The Use of Roman Law in Virginia Courts

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by W. Hamilton Bryson*

By statute,1 the courts of Virginia are required to decide cases according to the principles of the English common law.2 However, they are not forbidden to resort to any other legal system where the common law of England is silent. Moreover, when the English courts themselves have no English law on a particular point, they often look to the Roman law in its ancient or its current form for guidance. Therefore, it is not unreasonable for Virginia courts to do likewise, and in the eighteenth and nineteenth centuries, in fact, they did. The purpose of this essay is to consider how far the Virginia courts have used the Roman law, whether in its ancient form as compiled by the Emperor Justinian in the sixth century A.D., or in its evolved form as the current law of the various countries of continental Europe.

The first great age of the Roman law was the period of the Roman jurists from about one hundred to four hundred A.D. After a period of decline, Justinian in the sixth century ordered the classical Roman law to be codified. However, Justinian was the last Latin-speaking Roman emperor, and he was the last to have any power in the western part of the Roman Empire. After he died, his legal compilations, which were in Latin rather than Greek, became a dead letter. In the eleventh century, Justinian's codifications were rediscovered and the use of the ancient Roman law was revived. The revival began in northern Italy. It spread from there to the rest of Italy, southern France, Spain, and Portugal. By the eighteenth century, the Roman law was the basis of the legal systems of all of the nations of western Europe and their colonies, except England and her colonies and Ireland.

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2. Unless there is a statute or constitutional provision which governs the matter in dispute.
For the English jurist, however, Roman law was important, even though it was not the basis of his general legal system. The English ecclesiastical courts, which dealt with marriage and divorce and wills, among other things, continued to use the Roman-based law of the Roman Catholic Church after the break with the pope. All legal problems involving foreign countries were settled by the common and international principles of the continental countries, whose national law was Roman based, as mentioned above. Thus the English law touching commerce, maritime and naval matters, diplomats, war and peace, and treaties was directly influenced by the Roman law of the neighboring countries. The classical Roman law and the modern continental legal systems based on it are often referred to as the civil law to distinguish it generally from the English common law and the systems derived from it.

The law of Virginia is founded upon the common law in England. The English common law unquestionably has borrowed from the Roman law to a greater or lesser extent (the extent being much disputed), and therefore much Roman law exists in Virginia. However, this indirect reception, or at least influence, is rather a part of the history of the law of England than that of Virginia, and so this essay will not touch upon it but will consider only any direct influence which can be found of the Roman law and the Roman-based civil law of continental Europe.

In order to show a direct influence of Roman law on Virginia law, we must find the intellectual link which made it possible. This link is the number of books on the civil law which were present in Virginia at the time of this influence. The following list of books found in private Virginia libraries before 1776 shows clearly the accessibility of Roman law to Virginia jurists and lawyers:

- Alexander ab Alexandro. *Genialium Dierum*
- Calvinus, J. *Lexicon Iuridicum*
- "De Comitiis Imperatoris"
- *Corpus Iuris Canonici*
- Domat, J. *Les Loix Civiles*
- "La Droite Romaine"
- Goguet, A. Y. *Origin of Laws*
- Grotius, H. *De iure Belli ac Pacis*
- Heineccius, J. G. *Methodical System of Universal Law*
- Herauld, D. *De Rerum Iudicatarum Auctoritate*
- Ferriere, C. J. [?] "Institutiones Iuris Romani ac Gallici"
- Justinian. *Corpus Iuris Civilis*
- Justinian. *Institutiones*

Pacius, J. "Analysis Institutionum Imperatorum"
Pacius, J. Isagogicorum
‘Pandectae Canoni Gr. & Lat.’
Patru, O. Plaidoyers
Perez, A. Institutiones Imperiales
Pufendorf, S. De Iure Naturae et Gentium
Pufendorf, S. De Officio Hominis et Civis
Raymond de Pennafort. Decretales Gregorii IX
Sanderson, R. De Juramentia Promissorii Obligatione
Suarez, F. De Legibus
Summa Iuris Canonici
Vattel, E. Law of Nations
Vinnius, A. Commentarius
Vinnius, A. "Ius Civile"
Volckmar, B. De Iure Principum

In the following century Thomas Jefferson and William Green included large numbers of works on the civil law in their libraries. Jefferson had twenty-three titles, and Green had forty. This shows that the supply of these continental law sources was not abated by the American Revolution.

The most important of the books listed above were and are the basic compilations of the Roman law by Justinian. The works by Domat, Heineccius, and Vinnius were basic textbooks. Grotius, Pufendorf, and Vattel wrote treatises on international law, all of which were immensely popular; these books dealt with international law as a practical application of jurisprudence or legal philosophy and were based on Roman law principles.

Roman law texts were used occasionally in colonial Virginia to teach Latin grammar. In 1765 Donald Robertson, a school master, sold a copy of Justinian’s Institutes to John Crutchfield. Perhaps George Wythe’s introduction to the civil law was through exercises done to improve his Latin.

George Wythe was well grounded in the Latin language, the classical Roman writers, and in the Roman law. In addition to having a series of legal apprentices who later distinguished themselves, such as Thomas Jefferson, George Wythe was the first law professor in Virginia teaching the first generation of lawyers in republican Virginia, one of the more famous being John Marshall. Wythe frequently referred to the Roman law in his opinions, as will be dis-

5. Donald Robertson’s School, King and Queen County, Va., 1758-1769, 34 VA. MAG. HIST. BIOG. 143 (1926).
cussed below, and it is most likely that he introduced his students to it as well. Wythe taught at the College of William and Mary from 1779 until 1789, when he was required to move to Richmond.6 The Virginia bar at this period was a small fraternity, and they all had the opportunity to benefit from his legal erudition as students in his class, as practitioners in his court, or in many instances as both.

Edmund Pendleton, one of Wythe’s legal rivals, also had a high regard for the study of Roman law. Near the close of his life, he wrote to a nephew that the civil law, “Where a youth is not hurried into practice by narrow circumstances, is the best foundation. It opens and enlarges the mind by general principles of moral justice, which often apply under municipal regulations, and directs a student to enquire into the reason of cases adjudged, instead of mere dictions of judges.”7 Whether or not young Virginia law students agreed with Pendleton’s view, few had the time or inclination to follow his advice in their rush to get into practice.

Only a few reports of cases have survived from the colonial period of Virginia; however, these few show that the colonial lawyers had at least some knowledge of the Roman law and that they cited it in court. Between 1733 and 1743 Edward Barradall, the attorney general, referred to Domat at least six times,8 and in his argument of the case of Anderson v. Winston he cited Pufendorf, Barbeyrac, and Grotius on the laws of usury.9 In addition he makes references to the “civil law” and the “Roman law.”10 Thomas Jefferson in his Reports cites Pufendorf three times and Justinian twice.11 Jefferson’s manuscripts also show that he was well grounded in the Roman law.12

Turning now to the influence of Roman law in Virginia after independence, let us discuss first two Virginia statutes, then the

9. Id. B206, B207.
12. In the case of Bolling v. Bolling, he argues from the works of Pufendorf and Justinian, and he discusses the Roman law on the ownership of crops and the doctrine of accessio; his discussion of the Batture Case in Louisiana is full of Roman law learning; E. Dumkauld, Thomas Jefferson and the Law 61-69, 98, 110 (1978).
Certainly the most significant area of Roman law influence in Virginia is that of intestate succession. These are the rules which determine who gets a dead person's property when there is no will. The Statute of Descents and Distributions of 1785, sections 1-14, 13 is, except for the position of spouses, basically the same in substance as the current statute. 14 In 1785 this statute, which was drafted by Thomas Jefferson, 15 abolished the English common law of primogeniture and set up a system of intestate succession, a parcellary distribution of property, based on the Roman law model. It was certainly not a blind copying of any one of the Roman systems, but it clearly was based on Roman law ideas and was so considered by later jurists.

St. George Tucker said "The rule of partition established by our law is exactly conformable to the rule of the Roman law." 16 Later in the same work, 17 he also noted the similarity of the Roman and Virginian rules of partition. Similarly, Judge Dabney Carr remarked in the case of Davis v. Rowe 18 that "whoever will look into the civil law, especially to the 118th Novel of Justinian . . . will be convinced that that is the foundation from which both [i.e., the distribution of realty and of personalty] these streams have flowed." 19 Carr added, "I have no doubt that our Act was taken (with the changes stated) from the Statute of Distribution [of personalty] 19 and the Civil Law." 20 In the same case Judge John Coalter declared that "The legislature, in framing the statute of descents, seem to have pursued the policy of the civil law, in applying the same provisions to the descent of lands, and the distribution of personal property. . . . Hence I conclude, that that Statute [of 1785] was drawn very much from our Statute of Distributions [of personal property, and from] the Civil Law." 21 The point in issue was settled with references,
inter alia, to Cujacius, Domat, Heineccius, Huberus, and Vulteius. Judge Parker in the case of Garland v. Harrison, also commenting on the 1785 statute, said, "Its basis was the statute of distributions [of personal property] and the civil law."

The lex mercatoria, the customs of international merchants and the foundation of English maritime and admiralty law, by the seventeenth century was sufficiently influenced by the Roman law and merged into the usus modernus that it should be included within the scope of this essay. There was a vice-admiralty court from 1698 to 1776 in colonial Virginia; this court was modeled on the English court of admiralty and therefore used the lex mercatoria as precedent. The presence of books on maritime law in many private colonial libraries indicates that a significant part of the population was conversant on the subject. The following titles have been found:

- Beawes, W. *Lex Mercatoria Rediviva.*
- Duck, A. *De Usu et Authoritate Juris Civilis Romanorum.*
- Jacob, G. *Lex Mercatoria.*
- Malynes, G. *Lex Mercatoria.*
- Molloy, C. *De Jure Maritimo et Navali.*
- Ridley, T. *View of the Civil and Ecclesiastical Law.*
- Selden, J. *Mare Clausum.*
- Welwood, W. *Abridgment of All Sea Laws.*
- Zouch, R. *Elementa Jurisprudentiae.*

When Virginia became independent in 1776, a new court of admiralty was established. This court also was a duplication of the court of admiralty in England, and the founding statute specifically required that its judges "be governed in their proceedings and decisions by the regulations of the continental congress, acts of [the] general assembly, English statutes prior to the fourth year of the reign of king James the first [i.e., 1607], and the laws of Oleron, the Rhodian and Imperial [i.e., of Justinian] laws, so far as the same have been heretofore observed in the English courts of admiralty." Thus we see that not only were Virginians of this period

22. 35 Va. (8 Leigh) 368, 371 (1837).
26. 9 Hening's Statutes 203. This court was active primarily in the enforcement of revenue laws relating to shipping. At least one case from this court was reported, Hogue v. Stratton, 8 Va. (4 Call) 84 (1786), and several appeals from this court were reported: 8 Va. (4 Call) 127, 153, 158, 353, 522, 564.
aware of the civil law, but they also directed that it be used in maritime lawsuits.

This court was abolished in 1788 when the newly established federal government was given exclusive control over admiralty, maritime, and international affairs. This greatly curtailed, but did not destroy, the influence of the civilian lex mercatoria in Virginia. Merchants involved in strictly intrastate commerce occasionally had need to resort to it in the normal courts of common law; it was a more highly developed system than the eighteenth-century English common law of contracts. The following extract shows the procedure for bringing the civil lex mercatoria into the jurisprudence of the common law. Judge Pendleton declared that “[a] custom of this sort [i.e., custom of merchants], when first brought into Court, is a matter of fact, and merchants examined, to prove what it is. When legal decisions are made upon it, it becomes the law of the land; of which, all parties and Courts are to take notice, without stating it.”

In general, the most frequent use of Roman law was made by George Wythe (died 1806), without question one of the most erudite and distinguished jurists which Virginia has produced. Wythe was thoroughly familiar with the Corpus Juris Civili s. From two of Wythe’s comments, it appears that he considered the Roman law to be of equal value with the English common law as a source of legal ideas and precedents. However, he does not seem to have regarded it as binding authority like an English case which was squarely on point. In one case he said, “The Roman civil law, the authority of which, if not decisive, is respectable, in cases of testamentary dispositions of chattels, allowed such bequests as this.” And in another case he stated, “On the contrary, by the Roman civil law, which is ordinarily thought a reasonable rule of decision, ...”

In his judicial opinions, Chancellor Wythe used the civil law expertly, and he used it over a wide spectrum of legal points. In Pendleton v. Lomax, he dissented from the ruling that this suit for contribution from a joint endorser of a bill of exchange was not barred by the statute of limitations. Basing his conclusion on Justinian’s Digest 46.1.17 and 36 and Code 8.40.11, which deal with a surety’s rights to subrogation and contribution, he argued that the plaintiff’s right to sue the defendant had accrued many years before and was thus barred. The case of Ross v. Pynes involved an allega-

27. 12 Henig’s Statutes 769; see also Scott v. Graves, 8 Va. (4 Call) 372 (1790), and Commonwealth v. Gaines, 4 Va. (2 Va. Cas.) 172, 177-80 (1819).
31. Wythe’s Reports 4, 8 (1790).
32. Wythe’s Reports 69, 72 (1790).
tion of slander of title to goods exposed to sale by auction. The defendant’s agent had made public a private letter from the defendant, which resulted in the goods not being sold. Wythe found the defendant liable for the damages, on the authority of *Digest* 9.2.31, because he was negligent in not taking proper precautions to avoid the loss. In another case he cited *Digest* 17.2.76 and *Digest* 4.8.19 to support his opinion that an award of arbitrators cannot be reviewed by the courts for error.\(^33\)

In the case of *Dandridge v. Lyon*\(^34\) Wythe found the passages in Justinian’s *Institutes* 2.20.7 and *Digest* 20.24.pr. affirming that one can bequeath that which is not yet in existence; the example given by Justinian, the issue of a slave, was exactly the problem of the case.\(^35\)

The case of *Woodson v. Woodson*\(^36\) involved the pledge of a specific slave to secure the loan of a sum of tobacco. The issue was whether the creditor was accountable for the profits of the pledge, i.e., the value of his services, in the absence of an agreement on the point. Wythe, relying upon Justinian’s *Code* 4.24.1-3, ruled that he was accountable. The problem dealt with in *Turpin v. Turpin*\(^37\) was a bequest of specific chattels, in this case slaves mentioned by name, which were not owned at the time of the execution of the will but which were subsequently acquired and which were owned at the time of death. Wythe decreed that the bequest was valid on the authority of *Institutes* 2.20.4 and *Code* 6.37.10. He distinguished the *regula catoniana* (*Digest* 34.7.1.pr.) from the facts of this case by asserting that the *regula* was not a universal rule but applied perhaps only to legacies which were made by persons who lacked testamentary capacity at the time of executing the will. Wythe’s somewhat bold construction by supplement of a will in *Cary v. Buxton*\(^38\) is supported by an elaborate note which cites *Digest* 28.2.13; *Digest* 28.5.82; *Digest* 28.5.93; *Institutes* 2.13.pr.; *Digest* 28.3.1; Quintilian; Cicero; and Valerius Maximius.

In three additional cases, Chancellor Wythe quoted Justinian in passing, by way of obiter dictum. He noted that a guardian should treat all of his wards equally,\(^39\) that a contract entered into through a

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34. Wythe’s Reports 123, 125, 126 (1791).
35. Wythe’s opinion was followed by Justice Lee in Taylor v. Yarbrough, 54 Va. (13 Gratt.) 183, 189 (1856).
37. Turpin v. Turpin, Wythe’s Reports 137, 142 (1791).
38. Wythe’s Reports 183 (1793).
mistake should not be enforced,\textsuperscript{40} and that the Roman praetor could appoint a curator for a prodigal.\textsuperscript{41}

Aside from George Wythe, it is only occasionally that the civil law of Rome is referred to. In a survey of the period 1776 to 1861 only two judges and one attorney are seen to cite it in court more than a couple of times. Judge John W. Green, who sat on the Court of Appeals from 1822 to 1834, cited the \textit{Corpus Iuris Civilis} at least eight times, Domat three times, and Vulteius twice.\textsuperscript{42} Judge Peter Lyons, a judge from 1779 to 1809, referred to civilian treatises seven times.\textsuperscript{43} Daniel Call, a distinguished member of the early nineteenth-century Virginia bar, also made use of the secondary civil law sources often.\textsuperscript{44} However, a large number of lawyers and judges cited the Roman law only once or twice in passing. The works most frequently mentioned were the standard texts by Domat, Pothier, Grotius, Vattel, and Pufendorf. The points of law most frequently buttressed by civilian authority involved questions of international law, contracts, suretyship and mortgages, illegitimacy, and slavery.

No judge or attorney seems to have resorted to the Roman law as often or as enthusiastically as George Wythe. The rest of the Virginia legal profession used it primarily by way of comparison or as authority where there was no Virginia or English case on point at all. The general opinion seems to be well stated by Judge Green, who said, "If we doubted whether the rule of the civil law or that of the common law were most just or convenient, we should be bound to adhere to the latter."\textsuperscript{45}

Nevertheless, when a crucial point involving a Roman law principle was raised, the bench and the bar could discuss the civil law with understanding and depth. Problems of citizenship and treaties

\textsuperscript{40} Field v. Harrison, Wythe's Reports 273, 289 (1794), citing \textit{Dig. Just. 50.17.116.2}.

\textsuperscript{41} Hinde v. Pendleton, Wythe's Reports 354, 357 (1791), citing \textit{Inst. Just. 1.23.3}.


\textsuperscript{43} 5 Va. (1 Call) 317; 8 Va. (4 Call) 401; 9 Va. (5 Call) 230; 10 Va. (6 Call) 180.

\textsuperscript{44} 7 Va. (3 Call) 94; 9 Va. (5 Call) 375, citing Bynkershoek; 11 Va. (1 Hen. & M.) 147; 14 Va. (4 Hen. & M.) 317; 15 Va. (1 Munf.) 305; 17 Va. (3 Munf.) 589; 19 Va. (5 Munf.) 446.

\textsuperscript{45} Wilson v. Shackleford, 25 Va. (4 Rand.) 5, 8 (1826). Chancellor Creed Taylor was in a minority of one when he said, "... while I have not less respect for English Judges and English opinions, than other gentlemen, yet I have too much regard for myself, and the national character of my country to rely upon English books, farther than for information merely, but not as authority: it was the common law we adopted, and not English decisions; and we should take the standard of that law, namely, that we would live honestly, should hurt nobody, and should render to every one his due, for our judicial guide." Marks v. Morris, 14 Va. (4 Hen. & M.) 463 (1809).
were discussed in *Read v. Read*\(^{46}\) and *Murray v. McCarty*\(^{47}\) with references to Vattel, Domat, Grotius, Pufendorf, and Heineccius. The Roman law of slavery as expounded in the *Institutes* and *Digest* of Justinian and by Vattel was mentioned in *Maria v. Surbaugh*\(^{48}\) and *Commonwealth v. Turner*.\(^{49}\) Justinian, Domat, Pothier, and Gothofredus were relied upon in *Towner v. Lane*\(^{50}\) to determine how the profits of a partnership should be apportioned in the absence of an express agreement. The international law of boundaries as expounded by Vattel and Grotius was discussed at length in *Garner's Case*\(^{51}\) to determine whether a crime committed at the northern edge of the Ohio River took place in Virginia.

Turning to the secondary legal literature of Virginia, we find a great paucity of use of the civilian law. This is to be noted because, in ancient Rome and in modern Europe, the scholarly literature of the civil law was its major means of propagation and growth.

The most optimistic note to be found in Virginia is in a letter of Professor John Tayloe Lomax of the University of Virginia to R. M. T. Hunter. Lomax wrote in 1828, "I would recommend to you to study Pothier on Obligations by Evans. The Civil Law is destined, if I mistake not, to have much influence in ameliorating our system of jurisprudence."\(^{52}\)

The other nineteenth-century Virginia jurists, however, showed little or no interest in Roman or continental law. In particular, the scholarly works to be examined are those of St. George Tucker (died 1827) and of his son Henry St. George Tucker (died 1848). The elder Tucker succeeded George Wythe as professor of law at William and Mary College; both Tuckers were law teachers, writers, and judges. Neither of these eminent jurists relied significantly on the civil law for any purpose. Occasionally there can be found in their writings a reference or two to Justinian, but it turns out that these were taken from Blackstone; occasionally the younger Tucker will refer to Pothier or Grotius. In general, however, they both ignored Roman law ideas.

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46. 9 Va. (5 Call) 160, 201, 209, 213, 221, 230 (1804).
47. 16 Va. (2 Munf.) 392, 397, 398 (1811).
48. 23 Va. (2 Rand.) 228, 241, 242 (1824); this leading case and the civil law rule *partus sequitur ventrem* were discussed in Patterson v. Franklin, 34 Va. (7 Leigh) 590, 592 (1836), Poinexter v. Davis, 47 Va. (6 Gratt.) 481, 508 (1850), Wood v. Humphreys, 53 Va. (12 Gratt.) 333, 345, 346 (1855).
49. 26 Va. (5 Rand.) 678, 683, 687, 688 (1827).
50. 36 Va. (9 Leigh) 262, 268-71 (1838).
52. Letter of J. T. Lomax to R. M. T. Hunter (March 28, 1828), Hunter-Garnett papers, University of Virginia Library.
William Green (died 1880), who wrote and practiced law in the middle decades of the nineteenth century, cited the civil law regularly throughout his scholarly essays. For example, in his notes and comments to Wythe's Reports, he used it extensively but only comparatively. In addition to the compilations of Justinian, Green quoted from Bynkershoek, Domat, Huberus, Mackenzie, Pothier, Stair, Vinnius, and Vulteius.

Green was followed by another Virginia jurist of the first rank, Professor John B. Minor. Minor had a high regard for Roman law and recommended that the practicing attorney have in his working library Cooper's edition of Justinian's Institutes and the Corpus Juris Civilis. Although Minor appears not to have had a very deep background in Roman law, he included citations here and there to it in his monumental encyclopedia of Virginia law. These citations were included primarily for historical and comparative purposes. There are a couple of references each to Grotius, Pothier, and Vattel; all the others are to the Institutes and Digest of Justinian. In comparison with the size of the entire work, these references are few indeed.

The last scholar to be noted is Judge Beverley Tucker Crump, a Richmonder who studied the civil law at the universities of Goettingen and Berlin. When Crump returned to Virginia after his studies in Germany, he published in the Virginia Law Journal an article entitled "The Value of the Roman Law to the Modern World." This was a translation of an essay by the celebrated Romanist Rudolph von Jhering. Crump, in an article on guardians ad litem which he wrote in 1898, discussed the Roman law origins of the subject. Although these articles were no doubt read by the legal profession in Virginia, they do not appear to have effected any revival of Roman law studies.

In summary it can be clearly stated that the height of Roman law in Virginia occurred in the period of 1776 to about 1830. Neither before nor since was it very much in vogue. George Wythe, the teacher and judge, probably had a lot to do with its popularity at that time; on the other hand, William Green, the antiquarian of a later


54. J. B. MINOR, INSTITUTES (1891-1895), 4 vols. in 6, especially in his discussion of mercantile law in vol. 3, pt. 2.

55. H. C. Riely, Beverley Tucker Crump, 42 VA. STATE BAR ASSN. REPTS. 207-08 (1930).

56. 4 VA. L. J. 453-64 (1880).

57. The Guardian ad Litem, 11 VA. STATE BAR ASSN. REPTS. 277, 285-86 (1898).
generation, was revered but not emulated. Perhaps this decline in Roman law scholarship in Virginia reflects a trend in the legal profession away from the study of political philosophy and jurisprudence and towards commercial expertise and technical proficiency. It is interesting to note a similar decline in interest in the Roman law in other parts of the United States, as pointed out by Professor Peter Stein. It is more likely, however, that it was easier to meet the ever-changing needs of society by developing the English common law rather than by borrowing the Roman law rules, which were foreign to the existing foundation.

Moreover, as the nineteenth century progressed, the body of Virginia case law accumulated. As the quantity of Virginia precedents increased, it became less necessary and then unnecessary to cite English cases, to rely on first principles, or to argue from the civil law of Imperial Rome. The rules of the civil law, however, are reasonable and respectable, as George Wythe pointed out, even if they do not have for Virginia the same authority as the English common law. During the first fifty years or so of republican Virginia, many Roman law concepts became incorporated into the body of Virginia case law, as we have seen, and in this limited form the Roman law survives today in Virginia.