BOOK REVIEW

REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION (1990)

REVIEWED BY: R. H. HELMHOLZ*

The aim of this book is to discover and describe the "characteristic concepts and institutions" of the Roman law of obligations[1] and then to trace their subsequent development and influence through the Middle Ages and the early modern period, up to the present day. This is a most ambitious work. It is also a difficult one. The text is very long — over 1100 pages. It contains more than a few untranslated passages from several foreign languages: Latin, German, French, even Dutch.[2] And it takes for granted that the reader comes to what the author disarmingly describes as "the arduous task that lies ahead,"[3] equipped already with a basic knowledge of Roman law and institutions. The conscientious reader who is mystified by a *iudicium bonae fidei*,[4] who has never heard of Augustin Leyser,[5] or who has difficulty knowing what it means to say that "the merces had to consist in pecunia numerata,"[6] will have some extra work to do. They are not explained here. The reader should therefore be warned in advance; this book makes real demands upon anyone who takes it up.

However, the persevering reader will be more than amply rewarded for his efforts. The book is full of life. Indeed it has been a very long time since this reviewer has come across a book of comparative legal history so consistently enlightening and interesting. Zimmermann is a wonderful tour guide along the great paths of legal development. He combines genuine learning with both an ability to put familiar sights into a new light and a willingness to explore obscure byways along the way. On virtually every page, the reviewer learned something new about Roman law, about the long shadow it has cast over the development of

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1. REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION xii (1990).

2. *See, e.g., id.* at 382 (stating "[t]he South African courts apply 'huur gaat voor koop'" without giving a translation). The reviewer found no examples of such usage of Italian or Spanish; for the most part, the book leaves open the subject of connecting its subject with developments in these centers of the *ius commune*.

3. *Id.* at xiv.

4. *See, e.g., id.* at 277. Literally, a "judgment of good faith," it referred to cases in which the judge was accorded the authority to decide the merits and shape the remedy according to equitable principles based upon *bona fides*. *See also id.* at 761-62 (explaining use of *iudicia bonae fidei* in cases involving set-off remedies).

5. *Id.* at 545. Augustin Leyser (d. 1752) was the author of MEDITATIONES AD PANDECTAS (1717-47) and a professor of law at several German universities, ending his teaching career in his hometown of Wittenberg.

6. *Id.* at 354. Literally, "the reward had to consist in money paid," it means that in leases of real property, the rent ordinarily had to have been paid in cash.

western law, and even about the legal dilemmas and possibilities of the present day. This review first looks at the coverage of the book, then provides a more extended treatment of some of the author's themes; at the end, a brief appreciation for the book's merits.

A. THE BOOK'S SCOPE AND METHOD

To many American readers, the word "obligations" is simply the civil law's peculiar way of saying "contracts." Properly speaking, of course, the term means more than that; Justinian's *Institutes* divided obligations into four classes: contractual, quasi-contractual, delictual, and quasi-delictual, and at least the first three of these have stuck.[7] However, at its core the term has always centered attention on the kinds of legal duties assumed by contract. A great deal of the book is therefore appropriately devoted to explaining the complex Roman law of obligations that was based upon agreements, express or implied, by private parties to pay money, perform services, or transfer property.

Since Roman law knew no general law of contract, this exposition of the law of obligations requires explication of many different sorts of transactions, beginning with the formal *stipulatio* and winding its way forward to subjects on the very margins of contractual obligations, the law of restitution, and the principle of unjust enrichment. Along this long road lies excursions into the civil law of suretyship and the various kinds of bailment, and then into the law relating to the sale of goods, agency, partnership, and gifts. The author makes a slight detour for the doctrine of *causa*, the rough civilian equivalent of our doctrine of consideration. He deals with problems associated with void and voidable agreements: error, fraud, compulsion, illegality, and impossibility. He treats conditional contracts, on which the civil law contained a vast body of complicated learning, some of which may astound American lawyers. He finishes with a discussion of the problems and legal remedies resulting from breach of contracts, and then deals with their termination for reasons, such as release or supervening impossibility, that could be proffered by one side or the other as justification for failure to fulfil a contractual obligation.

The final six of the thirty-two chapters of the book deal with obligations arising from delict. Here intentional and negligently caused physical injuries to persons and property naturally take center stage, although the law of defamation also assumes a strong supporting role. The author deals at length with the *Lex Aquilia* and the fertile *actio*

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7. J. INST. 3.13.pr. Quasi-delictual liability clearly exists in substance under modern American and English law, but we call it liability without fault or strict liability, instead of using the Roman law term. *See* W.W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW & COMMON LAW: A COMPARISON IN OUTLINE 395-98 (1952).

iniuriarum. He illuminates topics that have long fascinated anthropologically-minded lawyers: the institution of noxal surrender and vicarious liability, for instance. But he goes much beyond, examining the civilians' treatment of many problems that continue to agitate modern lawyers. How far should we embrace a regime of strict liability in preference to fault-based liability? Can the law of delict be kept from spilling over its banks, so as to end by imposing liability for acts that are more socially valuable than the harm they have caused? What about making defendants pay when they have done no more than commit an "act of omission"? Though the Roman lawyers dealt with a society vastly different from our own in many ways — the law of slavery, for example, figured largely in their discussion of delict — Zimmermann shows that their answers have continued to influence the course of our law. Rightly so, he thinks. Even a dramatically changed world has not rendered their approach to recurring legal issues, and often their answers, necessarily obsolete.

When discussing each of these topics, Zimmermann's method is consistent, subject to only minor modification under each topic. He begins with the classical Roman law, setting out its most characteristic and salient features. In this, he has his eyes firmly fixed both on the limits and possibilities of juristic thought and on Roman society and mores. The book discusses, but does not labor over, the exploration of textual problems which have furnished the stuff of much important Roman law scholarship. For example, Zimmermann has little time, and apparently little patience, with the more extreme hypotheses of interpolationist scholarship, though his text and footnotes show that he is fully aware of it.[8] He likewise regards as artificial the traditional practice of harmonizing apparently contradictory texts through ingenuity, distinction, amplification, and limitation.[9] He recognizes that interpolation occurred, of course, though probably to a lesser extent than is sometimes said. He recognizes that attempts to bring disparate texts into harmony are possible, and perhaps inevitable. More often than not, however, he cuts short the discussion of the possibilities of both, either suggesting that a more extended inquiry would be only "a matter for speculation,"[10] noting that it would only produce "an equation with too many variables,"[11] or else concluding simply that the history of the

8. *See, e.g.*, ZIMMERMANN, *supra* note 1, at 282 (citing with approval the abandonment of the "shifting sands of far-reaching interpolation allegations").

9. *See, e.g., id.* at 160 ("an absolutely futile piece of *Pandektenharmonismus*").

10. *Id.* at 366 (dealing with the search for a unifying principle covering the potential liability of lessors). *See also id.* at 1056 ("None of these hypotheses can be proved" of attempts to bring the Digest of Justinian 47.10.15.15 into harmony with other texts dealing with attempts on a woman's chastity.).

11. *See, e.g., id.* at 966.

Roman law has been "varied and eventful."[12] He does not have a ready explanation for every inconsistency in the text.

Having sketched the main features of the Roman law, the author continues in each section with a discussion of special problems that inevitably arose in a legal system that changed from archaic to sophisticated in the long span of time between the Twelve Tables and the Justinianic compilations of the sixth century. Pressures on the Roman law and consequent change within it stemmed from a wide variety of factors: the internal logic of legal analysis; the exigencies of commercial practice; the expansion of the territorial reach of the empire; the influence of Greek thought; the ideals and failings of Roman society; the arrival of Christianity; even the personal predilections of the emperors.[13] All these are grist for the author's mill.

From the achievements of the era of Justinian, the book moves directly to the *ius commune* of the Middle Ages, that amalgamation of Roman and canon law that long dominated European legal thought, education, and, to a lesser extent, legal practice.[14] The additions and changes to the classical law attributable to the *ius commune* are noted. For instance, classical Roman law had little useful to say about the law of evidence. Development of workable law on the subject was the product of this later era; it is now accessible in the encyclopedic treatise tradition associated with names like Guilielmus Durantis (d. 1296),[15] Josephus Mascardus (d. 1588),[16] and Jacobus Menochius (d. 1607).[17] It is to the author's credit that his book recognizes this vital contribution to Western law and develops it for English-speaking readers, for most of whom it will be *terra incognita.*

The author regularly addresses contributions to the law made by the *usus modernus Pandectarum* during the sixteenth and seventeenth centuries,[18] and also those of the natural school of law of the seventeenth and eighteenth.[19] For instance, he shows that the natural lawyers built on the base of developments within the *ius commune* in

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12. *Id.* at 40 (dealing with third party beneficiary contracts).

13. *Id.* at 15 (noting the origin of the four-fold division of obligation in Justinian's "great delight in the number four").

14. *See, e.g.*, MANLIO BELLOMO, L'EUROPA DEL DIRITTO COMUNE (5th ed. 1991), a book which happily is soon to be translated into English.

15. Author of SPECULUM IUDICIALE (Guillaume Durand ed., 1975) (Neudruck Der Ausgabe Basel 1574).

16. Author of DE PROBATIONIBUS (1584-88), subsequently published in many editions but not so far reprinted. *See* DAVID WALKER, THE OXFORD COMPANION TO LAW 814 (1980).

17. Author of DE PRAESUMPTIONIBUS (1597), also published in several editions and not reprinted. *See generally* 1 H. COING, EUROPÄISCHES PRIVATRECHT 1500 BIS 1800: ÄLTERES GEMEINES RECHT 134-35 (1985) (regarding Menochius's contributions to the use of presumptions in the law of evidence).

18. For an English introduction to the subject, see O.F. ROBINSON ET AL., AN INTRODUCTION TO EUROPEAN LEGAL HISTORY 327-29, 333 (1985).

19. *Id.* at 354-66.

rejecting the Roman law rule against enforcing contracts in favor of third parties.[20] The position taken by Grotius, that the rule *alteri stipulari nemo potest* was incompatible with principles of natural law, brought to fruition juristic development that had begun earlier among Spanish jurists. Along the way, Zimmermann skillfully weaves parallel developments in the English common law into his story. Some parts of the common law were profoundly touched by the *ius commune* and many more are fruitfully compared with it. In adhering to the classical principles against direct enforcement of third-party beneficiary contracts, for example, one witnesses the nicely ironic situation in which the English lawyers actually turned out to be more civilian than the civilians.

Having been carried almost effortlessly through time in a fashion reminiscent of the feats of the great civilian commentators, the reader may be surprised suddenly to find himself face-to-face with the modern world. But he is put there. He is provided with selective, but always intelligent and instructive, coverage of recent developments in the law of obligations in Germany, France, South Africa, Great Britain, and the United States. And each of the subjects is tied to its history within the civilian tradition. For Zimmermann, legal history without modern relevance "tends to become a rather sapless, purely 'academic' affair . . . ."[21] He does not wish that fate for his book, and I can only say that he avoids it. If it can be vindicated at all, the modern relevance of the study of Roman law and its traditions is vindicated in these pages.

B. THE BOOK'S THEMES

Straightforward exposition of the civilian tradition is, appropriately, the subject of most of the book. There is a lot that deserves exposition. This does not mean, however, that the work lacks continuing themes or that its author keeps clear of controversy. He has opinions.

Zimmermann is skeptical, for instance, about the desirability of the doctrine of *laesio enormis*, and he says so.[22] To him, the economic liberalism and private autonomy characteristic of classical Roman law seem preferable, at least on the whole. The doctrine of *laesio enormis* invited courts, in the interests of fairness, to make inroads in the ability of contracting parties to set the price of goods being bought and sold. The doctrine held that if the deal were unfair enough, it could be set aside. This can be a mightily appealing approach, at least after the fact. The doctrine has been adopted, and then set aside, more than once in the

20. ZIMMERMANN, *supra* note 1, at 43.

21. *Id.* at viii.

22. *Id.* at 270. It is not entirely clear that he is merely citing the opinions of South African and German judges when he describes it as "[i]nherently arbitrary and preposterous, full of pitfalls and anomalies, subversive and fatal . . . ." *Id.* at 267.

history of the civilian tradition. Today appears to be one of its "up" moments. But Zimmermann is doubtful. He quotes the disparaging analogy of the doctrine to a Hydra, apparently first drawn by Christian Thomasius (d. 1728),[23] and then suggests that before we embrace this Hydra, or even try to tame it, we ought to take account of the lessons of the doctrine's checkered past.[24]

On the other hand, Zimmermann is the opposite of a doctrinaire even in habitually preferring the classical jurists' attitude toward freedom of contract. The interplay between the attractions of a legal regime enforcing unfettered choice and of one in which the law intervenes to protect the weak and unfortunate recurs throughout this work, and Zimmermann observes it with sophisticated detachment. In its attitude towards what modern American lawyers describe as "penalty clauses" in contracts, for example, European law has vacillated. Sometimes the clauses have been enforced as written; sometimes not. Whenever the law has moved decisively in one direction, a reaction in the other direction seems always to have come along. This vacillation continues to the present day, but the author's l[illegible] word on the subject recognizes how things now stand: in dealing with penalty clauses, unfettered freedom of contract "is not acceptable under modern economic circumstances."[25]

For American academic lawyers, and indeed for thoughtful English-speaking lawyers of every stripe, two recurring themes of the *The Law of Obligations* are likely to be of the greatest interest. The first is the author's examination of the ways in which the Roman law has decisively influenced the course of later legal development, in centuries long after and in places far removed from its origin. It raises the question of how law changes. The second is the relation between the traditions of the Continental *ius commune* and Anglo-American common law. It raises the long-disputed questions of the insularity of English law, or perhaps better said, the special character of the common law. Neither subject is new. But Zimmermann has something new to say about both, and what he says deserves our attention.

On a general level, no one can deny that the Roman law has been, and to some extent continues to be, of importance in the formation of the European legal tradition. The real question is to determine the exact ways in which that influence has been felt, and to assess accurately the extent to which the past has determined the present. How tight has the grip of the great Pandectist tradition been on the actual course of the law, and what real difference does it continue to make today?

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23. *Id.* at 263. On the views of Thomasius towards the civil law of contract, see Italo Birocchi, *La questione dei patti nella dottrina tedesca dell'Usus modernus*, *in* TOWARDS A GENERAL LAW OF CONTRACTS 139 (John Barton ed., 1990).

24. ZIMMERMANN, *supra* note 1, at 270.

25. *Id.* at 107.

Zimmermann treats the study of the Roman law and the *ius commune*, even now, as fundamental for understanding any European legal system regarding it as "a unifying force of great potential" in the European Community.[26] He identifies four ways in which the civilian tradition has created the modern law of obligations. The first is direct continuity. It appears notably in codified form in Germany. The liability of sellers of goods for latent defects furnishes a good example. The Bürgerliches Gesetzbuch (BGB), the German Civil Code adopted at the very end of the last century, owed not only its organizing principles to enthusiastic Romanists. On this particular question, the BGB "attempted little more than to codify the current Roman common law" related to it.[27] Tradition determined present law. Not that this was necessarily for the best. The limited forms of relief available under Roman law have discouraged German courts from adapting the law to meet the needs of modern commerce. The civilian tradition can ossify as well as vivify. But where there has been no evident or forceful reason to reject the traditional law, it has remained intact.

Today, of course, the civilian tradition survives most actively in South Africa, where the author taught for seven years at the University of Cape Town before moving on to Regensburg. American lawyers know mostly about South Africa's dilemmas as a racialist society, and Zimmermann does not ignore that unhappy side of history.[28] However, South Africa has also preserved something very like the uncodified *ius commune*. It is there that we see jurists laboring to adapt it to modern circumstances. It is also there that one sees the limits and the possibilities of immersion in the civilian traditions, having, for example, to decide what to do with contracts for surrogate motherhood on the basis of a standard of *boni mores* taken from Roman-Dutch law.[29] Zimmermann gives us an excellent tour.

The second source of continuity is rebirth. It has often happened that one part or another of the civil law has fallen out of use or even been rejected outright. Then, years later and perhaps wearing a slight disguise, it springs back to life. The law of defamation in Germany provides an example. The *actio iniuriarum*, as expanded under the *ius commune*, governed practice in the early modern period. Its broad definition of actionable language, its absorption of the Church's concern to punish slanderers *ratione peccati*,[30] its desire to make whole the reputation of persons wrongly slandered, and its adoption of a

26. *Id.* at xi.
27. *Id.* at 327.
28. *Id.* at xv.
29. *Id.* at 714.
30. This expansive and much disputed principle would have allowed ecclesiastical courts to take jurisdiction over temporal matters whenever the sin of one of the parties was involved. *See* BRIAN TIERNEY, THE CRISIS OF CHURCH & STATE 1050-1300, at 127-31 (1964).

presumption of *animus iniuriandi*, combined to give the civilian remedy a largish scope.[31] Too great a scope, in fact. In time, the remedy began to seem ridiculous, or at any rate inconsistent with the creed of a gentleman.[32] Bringing an action for defamation came to be regarded as itself an abuse of the law. During the nineteenth century, it was therefore eliminated little by little in Germany and, ultimately, the BGB dropped it.[33] But wait! Perhaps it was not dead, only sleeping. In the wake of the Nazi experience, the Germans embraced something called the "general right of personality."[34] In the author's view, the result has been nothing less than the recreation of the old *actio iniuriarum*. As Zimmermann puts it, "thrown out by the front door, the *actio iniuriarum* has managed to sneak in through the back window . . . ."[35] It seems hard to keep the civilian tradition down.[36]

The third means by which the civilian tradition has lived is through its tenacious grip on the attitudes of lawyers, judges, and law professors. For most of its history, the *ius commune* has furnished the basis for European legal education. This fact is bound to have made a difference, even where statutes, constitutions, or wholly different circumstances have intervened. Lawyers, at least most lawyers, resist drastic change. They come at new problems with attitudes formed by what they know of the past. This inclines them naturally towards a "minimalist" reading of the changes they are obliged to implement. Thus, for example, in interpreting statutes dealing with the allocation of the risk of loss to chattels being worked upon by bailees, German lawyers regarded the texts of the BGB with minds saturated in the Roman law Digest. They minimized any change, retaining the civilian approach towards the problem of allocation of risk of accidental loss between bailor and bailee in the face of statutes purporting to codify and define the whole law on the subject. The confrontation thus led to "a nice example" of the holding power of the *ius commune*, "even against the odds of codificatory intervention."[37]

The fourth means by which the civilian tradition has made its presence felt is as a "Treasure House" of good ideas.[38] Lawyers have quarried the Digest for solutions to new problems, and they have found

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31. *See* ZIMMERMANN, *supra* note 1, at 1067-70.

32. Interestingly, the current American preoccupation, protecting freedom of speech, seems to have played no role in the demise of the remedy. At least, Zimmermann mentions none.

33. *Id.* at 1091-92.

34. *Id.* at 1092.

35. *Id.* (emphasis added).

36. *See id.* at 1054-55. The tort of "attempting a woman's chastity" is a similar English example from an earlier period. MARTIN INGRAM, CHURCH COURTS, SEX AND MARRIAGE IN ENGLAND, 1570-1640, at 240 (1987).

37. ZIMMERMANN, *supra* note 1, at 404.

38. *Id.* (quoting HERMANN KANTOROWICZ, BRACTONIAN PROBLEMS 126 (1941)).

in it things that never existed in classical Roman law. The theory that the fundamental basis for contractual liability rests upon the concurrence of the consent of two persons, made familiar to American lawyers by their law school training in "offer and acceptance" and the necessity of a "meeting of the minds" in the formation of contracts, is one such product. The Roman law of obligations had not depended on this theory; it knew a much more formal system of contractual obligation. But in the eighteenth century, when Domat and Pothier wished to find support for their consensus theory of contracts, they turned to the Digest.[39] True enough, what they required involved a highly selective use of the texts found in the Digest. But the variety of ideas found therein is in fact very great. It was the Roman law of consensus that furnished the building blocks they needed to create a general theory of contractual obligation. Thus, the civilian tradition proved fruitful in ways that might have surprised its founders.[40]

These four sources of the civilian tradition's continued vitality are exposed with clarity in the text, and they are connected forcefully and convincingly with the author's argument that his subject has direct contemporary relevance. The reviewer's doubts have to do only with how far the argument should be pushed. The spectacle of historical reliance on inherited civilian tradition may lead to a despair about lawyers' ability to escape the shackles of inherited categories,[41] or it may lead instead to an exaggerated romanticism about the transformative powers of the *ius commune*. Zimmermann inclines only occasionally to the second, and not terribly far in its direction. But even so, I wonder: is it really right to say, as one author does, that in modern law "[i]t is only by examining the continuity and transformation of Roman law within the history of the *ius commune* . . . that we can make meaningful profess," as the author does?[42] The reviewer will readily confess that he shares the author's hope that this is so, but he has had some difficulty persuading himself that this is actually the case. There are too many situations where the civilian tradition has been fruitfully rejected, and in which the best that can be said is that it provides "the background against which to evaluate such a decision . . . ."[43]

Another theme of interest about which the book has much to say, and will be of interest to readers of the *Journal*, is the relationship

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39. *Id.* at 567.

40. Zimmermann also explains that the rule that contracts are to be read against the drafter, is "a good example of how isolated utterances of the Roman jurists were able to become the fons and origo of a general rule of law . . . ." *Id.* at 639.

41. *See, e.g.*, ALAN WATSON, FAILURES OF THE LEGAL IMAGINATION (1988). Zimmermann also recognizes of course that the civilian tradition can be an obstacle to progress. For example, he writes that following Roman law about latent defects in the sale of goods "does not have only beneficial effects." ZIMMERMANN, *supra* note 1, at 327.

42. ZIMMERMANN, *supra* note 1, at 270.

43. *Id.* at 230.

between Continental law and the English common law. There is a good deal of current scholarly interest and research about this question, on both sides of the English Channel and on both sides of the Atlantic Ocean.[44] Zimmermann clearly thinks that there should be more. In his view, the English and European traditions have never been "so radically distinct as is often suggested," and indeed this connection has often been more than accidental parallelism.[45] The Roman legal tradition, in his opinion, "never ceased, through various channels, to exercise a considerable influence on English law . . . ."[46]

The form of connection about which the book says the most, but which, concededly, is more interesting than probative, is a similarity in the attitudes and methods of the traditional English lawyer and the classical Roman jurist. It should be understood that this type of similarity is not so much a result of the direct influence of Roman law, as it is a result of a more general similarity in the social structures present in both Roman and English society. Both were suspicious of system. Both thought about concrete cases, comparing them, distinguishing them, and building upon them. That seemed the right occupation for a lawyer, and they were very good at doing it. This is to say, both classical Roman and English lawyers were practical men. They had no taste for a law "characterized by impractical abstractions."[47] They created no "neat and rational system,"[48] and they saw no need for one. On the contrary, their work had a "wholly casuistic character."[49] To the extent that there was a divergence between England and the Continent on this point, it was the product of a later period, when "systematizers" invaded and changed the original civilian tradition.

This recurring theme will surprise many English speaking readers. It is the opposite of a commonly held view that regards Roman law as inherently more "systematic" than the common law, and perhaps the author occasionally pushes the parallel just a little harder than the

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44. *See, e.g.*, HELMUT COING & KNUT WOLFGANG NÖRR, ENGLISCHE UND KONTINENTALE RECHTSGESCHICHTE: EIN FORSCHUNGSPROJEKT (1985) (including subsequent volumes published under their auspices under the series title *Comparative Studies in Continental and Anglo-American Legal History*). *See also* Gino Gorla & Luigi Moccia, *A 'Revisiting' of the Comparison Between 'Continental Law' and 'English Law' (16th to 19th Century)*, 2 J. LEGAL HIST. 143 (1981) (comparing the development of English law and Continental law from the sixteenth century to the beginning of the nineteenth century). I have tried to sum up my own (largely congruent) views on the subject in R.H. Helmholz, *Continental Law and Common Law: Historical Strangers or Companions?*, 1990 DUKE L.J. 1207.

45. ZIMMERMANN, *supra* note 1, at xi.

46. *Id.*

47. *Id.*

48. *Id.* at 537.

49. *Id.* at 913. *See also id.* at 340 ("quite uninterested in abstract categorization"); *id.* at 587 ("[T]he last thing we can expect to find is, of course, a neat and logical theoretical framework . . . ."); *id.* at 684 ("The Roman lawyers, as may be expected, did not bother with subtle dogmatic distinctions.").

evidence warrants. Reading along, one expects to come across Baron Parke in a toga, Ulpian in the Court of Appeals. On the other hand, it is well that the point is made. The urge to create systems and the belief in the power of abstract definitions do not stand out either in the texts of the Digest or the attitudes of the early jurists. These things were regarded with suspicion even during the Middle Ages. It was only during the later development of the *ius commune,* most particularly in the heyday of the natural law school, that ideal and logical systems truly came into their own.

This parallel is part of what has been well described as an "inner relationship" between Roman law and English common law.[50] It means that the two are similar, even though there has been no actual Roman law influence on the development of English law. Similar social settings and similar juridical institutions give rise to similarity in legal outcome. Other examples are the formulary system itself,[51] the common use of legal maxims,[52] and parts of the law of crimes and torts.[53] In them, it is accidental, but not wholly surprising, that the English law should sometimes turn out to be more like the classical Roman law than some of the legal systems derived more directly from it. There is affinity without direct connection.

In a second common situation dealt with in *The Law of Obligations,* however, there is a more direct connection. It involves the knowing use by English lawyers of categories, ideas, and phrases drawn from the Roman legal tradition and used consciously to shape the English common law itself. It is about this kind of supposed civilian influence that most debate has swirled, because it may be thought to detract from the uniqueness and even the excellence of the common law if it turns out that it has substantial roots in the civilian tradition. Many historians of English law reject it altogether,[54] contending that the systems were different in fundamental ways, and that only the most superficial sort of civilian influence actually occurred. They point out that in the extreme form of the argument, the special character of English law disappears altogether. The common law then becomes simply one more part of a general western legal tradition.[55] The difference between English and French law becomes no more significant than, say, the difference between the legal systems of France and Spain.

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50. Fritz Pringsheim, *The Inner Relationship Between English and Roman Law,* 5 CAMBRIDGE L.J. 347 (1935).

51. BUCKLAND & MCNAIR, *supra* note 7, at 409.

52. PETER STEIN, REGULAE IURIS 154-56 (1966).

53. ZIMMERMANN, *supra* note 1, at 913.

54. *See, e.g.,* R.C. van Caenegem, *The English Common Law, a Divergence from the European Pattern,* 47 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 1, 3 (1979) (speaking of "this extraordinary divergence, this real aberration from the established European pattern").

55. This is essentially the view expressed by Harold Berman. *See* HAROLD BERMAN, LAW AND REVOLUTION (1983).

Zimmermann's work brings him within the camp of those who argue that there has been real influence on English common law. However, he does not strain the evidence. The English Channel remains in place. He thinks that in some areas of the law, substantial influence has occurred. In others, and seemingly the majority, the borrowing has been mostly superficial. There has been no wall of separation between England and the Continent, but neither has there been identity.

A representative example of the true influence of Roman law is the law of bailments. Through Sir John Holt's opinion in the celebrated case of *Coggs v. Bernard* (1703),[56] and by means of the influential commentaries on the subject by Sir William Jones,[57] and Justice Story,[58] "the Roman law of *commodatum, depositum, and pignus* entered into English law."[59] Zimmermann explores this in convincing detail. Here, the initial and avowed use of civilian terminology and principles, coupled with the subsequent identity at many points between the common law and Continental law of bailments, make the reality of influence hard to deny. True, denial can be attempted. It can be asserted that the common law cases have only a "coating of Roman terms" and that the "internal growth" of the law on the subject has been "purely English."[60] But even if one could understand exactly what this counterargument means, it is too apologetic to carry conviction. And indeed, the kind of influence suggested by the law of bailments exists in too many aspects of the law — in suretyship,[61] gifts,[62] breach of contract,[63] even strict liability in tort[64] — for much doubt to remain. Repetition of the pattern demonstrates the reality of legal borrowing.

However, the book also shows that sometimes the civilian influence exercised on the common law has truly been superficial. Influence is not an "all or nothing" proposition. Common lawyers have, for instance, long been attached to the use of maxims and catch-phrases in legal argument. Many of these were undoubtedly drawn originally from the civilian tradition: *consensus ad idem*, for example, in the formation of contracts. This phrase, borrowed from Pothier and a vital part of his

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56. Coggs v. Bernard, 2 Ld Raym 909 (1703).

57. Author of AN ESSAY ON THE LAW OF BAILMENTS (2d ed. 1804). Zimmermann calls this "the first English monograph, . . . which can properly be called a legal treatise." ZIMMERMANN, *supra* note 1, at 189. Before accepting this very debatable conclusion, the reviewer would like to have been furnished with a fuller statement of what it takes to qualify as a genuine treatise.

58. Author of COMMENTARIES ON THE LAW OF BAILMENTS (2d ed. 1840).

59. ZIMMERMANN, *supra* note 1, at 203-05.

60. 2 THOMAS ATKINS STREET, THE FOUNDATIONS OF LEGAL LIABILITY 318-19 (1906).

61. *See* ZIMMERMANN, *supra* note 1, at 144 ("The rules relating to fideiussio have shaped the accessory nature of the surety's liability.").

62. *Id.* at 506 (describing the doctrine of consideration as delivered by "a midwife wrapped in Roman-Canon dressing").

63. *Id.* at 816 ("The basic inspiration came from Roman law.").

64. *Id.* at 1136 ("[I]t is not unlikley that . . . [Roman law sources] had some influence in this regard.").

"will theory" of contracts, has worked its way into English and American contract law. But the frequency of its use has never meant that we have imported Pothier's theories whole. In fact, in many ways the reverse is true: in important particulars they have been rejected.[65] The same holds true for the use of civilian maxims by common lawyers. They may come from the storehouses of the *ius commune*, but their common usage no more means that the common lawyers' views were thereby determined by the civil law than the fact that I have a Japanese bowl in my living room means that Japanese culture has had a measurable influence upon my life. I simply like its looks. Conceivably, I may not even know that the bowl comes from Japan. Its existence should keep me from asserting that there has been no United States-Japanese trade, but real influence is another matter. Influence can follow trade when the conditions are right. But it need not.

C. THE BOOK'S MERITS

None of the foregoing should leave the impression that this book is strictly organized so as to express and prove a packaged set of themes. It is organized around the civil law of obligations. Within this capacious structure, the book has a learned but free ranging character — a little difficult to catch in a review, but a delight to read nonetheless. This character is evident, above all, in the range and variety of subjects the author takes up and relates to his subject. The book moves easily backward and forward in time, and its scope is wide. The law's attitudes toward animals,[66] toward the effects of the "follies" to which lovers are prone,[67] and toward the persistence of duelling among gentleman,[68] all claim the author's attention. He relates them to the substance of the law of obligations. That rich Romans had a taste for tables made of expensive wood,[69] that Roman schoolboys learned the Twelve Tables by heart,[70] or that the god Hermes was thought to protect both merchants and thieves,[71] are all taken up and shown to have had an effect on the course of the civilian tradition. Zimmermann has a sharp eye for the telling example. They seem almost to jump out at the reader from quite unexpected corners of human experience.

The book is lively in more than its examples. Although it contains the occasional indication that the author's native language is not English, these instances are remarkably few. He has read and mastered much of

65. *Id.* at 601.
66. *Id.* at 1096-99.
67. *Id.* at 484-87.
68. *Id.* at 1063 n.107.
69. *Id.* at 594-95 n.44.
70. *Id.* at 605.
71. *Id.* at 257.

the literature of English comparative law and legal history,[72] and he clearly used his years in South Africa to good advantage. He writes with what appears to this reviewer to be the product of a special delight in using a language that is not his own. The prose is sprightly and imaginative, always comprehensible, and it is spiced throughout with the author's patiently skeptical sense of humor.

Finally, and this may be the book's greatest merit for most readers of the *Journal*, Zimmermann is a master of the clear summary of difficult topics. If a reader is in search of a basic understanding of the realities of the Roman law *stipulatio*,[73] the origins and difficulties of the doctrine of *laesio enormis*,[74] or the role of commercial practice and the canon law in shaping a general law of contracts,[75] it will be hard for him to find a better resource than this volume. All these are but examples. Throughout, complicated subjects are reduced to manageable size, and they are illuminated by the author's balanced judgments. Zimmermann claims in his introduction that, despite its considerable size, his book is actually "alarmingly short."[76] One sees what he means. It *could* be much longer, given its scope in time and subject. On this point, it is nevertheless impossible to agree with him. The book's "alarming shortness" is one of its many merits.

72. The reviewer missed, however, the inclusion of the works of J.H. Baker and S.F.C. Milsom, leading contemporary historians of the common law. *See, e.g.*, JOHN HAMILTON BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY (3d ed. 1990); STROUD FRANCIS CHARLES MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW (2d ed. 1981).

73. *See* ZIMMERMANN, *supra* note 1, at 68-75.

74. *See id.* at 259-70.

75. *See id.* at 537-45.

76. *Id.* at vii.