either as a testamentary heir, including executors and administrators, or as the next of kin known as heirs at law.[1233] The common law restricted the term heir to the successor of the last person seised of real property, a *haeres sanguis*, because the appointment of an executor did not succeed to a devise because it transferred as a deed.[1234]

England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law, (Libreria Ateneo Salesiano, Rome 1996) at 68; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 303; Will of Cardinal Pole (1558) in J. G. Nichols, J. Bruce (eds), *Wills from Doctors Commons: A Selection from the Wills of Eminent Persons proved in the Prerogative Court of Canterbury 1495 – 1695* (Printed for the Camden Society, London 1863) at 51.

[1228] B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 80; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 267.

[1229] (1745) 3 ATK 299; 26 Eng. Rep. 974.

[1230] (1745) 3 ATK 299 at 300; 26 Eng. Rep. 974 at 975.

[1231] (1751) 2 Ves. Sen. 285; 28 Eng. Rep. 184.

[1232] (1751) 2 Ves. Sen. 285 at 285; 28 Eng. Rep. 184 at 185; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 44; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 344.

[1233] *Reformatio Legum Ecclesiasticarum,* 55.20; *Greenway v Barker* 1 Godbolt 260 at 260; 78 Eng. Rep. 151 at 152; *Gittings v M'Dermott* (1833) 2 My & K 69 at 74; 39 Eng. Rep. 870 at 872; *Steadman v Palling* (1746) 3 ATK 423 at 426; 26 Eng. Rep. 1044 at 1046; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at xxxiii; R. Donnison Roper, H. White, *A Treatise on the Law of Legacies*, fourth edition, volume 1, (W. Benning, London 1847) at 89; H. Chitty, *A Treatise of the Law of Descents* (Joseph Butterworth and Son, London, 1825) at 14; J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 118; B. Beinart, "Heir and Executor" [1960] *Acta Juridica*, 223 at 231.

[1234] S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 47; W. W.

The concept of the executor as the "*caput et fundamentum testamenti*" formed part of civilian practice and the absence of their institution in a will for personalty resulted in intestacy.[1235] Consett indicates the connection with the heir resulted in a named universal legatee assuming office if the will did not appoint an executor.[1236] The ordinary permitted the will's instructions to stand only because they committed administration *cum testamento annexo* for the administrator to carry out.[1237] In *Lynch v Bellew*[1238], Drs Jenner and Phillimore noted:

Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 141; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 118 – 119; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 378; T. M. Wentworth, *The Office and Duty of Executors*, (Printed by the Assigns of Richard and Edward Atkins, London 1589) at 5; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 73.

[1235] *Reformatio Legum Ecclesiasticarum,* 27.40; Henrician Canons, 31.10; *Gosling c Stelwoman* The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 7; *La Cloche v La Cloche* (1870) 6 Moore N.S. 383 at 392; 16 Eng. Rep. 770 at 773; *Hunt v Berkley* (1728) 1 Mosely 47 at 49; 25 Eng. Rep. 263 at 263; *Thorold v Thorold* (1809) 1 Phill. Ecc. 1 at 6; 161 Eng. Rep. 894 at 896; *Blinkhorn v Feast* (1750) 2 Ves. Sen. 27 at 29; 28 Eng. Rep. 18 at 20; *Wood v Medley* (1828) 1 Hagg. Ecc. 645 at 649; 162 Eng. Rep. 705 at 706; *Brook's New Cases*, 1651, 73 Eng. Rep.925; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 7, 238 - 239; T. M. Wentworth, *The Office and Duty of Executors*, (Printed by the Assigns of Richard and Edward Atkins, London 1589) at 3; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 400; H. Consett, *The Practice of the Spiritual or Ecclesiastical Courts*, (Printed for W. Battersby, London 1700) at 12; J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 118; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 377; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 3; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 31; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 60, 64; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 62 – 63; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 130; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965), at 149; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 503.

[1236] H. Consett, *The Practice of the Spiritual or Ecclesiastical Courts*, (Printed for W. Battersby, London 1700) at 13.

[1237] Henrician Canons, 31.10; *Reformatio Legum Ecclesiasticarum,* 27.41; *Broke, Offley et al c Barret* (1584) The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 26; *Chadron v Harris* 1 Noy 12 at 12; 74 Eng. Rep. 983 at 983; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 183; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965), at 149; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 98 see Nov. 48; 31 Edw.III, stat 1, c 11; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 503; H. Consett, *The Practice of the Spiritual or Ecclesiastical Courts*, (Printed for W. Battersby, London 1700) at 13.

[1238] (1820) 3 Phill. Ecc. 424; 161 Eng. Rep. 1372.

> "[430] The heir of the civil law was necessarily vested with all the functions of executor. The term executor was not then known, it is the growth of a more barbarous age; with us in England even so late as Swinburne's time, no will, properly so called, could subsist without an executor, who unquestionably was analogous to the heir of the civil law".[1239]

This notion remained poignant in the nineteenth century and the executor remained a defining characteristic despite the learned doctors noting that a testamentary document is a will "whether an executor appointment is made or not".[1240] The presence of legacies in an instrument without an institution of executor is insufficient to create a will; and on the other hand, the appointment of an executor without any other dispositions was sufficient to create a will.[1241] Modern law no longer regards the executor as *caput et fundamentum testamenti* and courts grant administration *cum testamento annexo* to the administrator if the will-maker fails to make a valid appointment.[1242] Chancery's jurisdiction to determine actions concerning the presence of fraud or trusts in a will led to the conceptualisation of the executor in light of their custodial role of property, analogous to a trustee, which remains a poignant view in New Zealand today.[1243]

The fundamental distinction between the heir and the executor is the latter was not entitled to collect the Falcidian portion.[1244] Nonetheless, the ecclesiastical courts adopted a presumption that the will-maker intended the executor to inherit the residue of the estate, forming English

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[1239] (1820) 3 Phill. Ecc. 424 at 430; 161 Eng. Rep. 1372 at 1374 see H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 7.
[1240] *Thorold v Thorold* (1809) 1 Phill. Ecc. 1 at 4; 161 Eng. Rep. 894 at 895; *Attorney General v Jones* (1817) 3 Price 368 at 383; 146 Eng. Rep. 291 at 296; *Lynch v Bellew* (1820) 3 Phill. Ecc. 424 at 430; 161 Eng. Rep. 1372 at 1374; *Wood v Medley* (1828) 1 Hagg. Ecc. 645 at 649; 162 Eng. Rep. 705 at 706; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 76.
[1241] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 238-239; J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 118.
[1242] J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 909; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 554.
[1243] 1 Eq. Ca. Ab. 238; *Powell v Merrett* (1853) 1 SM & Giff 381 at 383; 65 Eng. Rep. 167 at 168; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 433; R. S. Donnison Roper, H. H. White, *A Treatise on the Law of Legacies*, fourth edition, volume 2, (W. Benning, London 1847) at 1788 see *Barnesly v Powel* (1748) 1 Ves. Sen. 119 at 119; 27 Eng. Rep. 930 at 930.
[1244] J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 122.

practice, because their role as 'heir' rendered the courts unable to compel distribution.[1245] In *Bowker v Hunter*[1246], the Lord Chancellor noted *"*the rule, that the executor shall take the residue*,* must prevail unless there is an irresistible inference to the contrary".[1247] A legacy left for the pains of administration rebutted the presumption.[1248] An argument exists suggesting the executor with undisposed residue was in an analogous position to the administrator's role to dispose of the dead man's part, and both were legally obligated to apply the undisposed estate for the benefit of the will-maker's soul.[1249] Therefore, once the rule of thirds disappeared from English custom, the association with the civil law heir placed the executor in a natural position to keep the residue despite a moral obligation to benefit the will-maker's soul.[1250] In *R v Sir Thomas Waller*[1251], the Court stated, "if executors have a surplusage of the

[1245]*Broke, Offley et al c Barret* (1584) The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 23; *Hatton v Hatton*, 1 Barn. K.B. 329 at 329; 94 Eng. Rep. 222 at 222; *Owen v Owen* (1738) 1 West T. Hard 593 at 596; 25 Eng. Rep. 1102 at 1103; *Androvin v Poilblanc* (1745) 3 ATK 299 at 300; 26 Eng. Rep. 974 at 975; *Blinkhorn v Feast* (1750) 2 Ves. Sen. 27 at 29; 28 Eng. Rep. 18 at 20; *Hunt v Berkley* (1728) 1 Mosely 47 at 49; 25 Eng. Rep. 263 at 264; *Bowker v Hunter* (1783) 1 Bro. C. C. 328 at 329; 28 Eng. Rep. 1161 at 1162; *Newstead v Johnson* 9 Mod 242 at 243; 88 Eng. Rep. 425 at 426; *Petit v Smith* (1695) 1 P. WMS. 7 at 7; 24 Eng. Rep. 272 at 272; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 381; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 94; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 764; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 131; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 583 - 584; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 109; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 78.

[1246] (1783) 1 Bro. C. C. 328; 28 Eng. Rep. 1161.

[1247] (1783) 1 Bro. C. C. 328 at 330; 28 Eng. Rep. 1161 at 1162; see *Newstead v Johnson* 9 Mod 242 at 243; 88 Eng. Rep. 425 at 426; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 78; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 80 see W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 514 – 515.

[1248] *Hatton v Hatton*, 1 Barn. K.B. 329 at 329; 94 Eng. Rep. 222 at 222; *Newstead v Johnson* 9 Mod 242 at 244; 88 Eng. Rep. 425 at 426; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 382.

[1249] 21 Hen. VIII, c 4; *Marriot v Marriot* (1725) 1 Gilb Rep 203 at 204 at 206; 25 Eng. Rep. 142 at 144; *Anonymous* 1 Owen 33 at 33 - 34; 74 Eng. Rep. 879 at 880; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 764; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 131; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 78; J. Reeves, W. F. Finlason, *Reeves's History of the English Law: From the Time of the Romans of the End of the Reign of Elizabeth*, volume 3, (M. Murphy, Philadelphia 1880) at 126; J. Selden, "Of the Dispositions or Administration of Intestate's Goods" in J. Selden, D. Wilkins (ed), *Joannis Seldeni Jurisconsulti Opera Omnia, Tam Edita quam Inedita. The Works of John Selden in Three volumes with New Introduction*, volume 3 part 2, (New Jersey, Clark 2006) at 1680.

[1250] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 430 - 431; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company,

goods of the dead, these ought to be imployed in pious uses [and render an account of them]".[1252] However, this deprived the heirs at law from benefitting from the estate contrary to equitable principles that conceptualised the executor as a trustee.[1253] In *Owen v Owen*[1254], Lord Chancellor Hardwicke observed "because by the ecclesiastical law, if a man makes a will, and appoints an executor, the whole belongs to him**:** and in such cases there is only a trust in the executor, which is the province of a court of equity".[1255] Nonetheless, the principle continued to reflect practice because the executor was not a trustee of the estate; they would only become a trustee administrating the estate on behalf of the next of kin during the nineteenth century.[1256]

English civilians had already turned to the law of guardianship, another importation from the *ius commune*, which led to English courts defining the executor and their duties according to their custodial relationship over the estate in a manner of a trustee.[1257] The ecclesiastical courts possessed jurisdiction over causes touching guardianship, as part of a general jurisdiction over family law, which drew on the civil law in the same manner as testamentary

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Boston ,1909) at 766 – 767; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 110

[1251] 3 Bulstrode 1; 81 Eng. Rep. 1.

[1252] 3 Bulstrode 1at 6; 81 Eng. Rep. 1 at 6.

[1253] *Farrington v Knightly* (1719) 1 P. WMS. 544 at 546, 555; 24 Eng. Rep. 509 at 510, 513; *Owen v Owen* (1738) 1 West T. Hard 593 at 597; 25 Eng. Rep. 1102 at 1104; *Norwood v Read* (1694) 1 Plowden 180 at 182 at 182; 75 Eng. Rep. 277 at 280 at 280; *Arthur v Bokenham* 11 Mod 154 at 162; 88 Eng. Rep. 957 at 963; *Hunt v Berkley* (1728) 1 Mosely 47 at 49; 25 Eng. Rep. 263 at 264; *Androvin v Poilblanc* (1745) 3 ATK 299 at 301; 26 Eng. Rep. 974 at 976; *Parsons v Saffery* (1821) 9 Price 578 at 582; 147 Eng. Rep. 187 at 189; *Gingell v Horne* (1839) 9 Sim 539 at 541; 59 Eng. Rep. 466 at 447; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 592.

[1254] (1738) 1 West T. Hard 593; 25 Eng. Rep. 1102; *Newstead v Johnson* 9 Mod 242 at 243; 88 Eng. Rep. 425 at 426.

[1255] *Owen v Owen* (1738) 1 West T. Hard 593 at 597; 25 Eng. Rep. 1102 at 1104.

[1256] *Hatton v Hatton*, 1 Barn. K.B. 329 at 329; 94 Eng. Rep. 222 at 222; *Bowker v Hunter* (1783) 1 Bro. C. C. 328 at 331; 28 Eng. Rep. 1161 at 1163; *Blinkhorn v Feast* (1750) 2 Ves. Sen. 27 at 30; 28 Eng. Rep. 18 at 20; *Foster v Munt* (1687) 1 Vern 473 at 473; 23 Eng. Rep. 598 at 598; *Newstead v Johnson* 9 Mod 242 at 243, 246; 88 Eng. Rep. 425 at 426, 428; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 94, 96; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 131; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 768; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 1580.

[1257] Dig. 26.7.3.1; *Bank of Montreal v Simson* (1861) 14 Moore 419 at 430; 15 Eng. Rep. 363 at 368; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 239; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 266; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 101; J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at 596; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 646; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 111.

causes.[1258] Guardianship concerns a title in the law of persons that treats the legal position of a vulnerable person *sui iuris* placed in the control of a guardian who possesses capacity to manage their affairs.[1259] The civil law recognised two species of guardian, the offices of tutor and curator, charged with care for another person and their property.[1260] The tutor assumed the father's position to manage an *impubes's* property and maintain their person because the law recognised their want of discretion; and English law insisted on the care of the child's well-being.[1261] A curator administered the property of a person *sui iuris* either with their

[1258] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 209 – 210; R. H. Helmholz, "The Roman law of Guardianship in England" (1978) 52 (2) *Tulane Law Review*, 223 at 224, 226; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records* (Lochin Publishing, Dursley 1992) at 51; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 420.

[1259] Inst. 1.13.1; Inst. 1.20.6; F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphannotrophei, Halae Magdeburgicae 1769) at 377; B. W. Frier, T. A. J. Mc Ginn, *A Casebook on Roman Family Law*, (Oxford University Press, Oxford 2004) at 22; O. F. Robinson, *Person*s in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 32; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 130; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 252, 255; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 146; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 264; E. Jenks (ed), W. M. Geldart, R. W. Lee, W. S. Holdsworth, J.C. Miles*, A Digest of Civil Law*, second edition, volume 2, (Butterworth & Co, London 1921) at 1224; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 38, 41; E. R. Humpreys, *Manual of Civil Law: For the use of Schools, and more especially Candidates of the Civil Service*, (Longman, Brown, Green and Longmans, London 1854) at 46; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 697- 698; R. H. Helmholz, "The Roman law of Guardianship in England" (1978) 52 (2) *Tulane Law Review*, 223 at 225; C. St. Germain, W. Muchell (ed), *The Doctor and Student or Dialogues between a Doctor of Divinity and a Student in the Laws of England Containing the Grounds of Those Laws Together with Questions and Cases concerning the Equity Thereof Revised and Corrected* (Robert Clarke & Co, Cincinnati, 1874) at 129; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 136; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 328; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 44 see Dig. 1.5.20.

[1260] Dig. 26.1.1; *Johnstone v Beattie* (1843) 10 Clark & Finnelly 42 at 92; 8 Eng. Rep. 657 at 677; Bracton, G. E. Woodbine (ed), S. E. Thorne (trans), *De legibus et consuetudinibus Angliae*, volume 2, (Harvard University Press, Cambridge, 1968 – 1977) at 35; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 253; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 146; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 290; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 105; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 1, (V. and R. Stevens and Sons, London 1849) at 588; R. H. Helmholz, "The Roman law of Guardianship in England" (1978) 52 (2) *Tulane Law Review*, 223 at 229.

[1261] Dig. 26.2.14; Dig. 26.7.33; Dig. 36.1.1; *Bank of Montreal v Simson* (1861) 14 Moore 419 at 429, 445; 15 Eng. Rep. 363 at 366, 374; *Hall v Yates* (1673) 1 Rep. Temp. Finch. 2 at 2; 23 Eng. Rep. 1 at 2; F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphannotrophei, Halae Magdeburgicae 1769) at 392; H. Swinburne, *A*

consent until they reached majority at twenty-five years or throughout the period they lacked sound discretion because of a mental incapacity.[1262] English law amalgamated these offices into a single category of guardianship that described the functions of both tutors and curators, observing the differences between the two in practice, which reflects the development of

Treatise of Testaments and Last Wills, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 212; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 52, 257; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 130; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 148; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 37; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 290, 299; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 143 – 155; J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at 261; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 101; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 149; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 1, (V. and R. Stevens and Sons, London 1849) at 568, 601; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 698; R. H. Helmholz, "The Roman law of Guardianship in England" (1978) 52 (2) *Tulane Law Review*, 223 at 229; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 139; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965), at 152; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at 8; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 44; B. W. Frier, T. A. J. Mc Ginn, *A Casebook on Roman Family Law*, (Oxford University Press, Oxford 2004) at 23; C. P. Sherman, "The Debt of the Modern Law of Guardianship to Roman law" (1913) 12 (2) *Michigan Law Review*, 124 at 124.

[1262] Cod. 2.44.4; Cod. 5.70.1; Inst. 1.23.3; Dig. 4.4.1.2; Dig. 4.4.1.3; Dig. 27.10.1; Dig. 27.10.7; *Charles Duke of Brunswick v The King of Hanover* (1841) 6 Beav 1 at 16; 49 Eng. Rep. 724 at 730; J. F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphanotrophei, Halae Magdeburgicae 1769) at 400; D. Gofredus, *Institutiones Iustiniani*, (Apud Iuntas, Venice 1621) at 88 gl.; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 212; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 257; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 34; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 295 – 296; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 272; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 610; J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at 261; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 110; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 1, (V. and R. Stevens and Sons, London 1849) at 605 -606; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 698; R. H. Helmholz, "The Roman law of Guardianship in England" (1978) 52 (2) *Tulane Law Review*, 223 at 229; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 144 – 145.

Justinian who brought the offices closer together.[1263] Guardianship is another example of a civil law institution adopted and modified by English jurisprudence.[1264]

Civilians' acknowledged three kinds of executor, attributed to Durantis's *Speculum Iudiciale*, and classified them by their method of appointment as *testamentarius*, *legitimus*, or *datus*, which are divisions modelled on the guardian.[1265] The foremost kind is a testamentary guardian or executor, identifiable by their appointment by the will-maker, who possessed priority over the other forms.[1266] Dig. 26.2.7 provides the testamentary guardian, akin to an

[1263] *Ratcliff's Case* 3 Co. Rep. 37a at 37b; 76 Eng. Rep. 713 at 715; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 146; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 113 – 114; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 1, (V. and R. Stevens and Sons, London 1849) at 588; R. H. Helmholz, "The Roman law of Guardianship in England" (1978) 52 (2) *Tulane Law Review*, 223 at 230; J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 118; O.W. Holmes, *Collected Legal Papers*, (Peter Smith, New York 1952) at 30; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 147; W. Blackstone, *Commentaries on the Laws of England*, volume 1, (Clarendon Press, Oxford 1765) at 448.

[1264] *Shaftsbury (Earl of) v Shaftsbury* (1725) 1 Gilb Rep 172 at 174; 25 Eng. Rep. 121 at 122; C. P. Sherman, "The Debt of the Modern Law of Guardianship to Roman law" (1913) 12 (2) *Michigan Law Review*, 124 at 124.

[1265] C 16, q 1, c 40; Inst. 1.13.2; *De Arderne c Executors of Thomas the Linen-Draper* (1301) in N. Adams (ed), C. Donahue Jr (ed), *Select Cases from the Ecclesiastical Courts of the Province of Canterbury c. 1200 – 1301,* volume 95, (Selden Society, London 1981) at 138; *R v Raines*, 1 Ld. Raym. 361 at 362; 91 Eng. Rep. 1138; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 379; R. H. Helmholz, "The Roman law of Guardianship in England" (1978) 52 (2) *Tulane Law Review*, 223 at 235; J. F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphanotrophei, Halae Magdeburgicae 1769) at 377; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 215 – 216; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 149; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 83; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 130; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 32; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 144; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 272; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 607 – 608; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 106; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 1, (V. and R. Stevens and Sons, London 1849) at 567; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 38; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 638; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 83; B. W. Frier, T. A. J. Mc Ginn, *A Casebook on Roman Family Law*, (Oxford University Press, Oxford 2004) at 404; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 136 – 137.

[1266] Twelve Tables, Table 5.1; Dig. 26.2.1; Dig. 26.2.3; Dig. 26.2.3.1; Inst. 1.13.3; F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphannotrophei, Halae Magdeburgicae 1769) at 378; R. H. Helmholz, "The Roman law of Guardianship in England" (1978) 52 (2) *Tulane Law Review*, 223 at 239; T. Mackenzie, *Studies*

executor, derive their authority from either a will or codicil.[1267] This principle resonated with the executor because both offices received a direct mandate from the will-maker to manage property, which exempted them from the level of scrutiny of the other classes when carrying out their appointment because the ordinary cannot appoint an executor.[1268] Inst. 1.14.3 provides this mandate even permitted guardians to carry out their role prior to the heir's institution. This principle suggests a will did not necessarily require an appointment of an executor for its execution.[1269] The executor *legitimus*, better known as administrators, are the next of kin who enter their office through operation of law, in the absence of a testamentary appointment, in the same manner as a legitimate guardian.[1270] The office descends to the

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in Roman Law with Comparative Views of the Laws of France England and Scotland, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 148; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 292; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 144; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 265; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 106; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 142; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 1, (V. and R. Stevens and Sons, London 1849) at 586; R. P. Saller, *Patriarchy, Property and Death in the Roman Family* (Cambridge University Press, Cambridge 1994) at 183; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at 8.

[1267] Cod. 5.29.2; J. F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphanotrophei, Halae Magdeburgicae 1769) at 377; *Johnstone v Beattie* (1843) 10 Clark & Finnelly 42 at 92; 8 Eng. Rep. 657 at 677; *Wankford v Wankford*, 1 Salkeld 299 at 302; 91 Eng. Rep. 265 at 268; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 254; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 1, (V. and R. Stevens and Sons, London 1849) at 574; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 708; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 866, 909; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 100; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 78; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 381.

[1268] Cod. 5.29.4; *R v Raines*, 1 Ld. Raym. 361 at 362; 91 Eng. Rep. 1138; *Wankford v Wankford*, 1 Salkeld 299 at 303; 91 Eng. Rep. 265 at 268; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 107S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 292; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 283.

[1269] J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 129.

[1270] Twelve Tables, Table 5.2; Inst. 1.15; Inst. 1. 15.2; Dig. 26.4.5; J. F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphanotrophei, Halae Magdeburgicae 1769) at 379; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 133; J. Fortescue, F. Gregor (Trans), *De Laudibus Legum Angliae: A Treatise in Commendation of the Laws of England* (c1463), (Robert Clarke & Co, Cincinnati, 1874) at 167; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 254; T. Mackenzie, *Studies in Roman Law with*

deceased's nearest agnate because the law carries the expectation the next of kin are the most likely to protect the estate.[1271] The executor *dative* undertakes the office as an administrator in the absence or refusal of next-of-kin, or to administer a legacy *ad pias causas* in a will without a testamentary executor, and acts under the authority of an ordinary empowered to make the appointment by custom.[1272]

English law recognised the executor stood in the place of the heir, not the guardian, although many of the principles were applicable to both civil law offices.[1273] Guardianship is

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Comparative Views of the Laws of France England and Scotland, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 148; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 32; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 146; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 265- 266; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 107; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 1, (V. and R. Stevens and Sons, London 1849) at 585; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 711; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 11, 83; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at 8; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 91; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 78; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 283; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 647.

[1271] Dig. 26.4.1; Cod. 5.30.2.

[1272] Inst. 1.20.3; Dig. 26.5.3; *Freke v Thomas*, 1 Comyns 110 at 111; 92 Eng. Rep. 986 at 987; F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphannotrophei, Halae Magdeburgicae 1769) at 381; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 379; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 83; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 254; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 148; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 33; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 148; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 1, (V. and R. Stevens and Sons, London 1849) at 586; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 211; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 118-119; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at 8; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 283.

[1273] B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 637.

distinguishable from common law wardship that placed a male under instruction of the lord of the fee until twenty-one and a female until she married, which legally allowed the opportunity for pecuniary advantage despite a social obligation to act honourably.[1274] The office's fiduciary nature, like the executor, allowed Chancery to share concurrent jurisdiction under the inherent prerogative of the crown, as *parens patriae*, to supervise guardians in a manner associated with the praetor.[1275] The offices of the executor and guardian were conceptually close enough for the observation to arise that a person unable to act as one could not be the other.[1276] Dig. 26.4.10.1 states "deaf and dumb persons cannot be [guardians] since they cannot be lawfully appointed either by will or any other way" despite being able to become heirs.[1277] Both offices are characterised by the concept of *fides* because their duty is to protect the property charged to them and both could engage in a number of legal

[1274] J. Fortescue, F. Gregor (Trans), *De Laudibus Legum Angliae: A Treatise in Commendation of the Laws of England* (c1463), (Robert Clarke & Co, Cincinnati, 1874) at 167 - 168; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 212; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 47; J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England* (Printed for John Ridley 1651) at 37, 46; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 152; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 605; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 145; R. H. Helmholz, "The Roman law of Guardianship in England" (1978) 52 (2) *Tulane Law Review*, 223 at 225 see Nov. 72.1.

[1275] *Shaftsbury (Earl of) v Shaftsbury* (1725) 1 Gilb Rep 172 at 173; 25 Eng. Rep. 121 at 121; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 108; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 152; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 614- 615; W. W. Buckland, *Equity in Roman Law*, (University of London Press, London 1911) at 108; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 2, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 648; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 146; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 1, (V. and R. Stevens and Sons, London 1849) at 569, 603; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 614- 619; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965), at 152; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 52; D. Johnston, "Trust and Trust-like Devices in Roman Law" in *Itinera: Trust and Treuhand in Historical Perspective,* (Duncker & Humblot, Berlin 1998) at 55 see Inst. 1.26.1.

[1276] Inst. 1.14.2; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 104; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 211; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 86; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 1, (V. and R. Stevens and Sons, London 1849) at 575

[1277] See Inst. 2.19.4; Inst. 2.19.7; Dig 28.5.1.2; Dig. 29.2.5.

transactions and actions that benefitted the estate.[1278] Furthermore, pupils and legatees possessed an action against those who mismanaged the estate for their own benefit.[1279] In *Montgomerie v Wauchope*[1280], the court referred to civil law principles to compare the guardian's office, like the executorship, to the role of trustee because its undertaking was honorary and not for financial reward.[1281] Furthermore, no testamentary tutor or executor could appoint a deputy because their exclusive authority derives directly from the will-maker and only they could undertake the legitimate acts necessary to discharge their duty.[1282]

The executor's association with the heir furnished a number of principles surrounding the appointment of an executor that survive today.[1283] Civilians agreed a will-maker could appoint their executor in a written will, or by a verbal appointment or gesture in a nuncupative will.[1284] In *Parker v Nickson*[1285], the court cited Cod. 6.23.15 to indicate English law did not require an express method or words of appointment and did not require the will-

[1278] Inst. 1.13.2; O. F. Robinson, *Person*s in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 33; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 52, 256- 260; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 149; B. W. Frier, T. A. J. Mc Ginn, *A Casebook on Roman Family Law*, (Oxford University Press, Oxford 2004) at 425; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 416; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 38; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 156- 157; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965), at 152.

[1279] Cod. 5.38.1; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 209; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 259; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 149; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 161; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 489.

[1280] (1816) 4 Dow PC 109; 3 Eng. Rep. 1106.

[1281] *Montgomerie v Wauchope* (1816) 4 Dow PC 109 at 114 -115; 3 Eng. Rep. 1106 at 1108; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 252; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 37; W. W. Buckland, *Equity in Roman Law*, (University of London Press, London 1911) at 108.

[1282] P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 1, (V. and R. Stevens and Sons, London 1849) at 571.

[1283] See N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 555 – 556.

[1284] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 400.

[1285] (1863) 1 De. G. J. & S. 177; 46 Eng. Rep. 69.

maker to institute the executor first despite being good practice.[1286] It followed that an executor ascertainable through the tenor of a will or language used attributed with the office was a valid appointment.[1287] English law followed the civil law to permit the will-maker to appoint an infant or unborn child as an executor despite not being able to undertake their office.[1288] In *Atkinson v Cornish*[1289] Holt CJ noted "an executor by the civil law may take that office upon him at seventeen [concurring with the canon law]: but an administrator being created by statute [may take at twenty-one]".[1290] It also agreed a creditor who makes their debtor an executor extinguishes the debt because they cannot bring an action against themselves.[1291] The *ius commune* did not grant the creditor acting as an executor the same privilege of retainer that the common law introduced into English jurisprudence.[1292] The significance of the executor's appointment in defining the will is evident in *Yelverton c Yelverton*, in which Dr. Dun argued that if there are copies of an original will and the will-

[1286](1863) 1 De. G. J. & S. 177 at 183; 46 Eng. Rep. 69 at 72; Dig 28.5.1; Dig 28.5.1.3; Dig 28.5.1.5; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 184.
[1287] *Pickering v Towers* (1757) 2 Lee 401 at 402, 403; 161 Eng. Rep. 384 at 384, 385.
[1288]Cod. 6.48.1; Cod. 6.48.2; Inst. 2.14.2; Dig. 28.2.4; Dig. 28.2.10; *Windham v Windham* (1676) 1 Rep. Temp. Finch. 267 at 267; 23 Eng. Rep. 147 at 147; *Foxworth v Tremaine* 1 Ventris. 101 at 103; 86 Eng. Rep. 70 at 71; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 30; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 153; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 331; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 503.
[1289] Comberbach 475; 90 Eng. Rep. 600.
[1290] Comberbach 475 at 475; 90 Eng. Rep. 600 at 600 see *Smallwood v Brickhouse* 2 Mod 315 at 315; 86 Eng. Rep. 1095 at 1095; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 153; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 103; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 78; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 331; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 54.
[1291] Inst. 2.20. 13; T. M. Wentworth, *The Office and Duty of Executors*, (Printed by the Assigns of Richard and Edward Atkins, London 1589) at 47; W. Fulbecke, *A parallele or conference of the Civil law, the Canon law, and the Common Law of this Realme of England* (Printed for the Company of Stationers, London 1618) at 45; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 113 – 114; R. Caillemer "The Executor in England and on the Continent" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 3, (Little, Brown and Company, Boston ,1909) at 763; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 479; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 360.
[1292] T. M. Wentworth, *The Office and Duty of Executors*, (Printed by the Assigns of Richard and Edward Atkins, London 1589) at 47; W. Fulbecke, *A parallele or conference of the Civil law, the Canon law, and the Common Law of this Realme of England* (Printed for the Company of Stationers, London 1618) at 44; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 480- 481; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 360; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 216.

maker modified a copy to nominate a different executor, then the later in time transplants the original instrument.[1293] In *Sherard v Sherard*[1294], Sir Nicholl held that the appointment of an executor is only revocable through express language or by necessary implication.[1295]

English law granted will-makers a high degree of freedom when choosing an executor or executors to carry out their wishes.[1296] The maxim "whoever is able to make a will can also act as an [executor]" guided practice and the ordinary required an executor to possess *testamenti factio* when they accept office, or they would commit administration.[1297] Executors were morally obliged to be present when a will-maker made the appointment to ensure they would accept the estate.[1298] The will-maker could make a range of appointments similar to the testator, including kindred, manumitted villeins, and strangers, and could even appoint multiple executors and make substitutions.[1299] The appointment could be a simple nomination or an unconditional appointment that enabled the executor to enter the estate immediately, or subject to an express condition requiring them to wait for a contingent event or satisfy the condition.[1300] An executor must respect a condition, as a manifestation of the will-maker's intent, unless the direction interfered with the proper management of the estate

[1293] R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 36 see Nov. 65.1.
[1294] (1815) 2 Phill. Ecc. 251; 161 Eng. Rep. 1135 see Inst. 2.20.14.
[1295] *Sherard v Sherard* (1815) 2 Phill. Ecc. 251 at 254; 161 Eng. Rep. 1135 at 1136.
[1296] Dig. 26.2.20; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 77; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 152.
[1297] Dig. 26.2.21; Inst. 2.19.4; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 131; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 93 see Dig 28.5.50.1.
[1298] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 182 – 183.
[1299] Dig 28.5.31; Cod. 8.7.1; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 52; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 437; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 76, 82; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 565; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 358; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 212.
[1300] Dig. 26.2.8.1; *Lynch v Bellew* (1820) 3 Phill. Ecc. 424 at 430; 161 Eng. Rep. 1372 at 1374; *Bank of Montreal v Simson* (1861) 14 Moore 419 at 426; 15 Eng. Rep. 363 at 366; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 249, 253; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 76- 77; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 77; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 400.

in an unforeseen manner.[1301] The will-maker could impose a wider number of conditions on their appointed executor than testators could on their heirs.[1302] English law allowed the appointment of an executor for a limited duration contrary to the rule "once an heir always an heir" that prevented appointments for definite periods and against partial intestacies but follows Dig. 26.2.8.2 that allows the imposition of such a condition on a tutor.[1303] Will-makers took advantage of this exception and frequently instituted executors particularly over specific goods in a local area.[1304] Ecclesiastical courts also allowed an appointment with a condition subsequent, not possible under the civil law, and the ordinary could remove the executor if necessary once they determined it was satisfied.[1305] Furthermore, the ordinary could commit administration for the period that the executor needed to satisfy a condition.[1306]

The ecclesiastical courts permitted a testamentary executor to elect to either accept or refuse their appointment, unlike a guardian, because they act as a volunteer.[1307] An election to accept the office could be explicit, made at the time of proving the will, or implicitly by an

[1301] J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 921.
[1302] J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 78.
[1303] Inst. 1.14.3; Inst. 1.22.2; Inst. 1.22.5; Dig. 29.1.15.4; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 309- 310, 317; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 924; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 401; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 264; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 942; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 565; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 281, 283 see Inst. 2.14.9.
[1304] Dig. 29.1.17; *Lynch v Bellew* (1820) 3 Phill. Ecc. 424 at 430; 161 Eng. Rep. 1372 at 1374; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 239, 309; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 78; [1304] J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 129; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 184.
[1305] *R v Raines*, 1 Ld. Raym. 361 at 361; 91 Eng. Rep. 1138 at 1138 but see Inst. 1.14.4.
[1306] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 307.
[1307] *Hensloe's Case* 9 Co. Rep. 36b at 36b – 37a; 77 Eng. Rep. 784 at 785; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 383; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 116; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 303; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 163 see Cod. 6.19.1; Dig. 26.7.1.

active meddling with will-maker's estate.[1308] Modern law has not changed this definition of acceptance.[1309] The Constitutions of Othobone held an executor must refuse an office before the ordinary.[1310] X. 3.26.19 provides an executor must carry out their office to completion and the ordinary could compel performance once they have assumed the office.[1311] Nonetheless, the ordinary could not compel an executor to undertake the office unless they both intended and actively meddled with the goods, acting as an owner, which afterwards rendered an attempt to refuse invalid.[1312] Civilians held making an inventory, protecting the estate, or attending funerary arrangements for the benefit of the estate without the intention to act as an executor did not constitute meddling.[1313] New Zealand courts continue to follow ecclesiastical practice by defining meddling as a positive act of dominion that excludes acts of protection, burial, or charity.[1314] The meddling stranger who intruded on the estate without

[1308] Dig. 29.2.20; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 284; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 383; J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at 561.

[1309] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 563; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 37; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 212; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 307.

[1310] Canon 14, Constitution of Othobone; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 443.

[1311] Bernard's *Summa Decretalium* 3.22.9; *Freyhaus v Cramer* (1829) 1 Knapp 108 at 114- 115; 12 Eng. Rep. 261 at 264; *Parsons v Mayesden* (1674) 1 Freeman 151 at 151; 89 Eng. Rep. 109 at 109; J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at 561; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 391; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 280; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 212; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 443.

[1312] Dig. 29.2.20; Inst. 2.19.7; *Read's Case* 5 Co. Rep. 33b at 33b; 77 Eng. Rep. 103 at 103; *Hensloe's Case* 9 Co. Rep. 36b at 36b; 77 Eng. Rep. 784 at 785; *Parsons v Mayesden* (1674) 1 Freeman 151 at 151; 89 Eng. Rep. 109 at 109; *Long v Symes* (1832) 3 Hagg. Ecc. 771 at 773; 162 Eng. Rep. 1339 at 1340; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 384; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 101; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 303- 304; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 63; *Jackson v Wilson* (1838) 2 Moore 178 at 197; 13 Eng. Rep. 75 at 86 but see Inst. 2.19.7.

[1313] Cod. 6.30.20; Dig. 29.2.20.1; Dig. 29.2.20.2; Dig. 29.2.20.3; Dig. 29.2.20.5; Dig. 29.2.21.1; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 572; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 304.

[1314]Cod. 6.30.2; Dig. 11.7.4; Dig. 29.2.20.1; Dig. 29.2.20.2; Dig. 29.2.20.3; Dig. 29.2.20.5; *Long v Symes* (1832) 3 Hagg. Ecc. 771 at 773; 162 Eng. Rep. 1339 at 1340; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 557; J. Godolphin, *The Orphans Legacy*,

the will-maker's authority, termed an executor de son tort, created an anomalous form of executor dative compelled to office under command from the ordinary who construed their actions as an election binding them to the office even if they did not misappropriate any assets.[1315] The common law appears to have adopted a similar rule that viewed a person apparently seised as treatable as the rights holder in a custodial role.[1316] The ecclesiastical courts held the executor de son tort possessed the obligations and liabilities attached to executorship, including satisfying the debts and legacies they hold with their own assets, without the advantages of office including the benefit of inventory, even if the ordinary grants administration to another.[1317]

An executor who refused the office, or was unable to accept it, rendered the will-maker intestate and the estate passed to the administrator *legitimus* or *dative* to manage *cum testamento annexo* according to the instructions left in the will.[1318] The ordinary

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fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 101; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 944; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 572; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 99; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 163 – 164; L. Breach, "Is it an Executor's Duty to Bury the Dead" (2013) 7 (9) *New Zealand Family Law Journal*, 217 at 218; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 507.

[1315] Cod. 5.45.1; Dig. 27.5.1.1; *Long v Symes* (1832) 3 Hagg. Ecc. 771 at 772; 162 Eng. Rep. 1339 at 1340; *Parsons v Mayesden* (1674) 1 Freeman 151 at 151; 89 Eng. Rep. 109 at 110; *Long v Symes* (1832) 3 Hagg. Ecc. 771 at 774 -775; 162 Eng. Rep. 1339 at 1340; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 337; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 37; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 571, 591; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 411; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 164.

[1316] *La Cloche v La Cloche* (1870) 6 Moore N.S. 383 at 392, 404; 16 Eng. Rep. 770 at 774, 778; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 572.

[1317] Dig. 27.5.1.9; Dig. 27.5.4; 22. The Notebook of Dr Thomas Eden (1610) in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 52; *Parsons v Mayesden* (1674) 1 Freeman 151 at 151 - 152; 89 Eng. Rep. 109 at 110; *Long v Symes* (1832) 3 Hagg. Ecc. 771 at 772; 162 Eng. Rep. 1339 at 1340; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 571; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 944; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 420; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 212; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 164; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 24; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 507 see W. Patterson, A. Tipping (ed) *The Laws of New Zealand, Administration of Estates*, volume 1, (LexisNexis 2012, Wellington) at [247].

[1318] Dig. 26.2.11.3; *R v Raines*, 1 Ld. Raym. 361 at 362; 91 Eng. Rep. 1139; *Wankford v Wankford*, 1 Salkeld 299 at 300; 91 Eng. Rep. 265 at 266; *Hensloe's Case* 9 Co. Rep. 36b at 36b; 77 Eng. Rep. 784 at 785; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793)

acknowledged the executor's refusal if they made it in writing or by declining to swear an oath to administer the goods; provided the executor had not meddled with the goods because 'once an heir always an heir'.[1319] The ecclesiastical courts held an executor who refused the estate could only retract their refusal before the goods were committed to administration.[1320] Executors were unable to accept the estate in part because 'a refusal of part is a refusal of the whole'.[1321] The ordinary could also temporarily grant administration if an executor who refused to present a will despite a citation, whose contempt was punishable by excommunication, or if they are under the impression that the will-maker died intestate.[1322] If

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at 383; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 400; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 378; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 60-61; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 142; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 943; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965), at 151; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records* (Lochin Publishing, Dursley 1992) at 50; P. Lovelass, A. Barron (ed) *The Law's Disposal of a Person's Estate Who Dies without Will or Testament; to Which Is Added the Disposal of a Person's Estate by Will and Testament; with an Explanation of the Mortmain Act*, twelve edition, (J. S. Littell, Philadelphia 1839) at 207 see Administration Act 1969, s 10.

[1319] *Hensloe's Case* 9 Co. Rep. 36b at 36b; 77 Eng. Rep. 784 at 785; *Wankford v Wankford*, 1 Salkeld 299 at 301; 91 Eng. Rep. 265 at 266; *M'donnell v Prendergast* (1830) 3 Hagg. Ecc. 212 at 214; 162 Eng. Rep. 1134 at 1135; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 443; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 936; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 40; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 152; H.C. Coote, *The Common Form Practice of the Court of Probate, is Granting Probates and Letters of Administration with the New Act*, (Butterworths, London 1858) at 115; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 944; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 52; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 162, 164; P. Lovelass, A. Barron (ed) *The Law's Disposal of a Person's Estate Who Dies without Will or Testament; to Which Is Added the Disposal of a Person's Estate by Will and Testament; with an Explanation of the Mortmain Act*, twelve edition, (J. S. Littell, Philadelphia 1839) at 206.

[1320] *Hensloe's Case* 9 Co. Rep. 36b; 77 Eng. Rep. 784 at 785; *Sir Henry Goodiers Case*. 1 Leonard 135 at 135; 74 Eng. Rep. 125 at 125 - 126; *Broker v Charter* 1 Cro. Eliz. 92 at 92; 78 Eng. Rep. 351 at 351; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 385, 443; J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at 562; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 41; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 142; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 944; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 212.

[1321] S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 41, 53; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 142; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 304.

[1322] W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 52; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition,

the ordinary knew a will existed and committed administration before the executor's refusal; then the executor possessed an action of common law trespass against a stranger or administrator in the Royal courts.[1323] In *Parsons v Saffery*[1324] the court cited the principle in Cod. 6.30.19.1 to allow a year to deliberate their election and a grant of administration during this period was invalid because it would prejudice the will-maker's appointed personal representative.[1325] Dig. 27.3.9.1 obliged an administrator to stand aside "because statutory tutelage always yields to testamentary". Furthermore, the executor was obliged to create an inventory, establish the validity of will, undertake commission of administration, and make an account before receiving acquittal of office from the ordinary.[1326]

The ecclesiastical courts couched co-executors in civil law terms as successors to the estate in its entirety and the law deemed the actions of one represented those of the others, which was especially poignant for the purpose of the payment of legacies and receipt of debts.[1327] An executor was only liable for the assets they held and not for wrongs committed by other executors, and had no recourse lay against other co-executors mismanaging their portion unless they sought to recover detained goods.[1328] Furthermore, if an executor dies, then the

(Published by John Grigg, Philadelphia 1829) at 40; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 141; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 443.

[1323] 4. Edw. III., c. 7; Dig. 5.3.9; Dig. 26.2.11; *Graysbrook v Fox* 1 Plowden 275 at 281; 75 Eng. Rep. 419 at 429; R. Cosin, *An Apologie for Sundrie Proceedings by Jurisdiction Ecclesiasticall* (Printed by the Deputies of Christopher Baker, London 1591) at 23; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 147; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 383.

[1324] (1821) 9 Price 578; 147 Eng. Rep. 187; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 306.

[1325] Dig. 29.2.29; *Parsons v Saffery* (1821) 9 Price 578 at 583; 147 Eng. Rep. 187 at 190; see H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 385, 419; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965), at 154.

[1326] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 196.

[1327] Henrician Canons, 31.13; Henrician Canons, 31.14; Dig. 26.7.3; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 52; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 437.

[1328] Dig. 5.4.1.4; Dig. 26.7.4; Dig. 26.7.12; Dig. 26.7.27; Dig 28.5.35; Dig. 29.1.19.2; Cant. SVSB III 350 (1294) in C. Donahue, Jr (ed), *The Records of the Mediaeval Ecclesiastical Courts, part II, England*, (Duncker & Humblot, Berlin 1994) at 74; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 438 see Trustee Act 1956, s 38; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 595 but see J. Biancalana, "Testamentary cases in fifteenth-century Chancery" (2008) 76 (3 – 4)*Tijdschrift voor Rechtsgeschiedenis*, 283 at 302.

co-executor succeeds to the estate in the same manner as the civil law heir.[1329] In *Harrison v Harrison*[1330], Sir Fust held an executor who refused to act alongside their co-executors could not retract their refusal after a grant of probate.[1331] This does not appear to be the belief of the common law courts and in *Hensloe's Case*[1332], the court noted all executors must refuse the estate for the will-maker to die intestate and the acceptance of a single executor entitled the others to administer their part at their discretion.[1333] The common law concept of tail, a limitation of heirs that real property can descend, did not apply to personalty.[1334]

A will-maker could make a general substitution to take effect if the executor refused office or died to avoid a partial intestacy.[1335] Their powers of substitution, unlike unprivileged testators, included arranging to substitute an established executor already in office.[1336] English jurists drew on Dig. 28.6.36 to compare substitutions to a descending lineal line of consanguinity and a substitute, entering in the second degree, is unable to enter the estate until the principal refuses or is removed from office.[1337] Civilians also recognised the possibility that will-makers could make pupillary substitutions, or a second form of testament on behalf of an *impubes*, which stood alongside the principal.[1338] Inst. 2.16 restates a custom

[1329] Henrician Canons, 31.8; Dig. 28.5.67.1; Dig. 29.2.35; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 438; J. G. Phillimore, *Principles and Maxims of Jurisprudence*, (J. W. Parker and Son, London, 1856) at 140.
[1330] (1846) 1 Rob. Ecc. 406; 163 Eng. Rep. 1082.
[1331] (1846) 1 Rob. Ecc. 406 at 414, 419; 163 Eng. Rep. 1082 at 1085, 1087; see J. Perkins, M. Walbanck (trans), *A profitable book of Mr. John Perkins*, (Printed for Matthew Walbanck, London 1657) at 181; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 310.
[1332] 9 Co. Rep. 36b; 77 Eng. Rep. 784.
[1333] 9 Co. Rep. 36b at 37s – 37b; 77 Eng. Rep. 784 at 785 at 786 see *Harrison v Harrison* (1846) 1 Rob. Ecc. 406 at 411, 414; 163 Eng. Rep. 1082 at 1084, 1085; *House and Downs v The Lord Petre* (1700) 1 Salkeld 311 at 311; 91 Eng. Rep. 274 at 274.
[1334] J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 130-131; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 81; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 324.
[1335] Henrician Canons, 31.8; Sext. 3.11.2; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 943; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 261; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 81.
[1336] Dig. 28.6.1; Dig. 29.1.5; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 81.
[1337] Cod. 6.33.1; Dig 28.5.28; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 319; J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 129.
[1338] Dig. 28.6.1; Dig. 28.6.2; Dig 28.6.20; Dig 28.6.5; Dig 28.6.20.1; Dig 28.5.37.1; Cod. 6.26.2; R. Zouch, *Cases and Questions Resolved in the Civil Law*, (Printed for Leon Lichfield, for Tho Robinson, Oxford 1652) at 121; J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 130; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 105; F. J. Tomkins, H. D. Jencken, *A Compendium of the*

that empowered a testator to institute an heir on behalf of their succeeding child, as a conditional appointment to take effect if their natural heir died, which is a method of preventing foul play by expectant family members hoping to gain the estate through descent.[1339] Cowell notes civilians acknowledged pupillary substitution but he adds that it is not "highly regarded in England" and did not form part of practice because it allowed a person to make a will for another.[1340] The exclusion of pupillary substitutions highlights the effectiveness of the executor to carry out the will in the absence of an instituted heir. Furthermore, it illustrates that civilians were selectively choosing the principles to import into English testamentary succession rather than relying on a literal approach to the civil law.

3. Probate and Administration of the Estate

The history of probate has not received wide scholarly attention and the exact nature of its development remains uncertain because of insufficient evidence.[1341] Scholarship reports that Anglo-Saxon law did not have a system of probate despite the evidence suggesting a procedure had emerged to protect the *cwide*'s validity by making duplicate or triplicate copies that the donor and local church held to authenticate the instrument.[1342] The

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Modern Roman Law, (Butterworths, London 1870) at 235; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 326; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 49; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 350; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 261; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 300; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 146.

[1339] Inst. 2.16; Inst. 2.16.2; Inst. 2.16.3; Inst. 2.16.5; Dig. 28.6.2; Dig. 28.6.2.4; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 130 – 131; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 8; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 104; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 49; G. Campbell, *A Compendium of Roman Law: Founded on the Institutes of Justinian*, (The Lawbook Exchange, Clark 2008) at 72; also see Inst. 2.16.1.

[1340] J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 132 see Dig 28.5.32.

[1341] R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 79; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 196.

[1342] D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at xxv, 43 (Will of Ethelric), 47 (Confirmation of the Will of Ethelric), 69 (Will of Thurketel), 71 (Will of Thurketel Heyng), 79 (Will of Leofgifu), 79 (Thurstan's bequest), 89 (Will of Edwin);

chirographum described the practice of holding writing in order to preserve the *cwide* for later inspection.[1343] The Roman law term often applied to simple gifts rather than bilateral obligations, which hints at the *cwide's* unilateral nature.[1344] Nevertheless, the Anglo-Saxon clergy carefully categorised and archived large numbers of *cwide* in the Roman manner.[1345] However, jurists attributed the ecclesiastical court's exclusive probate jurisdiction and administration of estates to the unique customs of English law and royal consent.[1346] In 1080 A.D., the ecclesiastical courts exercised only occasional jurisdiction to resolve questions concerning validity as collary to their archiving duties, which appears similar to their Anglo-Saxon predecessors.[1347] Nonetheless, the formalities and procedures associated with probate and the administration had emerged by the beginning of the thirteenth century.[1348] The evidence suggests the ecclesiastical courts subsumed the customary jurisdiction of the County Court and the Courts Baron in probate matters with the exception of wills that disposed of lands held in borough custom.[1349] By the 1240s, the ecclesiastical courts had settled the

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A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 197; E. F. Murphy, "Early Forms of Probate and Administration: Some Evidence concerning Their Modern Significance" (1959) 3 (2) *The American Journal of Legal History*, 125 at 130; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 109; A. Campbell, "An Old English Will" (1938) 37 (2) The Journal of English and Germanic Philology, 133 at 136.

[1343] D. Whitelock, *Anglo-Saxon Wills, Edited with Translation and Notes by Dorothy Whitelock*, (WM.W. Gaunt & Sons, Inc, Florida, 1986) at xxv; K. A. Lowe, "The Nature and Effect of the Anglo- Saxon Vernacular Will" (1998) 19 (1) *The Journal of Legal History*, 26 at 32.

[1344] B. H. Stolte, "Trebatius in palimpsest. Notes on Cicero *ad Familiares* vii,18" [2005] *Fundamina: A Journal of Legal History: Essays in Honor of Eric H. Pool*, 316 at 318.

[1345] K. A. Lowe, "The Nature and Effect of the Anglo- Saxon Vernacular Will" (1998) 19 (1) *The Journal of Legal History*, 26 at 32.

[1346] *Hensloe's Case* 9 Co. Rep. 36b; 77 Eng. Rep. 784 at 785; *Bouchier v Taylor* (1776) 4 Brown 708 at 716; 2 Eng. Rep. 481 at 486; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 427 - 430; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 55; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 61.

[1347] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 196; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 291.

[1348] Magna Carta c 26, c 27; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 428; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 197, 211.

[1349] *Hensloe's Case* 9 Co. Rep. 36b; 77 Eng. Rep. 784 at 785; *Grandison (Lord) v Countess* of Dover 3 Mod 23 at 24; 87 Eng. Rep. 14 at 15; *Marriot v Marriot* (1725) 1 Gilb Rep 203 at 206; 25 Eng. Rep. 142 at 144; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 432; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 291 - 292; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840 at 338; L. Shelford, *Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of Unsound Mind with an Appendix of the Statutes of England, Ireland, and Scotland, Relating to Such Persons; and Precedents and Bills of Costs*, (J. S. Littell, Philadelphia 1833) at 194; R. S. Donnison Roper, H.

process for determining the validity of wills, referred to as probate or proving, and had established unique procedures as part of English custom.[1350] Therefore, probate appears to have developed alongside the executor and it changed from an occasional practice to a regular procedure by the fourteenth century.[1351]

Probate followed the diocesan jurisdictional division to determine the authority of the ordinary.[1352] This system was complex because rural deaneries, cathedral chapters, peculiars, archdeaconries, consistory courts and archiepiscopal authorities could possess, occasionally competing, probate jurisdiction.[1353] Both peculiars and archdeacons did not ordinarily grant

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H. White, *A Treatise on the Law of Legacies*, fourth edition, volume 2, (W. Benning, London 1847) at 1785; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 60; E. Gibson, *Codex Juris Ecclesiastici Anglicani*, (Printed by J. Baskett, London1713) at 560; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s*, (Oxford University Press, Oxford 2004) at 387.

[1350] *Blackborough v Davis* 12 Mod 615 at 617; 88 Eng. Rep. 1558 at 1559; *Hensloe's Case* 9 Co. Rep. 36b at 38a; 77 Eng. Rep. 784 at 788; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 427; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 66; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 112; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 281, 302; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 60; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 197; W. S. Holdsworth "The Ecclesiastical Courts and their Jurisdiction" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 2, (Little, Brown and Company, Boston 1908) at 301.

[1351] W. Lyndwood, Constitutions Provincialles and of Otho and Octhobone, translated in to Englyshe, (Robert Redman, London 1534) at 3.23.3; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 61; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 196

[1352] J. Perkins, M. Walbanck (trans), *A profitable book of Mr. John Perkins*, (Printed for Matthew Walbanck, London 1657) at 182; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 199; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 61; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 508; M. J. Quin, *An Examination of the Grounds upon which the Ecclesiastical and Real Property Commissioners and a Committee of the House of Commons have Proposed the Abolition of the Local Courts of Testamentary Jurisdiction* (Hume Tracts,1834), fifth edition, (J. Ridgway, London 1834) at 5.

[1353] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 199; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 61; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 65; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 293; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 967.

probate and only exercised this capacity through prescriptive title.[1354] The Constitutions of Othobone provides that probate shall occur in the diocese of the testator's death.[1355] However, the prevailing rule is that the ecclesiastical court of the diocese where the will-maker was domiciled had jurisdiction to determine probate.[1356] A difficulty emerged if the deceased held property located in multiple dioceses, which initially may have required an executor to engage in a slow and expensive process of obtaining probate from different ecclesiastical courts depending on the property's location.[1357] Canon 92 of the Canons of 1603 (1604) indicates that the Church contended with these difficulties by banning citation into different ecclesiastical courts for the probate of the same will.[1358] Canon 15.1 of the Canons of 1640 repeats the ban, emphasising the sanction of excommunication, which indicates the issue remained a persisting problem throughout ecclesiastical history. The competition to secure probate reflects the fact it proved to be the most lucrative, and therefore important, source of revenue for the spiritual courts.[1359] Furthermore, if a dispute arose between different ecclesiastical courts then the Court of Arches could assume jurisdiction to grant probate.[1360]

The rule developed forbidding bishops from citing executors who were managing an estate with goods in more than one diocese because probate belonged to the prerogative court of the

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[1354] R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 293; J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 1121.

[1355] Canon 14, Constitution of Othobone; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 68; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 427; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 198; P. S. Barnwell, "Emperors, Jurists and Kings: Law and Custom in the Late Roman and Early Medieval West" (2000) (168) *Past & Present*, 6 at 13.

[1356] *Hensloe's Case* 9 Co. Rep. 36b; 77 Eng. Rep. 784 at 785; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 58; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 69; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 55; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 967.

[1357] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 199; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 438 see *Anonymous* 4 Leonard 211 at 211; 74 Eng. Rep. 827 at 827.

[1358] See Dig. 22.5.3.6.

[1359] R. B. Outhwaite, *The Rise and Fall of The English Ecclesiastical Courts, 1500 – 1860*, (Cambridge University Press, Cambridge 2006) at 22; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 88; R.H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s*, (Oxford University Press, Oxford 2004) at 387.

[1360] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 201; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records* (Lochin Publishing, Dursley 1992) at 23.

province.[1361] The prerogative courts had jurisdiction over *bona notabilia*, or notable goods, which encompassed estates with property in different dioceses and larger estates that exceeded a certain sum.[1362] Ecclesiastical law settled on a figure of five pounds, although it permitted a greater threshold in some dioceses by peculiar custom.[1363] The ecclesiastical courts determined this value by the sum of all property, including the debts and obligations owed to the estate, which Lynwood states is an amount worth more than a pauper.[1364] Canon 93 provides the prerogative court must know that an estate contained *bona notabilia* before citation.[1365] A notable exception to the prerogative court's jurisdiction is that goods held in a peculiar were not *bona notabilia* and required the executor to undertake multiple probates.[1366] However, the law is unclear if the deceased held property in both archiepiscopal provinces.[1367] The evidence suggests an executor must acquire probate in both the Prerogative Courts of York and Canterbury, analogous to the prescriptive authority of a peculiar despite an argument the Prerogative Court of Canterbury possessed jurisdiction

[1361] Canon 92, Canons of 1603 (1604); M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 201; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 428, 438; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records* (Lochin Publishing, Dursley 1992) at 23.

[1362] The Canons of 1603 (1604), Canon 93; 107. The Notebook of Dr Thomas Eden (1610) in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 81; *Anonymous* 4 Leonard 211 at 211; 74 Eng. Rep. 827 at 827; *Burston v Ridley*, 1 Salkeld 39 at 39; 91 Eng. Rep. 40 at 40; J. Perkins, M. Walbanck (trans), *A profitable book of Mr. John Perkins*, (Printed for Matthew Walbanck, London 1657) at 183; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 59; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 68 - 70; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 55; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 65; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 294; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 509; J. Cowell, M. Thomas (ed), *A Law Dictionary; or, The Interpreter of Words and Terms*, second edition, (Printed by E. and R. Nutt Gosling, London, 1727) at (Bo); H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 439.

[1363] The Canons of 1603 (1604), Canon 93; Lynwood's *Provinciale* 3. 13.5; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 70; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 439; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 967.

[1364] S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 54; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 69; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 439.

[1365] F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 972

[1366] 130. The Notebook of Dr Thomas Eden (1610) in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 91; S. Toller, *Law of Executors and Administrators,* third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 50; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 56 see *Brook v Turner* 1 Mod 211 at 211; 86 Eng. Rep. 834 at 835 but see Canon 92, Canons of 1603 (1604).

[1367] F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 973.

because of its customary superiority.[1368] The papal bull of Alexander VI confirmed the prerogative of the Archbishop of Canterbury in 1494 to grant probate in their province concerning assets that touch multiple dioceses suggesting superior jurisdiction.[1369] Furthermore, it became an indication of status for the Prerogative Court of Canterbury to grant probate of the deceased's estate.[1370]

The English ecclesiastical courts do not appear to have derived their system of probate from the continental canon law and the subject appears notably absent in both the *Liber Extra* and surrounding commentary. Dist. 88, c 5 repeats the tenor in Cod. 1.3.40 to prohibit ecclesiastics from interfering with the process of proving wills. Nonetheless, the prominence of the *ars dictaminis*, art of writing, in early Bolognese legal education had the practical effect of equipping ecclesiastics with the *ars notaria* or notarial skill set necessary to create an efficient probate system.[1371] Richardson concludes the *ars dictaminis* never gained prominence in England because the legal profession developed around the common law and equity despite noting the civilians actively studied the *ars dictaminis* suggesting a stronger role in English law than the author suggests.[1372] Inferior ecclesiastical courts without the resources of the larger courts were notorious for exercising probate jurisdiction and subsequently losing the will, which forced intestacy on will-makers and caused legacies to be lost.[1373] Canon 126 of the Canons of 1603 (1604) addressed this issue by requiring the ordinary and a notary to seal the will and the latter to copy and archive the original within a registrar for later retrieval.[1374] Therefore, notaries played an important role in the success and efficiency of the English probate system.

[1368] *Burston v Ridley*, 1 Salkeld 39 at 39; 91 Eng. Rep. 40 at 41; 69. The Notebook of William Colman (1630) in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 139; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records* (Lochin Publishing, Dursley 1992) at 23; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 968.
[1369] R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 293; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 69; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 55; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 439.
[1370] M. Andrews-Reading, "A further look at Australian Probate Records in the Prerogative Court of Canterbury" (2009) 39 (2) *Descent*, 58 at 58; J. Godolphin, *The Orphans Legac*y, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 58.
[1371] M. Richardson, "The Fading Influence of the Medieval 'Ars Dictaminis' in England after 1400" (2001) 19 (2) *Rhetorica: A Journal of the History of Rhetoric*, 225 at 240.
[1372] M. Richardson, "The Fading Influence of the Medieval 'Ars Dictaminis' in England after 1400" (2001) 19 (2) *Rhetorica: A Journal of the History of Rhetoric*, 225 at 241, 246.
[1373] The Canons of 1603 (1604), Canon 126.
[1374] *Reformatio Legum Ecclesiasticarum,* 27.20; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies,

The English ecclesiastical courts drew on the civil law to breathe life into their system.[1375] Roman law furnished the precautionary *publicatio testamenti* that required an heir to bring a testamentary document before the *magister census* who opened it in front of available witnesses, inspected its contents, and made copies for public record.[1376] The *ius civile* did not possess a judicial procedure to confirm the validity of testaments, and aggrieved parties doubting its authenticity resorted to private actions.[1377] The system formed part of the *ius honorarium* that enabled interested parties to compel a person to deliver a will to the praetor.[1378] Justinian confirmed this practice and required the opening of the will within five days after its consummation and the magistrate to read the contents publically in the domicile of the testator.[1379] It followed the reasoning in Dig. 43.5.3.10 that any person left a legacy could demand production of the will. The procedure sought to ensure the authenticity of the

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Toronto 1963) at 205; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records* (Lochin Publishing, Dursley 1992) at 50; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 293; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 508; E. Gibson, *Codex Juris Ecclesiastici Anglicani*, (Printed by J. Baskett, London1713) at 563.

[1375] *Marriot v Marriot* (1725) 1 Gilb Rep 203 at 204; 25 Eng. Rep. 142 at 142; R. Hooker, I. Walton, *Of the Laws of Ecclesiastical Polity: Introductions; Commentary, Preface and Books V- VII*, (Medieval & Renaissance Texts & Studies, Binghamton 1993) at 1067.

[1376] Cod. 6.23.18; Cod. 6.23.23; Cod. 6.32.1; *Marriot v Marriot* (1725) 1 Gilb Rep 203 at 204; 25 Eng. Rep. 142 at 142; E. Champlin, *Final Judgments, Duty and Emotion in Roman Wills, 200 BC – A.D. 250*, (University of California Press, Berkeley and Los Angeles, 1991) at 77; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 6; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 450; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840 at 338; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 773; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 8 see 128. The Notebook of Dr Thomas Eden (1610) in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 90.

[1377] T. Rufner, "Testamentary formalities in Roman law" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 17; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 774.

[1378] *Marriot v Marriot* (1725) 1 Gilb Rep 203 at 204; 25 Eng. Rep. 142 at 142; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 428; T. Rufner, "Testamentary formalities in Roman law" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 8,17; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 132; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 6.

[1379] Cod. 6. 32.1; Cod. 6. 32.4; Cod. 6. 32.2; T. Rufner, "Testamentary formalities in Roman law" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 17; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 259; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 6.

document rather than its contents and the original testament was stored in public archives to ensure the production of additional copies for this purpose.[1380] Dig. 29.3.2 indicates it is a public document by stating "the instrument containing the will does not belong to one man, that is the heir, but to all those favour anything has been written in it", which provided additional incentive for the heir to follow the testator's instructions.[1381] It is notable Cod. 1.3.40 reveals Justinian prohibited the clergy from opening and copying testaments, and remonstrates them for usurping the powers of the *magister census* to authenticate wills, which indicates the clergy had concerned themselves with this procedure at an early period.[1382] The ecclesiastical courts did not follow the strict form of the civil law and Godolphin opines its processes were too ceremonious for English law.[1383]

Civilians conceptualised probate as the civil law *publicatio testamenti* despite the ecclesiastical courts developing a unique and obligatory practice.[1384] In English law, the discovery of a will in the deceased's possession required its possessor to exhibit the document before the ordinary, who like the *magister census*, opened the will and inspected its contents to determine its validity and ascertain who the will-maker had authorised to be their executor.[1385] The supervision of the will's administration, including the creation of an

[1380] Dig 29.3.1; E. Champlin, *Final Judgments, Duty and Emotion in Roman Wills, 200 BC – A.D. 250*, (University of California Press, Berkeley and Los Angeles, 1991) at 77; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 773; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 259.
[1381] Dig. 29.3.2.8; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 328; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 6; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 774; L. E. Hay, "Executorship Reporting: Some Historical Notes" (1961) 36 (1) *The Accounting Review*, 100 at 100
[1382] A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840 at 338; H. Spelman, *Reliquiae Spelmannianae: The Posthumous Works of Sir Henry Spelman Relating to the Laws and Antiquities of England*, (Printed for D. Brown, W. Mears, F. Clay, London, 1723) at 129.
[1383] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 450; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 62.
[1384] H. Spelman, *Reliquiae Spelmannianae: The Posthumous Works of Sir Henry Spelman Relating to the Laws and Antiquities of England*, (Printed for D. Brown, W. Mears, F. Clay, London, 1723) at 129; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 60.
[1385] Dig. 29.3.2.8; *Estate of Hatchenden* KAO DRb Pa. fo. 11 in R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 409; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 63; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records* (Lochin Publishing, Dursley 1992) at 49; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 944; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of

inventory and account, required the ordinary to know the will's contents.[1386] Therefore, probate's purpose, similar to the *publicatio testamenti*, is for the ecclesiastical court to examine a document to establish the validity of its testamentary character with the additional function of granting administration.[1387] The death of a local person would have been common knowledge and the ordinary often peremptorily cited the executor, or another in possession, who was compelled to bring the will before them.[1388] The ordinary punished an executor who fraudulently refused to produce the will with excommunication and compelled them to produce it through discovery.[1389] The executor must take out probate within six months after death, although the court ordinarily allocated additional time if the deceased left property in multiple dioceses.[1390] Occasionally, probate occurred before the will's consummation, akin to a public testament, which permitted administration to begin immediately after death.[1391] The ecclesiastical courts determined the validity of all wills for personalty, either the entire estate or a particular part, and took no notice of devises to prevent influencing a jury if a trial arose in the common law courts, which was a concession to exempt probate from prohibition unless

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Mediaeval Studies, Toronto 1963) at 182, 205; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 202; P. Lovelass, A. Barron (ed) *The Law's Disposal of a Person's Estate Who Dies without Will or Testament; to Which Is Added the Disposal of a Person's Estate by Will and Testament; with an Explanation of the Mortmain Act*, twelve edition, (J. S. Littell, Philadelphia 1839) at 206; C. Von Savigny, E. Cathcart (Trans), *The History of Roman Law during the Middle Ages*, volume 1, (Printed for Adam Black, Edinburgh 1829) at 158; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 74.

[1386] W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 591; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 197.

[1387] W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 74; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 205; T. Jarman, M. M. Bigelow, *A Treatise on Wills*, fifth edition, volume 2, (Little Brown and Company, Boston 1881) at 32; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 945.

[1388] Dig. 43.5.1.1; Dig. 43.5.1.1.2; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 945; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 429; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 443; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 409.

[1389] Dig. 43.5.3.6; *Jackson v Wilson* (1838) 2 Moore 178 at 195; 13 Eng. Rep. 75 at 85; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 40; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 443; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 409 – 410.

[1390] W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 58.

[1391] Cod. 6.23.19.1; Cod. 6.23.19.2; Cod. 6.23.19.3; Nov. 48.1; Nov. 481.1; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 205.

some special reason emerged.[1392] Section 17 of the Administration Act 1969 indicates this is no longer the case although s 56 indicates a jury may still try questions of fact.

The procedure of probate commenced in either common or solemn form.[1393] This is unknown to the civil law and is an innovation of the ecclesiastical courts that recognises the compulsory nature of probate. Before commencement of the procedure, the ordinary released a public proclamation to allow interested parties the opportunity to object to its validity.[1394] Probate in common form, the most frequent method, allowed the ordinary to determine validity without the citation of interested parties or the testimony of witnesses, which was a quicker and inexpensive form of probate.[1395] The executor then takes a general oath to swear

[1392] *Mary Semaine's Case* 1 Bulstrode 199 at 199; 80 Eng. Rep. 887 at 887; *Hensloe's Case* 9 Co. Rep. 36b at 38a; 77 Eng. Rep. 784 at 788; *Egerton v Egerton* 2 Bulstrode 218 st 219; 80 Eng. Rep. 1074 at 1074 *Smallwood v Brickhouse* 2 Mod 315 at 315; 86 Eng. Rep. 1095 at 1095; *Pawlett Marquess of Winchester's* Case 6 Co. Rep. 23a at 23b; 77 Eng. Rep. 287 at 288; *Fox v Marston* (1837) 1 Curt. 494 at 504; 163 Eng. Rep. 173 at 176; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 432; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 66; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at 124; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 59; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 81; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840 at 339; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 302; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 162, 179; L. Shelford, *Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of Unsound Mind with an Appendix of the Statutes of England, Ireland, and Scotland, Relating to Such Persons; and Precedents and Bills of Costs*, (J. S. Littell, Philadelphia 1833) at 194; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records* (Lochin Publishing, Dursley 1992) at 49 see *Egerton v Egerton* 1 Cro. Jac. 346 at 346; 79 Eng. Rep. 296 at 296.

[1393] W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 78; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 170.

[1394] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 415; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 84.

[1395] *Re Goods of Mary Keeton* (1832) 4 Hagg. Ecc. 209 at 209; 162 Eng. Rep. 1423 at 1423; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 448; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 62; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 945; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 196; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 415; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 60; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840 at 339; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 79; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 957; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 315 - 316; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J.

the document presented is the true, whole, and last will of the deceased, and they would administer the estate honestly, diligently, and faithfully.[1396] Some ecclesiastical courts, particularly in York, required a witness to accompany the executor; if no controversy existed, the singular testimony of the executor sufficed to prove the will contrary to the civil and canon laws.[1397] Probate of a nuncupative or a lost will always required the evidence of two witnesses, according to the canon law, who declared the will-maker's testamentary intentions before the ordinary.[1398] Once satisfied of the will's validity, the ordinary or their notary affixed their seal to the will and granted probate.[1399]

Probate in solemn form was a more secure method of determining validity because an interested party contesting its validity required the ordinary to be more cautious.[1400] Any interested person, including an executor, questioning the validity of the will or the will-

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Swords, New York 1797) at 170; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 56.

[1396] Cod. 1.4.27.3; Cod. 6.32.3; W. Lyndwood, *Constitutions Provincialles and of Otho and Octhobone, translated in to Englyshe*, (Robert Redman, London 1534) at 3.13.5; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 448; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 62; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 40; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 945; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 420; T. E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943) 8 (2) *Missouri Law Review*, 107 at 112; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 78; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 405; T. O. Martin, "The Trust and the *fundatio*" (1955) 15 (1) *The Jurist*, 11 at 17; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 508.

[1397] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 415; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 56; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 317; Anonymous (A Gentleman of Doctors Commons), *The Clerk's Instructor in the Ecclesiastical Courts*, (Printed for E. and R. Nutt, and Gosling, London 1711) at 100.

[1398] R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 70; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 205; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 408; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 60; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 324; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 174.

[1399] J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 62; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 170.

[1400] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 449; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 415; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 88.

maker's capacity can demand it proved in solemn form.[1401] From the late sixteenth century, the courts adopted a system where an interested party could give notice to the ordinary not grant probate in common form.[1402] An interested party, particularly spouse and issue, could contest a will within a thirty-year period after a grant of probate in common form to require proof of validity in solemn form.[1403] Solemn form required the ordinary to notify all interested parties and summon witnesses.[1404] If the court granted probate, either in solemn or common form, the ordinary recorded it in an Act book and the executor could commence administration; otherwise, if denied probate, the ordinary committed administration because the deceased died intestate.[1405] Probate did not prejudice claims of legatees because its

[1401] Dig 29.3.2; Dig 29.3.3; 70. *Walker c Cuffnaile*, The Notebook of William Colman (1630) in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 140; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 947; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 204; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 79; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 957; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 322.

[1402] R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 79.

[1403] 60. The Notebook of Dr Thomas Eden (1610) in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 64; H. Consett, *The Practice of the Spiritual or Ecclesiastical Courts*, (Printed for W. Battersby, London 1700) at 10; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 415; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 56; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 947; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 449; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 66; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 80; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 173; L. Shelford, *Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of Unsound Mind with an Appendix of the Statutes of England, Ireland, and Scotland, Relating to Such Persons; and Precedents and Bills of Costs*, (J. S. Littell, Philadelphia 1833) at 197.

[1404] Dig 29.3.4; Dig 29.3.5; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 449; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 56; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 945; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 507.

[1405] C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records* (Lochin Publishing, Dursley 1992) at 49; H. Consett, *The Practice of the Spiritual or Ecclesiastical Courts*, (Printed for W. Battersby, London 1700) at 10; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 211; Anonymous (A Gentleman of Doctors Commons), *The Clerk's Instructor in the Ecclesiastical Courts*, (Printed for E. and R. Nutt, and Gosling, London 1711) at 101.

purpose was to establish validity only and the right of the executor to administer the estate.[1406] Nevertheless, an ordinary could not freely revoke probate once they granted it.[1407]

The first duty of an executor, in the manner of the guardian, is to bind themselves by oath to the ordinary, either before probate or administration, to make an inventory representing the full, true and perfect schedule of the deceased's effects, including monies, chattels and debts, funeral expenses and mortuary fee and costs.[1408] The oath was in the following form:

> "You shall swear that you believe this to be the true last will and testament of the deceased. That you will pay all the debts and legacies of the deceased as far as the goods shall extend, and the law shall bind you; and that you will exhibit a true and perfect inventory of all and every the goods, rights and credits of the deceased, together with a just and true account, into the registry of the Court when you shall be lawfully called thereunto. So help you God".[1409]

The oath included a duty to administer the office properly, render account, and disclose evidence of previously bad character that may affect diligent administration.[1410] The ordinary

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[1406] *Wankford v Wankford*, 1 Salkeld 299 at 309; 91 Eng. Rep. 265 at 272; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 208.

[1407] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 435; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 208.

[1408] 21 Hen. VIII, c 5; Canon 92, Canons of 1603 (1604); *Reformatio Legum Ecclesiasticarum,* 27.10; W. Lyndwood, *Constitutions Provincialles and of Otho and Octhobone, translated in to Englyshe*, (Robert Redman, London 1534) at 3.13.5; *Jackson v Wilson* (1838) 2 Moore 178 at 194; 13 Eng. Rep. 75 at 84; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 264; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 150; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 490; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 70 – 71; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 650; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 404, 420; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 593; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 421 – 425, 463; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 198.

[1409] R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 327; H. Consett, *The Practice of the Spiritual or Ecclesiastical Courts*, (Printed for W. Battersby, London 1700) at 12.

[1410] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 412; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 326; H. Consett, *The Practice of the Spiritual or Ecclesiastical Courts*, (Printed for W. Battersby, London 1700) at 12; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 293.

did not give a commission of administration until the executor swore an oath, which formed part of practice to shorten any litigation that may arise.[1411] The Henrician Canons gives a nominated executor a reasonable time to deliberate acceptance by oath and a year to begin the administration of the estate after they had accepted, or they lost any benefit they would have accrued from the estate and administration descended to the Ordinary.[1412] Lynwood followed Dig. 49.16.5 to indicate the importance of the executor's reputation in relation to the oaths determined when the ordinary required inventory.[1413] Nevertheless, the executor benefits from the presumption in Dig. 12.3.11 that a person does not swear a false oath under compulsion of law.[1414]

From an early period, the ecclesiastical courts required an executor to make an inventory prior to, or shortly after, a grant of probate and before administration.[1415] The Prerogative

[1411] Dig. 12.2.1; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 672; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 114 see Dig. 12.2.38.

[1412] Henrician Canons, 31.6, 31.12; see X. 3.26.3; X. 3.26.6; *Reformatio Legum Ecclesiasticarum,* 27.23; 27. 34; Cod. 6.30.19.3; Dig 28.5.60.3; *Jackson v Wilson* (1838) 2 Moore 178 at 193; 13 Eng. Rep. 75 at 83 (ed); S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 49; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 5; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 604; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 245 – 246; F. J. Tomkins, H. D. Jencken, *A Compendium of the Modern Roman Law*, (Butterworths, London 1870) at 253; J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at 619; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965), at 154; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 7, 150.

[1413] B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 675; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 99; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 326.

[1414] H. Consett, *The Practice of the Spiritual or Ecclesiastical Courts*, (Printed for W. Battersby, London 1700) at 289.

[1415] Canon 14, Constitution of Othobone*; Reformatio Legum Ecclesiasticarum,* 27.16; Cod. 1.4.27.1; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 420; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 212; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 415; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 437; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records* (Lochin Publishing, Dursley 1992) at 50; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 405; T. O. Martin, "The Trust and the *fundatio*" (1955) 15 (1) *The Jurist*, 11 at 17; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 510.

Court of Canterbury could proceed *ex officio* to require the presentation of an inventory before probate, although it was generally required afterwards.[1416] The ecclesiastical courts possessed exclusive customary jurisdiction to receive inventories, examine them for inconsistencies, and permit challenges to arise.[1417] Its jurisdiction is a manifestation of the ecclesiastical court's relationship with the collection of debts.[1418]

The Constitution of Archbishop Stratford states:

> "And we forbid the executor of any testament whatsoever to administer the goods of the deceased, unless faithful inventory of the said goods be first made, the expenses of the funeral, and of making such an inventory only excepted: and we will that such an inventory be delivered to the ordinaries of the places, within a time, to be set by them at [their] discretion".[1419]

It emphasises the ordinary's discretion to determine when the executor ought to deliver the inventory within a reasonable period or dispense with the requirement entirely.[1420] There appears to be some flexibility in the practice and an inventory could be required after a grant

[1416] *Myddleton v Rushout* (1811) 1 Phill. Ecc. 244 at 244; 161 Eng. Rep. 973 at 973 R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 404 see Administration Act 1969, s 53.
[1417] R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 427, 429; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 103; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 420; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 212; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 415.
[1418] B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 656.
[1419] W. Lyndwood, *Constitutions Provincialles and of Otho and Octhobone, translated in to Englyshe*, (Robert Redman, London 1534) at 3.13.5.
[1420] *Phillips v Bignell* (1811) 1 Phill. Ecc. 239 at 240; 161 Eng. Rep. 972 at 972; *Upon a Commission of Review to the Court of Delegates* 1 Raym Sir T. 470 at 470; 83 Eng. Rep. 245 at 245; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 419; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 424; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 978; W. Nelson, *Lex Testamentaria: Or, A Compendious System of all the laws of England, as well before the statute of Henry VIII as since, concerning last wills and testaments* (London, Printed by E. and R. Nutt Gosling 1727) at 354.

of administration if the estate was large.[1421] An executor who refused to make an inventory and meddled with the goods was subject to ecclesiastical sanction.[1422]

Justinian originally introduced the *beneficium inventarii*, benefit of inventory, to protect heirs by releasing them from their full liability to pay debts and legacies by ensuring their property did not merge with the testator's property.[1423] The purpose of this benefit was to encourage heirs to accept near insolvent estates that carried the risk of conferring a debt as an incidence of succession, derived from the *ius civile*, which remained possible in the civil law.[1424] Cod. 6.30.22.2 provides a person who is doubtful about whether they wish to accept the estate may

[1421] B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 650, 652 - 653; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 94 – 96.
[1422] *Jackson v Wilson* (1838) 2 Moore 178 at 194; 13 Eng. Rep. 75 at 84; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 420.
[1423] Nov. 1.2.1; Cod. 6.30.22.4; Inst. 2.19.6; *Freyhaus v Cramer* (1829) 1 Knapp 108 at 113; 12 Eng. Rep. 261 at 263; P. du Plessis, *Borkowski's Textbook on Roman law, fourth edition*, (Oxford University Press, Oxford 2010) at 226; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840 at 303; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 139, 151; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 311; J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at 560; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 561; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 154; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 236 -237, 267; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 269; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 304, 313; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 604; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 143; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 77, 313; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965), at 150; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 5, 150; W. Nelson, *Lex Testamentaria: Or, A Compendious System of all the laws of England, as well before the statute of Henry VIII as since, concerning last wills and testaments* (London, Printed by E. and R. Nutt Gosling 1727) at 353; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 252; B. Beinart, "Heir and Executor" [1960] *Acta Juridica*, 223 at 226; W. M. Gordon, *Succession,* in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 106; F. J. Tomkins, H. D. Jencken, *A Compendium of the Modern Roman Law*, (Butterworths, London 1870) at 260.
[1424] Nov. 1.2.1; Inst. 2.19.6; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 49; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 236; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 268; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 5; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 244, 246; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 153; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 150.

begin to make an inventory, a schedule of the property in the estate including the costs of its administration, within thirty days after the will's opening and completed in sixty additional days in the presence of notaries.[1425] In practice two classes of heir emerged: those who made an inventory and those under the classical burdens of succession.[1426] The effect of Justinian's legislation was to compel the creation of an inventory because every prudent heir made an inventory least they face the same liability as the classical heir and lose the Falcidian portion.[1427] The heir must swear an oath that the inventory is an accurate account of the estate because the creditors had no recourse against an insolvent estate; and if the heir lied about the size of the estate then a creditor had an action for double the figure shown in the inventory.[1428] Nonetheless, the profound alteration to the idea of universal succession brought the heir closer to the position as an executor by making their role administrative in nature and limited their interest in the estate to the residue guaranteed by the Falcidian fourth.[1429]

[1425] Henrician Canons, 31.17; Cod. 6.30.22.4; Cod. 6.30.22.2; Cod. 6.30.22.9; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 139; J. Hadley, *Introduction to Roman Law in Twelve Academical Lectures*, (D. Appleton and Company, New York 1873) at 270; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 313; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 4; F. J. Tomkins, H. D. Jencken, *A Compendium of the Modern Roman Law*, (Butterworths, London 1870) at 259 – 260; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 90.

[1426] Inst. 2.19.6; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 871.

[1427] Nov. 1.2.2; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 237; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 5; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 226; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 77; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 153; W. M. Gordon, *Succession,* in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 106 see Dig. 22.3.17.

[1428] Nov. 1.2.1; Cod. 6.30.22.10; Cod. 6.30.22.4; Cod. 6.30.22.5; Cod. 6.30.22.2; F. J. Tomkins, H. D. Jencken, *A Compendium of the Modern Roman Law*, (Butterworths, London 1870) at 260; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840 at 303.

[1429] Inst. 2.22.3; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 755; B. Beinart, "Heir and Executor" [1960] *Acta Juridica*, 223 at 226; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 871; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965), at 150; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 154; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 235; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 872; G. J. McGinley, "Roman law and its influence in America" (1928) 3(2) *The Notre Dame Lawyer*, 70 at 78.

Justinian's innovation is a prominent example of a civil law institution surviving into modern succession law.[1430] The ecclesiastical courts clearly derived their requirement for an inventory from the civil law, which appears to combine the offices of heir and guardian.[1431] Civilians directly incorporated Justinian's *beneficium inventarii* into English law under the same rationale of enabling the executor to administer the estate secure in the knowledge that the inventory protects their own assets from liability.[1432] However, the executor could still avoid accepting a bankrupt estate if they did not wish to undertake the burden.[1433] The executor who made an inventory benefitted from the presumption that the estate did not exceed the amount show in the inventory.[1434] Nonetheless, an ordinary could order an inventory amended if it showed less assets than the estate held.[1435] Jurists may also have attributed the inventory requirement to the law of actions.[1436] Civilians agreed that the executor's position is analogous to the heir or guardian because both faced liability for the estate's legacies and liabilities if they did not make an inventory.[1437] This rule agreed with the

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[1430] *Jackson v Wilson* (1838) 2 Moore 178 at 194; 13 Eng. Rep. 75 at 84; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 150; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 236; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 581.

[1431] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 212; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 134; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 260.

[1432] *Reformatio Legum Ecclesiasticarum,* 27.21; *Jackson v Wilson* (1838) 2 Moore 178 at 194; 13 Eng. Rep. 75 at 84; *Estate of Gorwell* CCAL, Act Book Y. 4.2.m fo. 102 in R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 412; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 404; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 91; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 80; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 427; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 306; W. M Gordon, *Succession* in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 82.

[1433] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 411; R. H. Helmholz, "Bankruptcy and Probate Jurisdiction Before 1571" (1979) 48 (2) *Missouri Law Review*, 416 at 418.

[1434] *Reformatio Legum Ecclesiasticarum,* 27.21; Henrician Canons, 31.11; *Jackson v Wilson* (1838) 2 Moore 178 at 194; 13 Eng. Rep. 75 at 84; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 405; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 426.

[1435] R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 430.

[1436] Cod. 9.49.7; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 90.

[1437] Henrician Canons, 31.11; Cod. 6.30.22.12; Dig. 26.7.7; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 649; W. Nelson, *Lex Testamentaria: Or, A Compendious System of all the laws of England, as well before the statute of Henry VIII as since, concerning*

common law because the absence of inventory suggests to creditors and legatees that the executor held more assets than alleged if the estate cannot satisfy their claims.[1438]

The compulsory nature of the inventory, necessary to enter office, resembled the guardian's duty rather than the optional choice of the heir.[1439] An ordinary regarded the executor who broke their oath by failing to make an inventory as suspicious and prevented them from undertaking their office in the manner analogous of the guardian.[1440] Cod. 5.51.13.2 held that the will-maker could excuse an executor from making an inventory in a will, which further indicates their nature as a guardian.[1441] Nonetheless, the executorship initially differed from

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last wills and testaments (London, Printed by E. and R. Nutt Gosling 1727) at 354; J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at 602; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 404; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 572; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 198; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 237.

[1438] *Jackson v Wilson* (1838) 2 Moore 178 at 194; 13 Eng. Rep. 75 at 84; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 420; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 649; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 572; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 198; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 151.

[1439] Dig. 26.7.7; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 217; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 299; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 154; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 267; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 102; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 146, 423; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 52; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 647 – 459; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 139; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 108; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 92; D. Johnston, "Trust and Trust-like Devices in Roman Law" in *Itinera: Trust and Treuhand in Historical Perspective,* (Duncker & Humblot, Berlin 1998) at 55.

[1440] Dig. 26.10.3; Inst. 1.22.6; Inst. 1.26.5; F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphannotrophei, Halae Magdeburgicae 1769) at 384, 387; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 648; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 82, 95; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 78; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records* (Lochin Publishing, Dursley 1992) at 51.

[1441] R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 71; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 654; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at

the guardian who could offer or were compellable to give security for their fidelity, referred to as the fiduciary caution, at the discretion of the ordinary.[1442] However, Lynwood suggested an expectation that the executor should give security for their administration but later ecclesiastical courts may have followed Chancery to require it if they were insolvent.[1443] Dig 33.1.21.4 provided justification for the taking of security when the will-maker was unaware of the executor's insolvency, which impinged on their ability to administer the estate.[1444] Nevertheless, in *Rex v Raines*[1445], Holt CJ stated English law did not require security of an executor and the canon law agreed, contrary to the *Provinciale*, because their authority derived from the will-maker is paramount, and a court ought not to interfere with this appointment.[1446] After the exhibition of an inventory, the executor applied to the ordinary for

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139; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 97.

[1442] *Reformatio Legum Ecclesiasticarum,* 27.16; Nov. 72.2; Dig 2.8.8.4; Dig. 26.2.17; Dig. 26.4.5.1; Inst. 1.24; Cod. 1.4.27.1; *The Bishop of Carlisle v Wells* 3 Keble 610 at 610; 84 Eng. Rep. 908 at 908; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 34; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 298; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 154; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 102; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 1, (V. and R. Stevens and Sons, London 1849) at 594; P. Cumin, *A Manual of Civil Law; Or, Examination in the Institutes of Justinian: Being a Translation of and Commentary of that work*, (V & R Stevens and G. S. Norton, London 1854) at 52 – 53; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 139; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 108; D. Johnston, "Trust and Trust-like Devices in Roman Law" in *Itinera: Trust and Treuhand in Historical Perspective,* (Duncker & Humblot, Berlin 1998) at 55; W. Nelson, *Lex Testamentaria: Or, A Compendious System of all the laws of England, as well before the statute of Henry VIII as since, concerning last wills and testaments* (Printed by E. and R. Nutt Gosling, London 1727) at 470.

[1443] *Reformatio Legum Ecclesiasticarum,* 27.16; Dig. 26.2.17; *R v Raines*, 1 Ld. Raym. 361 at 361, 362; 91 Eng. Rep. 1138 at 1138; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 1075; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 157, 327- 328; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 420; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 212; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 415; C. R. Chapman, *Ecclesiastical Courts, their Officials, and their Records* (Lochin Publishing, Dursley 1992) at 50; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 175; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 83 see Dig. 36.3.1.1.

[1444] *Rex v. Raines*, 1 Ld. Raym. 361 at 363; 91 Eng. Rep. 1139 at 1139; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 640; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 84.

[1445] 1 Ld. Raym. 361; 91 Eng. Rep. 1138.

[1446] Dig. 26.10.8; Cod. 1.4.27.1; *Hensloe's Case* 9 Co. Rep. 36b at 38a; 77 Eng. Rep. 784 at 788; *R v Raines*, 1 Ld. Raym. 361 at 364; 91 Eng. Rep. 1138 at 1140; *Hill v Mills* 1 Show. K.B. 293 at 294; 89 Eng. Rep. 582 at

a commission of administration to carry out the will, which is necessary to avoid the suspicion cast on those who administer without undergoing the proper channels.[1447] However, the executor's authority did not derive from the ordinary and the courts permitted them to begin administration before commission despite having no actions available in law.[1448] Civilians cited Cod. 6.30.22.12 to indicate an executor can continue to administer the estate without the benefit of inventory.[1449]

The executor who proved the will, exhibited an inventory, and obtained a grant of administration could begin executing the will.[1450] The ecclesiastical courts referred to the next step as insinuation, which involved copying the will for deposit in the court archives.[1451] The civil law order of settlement from the estate is analogous to the position today: funeral arrangements, costs of settling the estate, debts, then legacies and other obligations.[1452] The

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583; *Hills v Mills*, 1 Salkeld 36 at 36; 91 Eng. Rep. 37 at 38; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 432; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 640; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 84 – 85; W. Nelson, *Lex Testamentaria: Or, A Compendious System of all the laws of England, as well before the statute of Henry VIII as since, concerning last wills and testaments* (London, Printed by E. and R. Nutt Gosling 1727) at 470; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 33.

[1447] R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 72.

[1448] *Middleton's Case* 5 Co. Rep. 28b at 28b; 77 Eng. Rep. 93 at 93; *Hensloe's Case* 9 Co. Rep. 36b at 39a; 77 Eng. Rep. 784 at 790; *Wankford v Wankford*, 1 Salkeld 299 at 301 – 302, 307; 91 Eng. Rep. 265 at 267, 270; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 434; J. Perkins, M. Walbanck (trans), *A profitable book of Mr. John Perkins*, (Printed for Matthew Walbanck, London 1657) at 181; J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 119.

[1449] B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 91- 92.

[1450] R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 72; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 1172; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 510.

[1451] R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 71; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 202; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 405; T. O. Martin, "The Trust and the *fundatio*" (1955) 15 (1) *The Jurist*, 11 at 17; R. Hooker, I. Walton, *Of the Laws of Ecclesiastical Polity: Introductions; Commentary, Preface and Books V- VII*, (Medieval & Renaissance Texts & Studies, Binghamton 1993) at 1067.

[1452] W. Lyndwood, *Constitutions Provincialles and of Otho and Octhobone, translated in to Englyshe*, (Robert Redman, London 1534) at 3.13.5; C. St. Germain, W. Muchell (ed), *The Doctor and Student or Dialogues between a Doctor of Divinity and a Student in the Laws of England Containing the Grounds of Those Laws Together with Questions and Cases concerning the Equity Thereof Revised and Corrected* (Robert Clarke & Co, Cincinnati, 1874) at 129 - 132; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book

ecclesiastical courts only imposed a strong moral or *prima facie* duty on the executor to bury the deceased as an incidence of their office rather than a strict legal obligation.[1453] New Zealand law is unclear after the decision in *Takamore v Clarke*[1454] although it appears the common law, guided by civilian practice, remains unchanged and Lord Coke's common bench indicated it would be undesirable to include burial as part of the executor's office because it would require authority from the court.[1455] Nonetheless, the executor enjoyed a comparably large degree of freedom to administer the will and the ecclesiastical courts did not interfere with their undertaking unless they became mentally incapacitated or a suspicion of fraud arose.[1456] The ordinary's principal role was to facilitate administration if the executor requested assistance, in recognition of the complexity of their task, particularly when third parties hinder the execution by withholding goods who must be compelled by excommunication to deliver them.[1457] Nonetheless, a dispute could arise at any period during the execution of a will or an interested party may call the executor to exhibit the inventory

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Company, Boston 1917) at 237; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 5; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 604; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 215; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 80; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 415; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 511.

[1453] Dig. 11.7.12.4; *Gilbert v Buzzard* (1820) 3 Phill. Ecc. 335 at 340; 161 Eng. Rep. 1342 at 1344; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 508; L. Breach, "Is it an Executor's Duty to Bury the Dead" (2013) 7 (9) *New Zealand Family Law Journal*, 217 at 218 – 220.

[1454] [2012] NZSC 116; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 580.

[1455] [2012] NZSC 116 at 151; *Laury v Aldred* (1612) 2 Brownl&Golds 183 at 187; 123 Eng. Rep. 886 at 888; *Rogers v Price* (1829) 3 Y & J 28 at 29, 148 ER 1080 at 1080; Henrician Canons, 31.18; L. Breach, "Is it an Executor's Duty to Bury the Dead" (2013) 7 (9) *New Zealand Family Law Journal*, 217 at 219- 220.

[1456]Inst. 1.26.5; Dig. 26.1.17; Dig. 26.10.3.4; Dig. 26.10.3.5; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 661, 663; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 107 – 108; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 215; W. S. Holdsworth "The Ecclesiastical Courts and their Jurisdiction" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 2, (Little, Brown and Company, Boston 1908) at 307.

[1457] *Stanton c Young* (1358) CP.E.241; *Moreby c Gray* (1361) CP.E.241X; *Harper c Brakan* (1394) CP.E.214; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 664; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 102; R. H. Helmholz, "Debt Claims and Probate Jurisdiction in Historical Perspective" (1979) 23 (1) *The American Journal of Legal History*, 68 at 73; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 73; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 661.

requiring them to appear before the ordinary.[1458] Furthermore, X. 3.26.19 permitted the ecclesiastical courts to summon the executor *ex officio* to answer their oath, as a matter of public interest, to ensure the proper execution of the will.[1459] The executor who failed to act diligently was subject to excommunication and the courts could even remove them from office in the manner of a guardian.[1460]

Later ecclesiastical courts imposed an executor's fiduciary duty to account for the estate combining the offices of heir and guardian.[1461] The executor's final task is to fulfil their oath to render account to the ordinary of all the property that passed through their hands, and the court could not cite *ex officio* an executor until after administration.[1462] Therefore, the

[1458] M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 204; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 435; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 605.

[1459] Cod. 4.1.9; E. Lake, *Memoranda: Touching the Oath ex Officio*, (Printed for R. Royston, London 1662) at 60; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 88; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 280.

[1460] Cod. 1.3.28; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 429; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 284- 285; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 415; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 435; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 615; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 102; W. W. Buckland, *Equity in Roman Law*, (University of London Press, London 1911) at 108; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 2, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 648.

[1461] Dig. 27.3.1; *Hughes v Hughes*, Carter. 125; 124 Eng. Rep. 867; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 85.

[1462] Henrician Canons, 31.9; *Reformatio Legum Ecclesiasticarum,* 27.16; Dig. 27.3.1; Dig. 27.3.9.4; 41. The Notebook of Dr Thomas Eden (1610) in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 57; 19. The Notebook of William Colman (1630) in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 121; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 465; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 76; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 672; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 603; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 225; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 593; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 114, 117; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 80; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 284; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 437; Anonymous (A Gentleman of Doctors Commons), *The Clerk's Instructor in the Ecclesiastical Courts*, (Printed for E. and R. Nutt, and Gosling, London 1711) at 194; S. Toller,

executor is akin to the civil law guardian who could only be obliged to account at the expiration of their office.[1463] This duty was mandatory and even the will-maker could not excuse the executor from giving a satisfactory account.[1464] X. 3.26.17 even prohibited the ordinary from excusing the executor because it was contrary to the public good.[1465] Dig. 26.7.19 did not require executors to account to each other although good practice encouraged communication between them to avoid suspicion.[1466] The account itself must demonstrate funeral costs, the debts and legacies satisfied, and necessary expenses associated with administration.[1467] The ordinary will compare the account with the inventory to discover if any inconsistencies arise between the assets held by the will-maker and the executor's administration of them.[1468] The ordinary permitted the executor to recover from the estate all

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Law of Executors and Administrators, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 490.

[1463] Henrician Canons, 31.9, 3.15; 41. The Notebook of Dr Thomas Eden (1610) in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 57; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 217; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 139; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 120; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 260; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 150; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 33; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 41; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 268; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 612; J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 49; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of Stationers, London 1607) at 8; W. W. Buckland, *Equity in Roman Law*, (University of London Press, London 1911) at 111; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 673.

[1464] X. 3.26. 17; *Reformatio Legum Ecclesiasticarum,* 27.18; *Hill v Mills* 1 Show. K.B. 293 at 294; 89 Eng. Rep. 582 at 583; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 76; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 674; W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 593.

[1465] B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 115- 116.

[1466] B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 677; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 604; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 226; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 118 – 119.

[1467] Dig. 26.7.33.3; Dig. 27.3.9; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 467; see Dig. 50.16.79.

[1468] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 465; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*,

reasonable costs of administration of the estate, including funerary arrangements, and excused them from accidents arising during administration.[1469] The rationale for recovery follows Dig. 11.7.1 that the executor acts on behalf of the deceased rather than their office. Furthermore, the ordinary could summon all creditors and legatees to determine what they had received.[1470] Once satisfied the executor has rendered a full and just account, having administered the estate properly, the ordinary gave letters of acquittance releasing them from their oath, and brought an end to their executorship and molestation from further suits.[1471]

The sixteenth and seventeenth centuries indicate a period of procedural continuity despite the number of old problems existing within the probate system and considerable changes to testamentary succession.[1472] The question of fees was a persistent problem plaguing probate procedure, predominantly in inferior diocesan courts, which received substantial coverage as the most controversial topic unique to English ecclesiastical jurisdiction.[1473] It was not an

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632 at 660; H. Consett, *The Practice of the Spiritual or Ecclesiastical Courts*, (Printed for W. Battersby, London 1700) at 292.

[1469] Henrician Canons, 31.19; Dig. 11.7.32; Dig. 11.7.37;. H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 217; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 382; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 496; J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at 611 – 612; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 114; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 80; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 110; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 137.

[1470] J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 225.

[1471] Dig. 12.2.6; Cod. 5.38.6; W. Lyndwood, *Constitutions Provincialles and of Otho and Octhobone, translated in to Englyshe*, (Robert Redman, London 1534) at 3.13.7; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 467; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 76; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 614; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 226; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 114; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 218; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 416 also see Dig. 12.2.41.

[1472] 29 Car. II, c 3, s 23; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 293; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 79.

[1473] R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 80; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 410, 416; R. E. Rodes, Jr., E*cclesiastical Administration in Medieval England: The Anglo-Saxons to the Reformation*,

issue resolvable by reference to the *ius commune*.[1474] The probate fee was an exaction determined by the size of the will-maker's estate and only the payment of debts took priority over their payment.[1475] The ecclesiastical authority attempted to address the issue and curb the belief that ordinaries had discretion to determine the fee charged.[1476] Lynwood reveals Archbishop Mepham promulgated a constitution in 1328 prohibiting the exaction of probate fees on estates that did not exceed one hundred shillings.[1477] In 1342, Archbishops Stephen's *Extravagantes* repeats his predecessor's prohibition, set limits on the amount of fees chargeable, and comments on the growing frustration against the ordinaries.[1478] Furthermore, subsequent legislative intervention also failed to address the problem.[1479] Neither the spiritual nor the secular enactments could provide a definite solution to the issue of probate fees.[1480] Nonetheless, Dr. Phillimore asserts the costs of probate were considerably less expensive than the procedures Royal courts in the nineteenth century.[1481] There were occasionally causes where the defendant confesses to administering assets without the ordinary's supervision.[1482] Furthermore, the image of the 'sticky fingered' executor indicates the office presented an opportunity to commit fraud despite the thoroughness of the procedures involved.[1483]

(University of Notre Dame Press, Notre Dame, 1977) at 141; E. Coke, *The Fourth Part of the Institutes of the Laws of England*; *Concerning the Jurisdiction of Courts*, (E. and R. Brooke, London 1797) at 335 see 158. The Notebook of Dr Thomas Eden (1610) in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 102.

[1474] J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 282.

[1475] J. Perkins, M. Walbanck (trans), *A profitable book of Mr. John Perkins*, (Printed for Matthew Walbanck, London 1657) at 182; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 282; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 206; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 416.

[1476] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 416; R. E. Rodes, Jr., E*cclesiastical Administration in Medieval England: The Anglo-Saxons to the Reformation*, (University of Notre Dame Press, Notre Dame, 1977) at 141.

[1477] W. Lyndwood, *Constitutions Provincialles and of Otho and Octhobone, translated in to Englyshe*, (Robert Redman, London 1534) at 3.13.4.

[1478] W. Lyndwood, *Constitutions Provincialles and of Otho and Octhobone, translated in to Englyshe*, (Robert Redman, London 1534) at 3.13.7.

[1479] 31. Edw. III., st. 1, c. 4; 21. Hen. VIII., c 5; 21 Hen. VIII, c. 6; J. Reeves, W. F. Finlason, *Reeves's History of the English Law: From the Time of the Romans of the End of the Reign of Elizabeth*, volume 3, (M. Murphy, Philadelphia 1880) at 125.

[1480] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 416.

[1481] R. Phillimore, *The Practice and Courts of Civil and Ecclesiastical Law, and the Statements in Mr. Bouverie's Speech on the Subject*, (W. Benning & Co, London 1848) at 42.

[1482] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 406.

[1483] W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 594; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe*

The evolution of the executor's role as personal representative of the entire estate remained incomplete until the office supplanted the heir to administer real property at the end of the nineteenth century.[1484] Prior to this development, the supervision of the executor and the procedures of probate developed by the ecclesiastical courts had passed to the Court of Probate in 1857, not exclusively to the Prerogative Courts as recommended, which persevered its developments for use in modern systems.[1485] The New Zealand High Court continues to grant probate to wills in either common or solemn form, and is empowered to grant administration with will annexed in the absence of an executor.[1486] Probate remains a necessary part of proving the validity of wills as a method of safeguarding against fraud.[1487] Holdsworth opined, "The minuteness of the account could not be surpassed; and I cannot doubt that the estate was quite as thoroughly and considerably more quickly administered than it would have been in the court of Chancery in the eighteenth century".[1488] Therefore,

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Jean Bodin pour l''Histoire Comparative des Institutions, 47 at 80; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 207; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) 285; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 416 see *Slater c Slater* (1476) CP.G.212.

[1484] Land Transfer Act 1897 (UK), s 1; Administration of Estates Act 1925 (UK), s 1; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 303; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 59; B. G. Lake, "The Land Transfer Act 1897" (1898) 23 (3) *Law Magazine & Quarterly Review of Jurisprudence 5th Series,* 179 at 180; C. F. Brickdale, *The Land Transfer Acts 1875 and 1897*, (Stevens and Sons, London 1899) at 240; C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property*, seventh edition, (Sweet & Maxwell, London, 2008) at 46, 85, 88; F. Bacon, *Reading Upon the Statute of Uses*, (Printed for E. Brooke, London 1785) at 552; R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 63.

[1485] (1 March 1853) 124 HC Deb (The Ecclesiastical Courts) at 852; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 79; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 957; M. J. Quin, *An Examination of the Grounds upon which the Ecclesiastical and Real Property Commissioners and a Committee of the House of Commons have Proposed the Abolition of the Local Courts of Testamentary Jurisdiction* (Hume Tracts,1834), fifth edition, (J. Ridgway, London 1834) at 6; W. Pritchard, *Reform of the Ecclesiastical Courts: An Analysis of the Present State of the Questions and Evidence Before Parliament, With an Examination of the Several Propositions of Reform Resulting Therefrom*, (W. G. Beening & Co, London 1853) at 76.

[1486]Administration Act 1969, s 5; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 566; W. Patterson, A. Tipping (ed) *The Laws of New Zealand, Administration of Estates*, volume 1, (LexisNexis 2012, Wellington) at [2], [187].

[1487] W. Patterson, A. Tipping (ed) *The Laws of New Zealand, Administration of Estates*, volume 1, (LexisNexis 2012, Wellington) at [15].

[1488] W. S. Holdsworth, *A History of English Law*, third edition, volume 3, (Methuen & Co, London 1923) at 594 see (1 March 1853) 124 HC Deb (The Ecclesiastical Courts) at 866; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 65.

the effectiveness of the modern probate system is indebted to the civilians who practised in the ecclesiastical courts and the procedures they developed to ensure a will's integrity.[1489]

[1489] R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 416; W. Patterson, A. Tipping (ed) *The Laws of New Zealand, Administration of Estates*, volume 1, (LexisNexis 2012, Wellington) at [1].

10. Ambulatory Character

A will-maker executes a will with the intention it is an ambulatory and becomes operative at the time of death rather than at the time of execution, which distinguishes it from a contract, deed, or gift.[1490] Even a derogatory clause in the first will not to revoke it did not disqualify a will-maker from making a second because of its ambulatory character.[1491] The instrument referred to as a 'mutual will' would appear to be a notable exception to this fundamental quality except the ecclesiastical courts emphasised that the obligation was not regarded as a true will in English law.[1492] Dig. 34.4.4 holds "the deceased is entitled to change his mind up to the last moment of life". The canon law accepted the ambulatory character of the canonical will, like the civil law testament, which remained in force until revoked by a testamentary action or by operation of law.[1493] In *Moore v Moore*[1494], an argument raised suggested the

[1490] *Christopher v Christopher* (1771) 1 Dickens 445 at 448; 21 Eng. Rep. 343 at 344; *Goodright v Glazier* (1770) 4 Burr. 2512 at 2514; 98 Eng. Rep. 317 at 319; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 237; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 154; C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property*, seventh edition, (Sweet & Maxwell, London, 2008) at 556; J. Schouler, *Law of Wills, Executors and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 8, 471; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 864.

[1491] *Berkenshaw v Gilbert* (1774) Loft 466 at 468; 98 Eng. Rep. 750 at 751; *Hungerford v Nosworthy* (1694) Shower PC 146 at 147; 1 Eng. Rep. 99 at 100; H. Swinburne, *A Treatise of Testaments and Last Wills* seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 110; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 524; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 260; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 76; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 53 – 54; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 49; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 238; J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 128; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 30, 95; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 502.

[1492] Cod. 6.21.11; *Hobson v Blackburn* (1822) 1 Add. 274 at 277; 162 Eng. Rep. 96 at 97; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 223; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 575; R. Croucher, "Mutual Wills: Contemporary Reflections on an Old Doctrine" (2005) 29 (2) *Melbourne University Law Review*, 390 at 410.

[1493] Bernard's *Summa Decretalium* 3.22.6; *Yelverton c Yelverton* (1588) The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 34; *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 466; 161 Eng. Rep. 1039 at 1045; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 529; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 75; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 471; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of

civil law testament did not possess the same ambulatory character of the English will and that it perfected on execution.[1495] However, the most learned Dr. Phillimore replied by citing Dig. 28.4.4 to indicate civilians had imported the ambulatory character of the civil law testament into English law and it would be contrary to reason and public policy to declare otherwise.[1496]

The ecclesiastical courts could not rely on the canon law to furnish extant principles on revocation and drew upon the civil law principles and statute to define this area of law.[1497] Inst. 2.17 begins its title with a brief statement that "a duly executed testament remains valid until either revoked or rescinded", which indicated a will did not lapse from the passage of time unless the will-maker desired it.[1498] The ecclesiastical courts accepted that the manifestation of an intention to revoke rebutted the presumption, even for charitable bequests, that they adopted against revocation.[1499] Revocation is divisible into two layers: an act done by the will-maker in a will or codicil, or revocation arising through a presumed change of intention.[1500] The civil law term *ruptum*, or broken, encompasses both express and implied forms of revocation, which is distinguished from the word *irritum* or will rescinded from a change of status.[1501] Inst. 2.17.4 states *capitis diminuto*, a term encompassing changes

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Mediaeval Studies, Toronto 1963) at 134; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 238.

[1494] (1817) 1 Phill. Ecc. 406; 161 Eng. Rep. 1026.

[1495] (1817) 1 Phill. Ecc. 406 at 426; 161 Eng. Rep. 1026 at 1032.

[1496] (1817) 1 Phill. Ecc. 406 at 435; 161 Eng. Rep. 1026 at 1035.

[1497] Bernard's *Summa Decretalium* 3.22.6; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 258; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 51; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 239.

[1498] Codex Theodosius 4.4.6; Cod. 6.23.27; Cod. 6.23.27.3; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 238; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 277; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 808; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 334; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 611; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 136.

[1499] Dig. 29.1.15.1; *Braddyll v Jehen* (1755) 2 Lee 193 at 208; 161 Eng. Rep. 310 at 315; *Willet v Sandford* (1748) 1 Ves. Sen. 178 at 180; 27 Eng. Rep. 967 at 968; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 529; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 268 see X. 3.24.2.

[1500] A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 239, 240.

[1501] Inst. 2.17.5; Hostiensis, *Summa Aurea*, Liber 3, (Venice 1574) at 1040; Goffredus de Trano, *Summa Super Titulis Decretalium* (Neudruck Der Ausgabe Lyon, 1519) at 144; F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphannotrophei, Halae Magdeburgicae 1769) at 415, 117; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 275; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law,*

of status, includes a loss of freedom, citizenship, or family resulting in the testament's rescission.[1502] This principle was relevant in English practice concerning religious and temporal crimes but is only of historical interest today.[1503] Nonetheless, a will's ambulatory character remains an essential part of the s 8 definition of a will under the Wills Act 2007 as part of its civilian heritage.

1. Revocation by a Testamentary Act

The civil law methods of revoking a will through a testamentary act or express revocation by the will-maker remain a fundamental part of New Zealand practice. A revocation through a testamentary act includes all actions the will-maker takes to demonstrate their intention to revoke a will.[1504] The *ius civile* recognised the execution of a fresh instrument as the foremost method of revocation.[1505] Gaius 2.151 provided the manifestation of a contrary intent or the

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Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law, volume 2, (V. and R. Stevens and Sons, London 1849) at 275; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 805; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 339; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 327; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 50.

[1502]Dig. 28.3.6.5; Inst. 1.17.7; Hostiensis, *Summa Aurea*, Liber 3, (Venice 1574) at 1040; F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphannotrophei, Halae Magdeburgicae 1769) at 97; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 49; A. Watson, *The Law of Succession in the Later Roman Republic*, (Clarendon Press, Oxford 1971) at 61; B. W. Frier, T. A. J. Mc Ginn, *A Casebook on Roman Family Law*, (Oxford University Press, Oxford 2004) at 354; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 280; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 805, 809; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 339; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 133; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 611; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 91.

[1503] Dig. 4.5.11; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 539; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 76.

[1504] *Brudenell v Boughton* (1741) 2 ATK 268 at 272; 26 Eng. Rep. 565 at 567; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 502; see W. Patterson (ed), A. Tipping (ed) *The Laws of New Zealand, Will* (LexisNexis, Wellington 2012) at [77].

[1505]Gaius 2.144; T. Rufner, "Testamentary Formalities in Roman law" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 16; B. W. Frier, T. A. J. Mc Ginn, *A Casebook on Roman Family Law*, (Oxford University Press, Oxford 2004) at 354; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 169.

destruction of the tablet alone without the execution of a fresh instrument was insufficient to revoke the *testamentum per aes et libram* because it derives its validity from the mancipatory ceremony rather than the instrument itself.[1506] However, the *ius honorarium* permitted revocation if the testator manifested an intention to revoke accompanied by either physical destruction or some other clear action indicating their intent either as an absolute revocation resulting in intestacy or as a partial revocation of a single bequest.[1507] Justinian's unification of the *ius civile* and *ius honorarium* furnished a single theory of revocation that sat alongside his introduction of new methods.[1508] Nonetheless, the civil law's foremost method of absolute revocation, recognised by the canon law, remained the execution of a second perfect will that revoked the former *in toto*.[1509] Dig. 34.4.17 states: "Nothing prevents the correction, alteration, or cancellation of an earlier provision by a later one (legacy)". Inst. 2.17.7 adds the testator must complete the instrument to revoke the first and a mere intention of revocation is insufficient.[1510] The legacy-driven nature of the canonical will did not require reference to the

[1506] T. Rufner, "Testamentary Formalities in Roman law" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 17; A. Watson, *Roman Private Law around 200 BC*, (Edinburgh University Press, Edinburgh 1971) at 160; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 238.
[1507] T. Rufner, "Testamentary Formalities in Roman law" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 17; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 238.
[1508] P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 238; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 169; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 24.
[1509] Inst. 2.17.2; Inst. 2.17.3; Bernard's *Summa Decretalium* 3.22.6; *Hungerford v Nosworthy* (1694) Shower PC 146 at 147; 1 Eng. Rep. 99 at 100; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 275; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 136; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 242; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 276; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 133; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 168; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 327; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 50; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 417; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 533; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 610.
[1510] *Cutto v Gilbert* (1853) 1 Sp. Ecc. & A. 276 at 279; 164 Eng. Rep. 160 at 162; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 277;

principles applicable to universal succession that only permitted a relaxed number of witnesses to revoke a will in some circumstances.[1511]

English law followed the civil law rationale that a will's purpose is to dispose of the whole estate, preventing the two subsisting together, and the execution of a fresh instrument indicated the will-maker departed from their previous intention.[1512] Inst. 2.17.1 states: "A will is revoked when, though the civil condition of the testator remains unaltered, the legal force of the will itself is destroyed". Civilians reasoned that the creation of a later will, even if nuncupative or subsequently lost, revoked the former instrument even if the earlier is extensively attested or the second did not appoint an executor.[1513] It also formed part of the

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W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 805.

[1511] Cod. 6.37.17; F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphannotrophei, Halae Magdeburgicae 1769) at 416; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 170; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 238; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 277.

[1512] *Reformatio Legum Ecclesiasticarum,* 27.4; Dig. 28.6.16.1; *Harwood v Goodright* (1774) 1 Cowp 87 at 89; 98 Eng. Rep. 981 at 982; *Helyar v Helyar* (1754) 1 Lee 472 at 511; 161 Eng. Rep. 174 at 189; B. W. Frier, T. A. J. Mc Ginn, *A Casebook on Roman Family Law*, (Oxford University Press, Oxford 2004) at 352; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 42; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 332; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 275; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 136; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 276; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 340; W. M. Gordon, *Succession* in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 96; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 325; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 417; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 533; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 502.

[1513] Inst. 2.17.2; Nov. 107.2; *Drummond v Parish* (1843) 3 Curt. 522 at 528; 163 Eng. Rep. 812 at 814; *Cutto v Gilbert* (1854) 9 Moore 130 at 144; 14 Eng. Rep. 247 at 253; *Berkenshaw v Gilbert* (1774) Loft 466 at 468; 98 Eng. Rep. 750 at 751; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 523 -524; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 30; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 76; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 260; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 53; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 334; R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and

testamentary principles adopted by the common law concerning devises.[1514] However, there was a fundamental difference in the operation of this principle in English law that recognised implied revocation through a testamentary act. In *Moore v Moore*, Dr. Phillimore authoritatively stated, "by the Roman law the cancellation of a second will *ipso facto* revoked a first; with us a second will cancelled is a presumptive revocation of a first; we do not push the argument further than this, we admit that the presumption may be repelled by circumstances".[1515] Therefore, ecclesiastical courts permitted English will-makers, analogous to privileged Roman soldiers, to die with multiple instruments executed at different times that comprised the single will, which gave effect to the canon law desire to emphasise the importance of the will-maker's testamentary intent despite being contrary to the civil law.[1516]

Civilians acknowledged that the principle in Inst. 2.17.7 indicated an imperfect instrument revoking the will *in toto* and did not revoke a perfectly executed will even though the first did not appear to satisfy the will-maker's intention.[1517] In *Moore v Moore*, the High Court of Delegates decided only a successfully executed second will revokes a former instrument.[1518] The second instrument failed only if the court could not determine whether the will-maker

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Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 156; R. Grey, *A System of English Ecclesiastical Law*, fourth edition, (Printed by Henry Lintot, Savoy 1743) at 154.

[1514] *Ex parte Ilchester (Earl of)* (1803) 7 Ves. Jun. 348 at 380; 32 Eng. Rep. 142 at 154; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 805.

[1515] *Moore v Moore* (1817) 1 Phill. Ecc. 406 at 434; 161 Eng. Rep. 1026 at 1035; see Dig. 50.17.188; *Ex parte Ilchester (Earl of)* (1803) 7 Ves. Jun. 348 at 379; 32 Eng. Rep. 142 at 153; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 242; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 154; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 331; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 341.

[1516] J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 340; R. H. Helmholz, "The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills" (1994) 20 *Syracuse Journal of International Law and Commerce*, 147 at 156; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 400.

[1517] Dig. 28.3.11; *Ex parte Ilchester (Earl of)* (1803) 7 Ves. Jun. 348 at 379; 32 Eng. Rep. 142 at 153; *Onyon v Fryers* (1716) Gilb. Rep. 131; 25 Eng. Rep. 91; *Lord John Thynne v Stanhope* (1822) 1 Add. 52 at 56; 162 Eng. Rep. 19 at 21; J. G. Phillimore, *Principles and Maxims of Jurisprudence*, (J. W. Parker and Son, London, 1856) at 347; J. Perkins, M. Walbanck (trans), *A profitable book of Mr. John Perkins*, (Printed for Matthew Walbanck, London 1657) at 179; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 505; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 524- 525; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 40.

[1518] (1817) 1 Phill. Ecc. 406 at 411; 161 Eng. Rep. 1026 at 1027; *Cutto v Gilbert* (1854) 9 Moore 131; 14 Eng. Rep. 247 at 248; *Wright v Netherwood*; *Lug v Lug*, 2 Salkeld 593; 91 Eng. Rep. 497 at 502; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 505.

executed it later or if they lacked testamentary capacity when making it.[1519] The production of two instruments with contradictory provisions, the last executed being unascertainable, resulted in both being declared void for uncertainty unless they could be reconciled.[1520] Furthermore, the ecclesiastical courts presumed a will-maker revoked a second will made concurrently with the first, if the person propounding the second's existence was unable to produce it or demonstrate its existence, because to conclude someone else revoked or concealed it would be to presume a crime.[1521] However, the second will only automatically revokes the first if both instruments purport to dispose of the entire estate.[1522] In *Helyar v Helyar*[1523], Sir Lee held that the execution of a second will of a different purport was by law a revocation of the first or otherwise both documents comprised the will.[1524] In *Cutto v Gilbert*[1525], the court noted all the authorities available to it indicated that effective revocation occurred when proof of differences between the instruments existed.[1526] This rule became particularly poignant when a will purported to revoke personalty contained a devise.[1527] Ecclesiastical courts even accepted the institution of a different executor as a revocation of

[1519] *Parker v Nickson* (1863) 1 De. G. J. & S. 177 at 179; 46 Eng. Rep. 69 at 70; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at525; J. Perkins, M. Walbanck (trans), *A profitable book of Mr. John Perkins*, (Printed for Matthew Walbanck, London 1657) at 179; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 30.

[1520] *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 454; 161 Eng. Rep. 1039 at 1041; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 151; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 936; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 333.

[1521] *Lord John Thynne v Stanhope* (1822) 1 Add. 52 at 52; 162 Eng. Rep. 19 at 19*; Rickards v Mumford* (1812) 2 Phill. Ecc. 23 at 24; 161 Eng. Rep. 1066 at 1066; *Loxley v Jackson* (1819) 3 Phill. Ecc. 126; 161 Eng. Rep. 1277 at 1277; *Cutto v Gilbert* (1854) 9 Moore 130 at 131; 14 Eng. Rep. 247 at 248; *Loxley v Jackson* (1819) 3 Phill. Ecc. 126 at 126; 161 Eng. Rep. 1277 at 1277; *Helyar v Helyar* (1754) 1 Lee 472 at 509; 161 Eng. Rep. 174 at 188; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 513; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 56; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 935; see Henrician Canons, 5.4 *Reformatio Legum Ecclesiasticarum,* 44.2.

[1522] J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 341; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 421.

[1523] (1754) 1 Lee 472; 161 Eng. Rep. 174.

[1524] (1754) 1 Lee 472 at 511; 161 Eng. Rep. 174 at 189.

[1525] (1854) 9 Moore 130; 14 Eng. Rep. 247.

[1526] (1854) 9 Moore 130 at 147; 14 Eng. Rep. 247 at 253 -254; *Harwood v Goodright* (1774) 1 Cowp 87 at 89, 91; 98 Eng. Rep. 981 at 982, 983; *Goodright v Harwood* (1773) Loft 282 at 284, 289; 98 Eng. Rep. 652 at 653, 656; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 333.

[1527] *Limbery v Mason and Hyde*, 2 Comyns 451 at 454; 92 Eng. Rep. 1155 at 1156.

the first following the rationale that the principal purpose of the second instrument is to revoke the institution of the heir.[1528]

The legacy-driven nature of the canonical will, supported by the civil law principles, fostered an instrument that was easily revocable. The ecclesiastical courts recognised revocation could become operative through an unequivocal act accompanied by a clear manifestation of the will-maker's intention to revoke their will either absolutely or in part.[1529] Swinburne observes that the underpinning rationale for adopting this principle is that it would be absurd for a will to stand contrary to the will-maker's wishes.[1530] Prior to the Statue of Wills, ecclesiastical courts determined a simple and naked statement of revocation, accompanied by the requisite intent, was sufficient to revoke a will.[1531] Civilians reasoned informal wishes and nuncupative revocations were sufficient to revoke the canonical will because the instrument did not institute a universal successor.[1532] After the statute, the temporal law drew on ecclesiastical practice and reasoned that devises should follow the rules for personalty.[1533] English courts accepted parol revocations for both written wills of real and personal property during this period.[1534] A will-maker could even revoke a devise through writing without witnesses despite the judicial warning that the presence of witnesses prevented controversies arising.[1535]

[1528] *Berkenshaw v Gilbert* (1774) Loft 466 at 468; 98 Eng. Rep. 750 at 751; *Cutto v Gilbert* (1854) 9 Moore 131; 14 Eng. Rep. 247; *Cutto v Gilbert* (1854) 1 Sp. Ecc. & A. 417 at 421; 164 Eng. Rep. 240 at 242 (PC); *Geaves v Price* (1863) 3 Sw. & Tr. 71 at 74; 164 Eng. Rep. 1199 at 1200.

[1529] *Scruby v Fordham* (1822) 1 Add. 74 at 74; 162 Eng. Rep. 27 at 27; *Moore v Moore* (1817) 1 Phill. Ecc. 406 at 430 - 431; 161 Eng. Rep. 1026 at 1034; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 531 - 532, 537; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 334, 336.

[1530] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 531.

[1531] *Butler v Baker's Case* 3 Co. Rep. 36b; 76 Eng. Rep. 684 at 701 at 710; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 531 – 532.

[1532] Inst. 2.21; Dig. 34.4.3.11; Dig. 50.16.80; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 151; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 170; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 409, 418; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 930.

[1533] *Christopher v Christopher* (1771) 1 Dickens 445; 21 Eng. Rep. 343; W. A. Graunke, J. H. Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator" (1930) 5 (7) *Wisconsin Law Review*, 387 at 391; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 75

[1534] *Hungerford v Nosworthy* (1694) Shower PC 146 at 148; 1 Eng. Rep. 99 at 1001; *Ellis v Smith* (1754) 1 Ves. Jun. 11 at 12 - 13; 30 Eng. Rep. 205 at 206;*Doe v Staple* (1788) 2 T.R. 684 at 687; 100 Eng. Rep. 368 at 370; *Ex parte Ilchester (Earl of)* (1803) 7 Ves. Jun. 348 at 377; 32 Eng. Rep. 152 at 147; 32 Eng. Rep. 142 at 145; *Brady v Cubitt* (1778) 1 Dougl. 31 at 34; 99 Eng. Rep. 24 at 26; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 260; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval

The Statute of Frauds[1536] rejected former practices surrounding devises to ensure English courts only construed solemn acts, perceived as necessary to prevent fraud and other injustices arising, as effective manifestations of the will-maker's intent to revoke.[1537] Section 6 of that Act provides:

> "noe Devise in Writeing of Lands Tenements or Hereditaments nor any Clause thereof shall … be revocable otherwise then by some other Will or Coddicill in Writeing or other Writeing declareing the same or by burning cancelling teareing or obliterating the same by the Testator himselfe or in his presence and by his directions and consent but all Devises and Bequests of Lands' and Tenements shall remaine and continue in force untill the same be burnt cancelled torne or obliterated by the Testator or his directions in manner aforesaid or unlesse the same be altered by some other Will or Codicill in Writeing or other Writeing of the Devisor signed in the presence of three or fower Witnesses declareing the same, Any former Law or Usage to the contrary notwithstanding".

English courts accepted that the statute allowed duly executed non-testamentary instruments, such as deeds or trusts, to revoke a devise.[1538] Notably, the manifestation of intent to revoke alone remained valid for trusts touching real property.[1539]

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and Samuel F. Bradford, Philadelphia 1824) at 139; W. Nelson, *Lex Testamentaria: Or, A Compendious System of all the laws of England, as well before the statute of Henry VIII as since, concerning last wills and testaments* (London, Printed by E. and R. Nutt Gosling 1727) at 510.

[1535] *Butler v Baker's Case* 3 Co. Rep. 36b; 76 Eng. Rep. 684 at 701 at 710; *Ex parte Ilchester (Earl of)* (1803) 7 Ves. Jun. 348 at 372; 32 Eng. Rep. 142 at 151.

[1536] 1677, 29 Car. II, c 3.

[1537] *Ex parte Ilchester (Earl of)* (1803) 7 Ves. Jun. 348 at 361, 372; 32 Eng. Rep. 142 at 147, 151; *Burkitt v Burkitt* (1705) 2 Vern 498 at 499; 23 Eng. Rep. 919 at 920; *Ellis v Smith* (1754) 1 Ves. Jun. 11 at 12; 30 Eng. Rep. 205 at 206; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 521; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 234 – 235; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 151; T. Jarman, M. M. Bigelow, *A Treatise on Wills*, fifth edition, volume 2, (Little Brown and Company, Boston 1881) at 200; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 240; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 533.

[1538] J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 505; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 40; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 131; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 238; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New

The Act aimed to restrict existing methods of revocation that the courts had adopted from the civil law and to curtail the relaxed approach developing around them rather than attempt to introduce new forms.[1540] The statute followed the civilian rationale that the formalities necessary to solemnise a will were required to revoke it, and an instrument unaccompanied by formalities merely intimated an intention to revoke.[1541] In *Ex parte Ilchester (Earl of)*[1542], the Master of Rolls observed that the civil law required the will-maker to revoke a will in the presence of seven witnesses unless exceptional circumstances arose.[1543] Before the statute, the civil law requirement pertaining to formal revocations created a more onerous form of revocation than the ecclesiastical courts desired and the principle did not form part of English law.[1544] In *Christopher v Christopher*[1545], the court held the absence of a section on revocation within the Statute of Wills permitted ordinaries to accept revocations of personalty by parol despite the risk of fraud.[1546] Section 21 did not alter the rule for personalty but reversed the practice of parol evidence for devises, requiring revocation to be committed to writing in the presence of three witnesses.[1547] Nonetheless, subsequent ecclesiastical practice interpreted the statute to conclude that revocation of a written will for personalty must be in a similar form to its publication and held parol ought not to easily revoke a written

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York 1797) at 155; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 537.

[1539] J. G. Phillimore, *Principles and Maxims of Jurisprudence*, (J. W. Parker and Son, London, 1856) at 347; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 418.

[1540] *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 467; 161 Eng. Rep. 1039 at 1046; *Doe v Harris* (1838) 8 AD. & E. 1 at 6; 112 Eng. Rep. 737 at 739; *Parsons v Lanoe* (1748) 1 AMB 557 at 560; 27 Eng. Rep. 358 at 359; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 505; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 76.

[1541] *Ex parte Ilchester (Earl of)* (1803) 7 Ves. Jun. 348 at 372, 376; 32 Eng. Rep. 142 at 151 - 152; *Holdfast on Demise of Ansty v Dowsing* (1747) 1 Black W. 8 at 10; 96 Eng. Rep. 5 at 5; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 139.

[1542] (1803) 7 Ves. Jun. 348; 32 Eng. Rep. 142.

[1543](1803) 7 Ves. Jun. 348 at 376; 32 Eng. Rep. 142 at 152; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 279.

[1544] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 531; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 522.

[1545] (1771) 1 Dickens 445; 21 Eng. Rep. 343.

[1546] (1771) 1 Dickens 445 at 449; 21 Eng. Rep. 343 at 344.

[1547] *Ex parte Ilchester (Earl of)* (1803) 7 Ves. Jun. 348 at 370; 32 Eng. Rep. 375 at 150; *Parsons v Lanoe* (1748) 1 AMB 557 at 560; 27 Eng. Rep. 358 at 359; *Helyar v Helyar* (1754) 1 Lee 472 at 501, 511; 161 Eng. Rep. 174 at 185, 189; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 76.

instrument.[1548] In *Heylar v Heylar*[1549], the Prerogative Court of Canterbury admitted parol evidence to prove a fact concerning revocation, and noted its admission did not create a special risk of fraud or violate the statute.[1550]

Section 6 of the Act also restricted prior practice that admitted physical destruction was sufficient to revoke a will, and required the will-maker to follow the prescribed forms of burning, cancelling, tearing, or obliterating.[1551] In *Moore v Moore*, Dr. Lushington, Dr. Jenner, and Taddy concurred that the civilian drafters directly incorporated the passage in Dig. 29.1.15.1 to define these four actions of revocation and introduce them into English law.[1552] They also cited Inst. 2.17.3 to state the ecclesiastical courts presumed the destruction of the will accompanies an intention to revoke, which is especially poignant to demonstrate a second ought to operate as the will.[1553] The ecclesiastical courts already recognised the will-

[1548] *Harrison v Stone* (1829) 2 Hagg. Ecc. 537 at 545; 162 Eng. Rep. 949 at 951; *Heylar v Heylar* (1754) 1 Lee 472 at 501; 161 Eng. Rep. 174 at 185; *Thorne v Rooke* (1841) 2 Curt. 799 at 812 at 814; 163 Eng. Rep. 589 at 594; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 931; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 203- 204; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 233; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 474; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 400; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 409; T. Jarman, M. M. Bigelow, *A Treatise on Wills*, fifth edition, volume 2, (Little Brown and Company, Boston 1881) at 200.

[1549] (1754) 1 Lee 472; 161 Eng. Rep. 174.

[1550] (1754) 1 Lee 472 at 501, 508; 161 Eng. Rep. 174 at 185, 188 per Sir Lee; see *Doe v Harris* (1838) 8 AD. & E. 1 at 5; 112 Eng. Rep. 737 at 739; (1817) 1 Phill. Ecc. 406 at 430 - 431; 161 Eng. Rep. 1026 at 1034; *Rickards v Mumford* (1812) 2 Phill. Ecc. 23 at 30; 161 Eng. Rep. 1066 at 1068; 3; T. Jarman, M. M. Bigelow, *A Treatise on Wills*, fifth edition, volume 2, (Little Brown and Company, Boston 1881) at 200; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 936.

[1551] *Brudenell v Boughton* (1741) 2 ATK 268 at 270 at 272; 26 Eng. Rep. 565 at 567; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 76; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 242; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 241; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 533; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 475; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 260; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 204; E. C. G., "Wills: Revocation by Judicial Legislation" (1919) 17 (4) *Michigan Law Review*, 331at 332; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 151.

[1552] (1817) 1 Phill. Ecc. 406 at 423 - 424; 161 Eng. Rep. 1026 at 1031 -1032 see W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 171.

[1553] *Moore v Moore* (1817) 1 Phill. Ecc. 406 at 411; 161 Eng. Rep. 1026 at 1027; *Rickards v Mumford* (1812) 2 Phill. Ecc. 23 at 24; 161 Eng. Rep. 1066 at 1066; *Moore v De La Torre* (1816) 1 Phill. Ecc. 375 at 401; 161

maker could physically destroy the will to revoke *in toto* or partially revoke it by blotting out part of its contents.[1554] Dig. 34.4.16 states "there is no difference between the erasure and the ademption of a provision". The primacy of intention meant the physical destruction of the canonical will alone did not outright revoke it because the act was only evidentiary of the will-maker's intent.[1555] However, English courts moved away from earlier practice to consider an intention to revoke unaccompanied by the positive acts prescribed by the statute as insufficient to demonstrate intent.[1556] In *Burtenshaw v Gilbert*[1557], Lord Mansfield held the tests of cancellation, tearing, obliterating, and burning were separate actions with each requiring the freely manifested intention of the will-maker to revoke, which distinguished its destruction from some unintended erosion of the document, error, or undue influence.[1558] The courts utilised the terms *animus revocandi* and *animus cancellandi* to express the necessity for a proper intention to revoke, being more than 'loose declarations' of revocation, which must accompany the physical act.[1559] The difference between these terms determined whether a devise was capable of reviving at common law.[1560]

Eng. Rep. 1016 at 1024; *Helyar v Helyar* (1754) 1 Lee 472 at 514; 161 Eng. Rep. 174 at 190; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 242; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 142; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 933, 935; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 24.

[1554] T. M. Wentworth, *The Office and Duty of Executors*, (Printed by the Assigns of Richard and Edward Atkins, London 1589) at 37; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 260; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 930.

[1555] *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 473; 161 Eng. Rep. 1039 at 1048; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 43; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 336.

[1556] *Berkenshaw v Gilbert* (1774) Loft 466 at 471; 98 Eng. Rep. 750 at 753; *Doe v Staple* (1788) 2 T.R. 684 at 689; 100 Eng. Rep. 368 at 371; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 221; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 334; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 138.

[1557] (1774) Loft 466 at 470; 98 Eng. Rep. 750 at 752.

[1558] (1774) Loft 466 at 470; 98 Eng. Rep. 750 at 752; see Cod. 6.23.7; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 476; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 223.

[1559] *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 461; 161 Eng. Rep. 1039 at 1044 per Sir Nicholl; *Moore v Moore* (1817) 1 Phill. Ecc. 406 at 407; 161 Eng. Rep. 1026 at 1026; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 524; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 138; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 152; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 334.

[1560] *Cutto v Gilbert* (1854) 9 Moore 131 at 143; 14 Eng. Rep. 247 at 252.

The creation of separate methods of revocation allowed ecclesiastical courts to accept ineffective revocations of reality as valid for personalty.[1561] The statute left the revocation of nuncupative wills unchanged and they remained revocable by a sufficient manifestation of intent.[1562] Furthermore, the ecclesiastical courts continued to emphasise intent for the revocation of written wills over the physical actions prescribed for devises.[1563] The courts did not accept the necessity that the will-maker must have completed the physical act.[1564] Therefore, a will-maker induced from fraud or mistake to believe they had successfully destroyed their will, for example directing another to destroy who instead concealed the instrument, is sufficient revocation because of the manifestation of intent.[1565] The significance of intent also accommodated partial revocations and in *Moore v Moore*, the learned civilians cited Dig. 28.4.3 that states a testator who mutilates the will themselves by cutting, erasing, interlining, or blotting out the institution of an heir is *ruptum*; and applying this principle to the solemn parts of the English will allowed partial revocations.[1566] English

[1561] *Ex parte Ilchester (Earl of)* (1803) 7 Ves. Jun. 348 at 372; 32 Eng. Rep. 375 at 152; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 50; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 418.

[1562] G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 419.

[1563] (1817) 1 Phill. Ecc. 406 at 424; 161 Eng. Rep. 1026 at 1032; *Doe v Harris* (1838) 8 AD. & E. 1 at 5; 112 Eng. Rep. 737 at 739; J. D. Hannan, *The Canon Law of Wills*, (The Dolphin Press, Philadelphia 1935) at 267; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 220; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 241; T. Jarman, M. M. Bigelow, *A Treatise on Wills*, fifth edition, volume 2, (Little Brown and Company, Boston 1881) at 200; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 336

[1564] *Doe v Harris* (1838) 8 AD. & E. 1 at 12; 112 Eng. Rep. 737 at 741; *Moore v Moore* (1817) 1 Phill. Ecc. 406 at 411; 161 Eng. Rep. 1026 at 1027; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 221; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 238.

[1565] Dig. 28.4.1.3; *Moore v Moore* (1817) 1 Phill. Ecc. 406 at 413; *Lord John Thynne v Stanhope* (1822) 1 Add. 52 at 52; 162 Eng. Rep. 19 at 19; 161 Eng. Rep. 1026 at 1028; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 472; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 220; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 237.

[1566] Cod. 6.23.30; Dig. 28.4.1; Dig. 28.4.4; *Moore v Moore* (1817) 1 Phill. Ecc. 406 at 408 - 416; 161 Eng. Rep. 1026 at 1026- 1029; *Scruby v Fordham* (1822) 1 Add. 74 at 78; 162 Eng. Rep. 27 at 28; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 221; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 43; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 138; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume

jurists advised will-makers to attach a memorandum in the manner of Dig. 28.4.1.1 alongside a partial revocation through interlination or erasure to clarify their intention to revoke a bequest.[1567] This advice highlights the principle in Cod. 6.23.2 that reasons that an accident or mistake did not revoke a will and the probate of a destroyed will was possible on proof of its contents.[1568] Dig. 50.17.48 indicates a will-maker who tore their will in a fit of rage did not revoke their testament because they lacked intent.[1569] Nonetheless, if a will is mutilated or lost, the presumption is the will-maker revoked the instrument and the onus is on the party alleging otherwise.[1570]

The importance of intent gave rise to a controversy in English law between the spiritual and temporal courts concerning the question whether the revocation of a later will revived the former. In *Moore v Moore*, Dr. Phillimore, Dr. Dodson, and Dr. Heald preferred to follow the causes of the Prerogative Court of Canterbury indicating English law adopted the principle in Inst. 2.17.7 that a will did not revive unless definitively proven the will-maker desired its

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4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 233; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 280; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 56; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 806; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 151; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 327; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 932- 933.

[1567] Dig. 28.4.2; *Butler v Baker's Case* 3 Co. Rep. 36b; 76 Eng. Rep. 684 at 701 at 710; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 934.

[1568] Cod. 6.23.30; Dig. 28.4.1; Dig. 28.4.1.3; *Hedges v Hedges* (1708) 1 Gilb Rep 12 at 13; 25 Eng. Rep. 9 at 10; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 224; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 477; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 43; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 931.

[1569] *Yelverton c Yelverton* (1588) The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 35; *Moore v Moore* (1817) 1 Phill. Ecc. 406 at 443; 161 Eng. Rep. 1026 at 1038; *Braddyll v Jehen* (1755) 2 Lee 193 at 208; 161 Eng. Rep. 310 at 315; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 220; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 492.

[1570] *Yelverton c Yelverton* (1588) The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 34; *Moore v Moore* (1817) 1 Phill. Ecc. 406 at 412; 161 Eng. Rep. 1026 at 1028; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 224; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 338.

revival.[1571] The learned doctors explicitly favoured civil law principles over common law precedent in English testamentary causes.[1572] The opposing argument, in favour of the temporal courts, likened testamentary instruments to statutory construction that the suspension of the second revives the first.[1573] It followed the King's Bench's decision in *Goodright v Glazier*[1574] that determined the execution of a second devise did not completely cancel the first because if the devisor later revoked the second, the common law presumes they intended the first to revive unless there is evidence to the contrary.[1575] The learned ordinary concluded that the presumption of the common law courts favoured revival and the ecclesiastical courts against it, and after weighing the arguments accepted in favour of the latter to hold that revival must come through a fresh publication.[1576] Section 22 of the Wills Act 1837 settled the controversy in favour of the spiritual courts to state English law presumed against revival and added the statement "unless it is re-executed" contrary to civilian practice only requiring an intention to revive.[1577]

The Wills Act 1837 introduced a single theory of express revocation for both realty and personalty and required will-makers to revoke their will by a successive instrument, either testamentary or non-testamentary, or through a manifestation of intention accompanied by a physical act of destruction.[1578] The first method indicates Dig. 34.4.17 remained a fundamental principle in testamentary succession. The second is a response to criticism that

[1571] (1817) 1 Phill. Ecc. 406 at 415; 161 Eng. Rep. 1026 at 1028; *Wright v Netherwood*; *Lug v Lug*, 2 Salkeld 593; 91 Eng. Rep. 497 at 502.
[1572] (1817) 1 Phill. Ecc. 406 at 415 at 431 -434; 161 Eng. Rep. 1026 at 1028 at 1034- 1035.
[1573] (1817) 1 Phill. Ecc. 406 at 415; 161 Eng. Rep. 1026 at 1028 at 1032.
[1574] (1770) 4 Burr. 2512; 98 Eng. Rep. 317.
[1575] (1770) 4 Burr. 2512 at 2514; 98 Eng. Rep. 317 at 319; (1817) 1 Phill. Ecc. 406 at 412; 161 Eng. Rep. 1026 at 1028; *Berkenshaw v Gilbert* (1774) Loft 466 at 469; 98 Eng. Rep. 750 at 751; *Wilson v Wilson* (1821) 3 Phill. Ecc. 543 at 554; 161 Eng. Rep. 1409 at 1413; *Helyar v Helyar* (1754) 1 Lee 472 at 512; 161 Eng. Rep. 174 at 189; *Braddyll v Jehen* (1755) 2 Lee 193 at 213- 214; 161 Eng. Rep. 310 at 317- 318; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 153; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 939.
[1576] (1817) 1 Phill. Ecc. 406 at 442; 161 Eng. Rep. 1026 at 1028 at 1037; *Wilson v Wilson* (1821) 3 Phill. Ecc. 543 at 554; 161 Eng. Rep. 1409 at 1413; *Helyar v Helyar* (1754) 1 Lee 472 at 476; 161 Eng. Rep. 174 at 176; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 153; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 234; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 939.
[1577] W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 171.
[1578] 7 Will. 4 & I Vict. c. 26, s 20; Dig. 28.4.1; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 479, 481; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 43; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 170- 171; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 931.

the ecclesiastical courts had previously accepted doubtful revocations, and imposes a more stringent test by requiring the utter obliteration of the will, which later practice tempered by only requiring the will to be rendered illegible.[1579] The Wills Act 2007 largely restates its predecessor. Section 16 (a) and (b) states a will is revocable by making another valid will or executing a document, complying with the solemnities, to indicate their intention to revoke.[1580] Dr. Richardson considers it good practice to include a revocation clause to revoke previous instruments.[1581] Echoing the statements of Dr. Phillimore in *Moore v Moore*, Tipping J held in *Re Archibald*[1582] that contradictory statements in a later perfect instrument implicitly revoked earlier dispositions contained in the former in the absence of an express clause.[1583] New Zealand courts continue to follow ecclesiastical practice, emphasising the will-maker's intent, to admit two consistent instruments comprising the single will.[1584] Section 16 (e) and (f) are a response to the difficulties surrounding a narrow interpretation of its predecessor by requiring some physical act, particularly those in Dig. 29.1.15.1, against the document to accompanied *animus revocandi* is sufficient revocation.[1585]

Section 16 (g) and (h) makes two significant introductions in the area of revocation in the absence of the formal methods above. The first states "the will-maker does anything else in relation to the will that satisfies the High Court that the will-maker intended to revoke the will" and s 16 (h) allows the Court to declare a will valid.[1586] There are no cases at the time of writing indicating how the s 14 dispensing powers will operate concerning revocation

[1579] J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 475, 478, 503; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 931; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 171.
[1580] W. Patterson (ed), A. Tipping (ed) *The Laws of New Zealand, Will* (LexisNexis, Wellington 2012) at [79]; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 389; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [5.2.1].
[1581] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 389; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [5.2.1].
[1582] (1992) 2 NZLR 109.
[1583] (1992) 2 NZLR 109 at 114; see N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 390; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [5.2.1].
[1584] *Re Lees* [2010] NZHC 1252 at [12]; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 391; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [5.2.1].
[1585] Will Act 2007 , s 16 (e), (f); N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 395; W. Patterson (ed), A. Tipping (ed) *The Laws of New Zealand, Will* (LexisNexis, Wellington 2012) at [85]; N. Peart "Where there is a Will, There is a Way - A New Wills Act for New Zealand" (2007) 15 (1) *Waikato Law Review*, 26 at 39.
[1586] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 396 – 397; N. Peart "Where there is a Will, There is a Way - A New Wills Act for New Zealand" (2007) 15 (1) *Waikato Law Review*, 26 at 39.

although it appears likely the High Court will invoke s 16 (g) and (h) together. The facts of *Re Wilkins*[1587] include a former will placed in a packet marked "revocation" that is an act likely to satisfy the High Court, alongside relevant parol evidence, that the will-maker intended to revoke their will.[1588] The evolution of express revocation reflects the pattern of emphasising form over intent. The traditional methods of revocation derived from the civil law continues to remain operative in New Zealand law and the earlier practice of the ecclesiastical courts will be valuable for interpreting the relaxed requirements surrounding the physical destruction of a document. The addition of s 16 (g) and (h) presents uncertainty, especially in light of the strict formalism previously imposed by s 20 of the Wills Act 1837; but the preceding practice of the ecclesiastical courts and civilian commentary ought to provide valuable precedent to interpret this section.

Codicils

Codicil, or little *codex*, is another clear example of an instrument borrowed from the civil law found in the Wills Act 2007 that English civilians did not identify as a form of will despite its testamentary characteristics.[1589] Inst. 2.25 attributes the codicil to the will of Lucius Lentulus whose innovative dispositions, including the *fideicommissum*, the Emperor Augustus confirmed setting a precedent in Roman law because they did not comply with testamentary formalities.[1590] Prior to the codicil, the *ius civile* did not permit alterations or partial

[1587] (2010) 1 NZLR 832.
[1588] (2010) 1 NZLR 832 at [13].
[1589] J. Cowell, "W. G." (trans), *The Institutes of the Lawes of England*, Printed for John Ridley 1651) at 153; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 6; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 162; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 131; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 612; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 281; J. Powell, T. Jarman (ed), *An Essay on Devises*, volume 1, (J. S. Littell, Philadelphia 1838) at 12; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 19; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 921; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 255; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 528; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 137; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 401; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 500.
[1590] Inst. 2.23.1; Isidore *Etymologies* 5.24.14; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 240; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban

revocations, and required testators to revoke *in toto* and make a completely new testament that repeated previous provisions if they desired to save them.[1591] Roman jurists perceived codicils as a convenient instrument of disposing property that fulfilled the function of varying a testament when making a fresh instrument was impractical.[1592] The civil law distinguished a codicil from the testament because the former could not institute, disinherit, or impose a condition on an heir; because it could only insert, update or alter legacies and *fideicommissa,* or appoint guardians, which were all functions ancillary to the principal purpose of will making.[1593] It even permitted unprivileged testators to die with more than one codicil that

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1986) at 146 - 147; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 294; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 336; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 339; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 131; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 612 - 613; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 282; E. R. Humpreys, *Manual of Civil Law: For the use of Schools, and more especially Candidates of the Civil Service*, (Longman, Brown, Green and Longmans, London 1854) at 142; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 826; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 311; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 765.

[1591] T. Rufner, "Testamentary Formalities in Roman law" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 16; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 254; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 133.

[1592] Inst. 2.25; E. Champlin, *Final Judgments, Duty and Emotion in Roman Wills, 200 BC – A.D. 250*, (University of California Press, Berkeley and Los Angeles, 1991) at 69; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 338; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 132; T. Rufner, "Testamentary Formalities in Roman law" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 17; D. Johnston, *The Roman Law of Trusts*, (Clarendon press, Oxford 1988) at 26.

[1593] Gaius 2.273; Cod. 5.28.2; Cod. 6.36.2; Inst. 2.25.2; Dig. 26.2.3; Dig. 29.7.10; J. F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphanotrophei, Halae Magdeburgicae 1769) at 439; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 147; G. J. McGinley," Roman law and its influence in America" (1928) 3(2) *The Notre Dame Lawyer*, 70 at 79; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 272, 293; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 336; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 162, 827; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 339; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 139; E. Champlin, *Final Judgments, Duty and Emotion in Roman Wills, 200 BC – A.D. 250*, (University of California Press, Berkeley and Los Angeles, 1991) at 69; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 613; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 341; E. R. Humpreys, *Manual of Civil Law: For the use of Schools, and more especially*

were equally binding on the heir subject to the Falcidian portion.[1594] Inst. 2.25.3 misleadingly distinguishes the two instruments by providing that no solemnities, referring to the heir's institution, were required for a codicil's execution.[1595] However, Cod. 6.36.8.3 required its execution before five witnesses in a single act and demands similar attestation requirements without the same rigidity of a solemn testament.[1596] Furthermore, English civilians took notice that the codicil exhibits the same ambulatory quality of a testament and the principle in

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Candidates of the Civil Service, (Longman, Brown, Green and Longmans, London 1854) at 142; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 827; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 254; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 123; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 256; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 528; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 285; N. Jansen, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 28.

[1594] Dig. 29.7.6.1; Inst. 2.25.3; G. J. McGinley," Roman law and its influence in America" (1928) 3(2) *The Notre Dame Lawyer*, 70 at 79.

[1595] G. J. McGinley," Roman law and its influence in America" (1928) 3(2) *The Notre Dame Lawyer*, 70 at 79; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 162; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 293; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 134; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 366; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 286; E. R. Humpreys, *Manual of Civil Law: For the use of Schools, and more especially Candidates of the Civil Service*, (Longman, Brown, Green and Longmans, London 1854) at 142; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 254.

[1596] Cod. 6.36.8.3; J. F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphanotrophei, Halae Magdeburgicae 1769) at 440; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 240; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 339; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 160- 161; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 293; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 366; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 341; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 283 – 284, 286; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 20; E. R. Humpreys, *Manual of Civil Law: For the use of Schools, and more especially Candidates of the Civil Service*, (Longman, Brown, Green and Longmans, London 1854) at 142; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 254; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 162; W. M. Gordon, *Succession* in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 108; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 257.

Dig. 29.7.6.3 provides "only a person who can also make a will can make codicil" reveals similar characteristics to a formal testamentary instrument.[1597]

The civil law defined codicils on two grounds: first, whether they were testate or intestate, and secondly whether they were confirmed or unconfirmed.[1598] A testamentary codicil existed alongside a testament and an intestate codicil stood independent of it operating on intestacy.[1599] A codicil could stand apart from the testament because the institution of an heir, either by the will or through operation of law, did not impinge on the bequests contained within.[1600] Jurists employed the notion of a codicillary fiction to deem the testator executed a

[1597] Cod. 6.36.5; Dig. 29.7.2.3; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 15; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 20; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 340; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 285; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 828; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 528; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 136 – 138; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 366; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 614.

[1598] Dig. 29.7.7; Dig. 29.7.8; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 134; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 613; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 284; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 20.

[1599] Dig. 29.7.8; Dig. 29.7.8.1; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 145; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 293; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 336; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 162; S. Amos, *The History and Principles of the Civil Law of Rome - An Aid to the Study of Scientific and Comparative Jurisprudence,* (Kegan Paul, Trench & Co, London 1883) at 339; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 612; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 340; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 254; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 528.

[1600] Dig. 29.7.3; Dig. 29.7.16; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 154; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 613; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 284; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 828; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 255.

testamentary codicil simultaneously with the testament meaning it formed part of it.[1601] Therefore, a testamentary codicil could not exist without a testament because the validity of the former depended on the latter, and if they contained conflicting provisions then the last executed took effect.[1602] The testator must have possessed intention to make a testamentary codicil rather than a testament, and Dig. 29.7.1 states the civil law would not recognise an invalid instrument as a codicil if the testator never intended it to stand as such.[1603] Nevertheless, testators often inserted clauses stating that an invalid testament ought to be read as a valid codicil to save the dispositions contained within.[1604] Roman law distinguished between confirmed codicils contained in a testament with a confirmation clause incorporating past or future codicils by reference and unconfirmed codicils that were only effective if the testator manifested they intended its performance.[1605] The civil law departed from the Roman law and treated confirmed and unconfirmed together.[1606] Nonetheless, it continued to

[1601] Dig. 29.7.2.2; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 173; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 285; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 828.
[1602] M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 143 – 144, 148; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 340; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 15 – 17, 23; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 147.
[1603] See Dig. 29.7.17; Cod. 6.36.8.
[1604] N. Jansen, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 29; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 614; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 24.
[1605] Cod. 6.36.8.1; Inst. 2.25.1; Dig. 29.7.3; Dig. 29.7.5; Dig. 29.7.18; T. Rufner, "Testamentary Formalities in Roman law" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 15; P. Spiller, *A Manual of Roman Law*, (Butterworths, Durban 1986) at 147; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 148; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 613; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 284, 285; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 256; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 613.
[1606] Bartolus a Sassoferrato, *In Primam Digesti Novi Partem Commentaria*, (Lugdunum, 1581) at 67; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 167; W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, (Cambridge University Press, London 1921) at 366- 367.

conceptualise the codicil as a distinct instrument rather than an ancillary part of a will that characterises the modern treatment.[1607]

Bernard's *summa* reveals the canon law concept of the codicil emerged alongside the canonical will. He begins by stating the *Code* indicates the civil law required five witnesses for the codicil to be valid.[1608] However, he cites Matthew 18:16 to establish that two or three witnesses, the same number required for the canonical will, were sufficient to witness indicating the instrument that emerged could be properly termed the canonical codicil.[1609] This passage demonstrates the canon law unified the witness requirement for both the will under X. 3.26.10 and the codicil.[1610] Ecclesiastical courts applied this reduced number of witnesses, ensuring it had identical requirements to the English will, and this convergence brought the two instruments closer together.[1611] Civilians reasoned it would contradict the purpose of a codicil to impose more stringent requirements than a will.[1612] Furthermore, English courts distinguished it from its civil law predecessor by regarding it principally as a

[1607] A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 292; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 162; W. M. Gordon, *Succession* in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 108; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 4; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 135; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 62; W. M. Gordon, *Succession,* in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 107; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 23.

[1608] Bernard's *Summa Decretalium* 3.22.7.

[1609] Bernard's *Summa Decretalium* 3.22.7; X. 3.26.10.

[1610] *Reformatio Legum Ecclesiasticarum,* 27.5; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 178.

[1611] *Reformatio Legum Ecclesiasticarum,* 27.5; Bernard's *Summa Decretalium* 3.22.7; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 20; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 14 - 15; R. Cosin, *An Apologie for Sundrie Proceedings by Jurisdiction Ecclesiasticall* (Printed by the Deputies of Christopher Baker, London 1591) at 21; N. Jansen, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 34; M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at 178; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 6; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l''Histoire Comparative des Institutions*, 47 at 73; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 611.

[1612] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 14; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 528.

supplementary part of a single will.[1613] A will-maker could execute a codicil either as a written instrument or in a nuncupative declaration, which in the later form was a frequent occurrence and often appeared because of an afterthought.[1614] The English canonical codicil accentuates the ambulatory character of a will, forming part of it, because its principal purpose is to add, modify, or absolutely or partially revoke a will.[1615]

A number of civil law principles formed part of the English law of codicils. Civilians recognised that English codicils carried the same essential elements as a will and Godolphin defined it is "a sentence of our will touching that we wish to have done after death without

[1613] *St. Alban's (Duke of)* v *Beauclerk* (1743) 2 ATK 636 at 638; 26 Eng. Rep. 780 at 781; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 336; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 6; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 921; E. R. Humpreys, *Manual of Civil Law: For the use of Schools, and more especially Candidates of the Civil Service*, (Longman, Brown, Green and Longmans, London 1854) at 141; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 253, 255; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 401; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 279.

[1614] *Estate of Pette* KAO, Act Book DRb Pa 2, fo. 61 in R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 401, 408; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 14; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 73; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 19; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 293; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 6; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 160; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 614; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 340; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 284; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 137.

[1615] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 15; M. A. Dropsie, *Roman Law of Testaments Codicils and Gifts in the Event of Death (Mortis Causa Donationes)*, (T. & J.W. Johnson & Co, Philadelphia 1892) at 168; E. Jenks, *The Book of English Law: As at the End of the Year 1935*, fourth edition, (John Murray, London, 1936) at 374; S. Hallifax, *Elements of the Roman civil law: in which a comparison is occasionally made between the Roman laws and those of England: being the heads of a course of lectures publicly read in the University of Cambridge*, (Printed for the proprietors, 14 Charlotte Street, Bloomsbury, London 1818) at 46; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 123; A. N. Localizado, *Modern Probate of Wills, Containing an Analysis of the Modern Law of Probate in England and America, with Numerous References to the English and American Cases, and Copious Extracts from the Leading Cases*, (Charles C Little and James Brown, Boston 1846) at 1; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 17, 33; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 137; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 17.

naming an executor".[1616] The definition that civilians subscribed to the codicil reflected the practice that a codicil was not a will and could not institute or disinherit an executor.[1617] In *Broke, Offley et al c Barrett*, a cause concerning a feme covert's will made with her husband's consent, appointing him her executor and bequeathing her residue to him, then subsequently leaving legacies contained in an unknown codicil diverting the residue to next of kin.[1618] The advocates on behalf of the next of kin contended the principle that a codicil could not create an executor.[1619] Ecclesiastical courts interpreted instruments not naming an executor as a codicil rather than a fresh will because they conceptualised codicils in civil law terms.[1620] However, English law did not strictly observe this principle and later practice permitted a canonical codicil to institute or substitute an executor, which distinguished it further from its civil law counter-parts.[1621] In *Willet v Sanford*[1622], the Lord Chancellor

[1616] *Reformatio Legum Ecclesiasticarum,* 27.5; Cod. 6.23.14; *Antrobus v Nepean* (1823) 1 Add. 399 at 403; 162 Eng. Rep. 141 at 142; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 3, 19; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 401; W. S. Holdsworth, C. W. Vickers, *The Law of Succession, Testamentary, and Intestate*, (B. H. Blackwell, Oxford 1899) at 31; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 137; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 2, (Matthew Bender & Company, New York 1915) at 917; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 13; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 73; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 22; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 527; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 62.

[1617] *Wintle v Carpenter; Pitcairne v Brase* (1680) 1 Rep. Temp. Finch. 462; 23 Eng. Rep. 25; J. Powell, T. Jarman (ed), *An Essay on Devises*, volume 1, (J. S. Littell, Philadelphia 1838) at 12; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 73; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 7, 13; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 22; J. Powell, T. Jarman (ed), *An Essay on Devises*, volume 1, (J. S. Littell, Philadelphia 1838) at 12.

[1618] *Broke, Offley et al c Barret* (1584) The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 20.

[1619] *Broke, Offley et al c Barret* (1584) The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 26.

[1620] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 525; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 32; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 270.

[1621] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at13; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 270; B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 62.

observed that the limitation placed on codicils by the civil law that it could not dispose of the inheritance is not present in English law, which is contrary to earlier practice forbidding it to operate as a will.[1623]

Civilians accepted the concept of a testate codicil required an executor to follow its directions, and an intestate codicil standing separate from the will that formed part of the administration of the estate.[1624] The Doctors Commons referred to it as a testamentary schedule when admitted with a will to probate.[1625] In *Taggart v Hooper*[1626], Sir Jenner held the ecclesiastical courts presumed a will-maker destroying a will intends to revoke all their testate codicils indicating they could not exist without the principal instrument unless demonstrated to be unconnected to it or intended to take effect alone.[1627] The learned ordinary stated:

> "[291] The Court has very little doubt in this case. It is admitted that there may be circumstances under which a codicil to a will may be established although the will is destroyed; there never was a case in which there was a stronger moral obligation to provide for the person benefited than in this".[1628]

The civil law principles resonated with civilians despite questionable applicability and in *Yelverton c Yelverton* Dr. Creake argued the civil law indicated an invalid instrument should

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[1622] *Willet v Sandford* (1748) 1 Ves. Sen. 178; 27 Eng. Rep. 967.
[1623] *Willet v Sandford* (1748) 1 Ves. Sen. 178 at 179; 27 Eng. Rep. 967 at 968; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 384
[1624] Dig. 29.7.3; Dig. 29.7.16; *Willet v Sandford* (1748) 1 Ves. Sen. 186 at 187; 27 Eng. Rep. 972 at 973; *Philipps v Allen* (1835) 7 Sim 446 at 464; 58 Eng. Rep. 909 at 915; *Willet v Sandford* (1748) 1 Ves. Sen. 186 at 187; 27 Eng. Rep. 972 at 973; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 25; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 921; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 15; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 73.
[1625] *Brudenell v Boughton* (1741) 2 ATK 268 at 272; 26 Eng. Rep. 565 at 567 see Cod. 6.32.4; Dig 29.3.11
[1626] *Taggart v Hooper* (1836) 1 Curt. 289; 163 Eng. Rep. 98.
[1627] *Taggart v Hooper* (1836) 1 Curt. 289 at 291; 163 Eng. Rep. 98 at 99 see M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 73; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 611; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 921.
[1628] *Taggart v Hooper* (1836) 1 Curt. 289 at 291; 163 Eng. Rep. 98 at 99.

not be interpreted as a valid codicil because the will-maker did not intend it.[1629] This cause conflicts with the convergence of formalities suggesting it was unnecessary to insert a codicillary clause because the codicil took as a will.[1630] Furthermore, the distinction between a confirmed and unconfirmed codicil became unnecessary because it remained similarly valid whether executed before or after the will regardless of any reference.[1631]

English will-makers could make any number of codicils during their lifetime to modify their dispositions, which added to the ambulatory character of the will.[1632] In *Willet v Sanford*[1633], the Lord Chancellor observed "the proper business of it [a codicil] being to revoke, as that is the effect of every alteration".[1634] English law imported the civil law principle that any number of codicils could stand together without revoking the former and construed them in light of each other.[1635] Codicils were revocable through either destruction or the execution of a fresh instrument.[1636] The codicil is a form of express revocation analogous to a subsequent will, and only revoked provisions in a will or each other if they contained contradictory dispositions.[1637] In *Harwood v Goodright*[1638], Lord Mansfield observed "but it may be said,

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[1629] Dig. 29.7.1; *Yelverton c Yelverton* (1588) The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 36.
[1630] B. E. Ferme, *Canon Law in Late Medieval England: A Study of William Lynwood's Provinciale with Particular Reference to Testamentary Law*, (Libreria Ateneo Salesiano, Rome 1996) at 62 – 63.
[1631] G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 23; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 20.
[1632] Dig. 29.7.6.1; *Croft v Day* (1838) 1 Curt 782 at 782; 163 Eng. Rep. 771 at 771; *Goodright v Harwood* (1773) Loft 282 at 289, 297; 98 Eng. Rep. 652 at 655, 660; *Willet v Sandford* (1748) 1 Ves. Sen. 186 at 187; 27 Eng. Rep. 972 at 973; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 129.
[1633] *Willet v Sandford* (1748) 1 Ves. Sen. 178; 27 Eng. Rep. 967.
[1634] *Willet v Sandford* (1748) 1 Ves. Sen. 178 at 179; 27 Eng. Rep. 967 at 968.
[1635] Dig. 29.7.2.2; *Willet v Sandford* (1748) 1 Ves. Sen. 186 at 187; 27 Eng. Rep. 972 at 973; *Doe Evans v Evans* (1839) 10 AD. & E. 229 at 233; 113 Eng. Rep. 88 at 91; *Hurst v Beach* (1820) 5 Madd 351 at 356; 56 Eng. Rep. 929 at 931; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 20; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 921; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 73.
[1636] Dig. 28.4.1.5; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 921.
[1637] *Ex Parte Wynch* (1854) 5 De. G. M. & G 188 at 227; 43 Eng. Rep. 842 at 857; *Willet v Sandford* (1748) 1 Ves. Sen. 186 at 187; 27 Eng. Rep. 972 at 973; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 15; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 25; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 20; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 138; W. Nelson, *Lex Testamentaria: Or, A Compendious System of all the laws of England, as well before the statute of Henry VIII as since, concerning last wills and testaments* (London, Printed by E. and R. Nutt Gosling 1727) at 528.

that if there is a complete second will, it cannot do otherwise than revoke a former: for if it is only a variation or subtraction from a former will, it is in the nature of a codicil".[1639] In *St. Alban's (Duke of) v Beauclerk*[1640], Lord Hardwicke expressly confirmed the principle in Cod. 6.36.3 to hold that an ascertained later codicil revokes the former where contrary provisions are present.[1641] English jurists referred to Dig. 31.1.47 to state multiple instruments containing the same bequest did not allow for double portions.[1642] In *Coote v Boyd*[1643], the Lord Chancellor stated the presumption concerning repetitious legacies to the same legatees in different codicils was rebuttable if the will-maker intended them to be accumulative.[1644] The same bequest to different legatees in multiple codicils divided between them only if the court could not ascertain their temporal order.[1645] Finally, the publication of a codicil raises the presumption the will-maker intends *animus republicandi* to revoke although its revocation did not revive the dispositions in the will it varied, which suggests civilians introduced the concept of codicillary fiction into English law.[1646]

The English codicil naturally became conceptualised as a kind of last will because its properties enabled it to suffer from similar defects concerning attestation and testamentary capacity, and in practice required the same probate procedures.[1647] Section 6 of the Statute of Frauds imposed the same formalities on wills and codicils, without affecting personalty,

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[1638] (1774) 1 Cowp 87; 98 Eng. Rep. 981.
[1639] (1774) 1 Cowp 87 at 89; 98 Eng. Rep. 981 at 982; J. Powell, T. Jarman (ed), *An Essay on Devises*, volume 1, (J. S. Littell, Philadelphia 1838) at 12.
[1640] (1743) 2 ATK 636; 26 Eng. Rep. 780.
[1641] (1743) 2 ATK 636 at 639; 26 Eng. Rep. 780 at 781; *Coote v Boyd* (1789) 2 Bro. C. C. 521 at 525; 29 Eng. Rep. 286 at 288; *Thorne v Rooke* (1841) 2 Curt. 799 at 812 at 812; 163 Eng. Rep. 589 at 589.
[1642] Dig. 22.3.12; Dig. 30.1.34.1; Dig. 50.17.91; *Rymes v Clarkson* (1809) 1 Phill. Ecc. 22 at 28; 161 Eng. Rep. 901at 903; *Sandford v Vaughan* (1809) 1 Phill. Ecc. 39 at 45; 161 Eng. Rep. 907 at 909; *Coote v Boyd* (1789) 2 Bro. C. C. 521 at 528; 29 Eng. Rep. 286 at 289; *St. Alban's (Duke of)* v *Beauclerk* (1743) 2 ATK 636 at 638-639; 26 Eng. Rep. 780 at 781- 782; R. S. Donnison Roper, H. H. White*, A Treatise on the Law of Legacies*, fourth edition, volume 2, (W. Benning, London 1847) at 999; J. Voet, W. P. Buchanan (Trans), *Johannes Voet Commentary on the Pandects: Book XXX, XXXI, and XXXII*, (J. C. Juta & Co, Cape Town 1902) at 42.
[1643] (1789) 2 Bro. C. C. 521; 29 Eng. Rep. 286.
[1644] Dig. 30.1.34.3; *Coote v Boyd* (1789) 2 Bro. C. C. 521 at 528; 29 Eng. Rep. 286 at 289; *St. Alban's (Duke of)* v *Beauclerk* (1743) 2 ATK 636 at 638; 26 Eng. Rep. 780 at 781; *Moggridge v Thackwell* (1792) 1 Ves. Jun. 464 at 472 - 473; 30 Eng. Rep. 440 at 444; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 20; R. S. Donnison Roper, H. H. White*, A Treatise on the Law of Legacies*, fourth edition, volume 2, (W. Benning, London 1847) at 1025.
[1645] G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 25.
[1646] *Rogers v Pittis* (1822) 1 Add. 30 at 37 - 38; 162 Eng. Rep. 12 at 14; *Alford v Earle* (1690) 2 Vern 209; 23 Eng. Rep. 736 at 737; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 27; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 921.
[1647] J. Williams, *Wills and Intestate Succession*, (Adam and Charles Black, London 1891) at 63.

bringing the instruments closer together.[1648] Subsequent ecclesiastical practice even permitted will-makers to write their codicil on the back of their wills concerning bequests of personalty.[1649] The first section of the Statute of Wills 1837 brought the notion of a will and codicil closer together by extending the word 'will' to both instruments, which changed how subsequent jurists treated codicils.[1650] Section 8 (3) (e) of the Wills Act 2007 simply states that the word 'will' includes a codicil.[1651] The definitive amalgamation of the two instruments led to the perception that the only similarity between the English and civil law codicil is a shared namesake.[1652] The view appears justified by the fact modern codicils possess the ability to appoint an executor, which had previously been fundamental in distinguishing the two instruments.[1653] Furthermore, the courts no longer observed difference between a testate and intestate codicil becoming an unnecessary distinction because either a person died with a will or they did not.[1654] Dr. Richardson observes that the extension of the definition of will to include a codicil recognises both instruments have the same solemnities and merely defines the latter more accurately.[1655] The modern codicil is describable, couched in civilian terms, as "a sentence of our will touching that we wish to have done after death" reflecting the absence of the former distinguishing features.

The Wills Act 1837 introduced the power of altering the will itself provided will-makers signed the change and attached a memorandum indicating the alteration supported by witnesses.[1656] In *Broke v Kent*[1657], Dr. Lushington noted that the codicil was the only method available to will-makers to vary a will prior to the introduction of this statutory power.[1658] Nevertheless, codicils remained the advisable method of altering a will despite the fact the

[1648] *Ellis v Smith* (1754) 1 Ves. Jun. 11 at 15, 17; 30 Eng. Rep. 205 at 207, 208.
[1649] *Heather v Rider* (1738) 1 ATK 425 at 426; 26 Eng. Rep. 271 at 271.
[1650] J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 7; C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property*, seventh edition, (Sweet & Maxwell, London, 2008) at 558.
[1651] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 388; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [5.1]; N. Peart "Where there is a Will, There is a Way - A New Wills Act for New Zealand" (2007) 15 (1) *Waikato Law Review*, 26 at 28.
[1652] J. Williams, *Wills and Intestate Succession*, (Adam and Charles Black, London 1891) at 63.
[1653] *Re Prince* [2012] NZHC 1058 at [5]; *Re Gillies* [1991] 1 NZLR 760 at 767; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 553.
[1654] *Public Trustee v Sheath*[1918] NZLR 129 at 147.
[1655] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 388; see W. Patterson (ed), A. Tipping (ed) *The Laws of New Zealand, Will* (LexisNexis, Wellington 2012) at [2]; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [2.1].
[1656] Wills Act 1837, s 21; W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 16; also see Dig. 50.17.183;
[1657] (1840) 3 Moore 333; 13 Eng. Rep. 136.
[1658] (1840) 3 Moore 333 at 349; 13 Eng. Rep. 136 at 142.

power of alteration lessened their practical importance.[1659] Dr. Richardson casts further doubt on their utility in the modern era by observing, "since the advent of computers and Word or text documents, codicils have become much rarer. Nowadays, most practitioners prefer to call up the old will, make changes to it directly, and re-execute the entire document".[1660] However, the modern codicil remains an independent instrument, capable of existing even if the will-maker revokes their will, and retains the primary function of its predecessor to revive, change, add to, or revoke a will.[1661] It has the additional advantage over an alteration because it validates any unattested alterations by republishing the will to the date of the codicil.[1662] Therefore, the modern codicil remains an ancillary part of the principal will notwithstanding the fact modern courts construe them together as comprising the will-maker's single testamentary intent in the same manner as their ecclesiastical counterparts.[1663]

The foremost characteristic retained from the civil law is that a will-maker's could die with multiple codicils despite the fact they could only die with a single will.[1664] This feature remains an essential quality of the modern codicil and New Zealand courts grant probate to

[1659] W. A. Holdsworth, *The Law of Wills, Executors, Administrators together with a copious collection of forms*, (Routledge, Warne, Routledge, London 1864) at 17.
[1660] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 388 see N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [5.1].
[1661] *Re Archibald* [1992] 2 NZLR 109 at 112, 114; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 388; W Patterson (ed), A Tipping (ed) *The Laws of New Zealand, Will* (LexisNexis 2012, Wellington) at [2], [84]; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [2.13]; C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property*, seventh edition, (Sweet & Maxwell, London, 2008) at 558; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 5; J. Williams, *Wills and Intestate Succession*, (Adam and Charles Black, London 1891) at 63; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 255.
[1662] W Patterson (ed), A Tipping (ed) *The Laws of New Zealand, Will* (LexisNexis 2012, Wellington) at [71]; H. S. G. Halsbury (ed), J.P.H Mc Kay (ed), *Halsbury's Law of England*, *Wills and Intestacy*, fifth edition, volume 102, (LexisNexis Butterworths, London 2010) at [85].
[1663] *Hanlon v Lister* [2000] No. CP 15/99 at [47]; H. S. G. Halsbury (ed), J.P.H Mc Kay (ed), *Halsbury's Law of England*, *Wills and Intestacy*, fifth edition, volume 102, (LexisNexis Butterworths, London 2010) at [1], [224]; W Patterson (ed), A Tipping (ed) *The Laws of New Zealand, Will* (LexisNexis 2012, Wellington) at [2]; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 27; J. C. H. Flood*, An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 259, 269.
[1664] Inst. 2.25.3; Cod. 6.36.6; *Hungerford v Nosworthy* (1694) Shower PC 146 at 147; 1 Eng. Rep. 99 at 100; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at15; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 25; J. C. H. Flood*, An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 254; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 138; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 286.

all the codicils together alongside a will.[1665] The Wills Act 2007 has not altered this practice.[1666] In *Re Gillies*[1667], Tipping J held the underlying rationale for the separate treatment between the instruments is:

> "When making a codicil the testator's intent will usually, if not always, be for both documents to be read together and that should be reflected in formal probate. The fact that by way of construction or codicil proves to have no dispositive effect should not affect its entitlement to become part of the formal probate".[1668]

The s 14 dispensing power allows a court to declare a document as a valid codicil.[1669] In *Browne v Public Trust*[1670], the plaintiff invited the High Court to exercise this power despite the fact it followed the formal requirements.[1671] McKenzie J felt satisfied he could declare the document valid because the will-maker intended the document to operate as a codicil to an earlier made will.[1672] Court practice appears to indicate that continued acknowledgement of the differences between the instruments gives greater effect to the will-makers intentions. Therefore, the civil law and modern codicils share more than a namesake despite the profound differences that have resulted from the canonical codicil's evolution and the ease of new technologies.

2. Operation of Law

The second form of revocation adopted in English law, forming part of the *ius gentium*, is the principle recognising all wills were revocable by operation of law arising from certain changes in circumstances.[1673] New Zealand law continues to recognise that a will is revocable

[1665] *Reynolds v Napier* (1882) 1 NZLR (CA) 277 at 284; *Krull v Bradey* (1885) 3 NZLR (CA) 199 at 203; *Krull v Bradey* (1886) 4 NZLR (SC) 369 at 374 – 375; *Re Archibald* [1992] 2 NZLR 109 at 114.
[1666] *Ex parte Hitchcock* CIV-2010-404-000388 at [15].
[1667] [1991] 1 NZLR 760.
[1668] [1991] 1 NZLR 760 at 767.
[1669] *Re Prince* [2012] NZHC 1058 at [13]; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 388; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [5.1] see also Dig. 28.1.21.1.
[1670] [2012] NZHC 1647.
[1671] [2012] NZHC 1647at [1], [7].
[1672] [2012] NZHC 1647at [1], [8] – [9].
[1673] *Jackson v Hurlock* (1764) 1 AMB 488 at 494; 27 Eng. Rep. 318 at 321; E. Durfee, "Revocation of Wills by Subsequent Change in the Condition or the Circumstances of the Testator" (1942) 40 (3) *Michigan Law Review*, 406 at 406; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 931, 936; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 502.

through an implied change of the will-maker's intent. The Statute of Frauds left the law concerning implied revocation unchanged and it remained applicable to devises despite early common law attempts to distinguish them from personalty to avoid the principle.[1674] The statute recognised there is a fundamental difference between revocation requiring a solemn act and revocation arising through operation of law.[1675] In *Brady v Cubitt*[1676], Buller J authoritatively held the solemn acts necessary to revoke a written will under the statute did not apply to revocations operating at law.[1677] English courts followed the persuasive authority of ecclesiastical practice to conclude an implied revocation depended on circumstances that are rebuttable by every kind of unequivocal evidence including parol.[1678] The doctrine of implied revocation arose when a significant alteration of the male will-maker's family

[1674] *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 467; 161 Eng. Rep. 1039 at 1046; *Marston v Roe* (1838) 8 AD. & E. 14 at 32; 112 Eng. Rep. 742 at 749; *Sheath v York* (1813) 1 V. & B. 391at 397; 35 Eng. Rep. 152 at 154; *Driver v Standering* (1759) 2 Wils. K.B. 88 at 90; 95 Eng. Rep. 701 at 702; *Doe v Lancashire* (1792) 5 T.R. 49 at 55; 101 Eng. Rep. 28 at 32; *Christopher v Christopher* (1771) 1 Dickens 445 at 449; 21 Eng. Rep. 343 at 344; *Wellington v Wellington* (1768) 4 Burr. 2165 at 2168; 98 Eng. Rep. 129 at 131; *Brady v Cubitt* (1778) 1 Dougl. 31 at 27; 99 Eng. Rep. 24 at 36; *Shepherd v Shepherd* Hil. (1770); *Fox v Marston* (1837) 1 Curt. 494 at 500; 163 Eng. Rep. 173 at 175; (1792) 5 T.R. 49 at 53; 101 Eng. Rep. 28 at 30; *Parsons v Lanoe* (1748) 1 AMB 557 at 561; 27 Eng. Rep. 358 at 560; *Goodright v Harwood* (1773) Loft 282 at 289, 297; 98 Eng. Rep. 652 at 658; E. Darfee, "Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator" (1942) 40 (3) *Michigan Law Review*, 406 at 407; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 234, 242; E. C. G., "Wills: Revocation by Judicial Legislation" (1919) 17 (4) *Michigan Law Review*, 331at 333; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 151; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 311; T. Jarman, M. M. Bigelow, *A Treatise on Wills*, fifth edition, volume 2, (Little Brown and Company, Boston 1881) at 152; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 17; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 409.

[1675] *Fox v Marston* (1837) 1 Curt. 494 at 501; 163 Eng. Rep. 173 at 175.

[1676] (1778) 1 Dougl. 31; 99 Eng. Rep. 24.

[1677] (1778) 1 Dougl. 31 at 35; 99 Eng. Rep. 24 at 26; *Christopher v Christopher* (1771) 1 Dickens 445 at 449; 21 Eng. Rep. 343 at 344.

[1678] *Brady v Cubitt* (1778) 1 Dougl. 31 at 39-40; 99 Eng. Rep. 24 at 29- 30; *Brady v Cubitt* (1813) 1 V. & B. 390 at 393; 35 Eng. Rep. 152 at 153; *Wright v Netherwood*; *Lug v Lug*, 2 Salkeld 592; 91 Eng. Rep. 497 at 498, 502; *Doe v Lancashire* (1792) 5 T.R. 49 at 50; 101 Eng. Rep. 28 at 29; *Shepard v Shepard* Hil. (1770); (1792) 5 T.R. 49 at 54; 101 Eng. Rep. 28 at 31; *Israell v Rodon (2)* (1839) 2 Moore 51 at 58; 12 Eng. Rep. 922 at 924; *Marston v Roe* (1838) 8 AD. & E. 14 at 27, 37; 112 Eng. Rep. 742 at 746, 749; *Braddyll v Jehen* (1755) 2 Lee 193 at 208; 161 Eng. Rep. 310 at 315; *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 454, 469; 161 Eng. Rep. 1039 at 1041, 1047; *Marston v Roe* (1838) 8 AD. & E. 14 at 32; 112 Eng. Rep. 742 at 749; *Fox v Marston* (1837) 1 Curt. 494 at 499; 163 Eng. Rep. 173 at 175; *Moore v Moore* (1817) 1 Phill. Ecc. 406 at 435; 161 Eng. Rep. 1026 at 1035; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 530; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 134; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 314; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 17; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 937.

circumstances occurred, through marriage and the birth of a child, which the law presumes the will-maker did not comprehend because they would have considered their moral obligation to maintain their child rather than leave an inofficious will.[1679] The temporal and spiritual courts considered two periods: the time of the testamentary act and the time it became operative as a will, and the emphasis in both jurisdictions is the presumed alteration of the testator's mind or the 'tacit condition' attached to the will that it should not take effect if there is a change of familial circumstances.[1680]

Both temporal and spiritual courts acknowledged the civil law origin of the doctrine.[1681] The ecclesiastical courts were the first to introduce the doctrine into their jurisdiction over wills of

[1679] *Sheath v York* (1813) 1 V. & B. 390 at 393, 396; 35 Eng. Rep. 152 at 153; *Emerson v Boville* (1811) 1 Phill. Ecc. 342 at 342; 161 Eng. Rep. 1004 at 1004; *Shepherd v Shepherd* Hil. (1770); (1792) 5 T.R. 49 at 53; 101 Eng. Rep. 28 at 30; *Doe v Lancashire* (1792) 5 T.R. 49 at 55; 101 Eng. Rep. 28 at 32; *Israell v Rodon* (2) (1839) 2 Moore 51 at 63; 12 Eng. Rep. 922 at 926; *Cook v Oakly* (1715) 1 P. WMS. 302 at 304; 24 Eng. Rep. 399 at 400; *Hollway v Clarke* (1811) 1 Phill. Ecc. 339; 161 Eng. Rep. 1003; *Braddyll v Jehen* (1755) 2 Lee 193 at 212; 161 Eng. Rep. 310 at 317; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 134; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 313; R. E. Mathews, "Trends in the Power to Disinherit Children" (1930) 16 (1) *American Bar Association Journal*, 293 at 293; A. Alston, "Wills made in Contemplation of Marriage" (1980) 4 (2) *Otago Law Review*, 133 at 133; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 268; R. Croucher, "Quirks and curios: Rescued footnotes in the history of succession law" (2009) 83 (9) *Australian Law Journal*, 609 at 617 see Dig. 25.3.5.

[1680] *Wright v Netherwood*; *Lug v Lug*, 2 Salkeld 592 - 593; 91 Eng. Rep. 497 at 498- 499; *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 453; 161 Eng. Rep. 1039 at 1041; *Doe v Barford* (1815) 4 M & S. 10 at 12; 105 Eng. Rep. 739 at 739; *Smith v Cowdery* (1825) 2 Sim & St 358 at 363; 57 Eng. Rep. 382 at 384; *Sheath v York* (1813) 1 V. & B. 391at 392; 35 Eng. Rep. 152 at 152; *Ex parte Ilchester (Earl of)* (1803) 7 Ves. Jun. 348 at 360; 32 Eng. Rep. 142 at 146; *Israell v Rodon* (2) (1839) 2 Moore 51 at 64- 65; 12 Eng. Rep. 922 at 926; *Doe v Lancashire* (1792) 5 T.R. 49 at 58; 101 Eng. Rep. 28 at 34 per Kenyon CJ; *Emerson v Boville* (1811) 1 Phill. Ecc. 342 at 343; 161 Eng. Rep. 1004 at 1005; *Marston v Roe* (1838) 8 AD. & E. 14 at 54; 112 Eng. Rep. 742 at 757; *Fox v Marston* (1837) 1 Curt. 494 at 499; 163 Eng. Rep. 173 at 174; *Talbot v Talbot* (1828) 1 Hagg. Ecc. 705 at 711; 162 Eng. Rep. 725 at 728; *Duppa v Mayo* 1 Wms. Saund. 275; 85 Eng. Rep. 336 at 353; W. A. Graunke, J. H. Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator" (1930) 5 (7) *Wisconsin Law Review*, 387 at 392; E. Darfee, "Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator" (1942) 40 (3) *Michigan Law Review*, 406 at 406; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 311; T. Jarman, M. M. Bigelow, *A Treatise on Wills*, fifth edition, volume 2, (Little Brown and Company, Boston 1881) at 152; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 17; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 937.

[1681] *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 473, 476; 161 Eng. Rep. 1039 at 1048, 1049; *Moore v Moore* (1817) 1 Phill. Ecc. 406 at 435; 161 Eng. Rep. 1026 at 1035; *Israell v Rodon* (2) (1839) 2 Moore 51 at 63; 12 Eng. Rep. 922 at 926; *Doe v Lancashire* (1792) 5 T.R. 49 at 55, 62; 101 Eng. Rep. 28 at 32, 37; *Smith v Cowdery* (1825) 2 Sim & St 358 at 362; 57 Eng. Rep. 382 at 384; *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 473; 161 Eng. Rep. 1039 at 1048; *Thellusson v Woodford* (1798) 4 Ves. Jun. 227 at 325; 31 Eng. Rep. 117 at 165; W. A. Graunke, J. H. Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator" (1930) 5 (7) *Wisconsin Law Review*, 387 at 393; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 529; E. C. G., "Wills: Revocation by Judicial Legislation" (1919) 17 (4) *Michigan Law Review*, 331at 335; J.

personalty, later forming the later testamentary practice of the common law courts and Chancery, which indicates civilian courts were more competent to entertain this area than temporal courts.[1682] In *Brady v Cubitt*, Lord Mansfield, referred to the oft-cited passage in Cicero's 'On the Orator', to state the doctrine of implied revocations is "old and well known".[1683] This reference indicates an acknowledgement that Roman law had firmly established an analogous doctrine before Justinian's reign.[1684] Roman law furnished two principles that automatically revoked a testament: first, the birth or adoption of a *sui et neccessarii* heir, and second a marriage *cum manu* that brought the wife into her husband's *familia* in a position analogous to a daughter.[1685] Notably in *Wright v Netherwood*, Sir Wynne observed, "The Roman law has been entered into, and it clearly appears by the Praetorian, which is considered as the latter Roman law [*ius honorarium*], that the revocation was entire

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Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 131; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 157; W. Ward, *A Treatise on Legacies: Or Bequests of Personal Property*, (J. S. Littell, Philadelphia 1837) at 275; T. Jarman, M. M. Bigelow, *A Treatise on Wills*, fifth edition, volume 2, (Little Brown and Company, Boston 1881) at151; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 368.

[1682] *Moore v Moore* (1817) 1 Phill. Ecc. 406 at 435; 161 Eng. Rep. 1026 at 1035; *Brady v Cubitt* (1778) 1 Dougl. 31 at 37; 99 Eng. Rep. 24 at 27; *Sheath v York* (1813) 1 V. & B. 391at 397; 35 Eng. Rep. 152 at 154; *Marston v Roe* (1838) 8 AD. & E. 14 at 25; 112 Eng. Rep. 742 at 746; W. A. Graunke, J. H. Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator" (1930) 5 (7) *Wisconsin Law Review*, 387 at 387, 390- 391; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 276.

[1683] (1778) 1 Dougl. 31 at 39; 99 Eng. Rep. 24 at 28; Cicero *De Orator* 1.13, 1.38; *Cook v Oakly* (1715) 1 P. WMS. 302 at 304; 24 Eng. Rep. 399 at 400; *Doe Evans v Evans* (1839) 10 AD. & E. 229 at 231; 113 Eng. Rep. 88 at 89; *Huguenin v Baseley* (1807) 14 Ves. Jun. 273 at 285; 33 Eng. Rep. 526 at 531; *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 470 161 Eng. Rep. 1039 at 1047; W. A. Graunke, J. H. Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator" (1930) 5 (7) *Wisconsin Law Review*, 387 at 388, 393; E. Durfee, "Revocation of Wills by Subsequent Change in the Condition or the Circumstances of the Testator" (1942) 40 (3) *Michigan Law Review*, 406 at 406.

[1684] Cod. 6.29.1; A. Watson, *The Law of Succession in the Later Roman Republic*, (Clarendon Press, Oxford 1971) at 61; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and sons, Edinburgh and London 1870) at 275; T. Jarman, M. M. Bigelow, *A Treatise on Wills*, fifth edition, volume 2, (Little Brown and Company, Boston 1881) at 152.

[1685] Gaius 2.138, 2.139, 2.140; Dig. 1.7.1; Dig. 28.3.8; *Garnish v Wentworth*, Carter. 137 at 148; 124 Eng. Rep. 875 at 878; B. W. Frier, T. A. J. Mc Ginn, *A Casebook on Roman Family Law*, (Oxford University Press, Oxford 2004) at 354; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 808; W. M. Gordon, *Succession* in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 96; W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 222; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 323; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 169; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 314; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 19; M. M. Wethmar-Lemmer, "The Legal Position of Roman Women: A Dissenting Perspective" (2006) 12 (2) *Fundamina*, 174 at 175; S. Dixon, "Polybius on Roman Woman and Property" (1985) 106 (2) *Journal of Philology*, 147 at 148.

and not presumptive, and yet the will was held to revive".[1686] However, it was never automatic in English law and the absence of an alteration of circumstances rebutted the revocation.[1687] Furthermore, Swinburne holds "and albeit the testator after the making of the testament have a child borne unto him, I suppose that the testament is not presumed thereby to be revoked".[1688] Swinburne's coverage of the subject led some scholars to doubt whether its attribution to the civil law is correct.[1689] Nonetheless, the civil law still furnished a number of relevant principles that the English courts utilised.

The civil law developed a number of legal restrictions on testamentary freedom in favour of children, recognising the moral duty owed to them, in the manner of forced heirship because the birth of a child that came within the *potestas* of the *pater familias* broke the testament.[1690] Inst. 2.17.1 repeats Gaius 2.138 to state that, even if the legal state of the testator is unaltered, the birth of an heir, including children born with profound disabilities, renders the testament *ruptum*.[1691] Papinian held that revocation occurred because the civil law deemed that the testator improperly executed their testament.[1692] Posthumous children must also be included in the will because the doctrine applied irrespective of whether a child was born before or after the testator's death.[1693] Dig. 5.2.6 provides an action lies in favour of posthumous

[1686] *Wright v Netherwood*; *Lug v Lug*, 2 Salkeld 592; 91 Eng. Rep. 497 at 501; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 268.
[1687] *Wright v Netherwood*; *Lug v Lug*, 2 Salkeld 592; 91 Eng. Rep. 497 at 498.
[1688] H. Swinburne, *A Treatise of Testaments and Last Wills*, (Printed by John Windet, London 1590) at 269.
[1689] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 530; *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 467; 161 Eng. Rep. 1039 at 1046; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 241; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 389.
[1690] Nov. 1; Dig. 28.2.12; Dig. 28.2.30; Dig. 28.3.8.1; Cod. 6.28.4; B. W. Frier, T. A. J. Mc Ginn, *A Casebook on Roman Family Law*, (Oxford University Press, Oxford 2004) at 345; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 311; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 159 - 161; W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 236; F. Tenney, "Some Economic Aspects of Rome's Early Law", (1931) 70 (2) *Proceedings of the American Philosophical Society*, 193 at 202; also see Cod. 6.36.1.
[1691] Cod. 6.29.1; Dig. 28.2.12.1; Dig. 28.3.8; B. W. Frier, T. A. J. Mc Ginn, *A Casebook on Roman Family Law*, (Oxford University Press, Oxford 2004) at 354; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 808.
[1692] Dig. 28.3.1; *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 476; 161 Eng. Rep. 1039 at 1049; Hostiensis, *Summa Aurea*, Liber 3, (Venice 1574) at 1040.
[1693] Cod. 6.12.2; Dig. 5.2.6; Dig. 28.2.10; Dig. 28.3.3.4; *Goodale v Gawthone* (1854) 2 SM & Giff 375; 65 Eng. Rep. 443; Isidore *Etymologies* 5.24.10; Hostiensis, *Summa Aurea*, Liber 3, (Venice 1574) at 1040; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 160; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 276; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell &

children because the testator failed to include a certain clause instituting them.[1694] In *Blasson v Blasson*[1695], the Lord Chancellor Westbury noted the underpinning rationale in Dig. 1.5.7, followed by the common law, imposed a fiction that the law did not distinguish between the entitlements of living and posthumous heirs.[1696] However, the anticipated birth of a posthumous child born instituted as heir did not revoke a testament.[1697]

The civil law required testators to either expressly institute or disinherit their *sui et neccessarii* heirs and they were unable to silently pass over them.[1698] A similar view may

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Son, London 1885) at 807; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 133; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 310; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 263; R. Zouch, *Cases and Questions Resolved in the Civil Law*, (Printed for Leon Lichfield, for Tho Robinson, Oxford 1652) at 113.

[1694] *Wright v Netherwood*; *Lug v Lug*, 2 Salkeld 593; 91 Eng. Rep. 497 at 499; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 123.

[1695] (1864) 2 De G. J. & S. 665; 46 Eng. Rep. 534.

[1696] (1864) 2 De G. J. & S. 665 at 670; 46 Eng. Rep. 534 at 536 see Dig. 1.5.26; Dig. 28.3.3.2; (1740); *Wallis v Hodson* (1740) 2 ATK 117; 26 Eng. Rep. 473; *Doe v Lancashire* (1792) 5 T.R. 49 at 63; 101 Eng. Rep. 28 at 37; *Braddyll v Jehen* (1755) 2 Lee 193 at 209; 161 Eng. Rep. 310 at 316; *Christopher v Christopher* (1771) 1 Dickens 445 at 450; 21 Eng. Rep. 343 at 344; *Doe v Barford* (1815) 4 M & S. 10 at 11 - 12; 105 Eng. Rep. 739 at 739; *Gibson v Gibson* (1698) 2 Freeman 223 at 224; 22 Eng. Rep. 1173 at 1173; *Thellusson v Woodford* (1798) 4 Ves. Jun. 227 at 241, 322; 31 Eng. Rep. 117 at 124, 163; *Thellusson v Woodford* (1805) 11 Ves. Jun. 112 at 139; 32 Eng. Rep. 1030 at 1040; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 312; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 527; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 158; H. Chitty, *A Treatise of the Law of Descents* (Joseph Butterworth and Son, London, 1825) at 288; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 263; R. R. M. Paisley, "The Succession Rights of the Unborn Child" (2006) 10 (1) *Edinburgh Law Review*, 28 at 29, 32 see 10 Gul. III, c 22.

[1697] J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 160; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 276, 312; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 807; E. Darfee, "Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator" (1942) 40 (3) *Michigan Law Review*, 406 at 406.

[1698] Cod. 6.28.4; Cod. 6.28.4.6; Inst. 2.13.1; Dig. 28.2.1; Dig. 28.2.2; Dig. 28.2.3; Dig. 28.3.3.1; *Jackson v Hurlock* (1764) 1 AMB 488 at 491; 27 Eng. Rep. 318 at 320; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 159- 160; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 276, 312; T. Jarman, M. M. Bigelow, *A Treatise on Wills*, fifth edition, volume 2, (Little Brown and Company, Boston 1881) at 151; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 123, 190; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 158; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 311; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 322 – 323; W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 236; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 528; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative

have emerged concerning the common law heir.[1699] Therefore, the civil law principles surrounding complaints against undutiful testaments and legitimate portions are prominent features underlying the presumption in the doctrine that a testator intended to benefit those whom he owed a natural duty and had wrongly passed over them.[1700] It is clear the birth of a subsequent child upset this duty.[1701] The difference between these forms of invalidity is that the birth of a child breaks a valid testament whilst a testament passing over existing heirs was immediately invalid.[1702] The second form permitted an aggrieved party was entitled to bring an action against an inofficious testament for *bonorum possessio contra tabulas* that enabled them to acquire their share of the estate.[1703] This suggests that the doctrine could also be

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Publishing Co, New York 1938) at 605; R. C. Fergus, "The influence of the Eighteenth Novel of Justinian II" (1897) 7 (2) *The Yale Law Journal*, 67 at 68.

[1699] *Gascoigne v Barker* (1746) 3 ATK 8 at 9; 26 Eng. Rep. 808 at 809; *Trent v Hanning* (1806) 7 East. 97 at 101; 103 Eng. Rep. 37 at 39.

[1700] *Reformatio Legum Ecclesiasticarum,* 27.11;Cod. 3.28.1; Dig. 5.2.1; Dig. 5.2.2; Dig. 5.2.5; Nov. 18.1; Isidore *Etymologies* 5.24.9; Hostiensis, *Summa Aurea*, Liber 3, (Venice 1574) at 1041; St. Augustine, P. Schaff (ed) *Nicene and Post-Nicene Fathers of the Christian Church: City of God,* volume 2, (W.M. B. Eerdmans Publishing Company, Michigan 1956) at 401; *Christopher v Christopher* (1771) 1 Dickens 445 at 450; 21 Eng. Rep. 343 at 344; *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 496; 161 Eng. Rep. 1039 at 1055; *Doe v Barford* (1815) 4 M & S. 10 at 12; 105 Eng. Rep. 739 at 739; *Marston v Roe* (1838) 8 AD. & E. 14 at 38; 112 Eng. Rep. 742 at 750; *Braddyll v Jehen* (1755) 2 Lee 193 at 209; 161 Eng. Rep. 310 at 316; *Grave v Salisbury (Earl of)* (1784) 1 Bro. C. C. 425 at 427; 28 Eng. Rep. 1218 at 1219; J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at xxxviii; J. Mackintosh, *Roman Law in Modern Practice*, (W. Green & Son Ltd, Edinburgh 1934) at 160; W. Ward, *A Treatise on Legacies: Or Bequests of Personal Property*, (J. S. Littell, Philadelphia 1837) at 258; T. Jarman, M. M. Bigelow, *A Treatise on Wills*, fifth edition, volume 2, (Little Brown and Company, Boston 1881) at 152; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 355; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 159; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 322, 329; W. W. Buckland, *Elementary Principles of the Roman Private Law*, (Cambridge University Press, Cambridge 1912) at 147; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 606; R. Wiseman, *The Law of Laws: Or Excellency of the Civil Law* (Printed for R. Royston, London 1664) at 9; J. A. Crook, *Law and Life Of Rome, 90 BC – AD 212*, (Cornell University Press, New York 1967) at 122

[1701] Cod. 3.28.3; Cod. 6.29.1; Dig. 5.2.6; Inst. 2.13.1; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 172; P. Stein, "Civil Law Maxims in Moral Philosophy" (1974) 48 (4) *Tulane Law Review*, 1075 at 1078.

[1702] Dig. 5.2.3; Dig. 28.3.3.3.

[1703] Cod. 6.12.2; Cod. 6.28.4.1; Inst. 2.13; Inst. 2.18.3; Dig. 5.2.19; Dig. 5.5.2; Dig. 37.4.1; Dig. 37.4.1.1; Dig. 37.4.1.2; Goffredus de Trano*, Summa Super Titulis Decretalium* (Neudruck Der Ausgabe Lyon, 1519) at 144; *Thellusson v Woodford* (1798) 4 Ves. Jun. 227 at 248; 31 Eng. Rep. 117 at 127; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 280, 311; W. A. Hunter, J. A. Cross, *Roman Law in the Order of a Code*, second edition, (William Maxwell & Son, London 1885) at 808; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 123, 135; J. Muirhead, H. Goudy (ed), *Historical Introduction to the Private Law of Rome*, second edition, (Fred B Rothman & Co, Littleton 1985) at 273-274; W. A. Hunter, *Introduction to Roman Law*, fourth edition, (William Maxwell & Son, London 1887) at 161; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 331, 353; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 558; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 323.

conceptualised as this form of equitable remedy.[1704] Dig. 5.2.2 provides the legal fiction behind their invalidity is that the testator was not in their right minds concerning familial duty when executing the testament, which does not appear to be a presumption in modern law.[1705] Nov. 115.3 limited the ability to stigmatising power of disinheritance to a prescribed number of circumstances, considered evidence of ingratitude, which were inapplicable to newborn children.[1706] Jurists recognised the material absence of universal succession meant English children lacked the same interest in the estate as Roman heirs, and held their birth only impliedly revoked the will rather than rendered it invalid.[1707]

The relationship between the reservation of a legitimate portion and inofficious wills underlies the English doctrine of implied revocation. In the earliest reported case, *Overbury v Overbury*[1708], the High Court of Delegates held a person who after making their will has children and then dies "is a revocation of [the] will, according to the notion of the civilians,

[1704] Dig. 37.4.1.
[1705] Dig. 5.2.5; Inst. 2.18; *Goodright v Harwood* (1773) Loft 282 at 288; 98 Eng. Rep. 652 at 655; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 135; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, volume 1, (V. and R. Stevens and G. S. Norton, London 1846) at 311; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 608; C. S. Rayment, "Legal Fictions regarding Disinheritance" (1953) 46 (7) *The Classical Weekly*, 101 at 102; B. W. Frier, T. A. J. Mc Ginn, *A Casebook on Roman Family Law*, (Oxford University Press, Oxford 2004) at 367; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 91 – 92; N. Peart, "Forced Heirship in New Zealand" (1996) 2 (4) *Butterworths Family Law Journal* 97 at 97; H. Lindsay, "Adoption and Succession in Roman law" (1998) 3(1) *Newcastle Law Review*, 57 at 76.
[1706] *Reformatio Legum Ecclesiasticarum,* 27.11; Cod. 3.28.28; Dig. 5.2.4; Nov. 92.1.1; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 276; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 135; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 22; J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at 596-587; R. Sohm, J. C. Ledlie (Trans), *The Institutes a Textbook of the History and System of Roman Private Law*, third edition, (Clarendon Press, Oxford 1907) at 559; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 324; W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 236; J. G. Phillimore, *Private Law among the Romans from the Pandects*, (Macmillan and Co, London and Cambridge 1863) at 354- 357; E. Cantarella, "Fathers and Sons in Rome" (2003) 96 (3) *The Classical World*, 281 at 289.
[1707] *Doe'd. Birtwhitle v Vardill*(1840) 6 Bing (N.C.) 385 at 387; 133 Eng. Rep. 148 at 149; *Birtwhistle v Vardill* (1840) 7 Clark & Finnelly 895 at 906; 7 Eng. Rep. 1308 at 1311; *Goodright v Harwood* (1773) Loft 282 at 288; 98 Eng. Rep. 652 at 655; *Shepard v Shepard* Hil. (1770); (1792) 5 T.R. 49 at 55; 101 Eng. Rep. 28 at 32; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 355; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 388 but see *Lectura* in F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at 47.
[1708] 2 Show. K.B. 242; 89 Eng. Rep. 915.

this being an *inofficosum testamentum*" explicitly couching the doctrine in civil law terms.[1709] English law similarly recognised that a parent owed natural love to a child, and this moral duty underpinned the rationale that a change in circumstances resulted in an implied revocation.[1710] The Court appears to have followed Cod. 3.28.36 that provides:

> "We know that we heretofore enacted a constitution, providing that if a father should leave less than the legal portion to his son, then though he has not stated that the deficiency should be supplied according to the judgment of a fair man, nevertheless the making up of such deficiency should, in all cases, be implied by operation of law".

Inst. 2.17 deliberately omitted the former Roman law concerning an implied revocation resulting from marriage because the civil law did not recognise a legal alteration in the will-makers circumstances had occurred to break a testament.[1711] This omission reflects the fundamental shift in family law theory that people commonly married *sine manu*, which meant a wife did not enter her husband's *potestas* and remained *extranei* to the will-maker's *familia*.[1712] However, the civil law recognised a moral duty owed to the wife and Nov. 117.5

[1709] 2 Show. K.B. 242 at 242; 89 Eng. Rep. 915 at 915; see *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 468, 476; 161 Eng. Rep. 1039 at 1046, 1049; W. A. Graunke, J. H. Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator" (1930) 5 (7) *Wisconsin Law Review*, 387 at 389; E. C. G., "Wills: Revocation by Judicial Legislation" (1919) 17 (4) *Michigan Law Review*, 331at 335;. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphannotrophei, Halae Magdeburgicae 1769) at 119; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 502 see G. Bray (ed) *The Anglican Canons 1529 - 1947*, (The Boydell Press, Woodbridge, 1998) at cxl.

[1710] Dig. 25.3.5.1; *Cookson v Ellison* (1790) 2 Cox 220 at 220; 30 Eng. Rep. 102 at 102; *Tolson v Collins* (1799) 4 Ves. Jun. 483 at 488; 31 Eng. Rep. 248 at 250; *Christopher v Christopher* (1771) 1 Dickens 445 at 449; 21 Eng. Rep. 343 at 344; *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 475, 496; 161 Eng. Rep. 1039 at 1048, 1055; *Talbot v Talbot* (1828) 1 Hagg. Ecc. 705 at 711; 162 Eng. Rep. 725 at 728; *Grave v Salisbury (Earl of)* (1784) 1 Bro. C. C. 425 at 427; 28 Eng. Rep. 1218 at 1219; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 311; W. Ward, *A Treatise on Legacies: Or Bequests of Personal Property*, (J. S. Littell, Philadelphia ,1837) at 275; W. Blackstone, *Commentaries on the Laws of England*, volume 1, (Clarendon Press, Oxford 1765) at 434 – 435.

[1711] W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 168; O. F. Robinson, *Person*s in E. Metzger (ed), *A companion to Justinian's Institutes* (Cornell University Press, New York 1998) at 28.

[1712] *Worseley v Johnson* (1753) 3 ATK 758 at 760; 26 Eng. Rep. 1235 at 1236; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 168; M. M. Wethmar-Lemmer, "The Legal Position of Roman Women: A Dissenting Perspective" (2006) 12 (2) *Fundamina*, 174 at 177; W. A. Graunke, J. H. Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator" (1930) 5 (7) *Wisconsin Law Review*, 387 at 388; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 119; W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 222, 224; A. T. Bierkan, C. P. Sherman, E. Stocquart, Jr, "Marriage in Roman Law" (1907) 16 (5) *The Yale Law Journal*, 303 at 311 see

introduced a widows fourth held in usufruct for the will-maker's issue that was measured against any legacies left within the testament.[1713] The idea did not influence the civil law in the same manner as the child's legitimate portion until later glossators interpreted it in light of an analogous Christian duty towards a spouse.[1714]

Roman testators also followed apostolic advice that emphasised the son's right to inherit and this duty survived in the writings of early canonists.[1715] Isidore of Seville demonstrates an awareness of the Lex Falcidia and its purpose to reserve a fourth in favour of the heir and held it formed part natural law.[1716] Furthermore, C 12, q 1, c 1 refers to a provincial constitution recognising the balance between rights of the church and the deceased's heirs. Bernard's *summa* reveals the same rationale underpinned the canonical will.[1717] The *Liber Extra* expressly recognises the right of issue to a portion of the estate under natural and secular law.[1718] X. 3.26.16 states:

> "In the goods of the father, mother and grandmother, a debt is owed in the law of nature, by which there can be no objection; and his son, whom he questioned concerning the restitution of the inheritance under a condition, does speak evil of the debt owed under the law of nature and the Trebellian [fourth] that it is calculated as part of the fruits received after litigation".[1719]

The *Decretum* indicates the church frequently sustained destitute widows, alongside poor orphans, in exchange for the performance of godly tasks and Dist. 87, c 1 forbade clergy to

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Bracton, G. E. Woodbine (ed), S. E. Thorne (trans), *De legibus et consuetudinibus Angliae*, volume 2, (Harvard University Press, Cambridge, 1968 – 1977) at 178.

[1713] Nov. 53.6; B. Beinart, "The Forgotten Widow: Provision by a Deceased Estate for Dependants" [1966] *Acta Juridica*, 285 at 289.

[1714] B. Beinart, "The Forgotten Widow: Provision by a Deceased Estate for Dependants" [1966] *Acta Juridica*, 285 at 289.

[1715] Dist. C 13, q 2, c 8; S. MacCormack, "Sin, Citizenship, and the Salvation of Souls: The Impact of Christian Priorities on Late-Roman and Post-Roman Society" (1997) 39 (4) *Comparative Studies in Society and History*, 660 at 664 – 665; R. H. Helmholz, *Legitim* in English Legal History, (1984) 1984 (3) *University of Illinois Law Review,* 659 at 661.

[1716] Dist. 2, c 6; C. J. Reid, P*ower over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon law*, (Wm B. Eerdmans Publishing Co, Grand Rapids 2004) at 190; R. H. Helmholz, *Legitim* in English Legal History, (1984) 1984 (3) *University of Illinois Law Review,* 659 at 661; K. Pennington, "*Lex Naturalis* and *Ius Naturale*" (2008) 68 (2) *The Jurist*, 569 at 582 see Dig. 5.2.8.9.

[1717] Bernard's *Summa Decretalium* 3.22.6.

[1718] X. 3.26.18; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 390.

[1719] In bonis patris, matris et aviae habet quis debitum iure naturae, in qua gravari nequit; et filius, rogatus de restituenda hereditate sub conditione, detrahit debitum iure naturae et Trebellianicam, in qua computantur fructus post litis contestationem percepti see Sext. 3.11.1; Dig. 36.1.3.

engage in financial undertakings unless it was for the benefit of these classes.[1720] Dist. 87, c 4 recognises the duty to ensure charitable care for these classes and the church appointed secular administrators to manage this task.[1721] However, the rights of widows are not as pronounced, although C 1, q 2, c 5 indicates the church allocated resources to sustaining widows if they cannot support themselves through their husband's estate or by their parents.[1722] Furthermore, Dist. 34, c 16, treats destitute widows alongside cast out wives and prostitutes. Both passages suggest the husband owed a moral duty to sustain his wife by his estate to avoid the stigma of destitution and not burden the church with her to the extent she became an object of charity. However, the obligation to provide for a spouse never became as pronounced in English law than the duty to issue.

English law appears to have accepted an analogous concept of family property from an early period, and ecclesiastical courts followed the canon law to discourage acts of inofficiousness.[1723] It is also evident the common law writ *de rationalibi parte bonorum*, an action analogous to the *querela inofficiosi testamenti,* was available to anyone whom the law stated the will-maker owed a moral duty with particular regard to issue.[1724] The evidence suggests this writ may have been available to heirs first indicating their right to be seised of the estate.[1725] The evidence from the ecclesiastical courts indicates they were accustomed to pass sentence of causes concerning the filial portions owed to issue in York throughout the development of the English will.[1726] However, English custom limited the operation of the

[1720] Dist. 81, c 34 see St. Ambrose, H. De Romestein (Trans), "On Widows" in *Nicene and Post-Nicene Fathers of the Christian Church: The Principal Works of St. Ambrose,* volume 10, (James Parker and Company, Oxford 1896) at 393.
[1721] C 13, q 5, c 26.
[1722] See *Reformatio Legum Ecclesiasticarum,* 27.13; Nov. 53.6; St. Ambrose, H. De Romestein (Trans), "On Widows" in *Nicene and Post-Nicene Fathers of the Christian Church: The Principal Works of St. Ambrose,* volume 10, (James Parker and Company, Oxford 1896) at 401.
[1723] *Clare c Executors of Richard (Earl)* (1272) in N. Adams (ed), C. Donahue Jr (ed), *Select Cases from the Ecclesiastical Courts of the Province of Canterbury c. 1200 – 1301,* volume 95, (Selden Society, London 1981) at 138; Canterbury ESR 357. (1290 X 1300) in C. Donahue, Jr (ed), *The Records of the Mediaeval Ecclesiastical Courts, part II, England*, (Duncker & Humblot, Berlin 1994) at 131, 143.
[1724] Cod. 3.28.1; Cod. 3.28.17; *Britton* 3.9.1; *Hervey v Aston* (1738) 1 West T. Hard 350 at 358; 25 Eng. Rep. 975 at 979; *La Cloche v La Cloche* (1870) 6 Moore N.S. 383 at 404; 16 Eng. Rep. 770 at 778; *Hughes v Hughes*, Carter. 125 at 130; 124 Eng. Rep. 867 at 871; G. W. Keeton, L. C. B. Gower, "Freedom of Testation in English Law" (1935) 20 (2) *Iowa Law Review*, 326 at 338; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 199; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 492.
[1725] *La Cloche v La Cloche* (1870) 6 Moore N.S. 383 at 404; 16 Eng. Rep. 770 at 778.
[1726] *Home c Home*, CP.F 18 (1402); *Lockward c Kay*, CP.F 259 (1479); *Stapleton v Sherwood* (1683) 2 Chan. Rep 256 at 258; 21 Eng. Rep. 672 at 672; H. Swinburne*, A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 230; T. Ridley, *A view of the Civile and Ecclesiastical*

rule of thirds to the city of London and the province of York during the rise of the doctrine of implied revocation.[1727] The operation of the custom could even invoke the civil law to hold that an advancement of personal property in satisfaction of the portion brought into hotchpot to be distributed diminished the natural law entitlement to this portion.[1728] Nonetheless, Blackstone observes the doctrine emerged in a period of strong testamentary freedom opposed to the automatic distribution by custom.[1729] The author also suggests the rule is of British or Roman law origins before the civil law's reception.[1730] Nevertheless, the operation of the custom appears to be consistent with an action arising *bonorum possessio contra tabulas* as an equitable solution.[1731]

The concept of a moral duty to family does not appear to have left the imagination of English civilians. The *Reformatio Legum Ecclesiasticarum* referred to the rule of thirds and controversially included a canon that restated Nov. 115.3, modifying it to include a wife, to

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Law: and wherein the practise of them is streitned and may be relieved within this Land, (Printed for the Company of Stationers, London 1607) at 124.

[1727] *Collinson c Goldsborough* CP.F.163 (1427-1429); *Hall c Walpole*, Gl. Act Books, M.S. 9064/2, fo 147v in R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 425; *Pickford v Brown* (1856) 2 K. & J. 426 at 430, 431; 69 Eng. Rep. 849 at 851; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 62; P. Lovelass, A. Barron (ed) *The Law's Disposal of a Person's Estate Who Dies without Will or Testament; to Which Is Added the Disposal of a Person's Estate by Will and Testament; with an Explanation of the Mortmain Act*, twelve edition, (J. S. Littell, Philadelphia 1839) at 107, 109, 116; G. W. Keeton, L. C. B. Gower, "Freedom of Testation in English Law" (1935) 20 (2) *Iowa Law Review*, 326 at 338; H. Horwitz, "Testamentary Practice, Family Strategies and the Last Phases of the Custom of London 1660- 1725" (1984) 2 (2) *Law and History Review*, 223 at 223; W. Blackstone, *Commentaries on the Laws of England*, volume 1, (Clarendon Press, Oxford 1765) at 438; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 493, 528; R. H. Helmholz, *Legitim* in English Legal History, (1984) 1984 (3) *University of Illinois Law Review,* 659 at 665 – 667.

[1728] Cod. 6.20.1; Cod. 3.28.29; Dig. 5.2.25; Dig. 37.6.1; Dig. 50.16.108; *Kemps v Kelsey* (1722) Pre. Ch. 594 at 594; 24 Eng. Rep. 266 at 266; *Rawlins v Powel* (1715) 1 P. WMS. 297 at 299; 24 Eng. Rep. 397 at 398; *Hedges v Hedges* (1708) 1 Gilb Rep 12 at 13; 25 Eng. Rep. 9 at 10; *Fawkner v Watts* (1741) 1 ATK 406 at 406; 26 Eng. Rep. 257 at 257; *Weyland v Weyland* (1742) 2 ATK 632 at 635; 26 Eng. Rep. 777 at 779; *Cookson v Ellison* (1790) 2 Cox 220 at 220; 30 Eng. Rep. 102 at 102; *Cleaver v Spurling* (1729) 2 P. WMS. 526 at 527; 24 Eng. Rep. 846 at 846; G. W. Keeton, L. C. B. Gower, "Freedom of Testation in English Law" (1935) 20 (2) *Iowa Law Review*, 326 at 338; P. Lovelass, A. Barron (ed) *The Law's Disposal of a Person's Estate Who Dies without Will or Testament; to Which Is Added the Disposal of a Person's Estate by Will and Testament; with an Explanation of the Mortmain Act*, twelve edition, (J. S. Littell, Philadelphia 1839) at 111, 114, 119.

[1729] W. Blackstone, *Commentaries on the Laws of England*, volume 1, (Clarendon Press, Oxford 1765) at 43; see R. H. Helmholz, *Legitim* in English Legal History, (1984) 1984 (3) *University of Illinois Law Review,* 659 at 659.

[1730] W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 520.

[1731] Dig. 37.4.1.

represent a custom that may not have formed part of English law during its inception.[1732] It held:

> "No son [or wife] must be overlooked as father's testament, unless the father has explicitly disinherited beforehand, either before composing the testament or at the time of writing it. Nevertheless, this exclusion shall be invalid unless it has some just cause attached, which we list here, so that they may be fully known… also the ingratitude of the children shall be punished with the penalty of disinheritance".[1733]

This practice is akin to the *legitima portio* reserved for continental families.[1734] In *Hervey v Ashton*[1735], the temporal court referred to the *Lex Falcidia* and its relationship to inofficious wills to conceptualise the idea of reserved portions in English law.[1736] However, the absence of a *legitima portio* in English law obliged the ecclesiastical courts to balance the moral duty attached to implied revocation with the will-maker's testamentary freedom.[1737] Even the presence of improvidence did not trigger the doctrine to override the will-maker's clear intent.[1738] Nonetheless, the *Reformatio Legum Ecclesiasticarum* suggests the doctrine's association with the concept of *legitima portio* exerted a profound impact on later practice that attempted to realise the satisfaction of a natural law duty.[1739] In *Shepard v Shepard*[1740]

[1732] *Reformatio Legum Ecclesiasticarum* 27.10; 27.11; 27.13.
[1733] See *Reformatio Legum Ecclesiasticarum* 27.13.
[1734] *Tolson v Collins* (1799) 4 Ves. Jun. 483 at 488; 31 Eng. Rep. 248 at 250; *Calderino v Carolum et Simonem* (1704) in B. Bersano, *De Ultimis Voluntatibus* (Typis Petri-Mariae Montii, Bononiae 1707) at 68; *Pallavicino v Stangham et Del Mayno* (1704) in B. Bersano, *De Ultimis Voluntatibus* (Typis Petri-Mariae Montii, Bononiae 1707) at 87; H. S. Maine, *Dissertations on Early Law and Custom*, (Henry Holt and Company, New York 1883) at 110; F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphannotrophei, Halae Magdeburgicae 1769) at 116- 117; E. Jenks, *The Book of English Law: As at the End of the Year 1935*, fourth edition, (John Murray, London, 1936) at 376; O. K. McMurray, *Liberty of Testation and some Modern Limitations Thereon*, in *Celebration Legal Essays, By Various Authors To Mark the Twenty-fifth Year of Service of John H. Wigmore*, (North Western University Press, Chicago 1919) at 550; J. Domat, W. Strahan (Trans), *The Civil Law in its Natural Order: Together with the Publick Law* (Printed by J. Bettenham, London, 1721) at 598; M. Palmer, "Death and Transfer of Wealth: Bequest Patterns and Cultural Change in the Eighteenth Century" (2000) 33 (4) *Journal of Social History*, 913 at 913.
[1735] (1738) 1 West T. Hard 350; 25 Eng. Rep. 975.
[1736] (1738) 1 West T. Hard 350 at 396; 25 Eng. Rep. 975 at 998; also see *Lakan c Lakan*, BL, D/C.CP.1546/2.
[1737] *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 450; 161 Eng. Rep. 1039 at 1040; *Marston v Roe (1838) 8 AD. & E. 14 at 24*; 112 Eng. Rep. 742 at 746; *Shepard v Shepard* Hil. (1770); (1792) 5 T.R. 49 at 55; 101 Eng. Rep. 28 at 32; W. A. Graunke, J. H. Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator" (1930) 5 (7) *Wisconsin Law Review*, 387 at 389 W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 356; H. S. Maine, *Dissertations on Early Law and Custom*, (Henry Holt and Company, New York 1883) at 110.
[1738] *Huguenin v Baseley* (1807) 14 Ves. Jun. 273 at 285; 33 Eng. Rep. 526 at 531; *Sheath v York* (1813) 1 V. & B. 391at 392; 35 Eng. Rep. 152 at 152.
[1739] *Reformatio Legum Ecclesiasticarum,* 27.11.
[1740] Hil. (1770); (1792) 5 T.R. 49 at 53; 101 Eng. Rep. 28 at 30.

Dr. Hay cautiously noted in the Doctors Commons that the doctrine sat uncomfortably next to the primacy of testamentary freedom because it empowered the court to alter the contents of a will.[1741]

The ecclesiastical courts distinguished between an automatic deduction from an estate from the implied revocation arising from the will-maker's intention, to establish a presumptive element rather than the strict rule given to the *legitima portio* in continental jurisprudence.[1742] In *Johnston v Johnston*[1743], Sir Nicholl stated:

> "[468] a presumptive revocation of a will arising from marriage and the birth of a child is not mentioned, as far as I am aware, by any ancient text writer upon the law of England as a part of our English jurisprudence; nor as far as I am informed, was it a part of the ancient jurisprudence of any other country. It is not mentioned as a rule existing in Swinburne's time; nor is it enacted by the statute of frauds, or any other statute".[1744]

Therefore, its purported antiquity belies the fact the doctrine arose sometime after the Statute of Wills from positive court practice by civilians utilising the principles of the civil law to confront the inherent dangers of testamentary freedom.[1745] This explains its marked absence from Swinburne's work. In *Doe v Lancashire*[1746], Kenyon CJ and Buller J stated that the common law courts followed the lead of the spiritual courts and imported the principle in Inst. 2.13.2, without accepting all the rules concerning inofficious testament, into the common law jurisprudence concerning devises in a manner analogous to the ecclesiastical

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[1741] Hil. (1770); (1792) 5 T.R. 49 at 54; 101 Eng. Rep. 28 at 31; *Braddyll v Jehen* (1755) 2 Lee 193 at 208; 161 Eng. Rep. 310 at 315.
[1742] *Shepard v Shepard* Hil. (1770); (1792) 5 T.R. 49 at 55; 101 Eng. Rep. 28 at 32; *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 473, 496; 161 Eng. Rep. 1039 at 1048, 1055; *Moore v Moore* (1817) 1 Phill. Ecc. 406 at 435; 161 Eng. Rep. 1026 at 1035; *Braddyll v Jehen* (1755) 2 Lee 193 at 207; 161 Eng. Rep. 310 at 315; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 355; W. A. Graunke, J. H. Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator" (1930) 5 (7) *Wisconsin Law Review*, 387 at 394; E. Darfee, "Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator" (1942) 40 (3) *Michigan Law Review*, 406 at 406; P. du Plessis, *Borkowski's Textbook on Roman law*, fourth edition, (Oxford University Press, Oxford 2010) at 237; R. H. Helmholz, *Legitim* in English Legal History, (1984) 1984 (3) *University of Illinois Law Review,* 659 at 674.
[1743] (1817) 1 Phill. Ecc. 447; 161 Eng. Rep. 1039.
[1744] (1817) 1 Phill. Ecc. 447 at 468; 161 Eng. Rep. 1039 at 1046.
[1745] *Christopher v Christopher* (1771) 1 Dickens 445 at 448; 21 Eng. Rep. 343 at 344; *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 468- 469; 161 Eng. Rep. 1039 at 1046.
[1746] (1792) 5 T.R. 49; 101 Eng. Rep. 28.

court's treatment of personalty.[1747] The case law reveals the courts conceptualised implied revocation resulting from marriage and a child's birth together as necessary elements indicative of a substantial alteration of circumstances.[1748] However, the birth of issue and marriage alone was insufficient, and the substance of the will or some other extraneous circumstances must be present for the presumption to arise.[1749] The doctrine must confer a benefit to the child to become operative because the law presumed a will-maker would not introduce an impotent provision into their will.[1750]

[1747] (1792) 5 T.R. 49 at 52, 61; 101 Eng. Rep. 28 at 29 – 30, 35; see *Marston v Roe* (1838) 8 AD. & E. 14 at 24; 112 Eng. Rep. 742 at 746; *Doe v Barford* (1815) 4 M & S. 10 at 12; 105 Eng. Rep. 739 at 739; *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 468; 161 Eng. Rep. 1039 at 1046; W. A. Graunke, J. H. Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator" (1930) 5 (7) *Wisconsin Law Review*, 387 at 395; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 241; T. Jarman, M. M. Bigelow, *A Treatise on Wills*, fifth edition, volume 2, (Little Brown and Company, Boston 1881) at 152; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 18.

[1748] *Shepherd v Shepherd* Hil. (1770); (1792) 5 T.R. 49 at 54; 101 Eng. Rep. 28 at 31; *Sheath v York* (1813) 1 V. & B. 391at 391; 35 Eng. Rep. 152 at 152; *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 467; 161 Eng. Rep. 1039 at 1046; *Cook v Oakly* (1715) 1 P. WMS. 302 at 304; 24 Eng. Rep. 399 at 400; W. A. Graunke, J. H. Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator" (1930) 5 (7) *Wisconsin Law Review*, 387 at 397; E. C. G., "Wills: Revocation by Judicial Legislation" (1919) 17 (4) *Michigan Law Review*, 331at 335; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 240; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 314; W. Ward, *A Treatise on Legacies: Or Bequests of Personal Property*, (J. S. Littell, Philadelphia 1837) at 275; T. Jarman, M. M. Bigelow, *A Treatise on Wills*, fifth edition, volume 2, (Little Brown and Company, Boston 1881) at 151 - 152; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 355; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 18; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 241; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 529.

[1749] *Braddyll v Jehen* (1755) 2 Lee 193 at 208; 161 Eng. Rep. 310 at 315*; Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 467, 473; 161 Eng. Rep. 1039 at 1046, 1048; *Shepherd v Shepherd* Hil. (1770); (1792) 5 T.R. 49 at 53; 101 Eng. Rep. 28 at 30; *Gibbons v Caunt* (1799) 4 Ves. Jun. 840 at 846; 31 Eng. Rep. 435 at 438; *Brady v Cubitt* (1778) 1 Dougl. 31 at 39; 99 Eng. Rep. 24 at 28; *Doe v Barford* (1815) 4 M & S. 10 at 11; 105 Eng. Rep. 739 at 739; *Rickards v Mumford* (1812) 2 Phill. Ecc. 23 at 24; 161 Eng. Rep. 1066 at 1066; *Marston v Roe* (1838) 8 AD. & E. 14 at 25, 39; 112 Eng. Rep. 742 at 746, 751; *Fox v Marston* (1837) 1 Curt. 494 at 495, 503; 163 Eng. Rep. 173 at 173, 176; *Talbot v Talbot* (1828) 1 Hagg. Ecc. 705 at 705; 162 Eng. Rep. 725 at 725; *Doe v Lancashire* (1792) 5 T.R. 49 at 58, 61; 101 Eng. Rep. 28 at 34; W. A. Graunke, J. H. Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator" (1930) 5 (7) *Wisconsin Law Review*, 387 at 396; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 399, 530; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 131; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 315; T. Jarman, M. M. Bigelow, *A Treatise on Wills*, fifth edition, volume 2, (Little Brown and Company, Boston 1881) at151; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 18.

[1750] P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 313; S. Toller, *Law of Executors and Administrators*, third American from the sixth

A will made in contemplation of marriage and the birth of a child, including anticipatory directions concerning a posthumous child's entitlement, did not invoke the doctrine.[1751] The birth of a child who died during the will-maker's lifetime did not trigger an implied revocation if there is a sufficient manifestation of intent to the contrary to its operation.[1752] However, the ecclesiastical courts did not appear to have settled the question concerning a posthumous child who dies shortly after birth.[1753] In the case of simultaneous deaths, the leading decision is *Wright v Netherwood*[1754] where the Prerogative Court of Canterbury entertained a cause concerning the simultaneous death of the will-maker and his family in a shipwreck. Dr. Scott and Dr. Nicholl stated that the Roman law presumed that the father is the stronger party and his earlier will revives despite the birth of issue because the *ius honorarium* presumed the will-maker intended to omit the deceased infant child.[1755] Drs. Batten and Swabey replied "but the doctrine of revival is no part of the civil law which has been adopted by the law of England".[1756] Sir Wynne, the presiding ordinary, agreed and rejected the assertion of revival to hold all parties died at the same time and the doctrine of implied revocation remained.[1757] The learned ordinary also acknowledged the common law's

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London edition, (Published by John Grigg, Philadelphia 1829) at 19; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 399.

[1751] *Doe v Lancashire* (1792) 5 T.R. 49 at 57; 101 Eng. Rep. 28 at 34; *Storrs v Benbow* (1833) 2 My. & K. 46 at 48; 39 Eng. Rep. 862 at 863; *Sheath v York* (1813) 1 V. & B. 391 at 394; 35 Eng. Rep. 152 at 153; *Marston v Roe* (1838) 8 AD. & E. 14 at 24; 112 Eng. Rep. 742 at 746; *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 471 161 Eng. Rep. 1039 at 1047; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 240; T. Jarman, M. M. Bigelow, *A Treatise on Wills*, fifth edition, volume 2, (Little Brown and Company, Boston 1881) at 151.

[1752] Inst. 2.13.2; *Israell v Rodon (2)* (1839) 2 Moore 51 at 58; 12 Eng. Rep. 922 at 924; *Hollway v Clarke* (1811) 1 Phill. Ecc. 339 at 341; 161 Eng. Rep. 1003 at 1004; *Emerson v Boville* (1811) 1 Phill. Ecc. 342 at 343; 161 Eng. Rep. 1004 at 1005.

[1753] Cod. 6.29.3.1; *Wright v Netherwood*; *Lug v Lug*, 2 Salkeld 593; 91 Eng. Rep. 497 at 499; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 314 - 315; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 938.

[1754] 2 Salkeld 593; 91 Eng. Rep. 497.

[1755] Dig. 34.5.9; *Wright v Netherwood*; *Lug v Lug*, 2 Salkeld 593; 91 Eng. Rep. 497 at 499; *Taylor v Diplock* (1815) 2 Phill. Ecc. 261 at 270; 161 Eng. Rep. 1142; *Satterthwaite v Powell* (1838) 1 Curt. 705 at 706; 163 Eng. Rep. 246 at 246; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 367; R. Zouch, *Cases and Questions Resolved in the Civil Law*, (Printed for Leon Lichfield, for Tho Robinson, Oxford 1652) at 4.

[1756] *Wright v Netherwood*; *Lug v Lug*, 2 Salkeld 593; 91 Eng. Rep. 497 at 500.

[1757] *Wright v Netherwood*; *Lug v Lug*, 2 Salkeld 593; 91 Eng. Rep. 497 at 502 see *Sillick v Booth* (1841) 1 Y. & C. C. C. 117 at 125; 62 Eng. Rep. 816 at 820; *Satterthwaite v Powell* (1838) 1 Curt. 705 at 707; 163 Eng. Rep. 246 at 246; W. A. Graunke, J. H. Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator" (1930) 5 (7) *Wisconsin Law Review*, 387 at 396.

adoption of principle and referred to the *Brady* as an authoritative decision in the ecclesiastical courts.[1758]

A second form of implied revocation derived from the common law held that marriage alone automatically revoked a woman's will.[1759] The Court of Common Pleas first illuminated the second method in the decision of *Forse v Hembling*[1760] and held that the common law disqualification of a feme covert from making a will rendered her incapable of revoking it, analogous to a person of an unsound mind, which was contrary to the ambulatory character of a will.[1761] The court thought the potential mischief that could arise from an inability to revoke a will indicates that marriage must be an irrebuttable revocation of her will.[1762] Swinburne recognises the consequences of coverture but adds a civil law dimension to the rule by observing that a feme sole who makes a will before marriage will revive once she is

[1758] 2 Salkeld 593; 91 Eng. Rep. 497 at 500, 502.
[1759] R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 240; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 19; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 390; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 243; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 392; W. A. Graunke, J. H. Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator" (1930) 5 (7) *Wisconsin Law Review*, 387 at 399.
[1760] 4 Co Rep. 60b; 76 Eng. Rep. 1022.
[1761] 4 Co Rep. 60b at 61a - 61b; 76 Eng. Rep. 1022 at 1023- 1024 see *Brady v Cubitt* (1778) 1 Dougl. 31 at 35; 99 Eng. Rep. 24 at 36; *Arthur v Bokenham* 11 Mod 154 at 157; 88 Eng. Rep. 957 at 961; *Doe v Staple* (1788) 2 T.R. 684 at 688; 100 Eng. Rep. 368 at 370; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 526; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 239; E. Durfee, "Revocation of Wills by Subsequent Change in the Condition or the Circumstances of the Testator" (1942) 40 (3) *Michigan Law Review*, 406 at 407; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 239; E. Durfee, "Revocation of Wills by Subsequent Change in the Condition or the Circumstances of the Testator" (1942) 40 (3) *Michigan Law Review*, 406 at 407; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 392; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 63.
[1762] 4 Co Rep. 60b at 61b; 76 Eng. Rep. 1022 at 1024; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 526; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 239; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 157; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 52; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 392; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 88.

widowed.[1763] Civilians compared it to the principle in Inst. 1.12.5 that states automatic revocation occurs when the will-maker enters into the power of the enemy, and undergoes a fictitious death until they regain their freedom and their will revives.[1764] However, the prevailing rule under the common law distinguished the doctrine from Inst. 1.12.5 because a woman entered marriage voluntarily rather than through an involuntary act and held the will did not revive unless she republished it once regaining capacity.[1765] The difference between these treatments is that civilians viewed the will as suspended and rendered inoperative during her marriage while the common law outright revoked it.[1766] Nonetheless, it is uncertain whether this second method of implied revocation influenced the principal doctrine of implied revocation applying to the male sex.

The reason for the inclusion of marriage as an ingredient of the doctrine of implied revocation is uncertain but it reveals the English character and its evolution through practice.[1767] The evidence suggest it arose later as part of court practice and notably the first case, *Overbury v Overbury*, did not consider marriage an essential ingredient.[1768] The

[1763] H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 88; *Doe v Staple* (1788) 2 T.R. 684 at 688; 100 Eng. Rep. 368 at 370; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 527; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 373; W. A. Graunke, J. H. Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator" (1930) 5 (7) *Wisconsin Law Review*, 387 at 399.

[1764] Dig. 50.16.3.1; *Jackson v Hurlock* (1764) 1 AMB 488 at 494; 27 Eng. Rep. 318 at 322; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 374; J. A. C. Thomas (Trans), *The Institutes of Justinian: Texts, Translation and Commentary*, (Juta & Company Limited, Cape Town 1975) at 119; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 50; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 88; H. J. Wolff, "The Lex Cornelia De Captivis and the Roman law of Succession" (1941) 17 (2) *Tijdschrift voor Rechtsgeschiedenis*, 136 at 165.

[1765] *Goodright v Glazier* (1770) 4 Burr. 2512; 98 Eng. Rep. 317; *Berkenshaw v Gilbert* (1774) Loft 466 at 468; 98 Eng. Rep. 750 at 751; *Doe v Staple* (1788) 2 T.R. 684 at 689; 100 Eng. Rep. 368 at 371; *Marston v Roe* (1838) 8 AD. & E. 14 at 38; 112 Eng. Rep. 742 at 751; *Doe v Staple* (1788) 2 T.R. 684 at 688; 100 Eng. Rep. 368 at 370; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 373 - 374; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 393; J. F. Grimke, *The Duty of Executors and Administrators* (T. and J. Swords, New York 1797) at 50.

[1766] E. Darfee, "Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator" (1942) 40 (3) *Michigan Law Review*, 406 at 407; W. A. Graunke, J. H. Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator" (1930) 5 (7) *Wisconsin Law Review*, 387 at 399; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 19.

[1767] *Sheath v York* (1813) 1 V. & B. 391at 391; 35 Eng. Rep. 152 at 152; *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 496; 161 Eng. Rep. 1039 at 1055; W. A. Graunke, J. H. Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator" (1930) 5 (7) *Wisconsin Law Review*, 387 at 388.

[1768] *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 478 - 479; 161 Eng. Rep. 1039 at 1049 - 1050; *Braddyll v Jehen* (1755) 2 Lee 193 at 209; 161 Eng. Rep. 310 at 316; E. C. G., "Wills: Revocation by Judicial Legislation"

Prerogative Court of Canterbury in *Johnston v Johnston*[1769] outlined the historical development of marriage's role and noted ecclesiastical courts had set aside wills made without considering marriage a determinative factor.[1770] Sir Nicholl emphasised the subject of marriage had nothing to do with revocation from birth of issue.[1771] The evidence suggests the reason lies in English law's unique definition of 'heir' only applied to a legitimate child, as declared under the Statute of Merton[1772], born in wedlock and the *ius commune* principle of legitimation or moral duty do not arise for a *filius nullius* as part of common law bastardy until the twentieth century.[1773] Nonetheless, the ordinary canvassed a number of decisions, admitting the unreported decisions of the ecclesiastical courts may have gone unnoticed, to conclude marriage formed only one of a number of circumstances a court could consider.[1774] The moral duty to the wife did not form part of the doctrine because English law expected that dowry, marriage settlements, and customary portions would sustain her after her husband's death.[1775] The ordinary identified marriage as a civil contract, the wife risking her

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(1919) 17 (4) *Michigan Law Review*, 331at 335; W. A. Graunke, J. H. Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator" (1930) 5 (7) *Wisconsin Law Review*, 387 at 397; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 390.

[1769] (1817) 1 Phill. Ecc. 447; 161 Eng. Rep. 1039.

[1770] (1817) 1 Phill. Ecc. 447 at 450; 161 Eng. Rep. 1039 at 1040.

[1771] *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 476; 161 Eng. Rep. 1039 at 1049.

[1772] 20 Hen III, c 9.

[1773] Nov. 19; Nov. 74; Nov. 74.1; Nov. 74.3; Nov. 89. 2; Inst. 1.11.8; Inst. 2.13.4; Inst. 2.20.28; Dig. 1.7.16; Dig. 28.2.28.3; *Israell v Rodon* (2) (1839) 2 Moore 51 at 59; 12 Eng. Rep. 922 at 925; *Ex parte Ilchester (Earl of)* (1803) 7 Ves. Jun. 348 at 356, 360 – 361, 394; 32 Eng. Rep. 142 at 145- 146, 152; *Munro v Munro* (1840) 7 Clark & Finnelly 817 at 840; 7 Eng. Rep. 1279 at 1288; *Doe'd. Birtwhitle v Vardill* (1840) 6 Bing (N.C.) 385 at 401; 133 Eng. Rep. 148 at 155; *Doe'd. Birtwhitle v Vardill* (1840) 1 West 500 at 523 - 526; 9 Eng. Rep. 578 at 586 - 588; *Middleton v Crofts* (1736) 2 ATK 650 at 659; 26 Eng. Rep. 788 at 793; P. Mac Combaich de Colquhoun, *A summary of the Roman Civil law, Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and foreign law*, volume 2, (V. and R. Stevens and Sons, London 1849) at 313; W. Blackstone, *Law Tracts,* volume 2, (Clarendon Press, Oxford 1762) at lxxxv; W. Blackstone, *Law Tracts,* volume 1 (Clarendon Press, Oxford 1762) at 139; W. Blackstone, *Commentaries on the Laws of England*, volume 1, (Clarendon Press, Oxford 1765) at 434, 442 – 443; R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 6; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 44; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 114; R. H. Helmholz, "Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law" (1977) 63 (3) *Virginia Law Review*, 431 at 432; J. Fortescue, F. Gregor (Trans), *De Laudibus Legum Angliae: A Treatise in Commendation of the Laws of England* (c1463), (Robert Clarke & Co, Cincinnati, 1874) at 155; Bracton, G. E. Woodbine (ed), S. E. Thorne (trans), *De legibus et consuetudinibus Angliae*, volume 2, (Harvard University Press, Cambridge, 1968 – 1977) at 34, 185 but see Bracton, G. E. Woodbine (ed), S. E. Thorne (trans), *De legibus et consuetudinibus Angliae*, volume 2, (Harvard University Press, Cambridge, 1968 – 1977) at 186.

[1774] *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 479 - 497; 161 Eng. Rep. 1039 at 1049 – 1055; *Rickards v Mumford* (1812) 2 Phill. Ecc. 23 at 25; 161 Eng. Rep. 1066 at 1066.

[1775] Glanville, *Tractatus de legibus et consuetudinibus regni Angliae*, 6.4; T. Jarman, M. M. Bigelow, *A Treatise on Wills*, fifth edition, volume 2, (Little Brown and Company, Boston 1881) at151; E. Durfee, "Revocation of Wills by Subsequent Change in the Condition or the Circumstances of the Testator" (1942) 40 (3) *Michigan*

husband not providing for her, to conclude the civil law furnished no authority suggesting marriage was an essential circumstance revoking a will.[1776] In *Jackson v Hurlock*[1777], Lord Chancellor Northington determined, on the facts, that "there seems little reason to presume such intention [to revoke] from the simple act of marriage; for the law has provided for the wife".[1778] Therefore, neither temporal nor spiritual law possessed a rule of revocation for a man's will resulting from marriage alone until a later period.[1779]

The opinion that marriage only formed a single circumstance derived in the common law and ecclesiastical courts appears to have been distinguished by Chancery that later regarded marriage alone as an essential element.[1780] In *Brown v Thompson*[1781], the Lord Keeper controversially held marriage without the birth of a child was sufficient to revoke a will in equity if the husband did not provide for his wife because she was entitled to the same provision as a child.[1782] He reasoned: "it is for the sake of the wife as well as the children that the rule must prevail. A wife is entitled to a provision, as well as children: neither have anything secure in the personal".[1783] This approach emphasised the will-maker's moral duty to make a provision to spouse and issue with the requirement that revocation occurs because of injury to these parties.[1784] Therefore, provision for either the wife or child rebuts the presumption of revocation because there is no neglect or breach of moral duty.[1785] The

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Law Review, 406 at 407; R. E. Mathews, "Trends in the Power to Disinherit Children" (1930) 16 (1) *American Bar Association Journal*, 293 at 293.

[1776] (1817) 1 Phill. Ecc. 447 at 450,475- 476, 496; 161 Eng. Rep. 1039 at 1040, 1048- 1049, 1055; *Jackson v Hurlock*(1764) 1 AMB 488 at 491; 27 Eng. Rep. 318 at 320.

[1777] (1764) 1 AMB 488; 27 Eng. Rep. 318.

[1778] (1764) 1 AMB 488 at 495; 27 Eng. Rep. 318 at 321; *Shepard v Shepard* Hil. (1770); (1792) 5 T.R. 49 at 54; 101 Eng. Rep. 28 at 31; *Israell v Rodon* (2) (1839) 2 Moore 51 at 58; 12 Eng. Rep. 922 at 924; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 355.

[1779] Wills Act 1837, s 18; W. Ward, *A Treatise on Legacies: Or Bequests of Personal Property*, (J. S. Littell, Philadelphia 1837) at 275; W. Roberts, *A Treatise on the Law of Wills and Codicils*, volume 2, (Joseph Butterworth and Son, London 1815) at 355.

[1780] *Christopher v Christopher* (1771) 1 Dickens 445 at 450; 21 Eng. Rep. 343 at 344; *Brady v Cubitt* (1778) 1 Dougl. 31 at 37; 99 Eng. Rep. 24 at 27; E. Darfee, "Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator" (1942) 40 (3) *Michigan Law Review*, 406 at 406.

[1781] 1 Eq. Ca. Abr. 413; 21 Eng. Rep. 1142.

[1782] 1 Eq. Ca. Abr. 413; 21 Eng. Rep. 1142; *Jackson v Hurlock* (1764) 1 AMB 488 at 492; 27 Eng. Rep. 318 at 320; *Sheath v York* (1813) 1 V. & B. 391at 392; 35 Eng. Rep. 152 at 152.

[1783] 1 Eq. Ca. Abr. 413; 21 Eng. Rep. 1142; *Jackson v Hurlock* (1764) 1 AMB 488 at 492; 27 Eng. Rep. 318 at 320; *Rickards v Mumford* (1812) 2 Phill. Ecc. 23 at 25; 161 Eng. Rep. 1066 at 1066.

[1784] *Wright v Netherwood*; *Lug v Lug*, 2 Salkeld 592; 91 Eng. Rep. 497 at 498; *Brady v Cubitt* (1778) 1 Dougl. 31 at 37; 99 Eng. Rep. 24 at 27; *Marston v Roe* (1838) 8 AD. & E. 14 at 38; 112 Eng. Rep. 742 at 751; *Talbot v Talbot* (1828) 1 Hagg. Ecc. 705 at 711; 162 Eng. Rep. 725 at 728; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 939.

[1785] *Ex parte Ilchester (Earl of)* (1803) 7 Ves. Jun. 348 at 360; 32 Eng. Rep. 142 at 146; *Marston v Roe* (1838) 8 AD. & E. 14 at 24; 112 Eng. Rep. 742 at 746; *Talbot v Talbot* (1828) 1 Hagg. Ecc. 705 at 712; 162 Eng. Rep. 725 at 728; *Johnson v Wells* (1829) 2 Hagg. Ecc. 561 at 564; 162 Eng. Rep. 957 at 958; *Wright v Netherwood*; *Lug v Lug*, 2 Salkeld 592; 91 Eng. Rep. 497 at 501; J. R. Rood, *A Treatise on the Law of Wills: Including also*

doctrine crystallised the rebuttable presumption into an automatic exaction from the estate, an approach closer to the civil law, in the presence of improvidence.[1786] The onus lay on the party contesting revocation to show a contrary intent is evident.[1787] A belief persisted that will-makers could "cut off with a shilling", as had occurred to the will-maker's sister in *Billinghurst v Vickers*[1788], despite the fact it did not reflect the matured operation of the doctrine.[1789]

The implied revocation for marriage and the birth of a child subsisted until the Wills Act 1837 explicitly abolished the doctrine granting English will-makers an unparalleled level of testamentary freedom.[1790] However, the statute did not anticipate future developments in New

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Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration, (Callaghan & Company, Chicago 1904) at 234, 242; S. Toller, *Law of Executors and Administrators*, third American from the sixth London edition, (Published by John Grigg, Philadelphia 1829) at 17; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 937- 938; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 394; J. Comyns, *A Digest of the Laws of England*, fifth edition, volume 4, (J. Laval and Samuel F. Bradford, Philadelphia 1824) at 131; A. Alston, "Wills made in Contemplation of Marriage" (1980) 4 (2) *Otago Law Review*, 133 at 133.

[1786] R. E. Mathews, "Trends in the Power to Disinherit Children" (1930) 16 (1) *American Bar Association Journal*, 293 at 293.

[1787] *Marston v Roe* (1838) 8 AD. & E. 14 at 38; 112 Eng. Rep. 742 at 751; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 337.

[1788] (1810) 1 Phill. Ecc. 447; 161 Eng. Rep. 1039.

[1789] (1810) 1 Phill. Ecc. 447 at 476; 161 Eng. Rep. 1039 at 1049; *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 476; 161 Eng. Rep. 1039 at 1049; J. C. H. Flood, *An elementary Treatise on the law relating to Wills of Personal Property and some subjects appertaining thereto*, (William Maxell & Son, London 1877) at 71; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 264; R. Croucher, "Quirks and curios: Rescued footnotes in the history of succession law" (2009) 83 (9) *Australian Law Journal*, 609 at 618 but see W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 503.

[1790] Wills Act 1837, s 19; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 169; E. Darfee, "Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator" (1942) 40 (3) *Michigan Law Review*, 406 at 407; R. E. Mathews, "Trends in the Power to Disinherit Children" (1930) 16 (1) *American Bar Association Journal*, 293 at 293; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 249; E. Jenks, *The Book of English Law: As at the End of the Year 1935*, fourth edition, (John Murray, London, 1936) at 376; A. W. Scott, "Control of Property by the Dead" (1917) 65 (6) *University of Pennsylvania Law Review and American Law Register*, 527 at 530; O. K. McMurray, *Liberty of Testation and some Modern Limitations Thereon*, in *Celebration Legal Essays, By Various Authors To Mark the Twenty-fifth Year of Service of John H. Wigmore*, (North Western University Press, Chicago 1919) at 553; J. Williams, *Wills and Intestate Succession*, (Adam and Charles Black, London 1891) at 6; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 489; W. M. Geldart, *Elements of English Law*, (Williams & Norgate, London 1911) at 164; N. Cox, "Conditional Gifts and Freedom of Testation: Time for a Review?" (2001) 9 (1) *Waikato Law Review*, 24 at 30; F. du toit, "The Limits Imposed upon the Freedom of Attestation by the Boni Mores: Lessons from Common Law and Civil Law (Continental) Legal Systems" (2000) 11 *Stellenbosch*, 358 at 360.

Zealand law that introduced an Act to curb the negative aspects of testamentary freedom.[1791] The Testator's Family Maintenance Act 1900 aimed to curtail testamentary freedom, in response to social disquiet created by the perception of "cutting off with a shilling", by granting an action against wills failing to provide proper maintenance and support for spouses and issue.[1792] Parliament favoured granting an action that gave the courts discretion and rejected an attempt to introduce the rule of thirds modelled on the existing Scottish practice or fixing some other legitimate portion in the manner of civil law jurisdictions.[1793] In *Allardice v Allardice*[1794], Edwards J stated a will-maker must provide for 'proper maintenance and support' for spouse and issue or they would be "guilty of a manifest breach of moral duty".[1795] This pioneering statute inspired a re-emergence of an action against inofficious wills within a number of common law jurisdictions and introduced the seeds to develop a form of 'forced heirship'.[1796] It aimed to curb the same excesses of testamentary freedom that the doctrine of implied revocation developed to cure.

[1791] N. S. Peart, "The Direction of the Family Protection Act 1955" [1994] *New Zealand Recent Law Review*, 193 at 193; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 489.

[1792] Testator's Family Maintenance Act 1900, s 2; *Williams v Aucutt* [2000] 2 NZLR 479 at [33]; R.C. Brashier, "Disinheritance and the Modern Family" (1994) 45 (1) *Case Western Reserve Law Review*, 83 at 121; R. Croucher, "Quirks and curios: Rescued footnotes in the history of succession law" (2009) 83 (9) *Australian Law Journal*, 609 at 617; N. Peart, "Towards A Concept of Family Property in New Zealand" (1996) 10 (1) *International Journal of Law, Policy and the Family*, 105 at 108; J. Caldwell, "Family Protection Claims by Adult children: what is going on?" (2008) 6 (1) *New Zealand Family Law Journal* 4 at 4; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 489; N. Cox, "Conditional Gifts and Freedom of Testation: Time for a Review?" (2001) 9 (1) *Waikato Law Review*, 24 at 30.

[1793] R. Atherton, "New Zealand's Testator's Family Maintenance Act of 1900 – The Stouts, the Women's Movement and Political compromise" (1990) 7 (2) *Otago Law Review*, 202 at 208, 211, 213; N. Peart, "New Zealand's Succession Law: Subverting Reasonable Expectations" (2008) 37 (4) *Common Law World Revue*, 356 at 361; R. Croucher, 'Quirks and curios: Rescued footnotes in the history of succession law' (2009) 83 (9) *Australian Law Journal*, 609 at 617; N. S. Peart, "The Direction of the Family Protection Act 1955" [1994] *New Zealand Recent Law Review*, 193 at 193; R. Croucher, "Quirks and curios: Rescued footnotes in the history of succession law" (2009) 83 (9) *Australian Law Journal*, 609 at 613; N. Peart, "Towards A Concept of Family Property in New Zealand" (1996) 10 (1) *International Journal of Law, Policy and the Family*, 105 at 108; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 489; R. Sutton, N. Peart, "Testamentary Claims by Adult Children -The Agony of the "Wise and Just Testator" (2003) 10 (3) *Otago Law Review*, 385 at 386; M. S. Amos, "The Common Law and the Civil Law in the British Commonwealth of Nations" (1937) 50 (8) *Harvard Law Review*, 1249 at 1266.

[1794] (1910) 29 NZLR 959.

[1795] (1910) 29 NZLR 959 at 973; see N. S. Peart, "The Direction of the Family Protection Act 1955" [1994] *New Zealand Recent Law Review*, 193 at 194 – 195; R. Sutton, N. Peart, "Testamentary Claims by Adult Children - The Agony of the "Wise and Just Testator" (2003) 10 (3) *Otago Law Review*, 385 at 387.

[1796] *Fisher v Kirby* [2012] NZCA 310 at [107]; G. W. Keeton, L. C. B. Gower, "Freedom of Testation in English Law" (1935) 20 (2) *Iowa Law Review*, 326 at 328 – 329; N. Peart, "New Zealand Report on new Developments in Succession Law" (2010) 14 (2) *Electronic Journal of Comparative Law*, <http://www.ejcl.org/142/art142-3.pdf> at [1.3]; J. Caldwell, "Family Protection Claims by Adult children: what is going on?" (2008) 6 (1) *New Zealand Family Law Journal* 4 at 4.

The foremost kind of implied revocation in New Zealand law continues to arise from marriage alone, introduced under s 18 of the Wills Act 1837, which arguably extended the effects of coverture to both sexes, and English law later included a contemplation of marriage exception distinguishing it from the common law.[1797] New Zealand law gives greater bearing to the natural law duty owed to the spouse than to issue, which is contrary to the thrust of legal developments surrounding the earlier forms of implied revocation. Section 18 of the Wills Act 2007 states a marriage or a civil union impliedly revokes a will, except if the will-maker executes a will in contemplation of marriage that manifests either in an anticipatory clause or by clear evidence of intent through the surrounding circumstances.[1798] In *Public Trust v Stirling*[1799], the High Court indicated the basic rule has remained unchanged, even with the inclusion of the civil union, and the same controversies surrounding the contemplation of marriage continue to surround this form of implied revocation.[1800] New Zealand law goes further to protect a spouse than a child. The Property (Relationships) Act 1976 effectively curbs testamentary freedom by adding an additional layer of protection for spouses, which allows them to make an application under the Act to half the relationship property within the estate or elect to accept the legacies under a will.[1801] Section 16 of the Wills Act 2007 limits the modes of revocation despite legal recognition that a child's birth is a transitional life event and the advice tendered to review a will on such an occurrence.[1802] Nevertheless, a form of implied revocation as developed by the English courts appears to

[1797] Wills Amendment Act 1955, s 13; Law of Property Act 1925 (UK), s 117; A. Alston, "Wills made in Contemplation of Marriage" (1980) 4 (2) *Otago Law Review*, 133 at 133- 134; N. Richardson, "Wills made in Contemplation of Marriage" (2009) 6 (7) *New Zealand Family Law Journal*, 215 at 216; W. W. Buckland, A. D. McNair, F. H. Lawson (ed), *Roman Law and Common Law: A Comparison in Outline*, (Cambridge University Press, Cambridge 1965) at 168; W. Patterson, A. Tipping (ed) *The Laws of New Zealand, Will* (LexisNexis 2012, Wellington) at [74]; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 392; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 528; J. R. Rood, *A Treatise on the Law of Wills: Including also Gifts Causa Mortis and A Summary of the Law of Descent, Distribution and Administration*, (Callaghan & Company, Chicago 1904) at 239; T. Mackenzie, *Studies in Roman Law with Comparative Views of the Laws of France England and Scotland*, third edition, (William Blackwood and Sons, Edinburgh and London 1870) at 264.

[1798] See Wills Act 2007, s 16 (c); W. Patterson, A. Tipping (ed), *The Laws of New Zealand, Will* (LexisNexis 2012, Wellington) at [74]; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 392; N. Peart "Where there is a Will, There is a Way - A New Wills Act for New Zealand" (2007) 15 (1) *Waikato Law Review*, 26 at 40.

[1799] (2009) NZFLR 976.

[1800] (2009) NZFLR 976 at 979; N. Richardson, "Wills made in Contemplation of Marriage" (2009) 6 (7) *New Zealand Family Law Journal*, 215 at 215.

[1801] N. Peart, "New Zealand Report on new Developments in Succession Law" (2010) 14 (2) *Electronic Journal of Comparative Law*, <http://www.ejcl.org/142/art142-3.pdf> at [1.2.2], [1.3]; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 541; N. Peart "Where there is a Will, There is a Way - A New Wills Act for New Zealand" (2007) 15 (1) *Waikato Law Review*, 26 at 42

[1802] *B v Ministry of Social Development* (2008) NFLR 1012 at 1026; *Public Trust v Stirling* (2009) NZFLR 976 at 979, 984; W*ood-Luxford v Wood* [2012] NZCA 377at [51], [62].

have indirectly penetrated New Zealand law in recognition of a natural duty owed to issue and other dependents.

The Family Protection Act 1955 appears to have introduced a concept of 'forced heirship' into New Zealand law by permitting a person to whom the deceased owes a moral duty, particularly spouse and issue, to bring an action against the estate without any special need for maintenance and support.[1803] The High Court places itself in the shoes of a 'just and wise testator' and balances the competing claims against prevailing social concerns when apportioning the claimant's entitlement.[1804] In *Auckland City Mission v Brown*[1805], the Court of Appeal stated the court's role is to weigh the duty owed to the claimant against the entitlements of other legatees and reduced the amount left by the will-maker in a charitable bequest to satisfy an adult child's claim for moral support.[1806] This has the effect of partially revoking legacies left to beneficiaries with a weaker moral claim. Associate Professor Caldwell suggests the High Court re-writes wills to satisfy a legally imposed moral duty contrary to the will-maker's intention and dismisses judicial commentary denying any fetter placed on testamentary freedom.[1807] Caldwell cites *Strand v Strand*[1808] as an admission that judges significantly alter wills and considers it a helpful acknowledgement towards conceptualising testamentary freedom in New Zealand and relieving public uncertainty.[1809] The learned author suggests court practice indicates a legacy consisting of ten percent of the

[1803] Family Protection Act 1955, 4 (1); *Fisher v Kirby* [2012] NZCA 310 at [106]; *Little v Angus* [1981] 1 NZLR 126 at 127; N. Peart, "New Zealand Report on new Developments in Succession Law" (2010) 14 (2) *Electronic Journal of Comparative Law*, <http://www.ejcl.org/142/art142-3.pdf> at 1.3; N. Peart, 'Forced Heirship in New Zealand' (1996) 2 (4) *Butterworths Family Law Journal* 97 at 97; B. Patterson, N. Peart, "Testamentary Freedom" [2006] (2) *New Zealand Law Journal*, 46 at 46; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 505; R. Sutton, N. Peart, "Testamentary Claims by Adult Children -The Agony of the "Wise and Just Testator" (2003) 10 (3) *Otago Law Review*, 385 at 385.

[1804] *Williams v Aucutt* [2000] 2 NZLR 479 at [24], [36]; *Auckland City Mission v Brown* (2002) 2 NZLR 650 at [45]; *Little v Angus* (1981) 1 NZLR 126 at 127; *Re Leonard* [1985] 2 NZLR 88 at 92; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 504; R. Sutton, N. Peart, "Testamentary Claims by Adult Children -The Agony of the "Wise and Just Testator" (2003) 10 (3) *Otago Law Review*, 385 at 388.

[1805] [2002] 2 NZLR 650.

[1806] [2002] 2 NZLR 650 at [42], [45] – [46]; see *Williams v Aucutt* [2000] 2 NZLR 479 at [38]; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 504

[1807] J. Caldwell, "Family Protection Claims by Adult children: what is going on?" (2008) 6 (1) *New Zealand Family Law Journal* 4 at 4; see *Fisher v Kirby* [2012] NZCA 310 at [106]; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 492; V. Grainer, "Is Family Protection and Question of Moral Duty?" (1994) 24 (2) *Victoria University of Wellington Law Review*, 141 at 142, 148.

[1808] (2004) NZFLR 452.

[1809] J. Caldwell, "Family Protection Claims by Adult children: what is going on?" (2008) 6 (1) *New Zealand Family Law Journal* 4 at 4; (2004) NZFLR 452 at 464 see N. Peart, "Towards A Concept of Family Property in New Zealand" (1996) 10 (1) *International Journal of Law, Policy and the Family*, 105 at 126.

estate is a sound starting point for discharging a moral duty.[1810] Notably this deduction alongside a claim under the Property (Relationships) Act could result in a two-third exaction from the state in the manner of the rule of thirds. Acknowledgement of a partial revocation would assist will-makers to include anticipatory clauses, in the manner of civil law testators, to avoid neglecting their moral duty by passing over their children either living or posthumous.

The present state of New Zealand testamentary succession appears conflicted between ensuring will-makers carry out their natural law duty to protect spouse and issue, and the aim of the Wills Act to give effect to the will-maker's wishes.[1811] This restraint on testamentary freedom aims to prevent improvidence by favouring familial property rights has the same underpinning considerations that guide modern civil law forced heirship regimes.[1812] Peart observes the availability of an action under the Family Protection Act is analogous to the *querela inofficiosi testamenti* with the same aim of protecting family interests by curbing the rigours of absolute testamentary freedom by allowing children an action against an undutiful will.[1813] She notes, "this complaint with some changes, particularly in the proportions, was included in the *Corpus Iuris Civilis* by Justinian, because he regarded the legitimate portion as a parental duty arising from the Law of Nature". Cod. 3.28.36 resonates with the forced heirship scheme because it allows the abatement of legacies to satisfy the moral duty under the rationale that the operation of law ought to correct any deficiencies.[1814] The author also suggests the logical outcome of this legal development is that New Zealand law may follow civil law jurisdictions by introducing an automatic division of a fixed portion from the

[1810] J. Caldwell, "Family Protection Claims by Adult children: what is going on?" (2008) 6 (1) *New Zealand Family Law Journal* 4 at 7 – 8; R. Sutton, N. Peart, "Testamentary Claims by Adult Children -The Agony of the "Wise and Just Testator" (2003) 10 (3) *Otago Law Review*, 385 at 410.
[1811] N. Peart, "New Zealand Report on new Developments in Succession Law" (2010) 14 (2) *Electronic Journal of Comparative Law*, <http://www.ejcl.org/142/art142-3.pdf> at [1.2.6]; N. Richardson, "Wills made in Contemplation of Marriage" (2009) 6 (7) *New Zealand Family Law Journal*, 215 at 216; N. Peart, "Towards A Concept of Family Property in New Zealand" (1996) 10 (1) *International Journal of Law, Policy and the Family*, 105 at 125.
[1812] N. Peart, "Towards A Concept of Family Property in New Zealand" (1996) 10 (1) *International Journal of Law, Policy and the Family*, 105 at 111; N. Peart, "New Zealand's Succession Law: Subverting Reasonable Expectations" (2008) 37 (4) *Common Law World Revue*, 356 at 366; R. J. Scalise Jr., "Undue Influence and the Law of Wills: A Comparative Analysis" (2008) 19 (1) *Duke Journal of Comparative & International Law*, 41 at 82; B. Patterson, N. Peart, "Testamentary Freedom " [2006] (2) *New Zealand Law Journal* 46 at 47.
[1813] Inst. 2.18.2; N. Peart, 'Forced Heirship in New Zealand' (1996) 2 (4) *Butterworths Family Law Journal* 97 at 99; C. S. Rayment, "Legal Fictions regarding Disinheritance" (1953) 46 (7) *The Classical Weekly*, 101 at 101; N. S. Peart, "The Direction of the Family Protection Act 1955" [1994] *New Zealand Recent Law Review*, 193 at 210; K. S. Spaht, K. V. Lorio, C. Picou, C. Samuel, F. W. Swaim, Jr., "The New Forced Heirship Legislation: A Regrettable 'Revolution'" (1990) 50 (3) *Louisiana Law Review*, 411 at 486.
[1814] Cod. 3.28.30; Cod. 3.28.31; Cod. 3.28.32.

estate.[1815] Furthermore, the equitable nature of the regime is similar to a *bonorum possessio contra tabulas* as a grant of inheritance by a court. Nonetheless, a constraint on testamentary freedom has never been far from Roman or English testamentary jurisprudence and New Zealand law appears to be undergoing the same evolution.[1816] It is notable that the decision in *Wood-Luxford v Wood*[1817] denies an unborn child a claim under the Family Protection Act, departing from civil law principles and the doctrine of implied revocation, which suggests a child must be born before the Act will recognise a moral duty.[1818] This seems undesirable and future amendments may wish to reflect on the civil law position on posthumous children.[1819]

The court's power to 're-write' wills arises from an operation of law resulting in a partial revocation of the will-maker's will. Peart and Sutton suggest, "There is so much moralisation in this area already that comment from us about principle and expedient would add unnecessarily to the surplus".[1820] However, New Zealand courts appear to have adopted the same underlying rationale guiding civilian practice and have effectively introduced a partial revocation resulting from the birth of a child by asserting the legal presumption that a wise and just will-maker does not neglect their moral duty.[1821] A deeper reflection on the state of New Zealand alongside civil law principles, particularly concerning fixed portions and disinheritance, could alleviate perceptions of social dissonance attached to 'remaking wills'.[1822] New Zealand law creates a more onerous duty than the civil law or previous English practice because departure from the moral duty, or disinheritance, is seemingly

[1815] N. Peart, "New Zealand's Succession Law: Subverting Reasonable Expectations" (2008) 37 (4) *Common Law World Revue*, 356 at 372 but see Dig. 25.3.5.7.
[1816] N. Peart, "Forced Heirship in New Zealand" (1996) 2 (4) *Butterworths Family Law Journal*, 97 at 103; J. Caldwell, "Family Protection Claims by Adult children: what is going on?" (2008) 6 (1) *New Zealand Family Law Journal* 4 at 9 See S. Blumenthal, "The Deviance Of The Will: Policing The Bounds Of Testamentary Freedom In Nineteenth-Century America" (2006) 119 (4) *Harvard Law Review*, 960 at 967, 969; A. G. Lang, "Formality v Intention: Wills in an Australian Supermarket" (1986) 15 (1) *Melbourne University Law Review*, 82 at 82 – 83; R. Sutton, N. Peart, "Testamentary Claims by Adult Children -The Agony of the "Wise and Just Testator" (2003) 10 (3) *Otago Law Review*, 385 at 394; R.C. Brashier, "Disinheritance and the Modern Family" (1994) 45 (1) *Case Western Reserve Law Review*, 83 at 181.
[1817] [2012] NZCA 377.
[1818] [2012] NZCA 377 at [61].
[1819] See *In Re Brown (Deceased), Brown v Brown* (1933) NZLR 114 at 118.
[1820] R. Sutton, N. Peart, "Testamentary Claims by Adult Children -The Agony of the "Wise and Just Testator" (2003) 10 (3) *Otago Law Review*, 385 at 410.
[1821] R. Sutton, N. Peart, "Testamentary Claims by Adult Children -The Agony of the "Wise and Just Testator" (2003) 10 (3) *Otago Law Review*, 385 at 385.
[1822] J. Caldwell, "Family Protection Claims by Adult children: what is going on?" (2008) 6 (1) *New Zealand Family Law Journal* 4 at 9; J. G. Fleming, "Changing Functions of Succession Laws" (1977) 26 (2) T*he American Journal of Comparative Law*, 233 at 237.

impossible despite the absence of fixed portions.[1823] In *Re Vincent v Lewis*[1824], Randerson J recognised a "virtual total breakdown in their [parent/child] relationship" and considered the reprehensible conduct of the child as "vindictive and nasty"; yet held the will-maker failed to meet their moral duty despite including the child in their will and possible advancements during the will-maker's lifetime.[1825] The judge outlined nine principles to guide a court that included the controversial reassurance that "the court's power does not extend to rewriting a will because of a perception it is unfair".[1826] Nonetheless, the inclusion of an irrebuttable natural law duty owed by a parent to their child has the effect of rewriting wills and appears to prevent any form of disinheritance.[1827]

The direct introduction of Nov. 115.3 would alleviate the unfairness associated with effectively re-writing wills by preventing any form of disinheritance. Nov. 115.3 states:

> "No [testator] shall be permitted to pass over or disinherit a son, daughter, or other descendants in his or her testament, although they have already given them the required legal portion by gift, legacy, or fideicommissum, unless they are show to have been so ungrateful and the ascendants specially mention the fact of such ingratitude in the testament"

This principle recognises a child can breach their moral duty owed by natural law to their parent, and the rationale of Nov. 115.3 once formed part of English law.[1828] The conduct of the child in *Vincent* satisfies a number of criteria for disinheritance under this constitution, considered under the clear intentions of the will-maker, and a court with a similar set of facts that observed the principle would likely reach a different outcome.[1829] The positive experiences of Louisiana with a system of forced heirship, comparable to New Zealand law,

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[1823] N. Peart, "New Zealand Report on new Developments in Succession Law" (2010) 14 (2) *Electronic Journal of Comparative Law*, <http://www.ejcl.org/142/art142-3.pdf> at 1.3.
[1824] (2006) NZFLR 812.
[1825] (2006) NZFLR 812 at [37] [41], [46], [88].
[1826] (2006) NZFLR 812 at [81] see *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 494; 161 Eng. Rep. 1039 at 1055.
[1827] R. J. Sutton, "Law Commission Succession Project: Communal Family Property" (1995) 25 (1) *Victoria University of Wellington Law Review*, 53 at 57.
[1828] Nov. 89. 13; Dig. 25.3.5.2; *Lectura* in F. De Zulueta, P. Stein, *The teaching of Roman law in England around 1200*, (Selden Society, London, 1990) at 47; F. Ludovici, *Doctrina Pandectarum*, twelfth edition, (Orphannotrophei, Halae Magdeburgicae 1769) at 412; H. Swinburne, *A Treatise of Testaments and Last Wills* seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 225 see W. Blackstone, *Commentaries on the Laws of England*, volume 1, (Clarendon Press, Oxford 1765) at 442.
[1829] See Nov. 115.3.1; Nov.115.3.2; Nov. 115.3.7.

could provide a valuable model for advocating future amendments to the Family Protection Act.[1830] Article 1621A of the Louisiana Civil Code reproduced and modified Nov. 115.3 to meet modern demands to curtail the rigours of forced heirship by allowing disinheritance when accompanied by a just causes.[1831] It is also likely that *Vincent* would also have been decided differently in Louisiana.[1832] The response from Louisianan academics that "we feel that the portion of a decedent's estate reserved for descendants is of such importance to the citizens of this state that it is worthy of our passion and zeal" reflects the aims of the Family Protection Act and court practice.[1833] The power to disinherit a child addresses the undesirability of imposing a strict moral duty by allowing a limited departure from the forced heirship regime currently existing in New Zealand law.

[1830] Art. 1621A. 1, 2, 8; W. W. Howe, *Studies in the Civil Law and its Relations to the Law of England and America*, (Little, Brown and Company, Boston 1896) at 237; C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 266; A. W. Scott, "Control of Property by the Dead" (1917) 65 (6) *University of Pennsylvania Law Review and American Law Register*, 527 at 531; R. C. Fergus, "The influence of the Eighteenth Novel of Justinian II" (1897) 7 (2) *The Yale Law Journal*, 67 at 73; S. Blumenthal, "The Deviance Of The Will: Policing The Bounds Of Testamentary Freedom In Nineteenth-Century America" (2006) 119 (4) *Harvard Law Review*, 960 at 972; K. S. Spaht, K. V. Lorio, C. Picou, C. Samuel, F. W. Swaim, Jr., "The New Forced Heirship Legislation: A Regrettable 'Revolution'" (1990) 50 (3) *Louisiana Law Review*, 411 at 419; R.C. Brashier, "Disinheritance and the Modern Family" (1994) 45 (1) *Case Western Reserve Law Review*, 83 at 118.

[1831] M. Nathan, Jr., "Forced Heirship: The Unheralded "New" Disinherison Rules" (2000) 74 (3) *Tulane Law Review*, 1027 at 1027; R. J. Scalise Jr., "Undue Influence and the Law of Wills: A Comparative Analysis" (2008) 19 (1) *Duke Journal of Comparative & International Law*, 41 at 82; K. S. Spaht, K. V. Lorio, C. Picou, C. Samuel, F. W. Swaim, Jr., "The New Forced Heirship Legislation: A Regrettable 'Revolution'" (1990) 50 (3) *Louisiana Law Review*, 411 at 445 – 447; R.C. Brashier, "Disinheritance and the Modern Family" (1994) 45 (1) *Case Western Reserve Law Review*, 83 at 120; see Dig. 25.3.5.11.

[1832] See Art. 1621A. 1, 2, 8.

[1833] K. S. Spaht, K. V. Lorio, C. Picou, C. Samuel, F. W. Swaim, Jr., "The New Forced Heirship Legislation: A Regrettable 'Revolution'" (1990) 50 (3) *Louisiana Law Review*, 411 at 411.

11. Conclusion

Legal historians use an oft-cited quote from Goethe's conversations to compare the civil law's influence on common law jurisdictions to a duck because "sometimes it is visible, swimming prominently on the surface of the water; at other times it is hidden, diving amid the depths. But it is always there".[1834] Jurists often downplayed the common law's profound debt to the civil law and boasted about English law's immunity without a thorough examination.[1835] Nevertheless, even a cursory examination of English case law reveals a civilian influence in areas outside former ecclesiastical cognisance.[1836] New Zealand, like other English colonies, experienced a second-hand reception of the civil law through civilian treatise and the principles already forming part of our English legal heritage.[1837] The canon law also exercised a profound influence on New Zealand's legal development and its influence continues to resonate in modern systems.[1838] Sherman observes the ecclesiastical courts are responsible for the civil principles incorporated into modern succession.[1839] This observation is true for New Zealand law, and civil law elements continue to permeate the Wills Act 2007 and other facets of testamentary succession. In *Public Trustee v Sheath*[1840] Hosking J stated, "in view of the ecclesiastical law now applied by the Court in what may be

[1834] D. Johnston, "The Renewal of the Old" (1997) 56 (1) *Cambridge Law Journal* 80 at 81.
[1835] C. P. Sherman, *Roman Law in the Modern World*, volume 2, (The Boston Book Company, Boston 1917) at 3; H. E. Holmes, "The debt of the Common law to the Civil law" (1912) 6 (2) *Maine Law Review*, 57 at 61; Carl Guterbock, *Bracton and His Relation to the Roman Law: A Contribution to the History of the Roman Law in the Ages*, Translated by Brinton Coxe, (Fred B. Rothman & Co, Littleton 1979) at 13; J. Reeves, W. F. Finlason, *Reeves's History of the English Law: From the Time of the Romans of the End of the Reign of Elizabeth*, volume 1 (M. Murphy, Philadelphia 1880) at cxli; D. M. Rabban, "The Historiography of the Common Law" (2003) 28 (4) *Law & Social Inquiry,* 1161 at 1191; J. Maclaren, *Roman Law in English Jurisprudence*, (William Briggs, Toronto 1888) at 5.
[1836] *Coggs v Bernard*, 2 Ld. Raym. 909 at 915; 92 Eng. Rep. 107 at 111*;Acton v Blundell* (1843) 12 M. & W. 324 at 334; 152 Eng. Rep. 1223 at 1227; *May v Burdett* (1846) 9 Q.B 101 at 107; 115 Eng. Rep. 1213 at 1216; *Wiltsbear v Cottrell* (1853) 1 EL. & BL. 674 at 684; 118 Eng. Rep. 589 at 593; *Ockenden v Henly* (1853) EL. BL. & EL. 485 at 492; 120 Eng. Rep. 590 at 593; *Taylor v Caldwell* (1863) 3 B. & S. 826 at 834; 122 Eng. Rep. 309 at 312; J. Lee, "*Confusio*: Reference to Roman Law in the House of Lords and the Development of English Private Law" (2009) 5 (1) *Roman Legal Tradition*, 22 at 38.
[1837] C. P. Sherman, "Roman law in the United States: Its Effects on the American Common Law" (1934) 14 (7) *Brooklyn University Review*, 582 at 583; H. E. Yntema, "Roman Law and its Influence on Western Civilization" (195) 35 (1) *Cornell Law Quarterly*, 77 at 77, 88; W. S. Holdsworth, "The Reception of Roman Law in the Sixteenth Century I" (1911) 27 (4) *The Law Quarterly Review*, 387 at 388; C. P. Sherman, *Roman Law in the Modern World*, volume 1, (The Boston Book Company, Boston 1917) at 383; C. Shammas, "English Inheritance Law and Its Transfer to the Colonies" (1987) 31 (2) T*he American Journal of Legal History*, 145 at 145.
[1838] C. J. Reid Jr., J. Witte, "In the Steps of Gratian: Writing the history of canon law in the 1990s" (1999) 48 (2) *Emory Law Journal*, 647 at 647; W. W. Bassett, "Canon Law and the Common Law" (1978) 29 (6) *Hastings Law Journal*, 1383 at 1388; A. Gauthier, *Roman Law and its Contribution to the Development of the Canon Law*, second edition, (Faculty of Canon Law Saint Paul University, Ottawa 1996) at 1- 2.
[1839] C. P. Sherman, "A brief History of Imperial Roman Canon Law" (1919) 7 (2) *California Law Review*, 93 at 94.
[1840] [1918] NZLR 129.

called its probate jurisdiction, a person dies intestate either in fact or in law. He dies intestate in fact if he has made no will. This is a common meaning".[1841] His statement follows the principle in Dig. 50.17.89 and acknowledges the legacy of civilian jurisprudence inherent within our legal system.

The duck analogy is useful to describe the civil law's influence on testamentary succession because it is sometimes visible and mostly hidden. The civil law's influence on the evolution of testamentary succession is either evident from an examination of the *Corpus Iuris Civilis*, or requires insight from the practice of English courts and the civilian jurists. There is little contention to state that the civil law testament is the ancestor of the modern will.[1842] Nonetheless, the testament's rigid formalism is a stark contrast to the canonical will, designed to facilitate legacies rather than institute an heir, which ultimately supplanted native methods and became England's principal testamentary vehicle.[1843] Time has not changed the basic structure of the canonical will and s 11 (4) of the Wills Act 2007 continues to require two witnesses to attest a will.[1844] However, the civilians practising in the ecclesiastical courts realised the adoption of civil law principles were necessary to buffer the canonical will to make it worthy of a primary testamentary instrument. Their efforts furnished a will definable as: a just sentence of our will concerning our things after we die, appointing an executor, and by its nature is ambulatory and revocable. This definition incorporates all the fundamental elements of the will found in New Zealand today.

There are aspects of testamentary succession where the influence of civil law is clearly discernable in New Zealand law. The canon law's reduced witness requirements did not prevent civilians applying civil law principles directly to questions of their capacity and credibility that now form part of the common law.[1845] Their basic division of wills into

[1841] [1918] NZLR 129 at 147.
[1842] A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 280; W. C. Morey, *Outlines of Roman Law Comprising its Historical Growth and General Principles*, fourth edition, (Fred B. Rothman & Co, Littleton 1985) at 319.
[1843] M. M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, (Pontifical Institute of Mediaeval Studies, Toronto 1963) at, at 140- 141, 162; M. C. Mirow, "Last Wills and Testaments in England 1500 – 1800" (1993) 60 (1) *Recueils de la Societe Jean Bodin pour l"Histoire Comparative des Institutions*, 47 at 69; M. M. Sheehan, J. K. Farge (ed), *Marriage, Family, and Law in Medieval Europe: Collected Studies*, (University of Toronto Press, Toronto 1996) at 316.
[1844] Matthew 18:16; X. 3.26.10; Wills Act 2007, s 11 (4).
[1845] Inst. 2.10.7; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 122; T. Ridley, *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land*, (Printed for the Company of

written and nuncupative, unprivileged and privileged instruments even persists in the Wills Act 2007. The requirement that will-makers must complete their wills in *uno contextu actu* also continues to form a significant part of the will making ceremony.[1846] English legislative innovations drew on civil law solemnities in Cod. 6.23.21 to add a signature requirement that remains an important feature of a valid will under s 11 (3) and (4).[1847] Furthermore, the requirement in Inst. 2.12.1 that the will-maker possesses sufficient mental capacity remains an important starting point in New Zealand courts determining whether a will has manifested the requisite testamentary intent.[1848] Finally, the privileged military will is the clearest example of a civilian institution in New Zealand law, and the term 'informal testamentary actions' introduced under s 34 is unlikely to diminish its influence.[1849] It is likely our courts will face the same challenge defining 'operational service' in s 33 (1) as early English courts faced with 'on expedition'. These features of the civil law influence float at the surface of New Zealand law.

The privileged charitable bequest represents one instrument where the civil law influence ought to be easily discernable but it does not form part of the Wills Act 2007 because modern jurists treat the subject under the head of charitable trust.[1850] This is a prominent development because the charitable element reflects the original purpose of the canonical will.[1851] English

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Stationers, London 1607) at 121; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 526, 530; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 354.

[1846] Cod. 6. 23.21.1; Cod. 6.23.21.2; Dig. 28.1.21.3; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 356.

[1847] *Allen v Hill* (1725) 1 Gilb Rep 257 at 261; 25 Eng. Rep. 177 at 180; A. Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty: Being the Substance of a Course of Lectures read in the University of Dublin*, (Halsted and Voorhies, New York 1840) at 273; O. K. McMurray, *Liberty of Testation and some Modern Limitations Thereon*, in *Celebration Legal Essays, By Various Authors To Mark the Twenty-fifth Year of Service of John H. Wigmore*, (North Western University Press, Chicago 1919) at 549.

[1848] *Banks v Goodfellow* (1870) 5 Q.B. 549 at 561; (1826) 3 Add. 79 at 205; *Dew v Clark* (1826) 3 Add. 79 at 205 - 207; 162 Eng. Rep. 414 at 454; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 371- 373.

[1849] W. Patterson (ed), A Tipping (ed) *The Laws of New Zealand, Will* (LexisNexis 2012, Wellington) at [65]; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [10.14].

[1850] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 145.

[1851] Luke 11:41; St. Augustine "On forgiveness of Sins and Baptism" in St. Augustine, H. De Romestein (ed), *Nicene and Post-Nicene Fathers of the Christian Church: Anti-Pelagian Writings,* volume 5, (James Parker and Company, Oxford 1896) at 21; S. MacCormack, "Sin, Citizenship, and the Salvation of Souls: The Impact of Christian Priorities on Late-Roman and Post-Roman Society" (1997) 39 (4) *Comparative Studies in Society and History*, 644 at 668, 673; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 279; R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 390.

jurists buffered charitable bequests with a privileged status derived from the civil law, which continues to give them a unique position in New Zealand law.[1852] However, modern jurists have changed the motive behind the charitable trust as a gift to benefit a beneficiary rather than a bequest *ad pias causas* to benefit the will-maker's soul.[1853] Nonetheless, the modern treatment of these gifts under the head of trust does not diminish the fact the civil law had a profound influence on this aspect of law originally conceived under the rules of testamentary succession. Chancery's almost "*verbatim*" use of civil law principles now form part of New Zealand law, and their privileged position is justified by the underpinning rationale that their performance is in the public interest.[1854] These gifts remain characterised by their perpetual existence granted to them by the favour English jurists gave to Cod. 1.3.32.7 over the later Nov. 131.13.1, which indicates a court using civil law principles is not bound to adhere to the temporal order of Justinian's enactments.[1855] Furthermore, the civil law influence on modern law ensures these gifts do not fail for uncertainty and the cy-pres doctrine recognises their perpetual nature is fictitious in practice.[1856]

The majority of civil law principles that have influenced modern testamentary succession are not easily discernable because they no longer retain their original characteristics. A prominent example is the ability to revoke a will by the execution of a subsequent instrument, which is a fundamental aspect of the ambulatory quality of both the canonical will and the

[1852] Cod. 1.3.45.6; Cicero. *De Oratore*, 1.8; 2.16; *Morice v Durham* (*The Bishop of*) (1805) 10 Ves. Jun. 522 at 531, 540; 32 Eng. Rep. 947 at 951, 954; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 145, 153.
[1853] *Morice v Durham* (*The Bishop of*) (1805) 10 Ves. Jun. 522 at 531, 540; 32 Eng. Rep. 947 at 948; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 153 – 155.
[1854] 43 Eliz. I, c. 4; G. Jones, *History of the Law of Charity*, (Cambridge University Press, London 1969) at 6; R. H. Helmholz "The Law Of Charity in the Ecclesiastical Courts" in P. Hoskin, C. Brooke, Barrie Dobson (eds.) *Studies in the history of Medieval religion: The foundations of mediaeval English ecclesiastical history. Studies presented to David Smith*, (The Boydell Press, Woolbridge 2005) at 117, 120 – 121; W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, (The Lawyers Cooperative Publishing Co, New York 1938) at 295; R. Feenstra "Foundations in Continental Law since the 12th Century: The Legal Person Concept and Trust like Devises" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 273; W. R. A. Boyle, *A Practical Treatise on the Law of Charities* (Saunders and Benning, London 1837) at v; C. P. Sherman, "A brief History of Imperial Roman Canon Law" (1919) 7 (2) *California Law Review*, 93 at 94; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 149 – 155.
[1855] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 145 See Cod. 1.17.1.10.
[1856] Cod. 1.3.48; Cod. 6.50.1; Nov. 131.11.2; Nov. 131.9; *White v White* (1778) 1 Bro. C. C. 12 at 16; 28 Eng. Rep. 955 at 957; *Attorney General v Pyle* (1738) 1 Atk 435 at 436; 26 Eng. Rep. 278 at 279; *Moggridge v Thackwell* (1802) 7 Ves. Jun. 35 at 69, 77, 83; 32 Eng. Rep. 15 at 26, 29, 31; *Mills v Farmer* (1811) 19 Ves. Jun. 483 at 488; 34 Eng. Rep. 595 at 596; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 1, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 317b; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 188 – 189.

testament.[1857] This principle is observed in s 16 (1) (a) of the Wills Act 2007 and is a clear example of a civil law introduction into New Zealand law. However, the civilians modified the rule to hold the execution of a fresh instrument without an explicit revocation clause only implicitly revokes to the degree that the two instruments are incompatible.[1858] This rule is an example of the ecclesiastical courts using civil law principles, in a manner contrary to the purpose of the testament, which have formed modern practice.[1859] An additional example is s 16 (e), (f) of the Act returning to a civilian innovation that a will-maker may revoke a will through intention alone, without emphasising the physical Act, in the same manner as testator's could revoke legacies in a testament.[1860] Finally, the combination of two passages from the *Institutes* by civilian jurists disqualifying interested legatees from attesting for their own benefit continues to underlie s 13 (1) as a presumption protecting the integrity of the modern will.[1861] An exercise of merely holding the Wills Act 2007 against the text of the

[1857] Dig. 34.4.17; Inst. 2.17.2; Nov. 107.2; *Drummond v Parish* (1843) 3 Curt. 522 at 528; 163 Eng. Rep. 812 at 814; *Cutto v Gilbert* (1854) 9 Moore 130 at 144; 14 Eng. Rep. 247 at 253; *Berkenshaw v Gilbert* (1774) Loft 466 at 468; 98 Eng. Rep. 750 at 751; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 2, (Elisabeth Lynch, Dublin 1793) at 523 -524; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 30; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 303; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [2.2].

[1858] Wills Act 2007, s 16 (a), (b); *Helyar v Helyar* (1754) 1 Lee 472; 161 Eng. Rep. 174; G. Gilbert, *The Law of Executions. To Which are added, the History and Practice of the Court of King's Bench; And Some Cases Touching the Wills of Lands and Goods*, (Majefty's Law-Printer, for W. Owen near Temple Bar 1763) at 421; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 389.

[1859] *Moore v Moore* (1817) 1 Phill. Ecc. 406 at 415; 161 Eng. Rep. 1026 at 1028; *Wright v Netherwood*; *Lug v Lug*, 2 Salkeld 593; 91 Eng. Rep. 497 at 502; *Re Archibald* (1992) 2 NZLR 109 at 114; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 390 see Inst. 2.17.7.

[1860] Dig. 29.1.15.1; *Moore v Moore* (1817) 1 Phill. Ecc. 406 at 423 - 424; 161 Eng. Rep. 1026 at 1027, 1031 - 1032; *Rickards v Mumford* (1812) 2 Phill. Ecc. 23 at 24; 161 Eng. Rep. 1066 at 1066; *Moore v De La Torre* (1816) 1 Phill. Ecc. 375 at 401; 161 Eng. Rep. 1016 at 1024; *Helyar v Helyar* (1754) 1 Lee 472 at 514; 161 Eng. Rep. 174 at 190; R. Burn, R. Phillimore (ed), *The Ecclesiastical law*, ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 242; J. Ayliffe, *Paregon Juris Canonici Anglicani*, (Printed by D. Leach, London 1726) at 142; T. M. Wentworth, *The Office and Duty of Executors*, (Printed by the Assigns of Richard and Edward Atkins, London 1589) at 37; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 935; T. Rufner, "Testamentary formalities in early modern Europe" in K. G. Creid, M. J. Dewall, R. Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities*, volume 1, (Oxford University Press, Oxford 2011) at 24; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 389.

[1861] Inst. 2.10.10; Inst. 2.10.11; Wills Act 2007, s 13; *Gosling c Stelwoman* The Notebook of Sir Julius Caesar in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 7; *Bubye c Smythe and Executors of Goodyear* Bi Trans. Cp. 1562/1 in R. H. Helmholz, *The Oxford History of the Laws of England, volume I: The Canon law and Ecclesiastical Jurisdiction from 597 to the 1640s,* (Oxford University Press, Oxford 2004) at 407; *Wyndham v Chetwynd* (1757) 2 Keny. 121 at 153; 96 Eng. Rep. 1128 at 1138; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 346; W. Nelson, *Lex Testamentaria: Or, A Compendious System of all the laws of England, as well before the*

Corpus Iuris Civilis would not reveal the full extent of the civil law on shaping modern rules. Therefore, modern academics are required to examine civilian practice to uncover the true extent of its influence.

The English civilians are notable for their creative use of the civil law in a manner contrary to the intent behind its principles. The ecclesiastical courts liberally construed C 13, q 2, c 4 to emphasise testamentary intent in the spirit of the canon law over civil law formalism.[1862] Nevertheless, English civilians continued to utilise civil law principles to define the ecclesiastical court's own 'dispensing power' despite being contrary to the nature of the testament.[1863] They similarly used Nov. 107 to introduce a holographic will into English law for unprivileged will-makers without carrying over its restrictions in a manner that recognises English law's evolution away from strict formalism.[1864] The introduction of the s 14 'dispensing power' under the Wills Act 2007 implicitly restates C 13, q 2, c 4 and indicates future developments will continue to relax formalities to ensure the paramount importance of testamentary intent. Therefore, the ecclesiastical experience ought to be valuable to New Zealand courts interpreting this new feature of the Wills Act 2007 and the modern will. The practice of validating suicide notes is an example where the *comparatio litterarum* as a procedural method.[1865] Future reintroduction of the power to make a nuncupative will would also appear to be a natural next step in an evolutionary pattern that emphasises intent over form.[1866]

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statute of Henry VIII as since, concerning last wills and testaments (London, Printed by E. and R. Nutt Gosling 1727) at 577; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [9.8].

[1862] R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 7, 13.

[1863] Dig. 28.1.29; *Broke, Offley et al c Barret* in R. H. Helmholz, *Three Civilian Note Books*, volume 127, (Selden Society, London, 2010) at 25; *Marston v Roe* (1838) 8 AD. & E. 14 at 32; 112 Eng. Rep. 742 at 749; *Read v Phillips (*1813) 2 Phill. Ecc. 122 at 123; 161 Eng. Rep. 1096 at 1096; *Sandford v Vaughan* (1809) 1 Phill. Ecc. 39 at 50; 161 Eng. Rep. 907 at 911; *Antrobus v Nepean* (1823) 1 Add. 399 at 406; 162 Eng. Rep. 141 at 143; *Forbes v Gordon* (1821) 3 Phill. Ecc. 614 at 628; 161 Eng. Rep. 1431 at 1436; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 200; J. Schouler, *Law of Wills, Executors, and Administrators*, fifth edition, volume 1, (Matthew Bender & Company, New York 1915) at 325; R. Burn, R. Phillimore (ed), *The Ecclesiastical law,* ninth edition, volume 4, (S. Sweet; V. & R. Stevens & G. S. Norton, London 1842) at 127; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 914, 917 – 919.

[1864] *Re Goods of Mary Keeton* (1832) 4 Hagg. Ecc. 209 at 209; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at 65; J. Godolphin, *The Orphans Legacy*, fourth edition, (Printed by the Assigns of Richard and Edward Atkins, London, 1701) at 17.

[1865] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 362.

[1866] K. Maxton, "Execution of Wills: The Formalities Considered" (1982) 1 (3) *Canterbury Law Review*, 393 at 395, 400 – 401.

The Wills Act 2007 does not devote a part to the executor and their role remains unchanged. The executor and their role in probate, both unknown to the civil law, is another example of civilians utilising seemingly inapplicable principles to breathe life into a unique institution.[1867] The civilians gave shape to the office by likening it to both the *heres* and the guardian.[1868] This association appears to have transformed the office from *caput et fundamentum testamenti* to the custodial or trustee type role of the modern executor who is akin to the *haeres fiduciarius* because they hold the estate in a form of trusteeship without deriving a personal benefit as a universal successor.[1869] A prominent question arising from this change of relationship with testamentary succession is whether the executor acts for the deceased or the beneficiaries. Dig. 27.7.30 suggests the executor's principal duty is to administer the estate rather than to the will-maker or legatees.[1870] Nonetheless, the fundamental aspects of the office have changed little over the centuries, and ecclesiastical procedures continue to resonate in New Zealand courts. Will-makers are still free to nominate an executor, who may accept or refuse their appointment, appoint co-executors, and make substitutions to ensure the successful execution of their will.[1871] Modern executors continue to admit wills to probate, are required to make inventories, collect assets, satisfy debts and legacies, and must render account before they are relieved of their office.[1872] The executor remains an essential ingredient of the will and modern uncertainties surrounding the executor's origins have not diminished the civil law's influence on this facet of testamentary succession.

The civil law influence in some aspects of testamentary succession has largely disappeared or civilians have artificially grafted principles on an English institution. The codicil is an example of an instrument with a clear civil law past that has evolved beyond its origins. The

[1867] R. H. Helmholz, *Roman Canon Law in Reformation England*, (Cambridge University Press, Cambridge, 1990) at 88.
[1868] R. J. R. Goffin, *The Testamentary Executor in England and Elsewhere*, (C.J. Clay & Sons, London, 1901) at 134.
[1869] *Hill v Mills* 1 Show. K.B. 293 at 295; 89 Eng. Rep. 582 at 583; R. Zimmermann, "Heir fiduciarius: rise and fall of the testamentary executor" in R. Helmholz (ed), R. Zimmermannn (ed), *Itinera: Trust and Treuhand in Historical Perspective*, (Duncker & Humblot, Berlin 1998) at 303; B. E. Ferme, "The Testamentary Executor in Lyndwood's Provinciale" (1989) 49 (2) *The Jurist*, 632 at 639; N. G. Jones, "Wills, Trusts and Trusting from the Statute of Uses to Lord Nottingham" (2010) 31 (3) *The Journal of Legal History*, 273 at 283, 297
[1870] See Dig. 26.7.33.
[1871] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 555-556; W. Patterson, A. Tipping (ed) *The Laws of New Zealand, Administration of Estates*, volume 1, (LexisNexis 2012, Wellington) at [194], [197], [200], [209], [212].
[1872] Administration Act 1969, s 44; *Re Stewart* [2003] 1 NZLR 809 at [24] – [25]; N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 579 – 581, 596; N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [12.2.1].

codicil's purpose is to revoke a will and the ability to make multiple codicils are the foremost features distinguishing it from a will.[1873] Nonetheless, it possesses so many elements of a will that the Wills Act 2007 simply defines it as such, which has prompted modern jurists to question its function in modern law.[1874] A second example is how civilians stretched the civil law principles to create the doctrine of implied revocation in a manner reminiscent of the *querela inofficiosi testamenti* that formed part of Roman practice.[1875] The rationale behind the doctrine to prevent inofficious wills agrees with the civil law, and the court practice appears to have followed its principles.[1876] Furthermore, it had even begun to crystallise into a form of forced heirship before s 19 of the Wills Act 1837 removed it from English law.[1877] Nonetheless, this doctrine appears to be an artificial construct that jurists grafted civil law principles onto without carrying over their original substance. Nevertheless, the same motive against inofficious wills now underpins the Family Protection Act 1955 that permits a court to revoke elements of a will to ensure the will-maker has followed their moral duty.[1878] This

[1873] Inst. 2.25.3; Cod. 6.36.6; *Hungerford v Nosworthy* (1694) Shower PC 146 at 147; 1 Eng. Rep. 99 at 100; *Reynolds v Napier* (1882) 1 NZLR 277 at 284; *Krull v Bradey* (1885) 3 NZLR 199 at 203; *Krull v Bradey* (1886) 4 NZLR 369 at 374 – 375; *Re Archibald* [1992] 2 NZLR 109 at 114; H. Swinburne, *A Treatise of Testaments and Last Wills*, seventh edition, volume 1, (Elisabeth Lynch, Dublin 1793) at15; G. Meriton, *The Touchstone of Wills, Testaments and Administrations being a Compendium of Cases and Resolutions Touching the Same*, third edition, (Printed for W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Baffet, R. Pawlet, and S. Herrick, London 1674) at 25.

[1874] N. Richardson, *Nevill's: Law of Trusts, Wills and Administration*, eleventh edition, (LexisNexis, Wellington 2013) at 388 see N. Richardson (ed), *Wills and Succession,* (LexisNexis, Wellington 2012) at [5.1].

[1875] Cod. 3.28.1; Cod. 3.28.17; *Britton* 3.9.1; *Hervey v Aston* (1738) 1 West T. Hard 350 at 358; 25 Eng. Rep. 975 at 979; *La Cloche v La Cloche* (1870) 6 Moore N.S. 383 at 404; 16 Eng. Rep. 770 at 778; *Hughes v Hughes*, Carter. 125 at 130; 124 Eng. Rep. 867 at 871; G. W. Keeton, L. C. B. Gower, "Freedom of Testation in English Law" (1935) 20 (2) *Iowa Law Review*, 326 at 338; A. Reppy, *The Ordinance of William the Conqueror (1072) - Its Implications in the Modern Law of Succession*, (Oceana Publications, New York 1954) at 199; W. Blackstone, *Commentaries on the Laws of England*, fourth edition, volume 2 (Printed for John Exshaw, Boulter Grierson, Henry Saunders, Elizabeth Lynch,and James Williams, Dublin 1771) at 492.

[1876] Nov. 18.1; Isidore *Etymologies* 5.24.9; Hostiensis, *Summa Aurea*, Liber 3, (Venice 1574) at 1041; St. Augustine, P. Schaff (ed) *Nicene and Post-Nicene Fathers of the Christian Church: City of God,* volume 2, (W.M. B. Eerdmans Publishing Company, Michigan 1956) at 401; *Christopher v Christopher* (1771) 1 Dickens 445 at 450; 21 Eng. Rep. 343 at 344; *Marston v Roe* (1838) 8 AD. & E. 14 at 38; 112 Eng. Rep. 742 at 750; *Braddyll v Jehen* (1755) 2 Lee 193 at 209; 161 Eng. Rep. 310 at 316; *Grave v Salisbury (Earl of)* (1784) 1 Bro. C. C. 425 at 427; 28 Eng. Rep. 1218 at 1219; *Overbury v Overbury* 2 Show. K.B. 242 at 242; 89 Eng. Rep. 915 at 915; *Johnston v Johnston* (1817) 1 Phill. Ecc. 447 at 468, 476; 161 Eng. Rep. 1039 at 1046, 1049; W. A. Graunke, J. H. Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator" (1930) 5 (7) *Wisconsin Law Review*, 387 at 389.

[1877] *Wright v Netherwood*; *Lug v Lug*, 2 Salkeld 592; 91 Eng. Rep. 497 at 498; *Brady v Cubitt* (1778) 1 Dougl. 31 at 37; 99 Eng. Rep. 24 at 27; *Marston v Roe* (1838) 8 AD. & E. 14 at 38; 112 Eng. Rep. 742 at 751; *Talbot v Talbot* (1828) 1 Hagg. Ecc. 705 at 711; 162 Eng. Rep. 725 at 728; F. N. Rogers, *A Practical Arrangement of Ecclesiastical Law*, (Saunders and Benning, London 1840) at 939; R. E. Mathews, "Trends in the Power to Disinherit Children" (1930) 16 (1) *American Bar Association Journal*, 293 at 293.

[1878] Inst. 2.18.2; N. Peart, 'Forced Heirship in New Zealand' (1996) 2 (4) *Butterworths Family Law Journal* 97 at 99; C. S. Rayment, "Legal Fictions regarding Disinheritance" (1953) 46 (7) *The Classical Weekly*, 101 at 101; N. S. Peart, "The Direction of the Family Protection Act 1955" [1994] *New Zealand Recent Law Review*, 193 at 210; K. S. Spaht, K. V. Lorio, C. Picou, C. Samuel, F. W. Swaim, Jr., "The New Forced Heirship Legislation: A Regrettable 'Revolution'" (1990) 50 (3) *Louisiana Law Review*, 411 at 486; J. Caldwell, "Family Protection Claims by Adult children: what is going on?" (2008) 6 (1) *New Zealand Family Law Journal* 4 at 7 – 8; R.

does not outright revoke a will but Peart believes the imposition of a fetter undermines the purpose of the Wills Act 2007 and concludes this conflict has left New Zealand law in an unsatisfactory state.[1879] However, the fetter on testamentary freedom appears to be a natural evolution that could benefit from reference to civil law principles to make the restriction placed on testamentary freedom more equitable. Its introduction does not appear to have conflicted with the principle in C 13, q 2, c 4 and appears to be a natural result of testamentary succession.

New Zealand universities need to re-establish the civil law as a part of legal education if students are to acquire a full understanding of testamentary succession because its principles form the historical foundation of our modern law.[1880] Pollock and Maitland poignantly observed, "The study of Roman law never dies. When it seems to be dying it always returns to the texts and is born anew".[1881] Their statement was true during the late nineteenth century when academic commentary on the learned laws revitalised despite its waned importance.[1882] The best universities offered courses in the civil law at the beginning of the twentieth century as part of a higher legal culture that departed from an approach to education focussing on the necessities of practice that characterises current New Zealand legal education.[1883] Civil law courses formed a compulsory part of the New Zealand curriculum from 1877 until 1960 under the rationale that it offered law students an analytical approach to understanding the

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Sutton, N. Peart, "Testamentary Claims by Adult Children -The Agony of the "Wise and Just Testator" (2003) 10 (3) *Otago Law Review*, 385 at 410.

[1879] N. Peart, "New Zealand Report on new Developments in Succession Law" (2010) 14 (2) *Electronic Journal of Comparative Law*, <http://www.ejcl.org/142/art142-3.pdf> at [1.4] see V. Grainer, "Is Family Protection and Question of Moral Duty?" (1994) 24 (2) *Victoria University of Wellington Law Review*, 141 at 159, 161.

[1880] *Moore v Moore* (1817) 1 Phill. Ecc. 406 at 433; 161 Eng. Rep. 1026 at 1035 See M. H. Hoeflich, "Bibliographical Perspectives on Roman and Civil law" (1997) 89 (1) *Law Library Journal*, 41 at 41.

[1881] F. W. Maitland, "A Prologue to A History of English Law" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, volume 1, (Little, Brown and Company , Boston1907) at 32; F. Pollock, F. Maitland, *The history of English Law before the Time of Edward I, second edition*, volume 1, (Cambridge University Press, Cambridge 1898) at 24.

[1882] F. W. Maitland, *Why the History of English Law is not Written* (C. J. Clay & Sons, London: 1888) at 10; S. Randazzo, "Roman Legal Tradition and American Law" (2002) 1 (1) *Roman Legal Tradition*, 123 127; D. M. Owen, *The Medieval Canon Law: Teaching, Literature and Transmission*, (Cambridge University Press, Cambridge 1990) at 62; J. Ramage, "The Value of Roman Law" (1900) 48 (5) *American Law Register*, 280 at 280; M.H. Hoeflich, *Roman & Civil Law and the Development of Anglo-American Jurisprudence in the Nineteenth Century*, (The University of Georgia Press, Athens 1997) at 101.

[1883] P. Spiller, "Roman Law and New Zealand Law" [2005] *New Zealand Law Review* 9 at 9, 57; C. P. Sherman, "The Value of Roman Law to the American Lawyer of Today" (1911) 60 (3) *University of Pennsylvania Law Review and American Law Register*, 194 at 194, 200; M. H. Hoeflich, "Roman law in American Legal Culture" (1992) 66 (6) *Tulane Law Review* 1723 at 1723; H. J. Berman, "The crisis of the Western Legal Tradition" (1976) 9 (2) *Creighton Law Review*, 252 at 264; C. S. Lobingier, "The Common Law's Indebtedness to Rome" (1925) 11 (4) *American Bar Association Journal*, 265 at 265; J. Hopkins, "Missing the point? Law, Functionalism and Legal education in New Zealand" (2011) 9 (2) *Waikato Law Review*, 188 at 188.

common law.[1884] However, Buckland's prediction that civil law courses would not survive as part of a legal curriculum reflects New Zealand's current situation where modern universities do not offer regular civil law courses to students.[1885] The modern academic is likely to assert that the present state of the common law has left it immune to another reception of the civil law.[1886] Nevertheless, the renewed interest in the civil law stirring this millennium gives weight to the notion that it will be born anew and that its influence on legal development will never die.[1887]

The civil law continues to have a life within New Zealand's legal system and its principles remain an important source of law in the twenty-first century.[1888] Its relevance to the court system ought to encourage New Zealand law schools to provide students with the opportunity to examine its principles in order to better conceptualise modern rules for the betterment of the profession.[1889] Lord Hardwicke's authoritative statement in *Atkins v Hiccocks*[1890], reflecting its role in English law, held "the civil law is no otherwise of authority in England than as it has been received and allowed by usage, let us see how it is laid down by writers of our own who treat of it upon that footing".[1891] This statement accurately reflects the New Zealand legal system's relationship with the civil law and it should continue to guide practice

[1884] P. Spiller, "Roman Law and New Zealand Law" [2005] *New Zealand Law Review* 9 at 9; J. J. Bray, "A Plea for Roman Law" (1983) 9 (1) *Adelaide Law Review*, 50 at 59 see A. A. Ehrenzweig, "A common language of World Jurisprudence: Teaching Roman law in Twenty Hours" (1945) 12 (3) *The University of Chicago Law Review*, 285 at 288.
[1885] W. W. Buckland, "Wardour Street Roman law" (1901) 17 (2) *Law Quarterly Review*, 179 at 192.
[1886] A. Lewis, "Roman Law in the Middle of Its Third Millennium" (1997) 50 (1) *Current Legal Problems*, 397 at 414; P. Stein, "Roman law, Common Law, and Civil Law" (1992) 66 (6) *Tulane Law Review* 1591 at 1591.
[1887] C. Donahue Jr. "Why the History of Canon law is not Written" in Selden Society, *The Selden Society Lectures: 1951 – 2001*, (William S. Hein & Co, New York 2003) at 546; A. Lewis, "What Marcellus says is against you" in A.D.E Lewis (ed), D.J. Ibbetson (ed), *The Roman Law Tradition*, (Cambridge University Press, Cambridge 1994) at 199.
[1888] See *Garratt v Ikeda* [2002] 1 NZLR 577; *Damesh Holdings Ltd v Apple Fields Ltd* 25 TCL 42/4; [2002] BCL 968; *Ellis v Moodie* [2007] BCL 807; 30 TCL 33/3; *R v Ngan* [2008] 2 NZLR 48; *Jackson Mews Management td v Menere* [2010] 2 NZLR 347; *Walker v Watson* [1974] 2 NZLR 175; *Thomas v Robinson* [1977] 1 NZLR 385; *Southland Hospital Board v Perkins* [1986] 1 NZLR 373; *Coleman v Harvey* [1989] 1 NZLR 723; *R v Joyce* [1909] 25 NZLR 78; P. Spiller, "Roman Law and New Zealand Law" [2005] *New Zealand Law Review* 9 at 9 – 10.
[1889] M. Kirby, "Is Legal History now Ancient History?" (2009) 83 (9) *Australian Law Journal* 31 at 39; J. Rose, "Studying the Past: The Nature and Development of Legal History as an Academic Discipline" (2010) 31 (2) *Journal of Legal History*, 101 at 114; C. P. Sherman, "The Value of Roman Law to the American Lawyer of Today" (1911) 60 (3) *University of Pennsylvania Law Review and American Law Register*, 194 at 194- 195; J. Rose, "Studying the Past: The Nature and Development of Legal History as an Academic Discipline" (2010) 31 (2) *Journal of Legal History*, 101 at 109; J. Lee, "*Confusio*: Reference to Roman Law in the House of Lords and the Development of English Private Law" (2009) 5 (1) *Roman Legal Tradition*, 22 at 66.
[1890] (1737) 1 West T. Hard 114; 25 Eng. Rep. 849.
[1891] (1737) 1 West T. Hard 114 at 117; 25 Eng. Rep. 849 at 850 See *Evelyn v Evelyn* (1754) 3 Atk 762 at 764; 26 Eng. Rep. 1238; *Stair (Earl of) v MacGill* (1827) 1 Dow & Clark 24 at 29; 6 Eng. Rep. 434 at 436; *Acton v Blundell* (1843) 12 M. & W. 324 at 353; 152 Eng. Rep. 1223 at 1234 per Tindall CJ; *Taylor v Caldwell* (1863) 3 B. & S. 826 at 835; 122 Eng. Rep. 309 at 313.

within our courts.[1892] Therefore, modern students approaching the civil law must remember the entire *Corpus Iuris Civilis* has never received full legal force outside of the Roman Empire and that jurisdictions adopting its principle have only ever been permissive of its inclusion.[1893] Civil law academics enamoured by its principles tend to exaggerate its merits and downplay its faults when justifying its role in modern universites.[1894] Nonetheless, it must form part of university study for its legal connection with the common law.[1895] Its undeniable relationship with succession presents a strong argument for its inclusion in modern courses.

The sophisticated and extant principles of the civil law remain a fundamental part of modern law and part of the civilian legacy that forms New Zealand's legal heritage. The eminent Andrew Tipping once observed:

> "For me, equity and common law are like the individual strands of a two-stranded rope. The rope as a whole is the corpus of judge-made law. Each strand, while an essential part of the whole rope, is still recognisable for what it is – a discrete strand having a separate existence. The two strands work together to do the task required of the whole rope. To achieve this they are intertwined. Each depends on the other, and without each the whole rope would not exist".[1896]

His analogy is reminiscent of Lord Coke's statement that temporal and spiritual laws are inextricable parts of the England legal system, and the civilian Fulbecke's comparison that the learned laws and the common law form the root and stalk of English law.[1897] The rope of New Zealand law clearly contains the threads of both learned laws as they have penetrated

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[1892] See J. Lee, "*Confusio*: Reference to Roman Law in the House of Lords and the Development of English Private Law" (2009) 5 (1) *Roman Legal Tradition*, 22 at 63; A. Watson, "Justinian's institutes and some English counterparts" in P. Stein (ed), A.D.E Lewis (ed), *Studies in Justinian's Institutes in memory of J.A.C. Thomas*, (Sweet & Maxwell, London 1983) at 183.
[1893] H. F. Jolowicz, *Roman Foundations of Modern Law*, (Clarendon Press, Oxford 1957) at 2.
[1894] P. G. Monateri, "Black Gaius: A Quest for the Multicultural Origins of the Western Legal Tradition" (2000) 51 (3) *Hastings Law Journal*, 479 at 486.
[1895] R. J. C. Dorsey, "Roman Sources of Some English Principles of Equity and Common Law Rules" (1938) 8 (12) *American Law School Review*, 1233 at1243.
[1896] A. Tipping, "Causation at Law an in Equity –Do we have fusion?" (2000) 7 (3) *Canterbury Law Review*, 443 at 450 – 451.
[1897] W. Fulbecke, *A parallele or conference of the Civil law, the Canon law, and the Common Law of this Realme of England* (Printed for the Company of Stationers, London 1618) at 62; E. Coke, *The Fourth Part of the Institutes of the Laws of England*; *Concerning the Jurisdiction of Courts*, (E. and R. Brooke, London 1797) at 321.

our legal system.[1898] English jurists' consciously utilised the *ius commune* principles in all aspects of law.[1899] New Zealand jurists unconsciously mimic their forbearers. Therefore, an open appreciation of the civil law's influence on testamentary succession would greatly increase our understanding its evolution and the path for future development. Acknowledgement of the role the civil law has played in shaping modern law would be a valuable asset to interpreting the Wills Act 2007 and related facets of testamentary succession.

[1898] J. Frank, "Civil Law Influences on the Common Law. Some Reflections on 'Comparative' and 'Contrastive' Law" (1956) 104 (7) *University of Pennsylvania Law Review*, 887 at 894 – 895.
[1899] R. H. Helmholz, "Canon Law and English Common Law" in Selden Society, *The Selden Society Lectures: 1951 – 2001*, (William S. Hein & Co, New York 2003) at 530.

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[1900] Permission has been obtained for layout.

[1901] Please Note: The NZ Citation system does not provide for citing Ecclesiastical causes. They have been cited either in the collection they were found or by folder. It also does not provide abbreviations for ecclesiastical courts and the author has used discretion. Discretion has also been used in citing abridgements. The following are added: PCC – Perogative Court of Canterbury; Arch –Court of Arches; CCL – Consistory Court of London; Doc Comm – Doctors Commons; HCD – High Court of Delegates. Cases are largely illustrative of a principle rather than setting precedent. Permission has been obtained for layout.

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