

Structuring the Law: The Common Law and the Roman Institutional System

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1. Introduction

The two major modern legal systems of European origin, the common law and the civil law, are today structured according to the same basic principles. Both laws employ the central division into property, contracts, torts, and to some extent unjust enrichment. The resulting compatibility is a true improvement from the historical situation, when the Roman structures of the civil law and the writ structure of the common law made a comparison difficult. It was the far reaching influence of the Roman *Institutes* which contributed significantly to this development. However, neither the civil law nor the common law embraced the institutional system exactly as it was conceived by the Roman jurists, and the two laws also differed from each other in their time, extent and approach to the adoption of the Roman material. The following essay will trace the structural development of the common law since its creation, explore the influence of the Roman law and compare the organization of the Roman, civil, and common law systems.

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2. The Roman *Institutes*

In AD 533, the eastern Roman emperor Justinian declared his compilation of the Roman legal learning of antiquity as law.¹ Part of the collection consisted of the so called *Institutes*,² an introduction to the law for students, providing an overview, a map of the law. Justinian's own metaphor for the *Institutes* was that of the *cunabula legum*, cradle of the law, and it can be claimed that it is the most influential law book ever written.³ The *Institutes* of Justinian were largely an adoption of the *Institutes* of Gaius from the second century AD.⁴ The arrangement is part of the Roman achievement to systematize the law and give it a scientific foundation. Precedents can be found in other scientific disciplines, influenced by the Greek dialectic model of genera and species, which was generally used to classify branches of knowledge.⁵

The *Institutes* do not reveal on their surface the organization to which they aim to introduce the reader. They are composed of four books, each divided into titles and then numbered paragraphs, but the main categories must be extracted from the text: Inst. 1.1.4 states that there are two aspects of the law, public law and private law, and that the *Institutes* are only concerned with the latter (although a title on criminal law is actually included at Inst. 4.18).⁶ Then, in Inst. 1.2.12, the central statement is formulated that all law is about **persons, things, or actions**. Inst. 2.2 further divides things (lat. *res*) into corporeal and incorporeal ones. The text continues with a treatment of the different types of incorpo-

¹ See generally PETER BIRKS, GRANT MCLEOD, *Justinian's Institutes* 7-18 (1987); OKKO BEHREND, ROLF KNÜTEL, BERTHOLD KUPISCH, HANS HERMANN SEILER, *Corpus Iuris Civilis*, Band I, *Institutionen* 273, 279-288 (2nd ed. 1997). The work was comprised of four parts, the *Institutes*, the *Digest* (or *Pandects* in Greek), the *Codex*, and the *Novels*. BIRKS, MCLEOD, *supra* note 1, at 9, BEHREND, KNÜTEL, KUPISCH, SEILER, at 273. The *Codex* was enacted in AD 534 and the *Novels* are later amendments. Since the 12th century, the collection is known under the name *Corpus Iuris Civilis*. BEHREND, KNÜTEL, KUPISCH, SEILER, at 273.

² Lat. '*Institutiones*' or '*Institutionum*', meaning 'introduction', 'basic principles'. See detailed BIRKS, MCLEOD, *supra* note 1, at 12.

³ BIRKS, MCLEOD, *supra* note 1, at 7, 15, 18; BEHREND, KNÜTEL, KUPISCH, SEILER, *supra* note 1, at 289; ALAN WATSON, *Roman Law and Comparative Law* 167 (1991) [hereinafter WATSON, *Roman Law*]. The here relevant chapter of the book is also published as: *The Structure of Blackstone's Commentaries*, 97 *Nr. 5 Yale Journal* 795 et seq. (1988). In this essay, the book version is used.

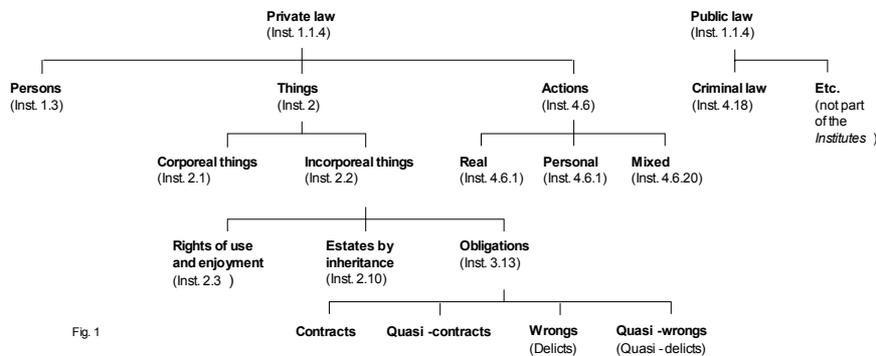
⁴ For the development of the institutional scheme see PETER STEIN, *The Development of the Institutional System*, in P. G. Stein and A. D. E. Lewis, *Studies in Justinian's Institutes in Memory of J. A. C. Thomas* 151 et seq. (1983) [hereinafter Stein, *Development*]. A line by line comparison is contained in T. LAMBERT MEARS, *The Institutes of Gaius and Justinian* (1882, reprinted 2004).

⁵ STEIN, *Development*, *supra* note 4, at 151, 157.

⁶ More on this in STEIN, *Development*, *supra* note 4, at 159. For the distinction between public and private law in Roman times see PETER G. STEIN, *Roman Law, Common Law and Civil Law*, 66 *Tulane Law Review* 1595 (1992) [hereinafter STEIN, *Roman Law*].

real things, and three groups can be identified:⁷ first, rights of use and enjoyment in real and movable property (security interests are only mentioned indirectly in Inst. 2.8.1), second, estates by inheritance, and third, obligations. The subdivision of obligations can be found in Inst. 3.13.2.⁸ There are contracts, quasi-contracts, wrongs (or delicts) and quasi-wrongs. Actions are subdivided in Inst. 4.6.1 and 4.6.20 into real, personal and mixed ones. The criminal law is a very small part, consisting only of the last title of book 4.

Institutes Corpus Iuris Civilis (533)



The categories persons and things designate the **objects of the law**,⁹ and actions designate the means of **legal redress**. The law of persons deals with the status of

⁷ See BIRKS, MCLEOD *supra* note 1, at 15; BEHREND, KNÜTEL, KUPISCH, SEILER, *supra* note 1, at 294.

⁸ The contract - tort dichotomy probably dates back to Aristotle. REINHARD ZIMMERMANN, *The Law of Obligations, Roman Foundations of the Civilian Tradition* 10 (1996). On the division of obligations see MAX KASER, *Divisio Obligationum*, in P. G. Stein and A. D. E. Lewis, *Studies in Justinian's Institutes in Memory of J. A. C. Thomas* 73 et seq. (1983) [hereinafter KASER, *Divisio*]; ZIMMERMANN, at 10-24. The quasi-categories were residual. Broadly speaking, quasi-contracts were related to contracts, but lacked the element of consent, and quasi-delicts were related to delicts, but usually lacked the element of culpability. MAX KASER, *Das Römische Privatrecht* § 260 (2nd ed. 1975) [hereinafter KASER, *Privatrecht*]; MAX KASER, *Roman Private Law* §§ 38 I 2, 48 III 4, 51 VI (2nd ed. 1968) [hereinafter KASER, *Roman Law*]; ANDREAS VON TUHR, HANS PETER, *Allgemeiner Teil des Schweizerischen Obligationenrechts* § 6 (3rd ed. 1979); ZIMMERMANN, at 15-18; W. W. BUCKLAND & ARNOLD D. MCNAIR, *Roman Law and Common Law* 66 (1936, reprint 1997), 254 et seq. (chapter IX).

⁹ ROLAND DUBISCHAR, *Über die Grundlagen der schulsystematischen Zweiteilung der Rechte in sogenannte absolute und relative. Ein dogmatischer Beitrag zur Lehre vom subjektiven Privatrecht* 8, 11, 54 (Dissertation) (1961). See also the terminology of the "carrier of rights" in FRIEDRICH XAVIER AFFOLTER, *Das römische Institutionensystem, Sein Wesen und seine Geschichte* 2, 3 (1897). Roman law, like later the medieval common law, in practice was based on

and the consequential relations among persons (family members, guardianship, etc.), and the law of things is concerned with assets.¹⁰ In this wide sense, things are anything that increases or decreases a person's wealth, therefore things also encompass obligations (credit or debt). A consequence of this comprehensive definition was the classification of obligations, which are relationships between persons,¹¹ under the term of things.¹² The section on actions deals with the

a system of actions, not like modern laws on a system of subjective rights. Stein, *Development*, *supra* note 4, at 158; DUBISCHAR, at 8, 11, 54; HANS PETER, *Actio und Writ* 56 (1957). However, by the time of Justinian, the formulary system of individual actions had been abolished. MAX KASER, *Roman Law*, *supra* note 8, at § 80 II; FRANZ WIEACKER, *Privatrechtsgeschichte der Neuzeit* 187 note 48 (1967), ULRICH ZIEGENBEIN, *Die Unterscheidung von Real und Personal Actions im Common Law* 32 (Dissertation) (1971). The content of an action was limited to a substantive law meaning, i.e., to the right. KASER, *Privatrecht*, *supra* note 8, at § 199 I 3. In Justinian's time, the law was moving into the direction of recognizing subjective rights. PETER STEIN, *The Fate of the Institutional System*, in PETER STEIN, *The Character and Influence of the Roman Civil Law* 74 et seq. (1988) [hereinafter Stein, *Fate*]. Still, the step to a system of rights had not been taken yet, and the clear differentiation between rights and actions was a later development. Stein, *Development*, *supra* note 4, at 158; DUBISCHAR, at 33, 34; Zimmermann, *supra* note 8, at 28. Nevertheless, the classification of the actions according to *in rem* and *in personam* already in the classical period has been interpreted by many authors as proof for a thinking in substantive rights. See, e.g., RUDOLPH SOHM, ed. by LUDWIG MITTEIS, *Institutionen, Geschichte und System des römischen Privatrechts* 686 et seq. (17th ed. 1933), criticized in DUBISCHAR, at 21, 33. The question about the classifications and the existence of the concept of rights in Roman law has been subject of great debate for a long time. For a survey see DUBISCHAR, at 3, 4. See also the texts of COING, *Zur Geschichte des Begriffs 'subjektives Recht'*, THIBAUT, *Über dingliches und persönliches Recht*, FEUERBACH, *Über actio in rem und actio in personam, ius in rem und ius in personam*. According to KASER, *Roman Law*, *supra* note 8, at § 4 I, the modern differentiation of rights has its historical roots in the historical differentiation of actions. BUCKLAND, MCNAIR, *supra* note 8, at 66 interpret the situation in explaining that the distinction between actions *in rem* and *in personam*, although expressed by the Romans in terms of procedure, was in reality one of substantive law.

¹⁰ BIRKS, MCLEOD, *supra* note 1, at 13.

¹¹ Inst. 3.13 defines obligations as "a legal tie which binds us to the necessity of making some performance [...]." See also ZIMMERMANN, *supra* note 8, at 1; BIRKS, MCLEOD, *supra* note 1, at 14. "The carving out of an 'obligatio' and the development of a law of obligations was one of the great contributions of classical jurisprudence to the science of law." ZIMMERMANN, *supra* note 8, at 1.

¹² The allocation of obligations under the category of things was met with opposition from the legal scholars of the following centuries. Already Theophilus, one of the three compilers of the *Institutes*, differentiated between obligations and things in his *Paraphrasis Institutionum* and instead combined the terms of the obligation and the action. According to him, obligations were the "mothers of the actions". STEIN, *Development*, *supra* note 4 at 161; DUBISCHAR, *supra* note 9, at 26; BEHRENDTS, KNÜTEL, KUPISCH, SEILER, *supra* note 1, at 294. The glossators in the 11th and 12th centuries, too, had a tendency to connect obligations with actions, since it was difficult to accept that an obligation was supposed to be a thing. AFFOLTER, *supra* note 9, at 80. Affolter explains this separation of the actions from things with a lack of understanding (already of Theophilus!) of the comprehensive concept of *res* as it was devised by Gaius. AFFOLTER, *supra* note 9, at 79-80. But it seems that the scholars hesitated to question the tripartite system of persons, things and actions as it was conceived by Gaius, and therefore had to allocate the obligations under one of the three headings (while a few jurists listed obligations as an independent category from early on. AFFOLTER, *supra* note 9, at 80). Dubischar says that the combination of

characteristics of different actions.¹³ The main divisions within the *Institutes* are, in summary, one of the law into man, his assets, and the means of legal redress.¹⁴

This structure is not consistently mirrored in the arrangement of the titles under the four books: Book one contains a general introduction into the law and deals with persons. Book two begins with the discussion of things, but ends in the middle of it, where book three begins, only to end in the middle of the treatment of obligations. Book four starts with obligations from delict, continues with actions, and finishes with criminal law. Gaius' *Institutes* were also divided into four books. But this seems to have had purely practical reasons, since in Gaius' time, and unlike in the period of Justinian, the length of a book was determined by the length of a roll.¹⁵ The division of the first two books in the *Institutes* of Justinian is the same as in Gaius, and was apparently just adopted from there. However, the place at which books three and four divide is new, since Gaius' fourth book began with the treatment of actions. There is a controversy among scholars about the meaning of the fact that part of the obligations are covered in book four in the *Institutes*. Some authors interpret the split as a sign that the *Institutes* of Justinian were slowly moving away from the concept of Gaius.¹⁶ But the division into books is not creating an order of its own, nor is it reflected in the text. No plausible alternative to the in Inst. 1.2.12 clearly proclaimed system of persons, things and actions, which in Inst. 2.2 defines obligations as incorporeal things, is presented.

obligatio and *actio* was possible because the claim based on an obligation often needed to be affirmed by bringing an action, while a property right was seen as a fact independent from actions. DUSISCHAR, *supra* note 9, at 27 et seq.

¹³ This, however does not amount to a complete description of the procedural law. See H.F. JOLOWICZ, *Obligatio and Actio*, 68 Law Quarterly Review 469-471 (1952); STEIN, *Development*, *supra* note 4, at 160; ZIMMERMANN, *supra* note 8, at 28.

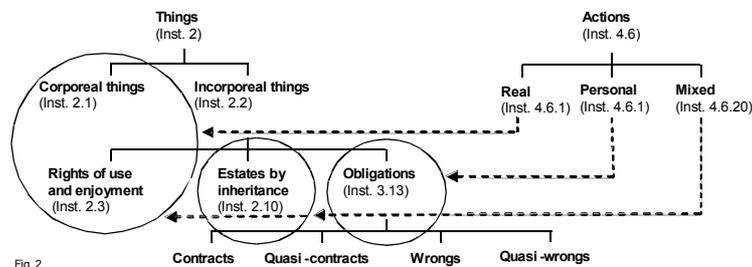
¹⁴ See BEHRENDTS, KNÜTEL, KUPISCH, SEILER, *supra* note 1, at 287.

¹⁵ ALAN WATSON, *The Making of the Civil Law* 64 (1981) [hereinafter WATSON, *Civil Law*].

¹⁶ Birks, McLeod say that the division into four books means nothing conceptually. BIRKS, MCLEOD *supra* note 1, at 13. Heilfron explains that the division into four books was in principle adopted from Gaius, but since the part on actions contained less material in Justinian than in Gaius, and for reasons of a more balanced distribution, part of the obligations was put into book four. EDUARD HEILFRON, *Römische Rechtsgeschichte und System des Römischen Privatrechts* 138 (§ 25) (5th ed. 1903). However, the changed division of the books may also have been a sign that the law was already moving away from the trichotomy of Gaius, as several scholars think it was the case. See BEHRENDTS, KNÜTEL, KUPISCH, SEILER, *supra* note 1, at 294; STEIN, *Fate*, *supra* note 9 at 75; STEIN, *Development*, *supra* note 4, at 161; ZIMMERMANN, *supra* note 8, at 28. Affolter says that Theophilus, one of the authors of the *Institutes*, was responsible for the allocation of actions in the third as well as the fourth book (see also HEIFRON, at 138 (§ 25)), and that the purpose was to promote his mistaken belief, that obligations belong to actions rather than to things. AFFOLTER, *supra* note 9, at 79-80. Watson compares the division into books in the *Institutes* to the division into four books in Blackstone's *Commentaries* and others (see below, at note 114), but without mentioning the problem of the significance of the division into books in the *Institutes*. WATSON, *Roman Law*, *supra* note 3, throughout chapter 18. The author contacted Alan Watson, but could not resolve the issue.

In any case, the question is of limited relevance, since the most important aspect of the institutional arrangement, especially regarding its impact on future systems, is located below the level of persons, things and actions: It is the differentiation between *actiones in rem*¹⁷ (real actions) and *actiones in personam* (personal actions), and their counterparts on the side of things. This is the basis for the central division of the modern legal systems into a law of property and a law of obligations, the latter including contracts, torts and unjust enrichment. The concept is contained in Inst. 4.6.1. According to this section, "[t]he main classification [of actions] is into two: [...] real or personal. A plaintiff may sue a defendant who is under an obligation to him, from contract or from wrongdoing. The personal actions lie for these claims. In them the plaintiff says that the defendant ought to give him something, or ought to give and or do something. He may also otherwise owe him something. Or else he may sue a defendant who is not under any kind of obligation to him but is someone with whom he is in dispute about a thing. Here the real actions lie."

Thus, the classification of actions and of things are interrelated in the *Institutes*, and the two sides must be read together in order to understand the concept. Inst. 4.6.1 makes clear that the basis for the *actiones in personam* is a contract or a delict. And according to Inst. 4.6.1 and 4.6.2, actions to claim the property of a thing or to enforce a right of use and enjoyment are *actiones in rem*. Mixed actions are the subject of Inst. 4.6.20. They are the action for partitioning an estate, dividing common property, and determining boundaries of land.



The roots of the division of actions into *in rem* and *in personam* date far back in Roman legal history. Originally, there were two sides to it: On the one hand the cause of action, i.e., claiming a property or a debt; and on the other hand the enforcement, i.e., allowing the plaintiff to seize a thing directly or be reimbursed monetarily.¹⁸ Actions simultaneously contained the substantive law

¹⁷ From lat. *res*, thing.

¹⁸ KASER, *Roman Law*, *supra* note 8, at § 4 I 1 a; MAX KASER, *Das römische Zivilprozessrecht*, §§ 12 II, 13, 14 (1966) [hereinafter KASER, *Zivilprozessrecht*]; ZIEGENBEIN, *supra* note 9, at 24.

rules as well as the procedure, and the substantive law meaning and the procedural aspect were congruent. Under a **substantive law** meaning the nature of the action was determined by the claim of the plaintiff.¹⁹ Under a **procedural law** aspect the division was determined according to the content of the relief, the aim of the action. During the classical period of Roman law, the differentiation became purely one of substantive law.²⁰ In the post-classical vulgar law period, the nature of the classification changed, and the content of the relief demanded became the determining factor.²¹ Justinian, however, returned to the meaning of *in rem* and *in personam* from the classical period.²² The division of actions into *in rem* and *in personam* in the *Institutes* is again one of **substantive law**. Actions are defined in Inst 4.6.1 as being *in rem* or *in personam* based on the respective *claim* (property, contract, etc.) in the part about things, and not according to procedural aspects.

There results the following definition: The division of *actiones in rem* and *actiones in personam* in the *Institutes* is based on the claim, and the claim determines against whom or what an action is directed.²³ An *actio in rem* is aimed at a *res*, a thing.²⁴ The *res* itself, no matter where it lies, is pursued. Things are identified directly, through their random possessor, without there

¹⁹ Although Roman law was traditionally based on actions, which were important for the practitioners, the Romans were from the beginning also thinking in terms of substantive law. ALAN WATSON, *The Law of Actions and the Development of Substantive Law in the Early Roman Republic*, 89 *Law Quarterly Review* 387-392 (1973); ALAN WATSON, *Roman Law and English Law: Two Patterns of Legal Development*, 36 *Loyola Law Review* 255 (1990) [hereinafter WATSON, *Patterns*]. See also the discussion in KASER, *Privatrecht*, *supra* note 8, at § 55 I 3. The formulary system of individual actions became abolished in the vulgar law period. ZIEGENBEIN, *supra* note 9, at 32; KASER, *Roman law*, *supra* note 8, at § 80 II.

²⁰ KASER, *Privatrecht*, *supra* note 8, at § 55; ZIEGENBEIN, *supra* note 9, at 24 et seq. The differences of actions *in rem* and *in personam* were to a certain degree still mirrored in the procedure. However, during the classical period of Roman law, both actions led to monetary relief. This way it was avoided that a real action would fail if the object was lost, and a new procedure *in personam* had to be initiated. ZIEGENBEIN, *supra* note 9, at 29-30.

²¹ KASER, *Privatrecht*, *supra* note 8, at § 199 I 2; KASER, *Zivilprozessrecht*, *supra* note 18, at § 88 I 2; ZIEGENBEIN, *supra* note 9, at 31-32.

²² KASER, *Privatrecht*, *supra* note 8, at § 199 I 3, § 245 II; KASER, *Zivilprozessrecht*, *supra* note 18, at § 88 I 3; ZIEGENBEIN, *supra* note 9, at 33-34. See also T. CYPRIAN WILLIAMS, *The Terms Real and Personal in English Law*, 4 *Law Quarterly Review* 395, 397 (1888). At the same time, the right for performance was extended to *actiones in rem*, and the proprietor became also personally responsible for the surrender of the thing. KASER, *Privatrecht*, *supra* note 8, at § 199 I 3. While this development is not a general departure from the concept that an *actio in rem* is a claim based on a right to the thing, it weakens its original character as an action *in rem*. KASER, *Privatrecht*, *supra* note 8, at § 199 I 3, § 245 II 2.

²³ KASER, *Roman Law*, *supra* note 8, at § 4 I 1 a, § 4 II 1 b; cf. also KONRAD ZWEIGERT, HEIN KÖTZ, *Einführung in die Rechtsvergleichung* 144 (3rd ed. 1996).

²⁴ This, however, is a simplification of the situation in Roman times. Actions *in rem* had in Roman times a wider use. WILLIAMS, *supra* note 22, at 395; DUBISCHAR, *supra* note 9, at 84 et seq. The exact definition of the dichotomy between *in rem* and *in personam* was subject to great debates among civil law scholars in the 19th century: For the dispute between Thibaut and Feuerbach see DUBISCHAR, *supra* note 9, at 83 et seq.

being a legal relationship between him and the claimant. An *actio in personam* means that a claim is directed against a certain person, and the plaintiff cannot directly get hold of the aim of his action. Things are only identified and seized indirectly, through a certain person. A debt has to be redeemed or a damage compensated for. The claim is brought in connection with the conduct of a person.

The system as it was put forward in the *Institutes*, great in its conception but intricate in its presentation,²⁵ was to become guiding for the structures of the civil law as well as the common law. The combination of actions and substantive law made the book attractive for the legal scholars of both systems, but also made dealing with it not an easy task.

3. The English Writ System

The history of the common law begins with the conquest of England by the Normans in the year 1066 (the battle of Hastings). Until that time, the law on the island was not markedly different from the one on the continent.²⁶ Around 500 BC, the Germanic Angles, Saxons and Jutes had subjugated the land which had been inhabited by the Celtic Britons, and they followed Germanic customary law. However, the law that the Normans brought with them from France (Normandy) was likewise Germanic. The rift with the continent was only to occur gradually: After the conquest by the Normans, a law emerged in England that, even though based on Germanic traditions, was new and modernized. This evolution was largely shaped by the political situation at the time.²⁷ The establishment of a rigidly controlled feudal system by the Norman conquerors under William I (William the Conqueror) was the trigger for the development of new rules in areas which were important enough to be dealt with by the king. Foremost among them were questions concerning land and the suppression of violence among the subjects. Land was the primary source of wealth of the time and most important basis of power for the king, who was at the top of the feudal chain, and the control over law and order was the condition for the ability to govern. Other legal claims, such as the enforcement of private promises (contracts), were supposed to be handled by the traditional local courts at first and remained outside of this development. Thus, the common law in the beginning was primarily a feudal law.

²⁵ The systematology of the Romans had its limits. Cf. ZIMMERMANN, *supra* note 8, at 24 et seq.; MAX KASER, ROLF KNÜTEL, *Römisches Privatrecht* § 2 III 3 (18th ed. 2005) (§ 2 III 3 is not in the English translation, KASER, *Roman law*, *supra* note 8); Stein, *Fate*, *supra* note 9, at 75; KASER, *Divisio*, *supra* note 8, at 73; DUBISCHAR, *supra* note 9, at 4-5, 70.

²⁶ R. C. VAN CAENEGEM, *The Birth of the English Common Law* 89 (1988).

²⁷ VAN CAENEGEM, *supra* note 26, at 7 et seq. 92, 107.

A procedural limitation for the access to the royal courts was set by the requirement to purchase a writ from the king's chancellor.²⁸ The choice of the writ determined the substantive law and procedural rules that applied.²⁹ As many writs existed as there were actions.³⁰ Once a writ had been issued, it became a precedent for the future, yet writs could be changed and new writs were created.³¹ In the beginning, there was no aspiration to build a comprehensive, coherent legal system. But with the increasing number of writs, the royal jurisdiction was equally extended.³² As the writs began to develop into a whole legal system, they had to be standard- and stabilized. In the middle of the 13th century, the chancellor was prohibited to create new writs without the consent of parliament.³³ This meant that the number of writs remained more or less unchanged from that point on. Since the law applied by the king's courts the longer the more represented the main body of the English law, and this law was in content dependent on the writs, it was the writs which soon provided the framework of the legal system.

²⁸ The writ was issued by the chancellor of the king, usually upon the request of the plaintiff and without granting the defendant an opportunity to be heard. PETER, *supra* note 9, at 28. The Chancery was the secretarial department of the king, and the chancellor his first minister. FREDERIC WILLIAM MAITLAND, *Equity: A Course of Lectures* 2 et seq. (A. H. Chaytor and W. J. Whittaker, editors), 2nd ed. rev. by J. Brunyate, Cambridge 1936. A writ was a sealed written (therefore "writ") order of the king that the claim of the plaintiff had to be satisfied. Writs could be issued for any proclamation of the king's will, and were used in all branches of the royal government. PETER, *supra* note 9, at 19. The order of the king was addressed to the sheriff, the local court, the feudal lord or private persons. VAN CAENEGEM, *supra* note 26, at 40. Only if the defendant refused to obey the order of the king would the plaintiff bring an action in the (royal) court. The court would then decide independent of the king's order. FREDERIC WILLIAM MAITLAND (A. H. Chaytor and W. J. Whittaker, ed.), *The Forms of Action at Common Law* 20, 42 (1909, numerous reprints) [hereinafter MAITLAND, *Forms of Action*]. See generally PETER, *supra* note 9, at 18 et seq.; J. H. BAKER, *An Introduction to English Legal History* 54 et seq. (4th ed. 2002); VAN CAENEGEM, *supra* note 26, at 30 et seq.; ZIEGENBEIN, *supra* note 9, at 35 et seq.; DUNCAN KENNEDY, *The Structure of Blackstone's Commentaries*, 28 *Buffalo Law Review* 231 et seq. (1979).

²⁹ PETER, *supra* note 9, at 35 et seq.; MAITLAND, *Forms of Action*, *supra* note 28, at 3. The substantive and procedural law was not contained in the writ itself, but was with time developed by the courts and the juries. PETER, *supra* note 9, at 37; BAKER, *supra* note 28, at 71-72, 76. Maine famously described the development of substantive rules the following way: "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that the substantive law has at first the look of being gradually secreted in the interstices of procedure." Cited in MAITLAND, *Forms of Action*, *supra* note 28, at 1.

³⁰ BAKER, *supra* note 28, at 55; PETER, *supra* note 9, at 36. However, action and writ have to be distinguished. An action was begun with a writ. PETER, *supra* note 9, at 36. See also L. B. CURZON, *English Legal History*, 73 (2nd ed. 1979). The writ-system was also known as "forms of action". BAKER, *supra* note 28, at 56; MAITLAND, *Forms of Action*, *supra* note 28, at 1, 3; KENNEDY, *supra* note 28, at 23.

³¹ BAKER, *supra* note 28, at 55; PETER, *supra* note 9, at 44.

³² PETER, *supra* note 9, at 44.

³³ BAKER, *supra* note 28, at 56; PETER, *supra* note 9, at 47. This restriction was diminished by the chancellors making use of their equity powers.

The writs became the foundation of the common law. Still, they retained their function to remedy particular facts within a confined technical meaning. It was not their purpose to provide for abstract legal concepts. And the English legal practitioner was not much occupied with structure. Up to several hundred actions, assisted by the concepts of equity, made up a collection of rather independent remedies, or "pigeon-holes".³⁴ The important question was which action would lie in a given case. A wrong choice meant a lost case.³⁵

The writs emerged without system, but classifying them into categories sharing common characteristics is nevertheless possible. The register of writs followed a certain inner scheme, grouping together the writ of right and related writs, writs concerning matters of the church, etc.³⁶ It is also possible to categorize the writs according to their underlying character of asserting a right or complaining of a wrong.³⁷ *Praecepta* (lat. command) writs were an assertion of a right, a demand to obtain something that is owed, or being owned (*praecipere quod reddat*), or, in its negative form, the allowance to have or do something (*praecipere quod permittat*), and the restoration of the lawful situation. They have their origin in claims of land. In contrast, the later developed *ostensurus quare* (lat. explain why) writs were used to complain about a (originally violent) wrong, an act of the past that should be redressed, compensated for. The smaller group of the assizes falls in between.

Medieval English law as it was established by the king's courts was innovative, progressive and sophisticated already in the 13th century. And it applied to all parts of the country, which led to the term "common law".³⁸ On the continent, the crown had not been powerful enough to bring about a similar development. The rest of Europe was legally a fragmented landscape at this time. The archaic Germanic customary law, which was also a system of actions,³⁹ still applied everywhere. But the rediscovery of the Roman law in Bologna in the 12th and 13th century allowed the replacement of the old customs on the conti-

³⁴ So called in MAITLAND, *Forms of Action*, *supra* note 28, at 3.

³⁵ The "suing out" of a writ was defining for the medieval common law (KENNEDY, *supra* note 28, at 232), and even today the modern term of the "lawsuit" reminds of this history.

³⁶ FREDERIC WILLIAM MAITLAND, in: H. A. L. Fisher (ed.), *The Collected Papers of Frederic William Maitland*, vol. II 112 et seq., 156 et seq. (1911) [hereinafter MAITLAND, *Papers*]; PETER, *supra* note 9, at 97-98, 112. The classification was not obvious, as MAITLAND, *id.* at 112, remarks: "When we take up the book the first time we may, indeed, be inclined to say that it has no arrangement whatever [...]." According to Maitland, there were also other criterias of classification employed, *id.* at 112 et seq., 115; PETER, *supra* note 9, at 98, with references to MAITLAND. PETER, at 94 et seq., compares in detail the system of the register of writs with that of the *edictum perpetuum*, the collection of actions of the Romans.

³⁷ BAKER, *supra* note 28, at 57-59, and the (historian's) classification at 70. The register of writs did not make use of this classification. See MAITLAND, *Papers*, *supra* note 36, at 113. Cf. also the list of writs listed in the order they appear in Glanvill, in G. D. H. HALL (ed. & trans.), *The treatise on the laws and customs of the realm of England commonly called Glanvill* 199 (1965).

³⁸ René DAVID, GÜNTHER GRASMANN, *Einführung in die grossen Rechtssysteme der Gegenwart*, 440 (1988); ZWEIGERT, KÖTZ, *supra* note 23, at 180; Peter, *supra* note 9, at 26.

³⁹ SOHM, *supra* note 9, at 685; cf. also ZIEGENBEIN, *supra* note 9, at 22 note 25.

ment with the scientific Roman legal methods.⁴⁰ Roman law was to lay the foundation of all civil law systems. There was no need for such a reception in England, which had already developed an autochthonous, modern law that applied to the whole country. The real breach therefore came not primarily from the English choosing their own path in the 12th century, but from the reception of the Roman law on the continent in the 15th century.⁴¹ And for much of the medieval period, English law developed outside the influence of Roman or civil law, and in content they differed widely.

Although usually told like this, it is not the full story. Roman law was a constant, if at times distant, companion of the common law from early on. Certainly, some of the common characteristics of the two laws had been developed independently:⁴² The system of actions, focusing on the means of redress rather than on rights, as the later civil law,⁴³ and the casuistic nature of both laws.⁴⁴ But there was also an important direct influence of Roman law, and a first intensive contact with it in the beginning of the development of the common law was having a profound and lasting impact on it. It came about in connection with the private initiative of legal scholars who had the ambition to create a comprehensive and systematic survey of writs. The earliest and most influential of these so called "books of authority" were Glanvill and Bracton. And Bracton in particular was looking to the Roman *Institutes* for guidance.

⁴⁰ Later also called "common law" (*gemeines Recht* in Germany, *droit commune* in France) on the continent. ZWIEGERT, KÖTZ, *supra* note 23, at 180.

⁴¹ VAN CAENEGEM, *supra* note 26, at 89 et seq.

⁴² PETER, *supra* note 9, at 10, 15, 21, 82, 102; FREDERICK POLLOCK, Frederic William Maitland, *The History of English Law before the Time of Edward I* vol. II 558 et seq. (1898/1968); ZWIEGERT, KÖTZ, *supra* note 23, at 183.

⁴³ PETER, *supra* note 9, at 55; MAITLAND, *Forms of Action*, *supra* note 28, at 63; ZWIEGERT, KÖTZ, *supra* note 23, at 183; ZIEGENBEIN, *supra* note 9, at 86. *Ubi remidium, ibi ius* (the existence of a remedy creates the right), and not as in the civil law, *ubi ius, ibi remidium* (the right creates the remedy).

⁴⁴ Even though casuistic, Roman law was in contrast to English law not a judge made law, and the Romans never knew a doctrine of *stare decisis*. See KASER, *Roman law*, *supra* note 8, at § 2 II 1, more elaborative in the newer German edition, KASER, KNÜTEL, *supra* note 25, at 2 II 1 *in fine*; STEPHAN BUHOFFER, *Case Law, rechtsvergleichende Analyse eines Begriffs*, *recht* 1 2001, 11-14. For a comprehensive comparison of the character of the Roman law, the common law and the civil law see, e.g., STEIN, *Roman Law*, *supra* note 6, at 1591-1603; WATSON, *Patterns*, *supra* note 20, at 247-268; OBRAD STANOJEVIC, *Roman Law and Common Law - A Different Point of View*, 36 *Loyola Law Review* 269-274 (1990); FRITZ PRINGSHEIM, *The Inner Relationship between English and Roman Law*, 5 *Cambridge Law Journal* 347-365 (1935); BUCKLAND, MCNAIR, *supra* note 8 (generally); THOMAS EDWARD SCRUTTON, *The Influence of the Roman Law on the Law of England* 150-151, 187-195 (1885, reprint 1985) [hereinafter SCRUTTON, *Roman Law*].

4. Glanvill, Bracton

Early royal common law judges had been in close contact with Roman law. Often, they were clerics accustomed to (Roman) canon law. Furthermore, the rediscovery of the *Corpus Juris Civilis* and revival of Roman law in the 11th and 12th centuries led to a general academic study of the scientific Roman legal thinking in Europe, which also affected England.⁴⁵ By 1145 Vacarius was teaching Roman law in England. And the first treatises on English law unsurprisingly were making use of the Roman model.

The earliest of the books of authority was *De Legibus et Consuetudinibus Regni Angliae*, probably written between 1187 and 1189. The author, long believed to be the justiciar Ranulf Glanvill, is uncertain.⁴⁶ The influence of Roman law on the arrangement, terminology and content is evident throughout the work, starting with the prologue, which is modeled after that of the *Institutes*.⁴⁷ But the volume is about English law: Divided into fourteen books and subdivided into numerous individual topics, the treatise largely is concerned with writs, yet it also contains discussions on substantive law independent of actions.⁴⁸

The inner structure of the work is not visible from its outer division, but provided in book i chapters 1-4: Pleas (writs)⁴⁹ are either criminal or civil, and they belong to the crown or to the sheriffs of counties (book i chapter 1). In book i chapter 3, royal civil pleas are divided into two categories, proprietary and possessory.⁵⁰ There is, therefore, a substantive law division of the writs into the categories of criminal and civil, and of the latter into proprietary and possessory. Both sets of distinctions were drawn from the terminology of Roman and canon law.⁵¹

⁴⁵ See, e.g., BAKER, *supra* note 28, at 28; HALL, *supra* note 37, at xv et seq.; BIRKS, MCLEOD, *supra* note 1, at 7; ZWEIGERT, KÖTZ, *supra* note 23, at 191 et seq.; FRANCIS DE ZULUETA, PETER STEIN, *The Teaching of Roman Law in England around 1200* (generally) (1990); POLLOCK, MAITLAND, *supra* note 42, at 559; PETER STEIN, *Römisches Recht und Europa*, 97 et seq. (3rd ed. 1999). But during the second half of the 12th century, King Stephen prohibited the study of Roman law in England. HALL, *supra* note 37, at xviii.

⁴⁶ HALL, *supra* note 37, at xxx.

⁴⁷ HALL, *supra* note 37, at xxxvi et seq.; Heinrich Brunner, *The Sources of English Law, in Select Essays in Anglo-American Legal History*, vol. II 34 (1908).

⁴⁸ HALL, *supra* note 37, at xviii, xxvii, xxix.

⁴⁹ BAKER, *supra* note 28, at 176.

⁵⁰ HALL, *supra* note 37, at xix et seq.; DAVID J. SEIPP, *The Concept of Property in the Early Common Law*, 12 Nr. 1 Law and History Review 35 (1994).

⁵¹ SEIPP, *supra* note 50, at 35.

Glanvill (1187)

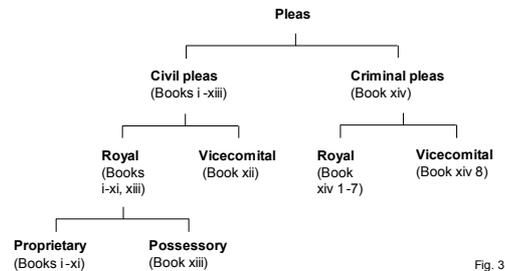


Fig. 3

The common law in Glanvill's time was not yet a comprehensive one. Foremost in the king's interest were still questions evolving around land and the suppression of violence. But even then the common law covered more than just questions about property and possession or crimes, which led to some difficult choices for the author in terms of categorization.⁵² Yet on the whole, the categorization did not seem to affect the content of the treatise much.

While the division of the law into civil and criminal parts can be found in the *Institutes*, it does not play a significant role. Furthermore, while both property and possession are Roman law concepts, they are not employed in the institutional scheme.⁵³ It was another, more influential treatise, written fifty years later, that would apply the full institutional scheme to the common law, Bracton's *De Legibus et Consuetudinibus Angliae (On the Laws and Customs of England)*.

As with Glanvill, the authorship of this treatise is uncertain.⁵⁴ The work was traditionally ascribed to Henrici de Bracton, a judge under Henry III. Most of the decisions the text is based upon are those of two other judges, Martin Pateshull and William Raleigh.⁵⁵ There exist a multitude of divergent manuscripts, which makes it difficult to decide what the original text, which is lost,⁵⁶ looked like. The book is distorted by additions, omissions, mistranslations and misprints of copyists.⁵⁷ In addition, it was never completely finished.⁵⁸ Neverthe-

⁵² HALL, *supra* note 37, at xxvi; SEIPP, *supra* note 50, at 35.

⁵³ Possession (*possessio*) was seen by the Romans as a fact and contrasted to the right of property. Still, possession was protected by the *interdicta*. Cf. Inst. 4.15.

⁵⁴ See for the detailed discussion of date and authorship: PAUL BRAND, 'The Age of Bracton', in *The History of English Law, Centenary Essays on Pollock and Maitland* (Proceedings of the British Academy, 89) 66 et seq., 73 et seq. (1996); SAMUEL E. THORNE, *Henry De Bracton, 1268-1968*, in Samuel E. Thorne, *Essays in English Legal History 75-78* (1985) [hereinafter THORNE, *Henry de Bracton*].

⁵⁵ BRAND, *supra* note 54, at 73 et seq. Bracton had served as a law clerk of Raleigh before becoming a judge himself. BRAND, *supra* note 54, at 74.

⁵⁶ THORNE, *Henry De Bracton*, *supra* note 54, at 84.

⁵⁷ See, e.g., GEORGE E. WOODBINE (ed.), SAMUEL E. THORNE (transl.), *Bracton on the Laws and Customs of England*, vol. I (Introduction), 28-29 (1968) (the book contains the text and a trans-

less, the treatise is the fullest account from the English law of the middle ages, and according to Maitland, it is "the crown and flower of English medieval jurisprudence."⁵⁹ While Glanvill still provided a collection of writs, Bracton's work is, for the first time, a systematic account of the substantive law.

It is not easy to derive the inner structure of Bracton's treatise. The numerous versions differ greatly in their division of the work.⁶⁰ Some were divided into five books, and further into titles and paragraphs.⁶¹ There is no evidence, however, to show that Bracton himself divided the treatise into books.⁶² Certain divisions are useful as a guide, but as with the *Institutes* and Glanvill, the structure of Bracton has to be reconstructed with the help of clues in the text. Even then is it not always apparent at exactly what points the text should be divided.⁶³

The law in Bracton is partly Roman and partly English.⁶⁴ The main Roman model was the *Summa Azonis*, a version of the *Institutes* by Azo,⁶⁵ which Bracton follows closely at times. And the inner division of the work is largely that of

lation of Bracton); SAMUEL E. THORNE, *The Text of Bracton's De Legibus Angliae*, in Samuel E. Thorne, *Essays in English Legal History* 93 et seq. (1985) [hereinafter THORNE, *Text*]; THORNE, *Henry de Bracton*, *supra* note 54, at 81, 88 et seq.; ZIEGENBEIN, *supra* note 9, at 40, 41; Frederic William Maitland, *Select Passages from the Works of Bracton and Azo* (Selden Society Publications 8) xvii (1895) [hereinafter MAITLAND, *Bracton and Azo*]. For a comment on Maitland's work see THORNE, *Text*, 7 et seq.; THORNE, *Henry De Bracton*, *supra* note 54, at 80, 90-91. HERMANN KANTOROWICZ, *Bractonian Problems*, 56 Glasgow University Publications 99 (1941) talks about an "exceedingly corrupt text". The edition of Sir T. Twiss has been criticized: Brunner, *supra* note 47, at 36; T. E. SCRUTTON, *Roman Law in Bracton*, 1 Law Quarterly Review 425, 426 (1885) [hereinafter SCRUTTON, *Bracton*].

⁵⁸ WOODBINE, THORNE, *supra* note 57, at 44; BRUNNER, *supra* note 47, at 35.

⁵⁹ Quoted in BRUNNER, *supra* note 47, at 35; BRAND, *supra* note 54, at 65.

⁶⁰ WOODBINE, THORNE, *supra* note 57, at 28 et seq., 41 et seq.; MAITLAND, *Bracton and Azo*, *supra* note 57, at xiv. For the arrangement see also THORNE, *Henry De Bracton*, *supra* note 54, at 85-87.

⁶¹ WOODBINE, THORNE, *supra* note 57, at 28; CARL GÜTERBOCK, *Bracton and his Relation to the Roman Law*, 34 (1866) (speaking of a subdivision into tracts, chapters and paragraphs); JOHN REEVES, *History of the English Law, From the Time of the Romans to the End of The Reign of Elizabeth*, 357 (chap. VIII) (1880), giving a short description of the content of each book.

⁶² WOODBINE, THORNE, *supra* note 57, at 35, 43-45.

⁶³ WOODBINE, THORNE, *supra* note 57, at 52 et seq. For the arrangement of the content as reconstructed by scholars see WOODBINE, THORNE, *supra* note 57, at 60; and similar GÜTERBOCK, *supra* note 61, at 36. GÜTERBOCK, at 35, notes that the inner system of Bracton does not entirely coincide with the outer division. REEVES, *supra* note 61, at 357 introduces his overview of the content of Bracton with the words: "Because the form in which the work is printed does not much contribute towards exhibiting to a cursory inspector the plan and design of the whole [...]". WOODBINE, THORNE, *supra* note 57 at 49 says that Bracton may have avoided a clear and definitive scheme because of the difficulty of arranging the unorganized English law under such a plan.

⁶⁴ To what extent the work is Roman or English is subject to discussion. See, e.g., WOODBINE, THORNE, *supra* note 57, at 51; SCRUTTON, *Bracton*, *supra* note 57, generally.

⁶⁵ As discovered by Güterbock (*supra* note 61). MAITLAND, *Bracton and Azo*, *supra* note 57, at ix. For more on Azo see there.

the *Institutes*:⁶⁶ In folio 4b, Bracton adopts the basic division of the law into **persons, things, and actions** of the *Institutes*. However, the law of things in Bracton is subdivided into a section on the division of things and a section on the acquisition of things. The classification of corporeal and incorporeal things is abandoned. Nevertheless, Bracton's law of things roughly follows the content of the *Institutes* with regard to the law of property and inheritance.⁶⁷ But the main discussion of obligations has been removed from the treatment of things and placed in the section on actions. The broad definition of things, already criticized by Azo, has not been adopted.⁶⁸ The part on actions contains a general introduction to actions (fs. 98-99), a treatment of obligations (fs. 99-101b) and a general part on the division of actions as well as the treatment of certain procedural questions (fs. 101b et seq.). There then follows a part on criminal actions (fs. 115b-159b). Finally, the civil actions are discussed, which constitute the bulk of the work (fs. 159b-439).⁶⁹

Bracton (1250)

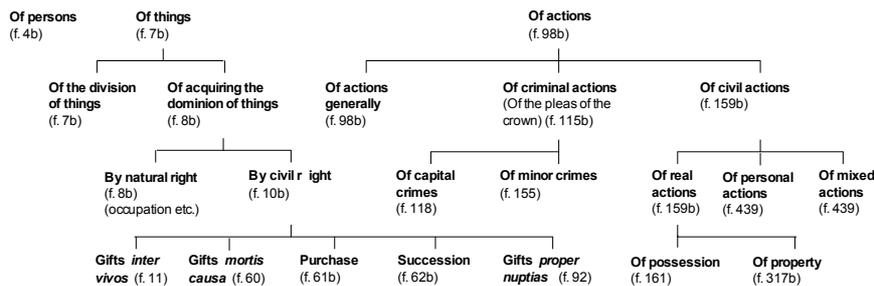


Fig. 4

⁶⁶ SCRUTTON, *Bracton*, *supra* note 57, at 433, 438.

⁶⁷ Cf. MAITLAND, *Bracton and Azo*, *supra* note 57, at xv-xvi; SCRUTTON, *Bracton*, *supra* note 57, at 430. Already in the *Institutes*, there were some discussions on contracting before the part on obligations, and this is also the case in Bracton.

⁶⁸ While Azo retained the order of the *Institutes*, he remarked that the obligations belong to actions rather than to things. (For this, under the glossators generally prevailing view, see above, note 12.) Apparently influenced by this opinion, Bracton went a step further and allocated the obligations in the part on actions. (Cf. also the remark in f. 99, according to which all actions are based on obligations.) Maitland comments: "The whole of private law, so [Bracton] has learnt, can be brought under the three heads, Persons, Things, Actions; and it seems to him that the treatment of Obligations comes more naturally under the third than under the second of these three." MAITLAND, *Bracton and Azo*, *supra* note 57, at 134. See also *id.* at 141.

⁶⁹ One quarter of Bracton, 117 folios, are only about the writ of right. ZIEGENBEIN, *supra* note 9, at 42.

In the general part concerning the division of actions from f. 101b to about f. 104b, Bracton states that there are **actions in rem, in personam, and mixed actions**, and he defines them. However, there is no coherence regarding this definition in the book.⁷⁰ One criterion of several for classifying the actions employed by Bracton is the **substantive law**, like in the *Institutes*: "The first classification of actions or pleas [...] is this, that some are in rem, some are in personam, and some mixed. Of those in personam, [some] descend ex maleficio, [others] ex contractu." (f. 101b). In f. 102, actions *in rem* are also defined according to substantive law criteria: "[...] where one claims a specific thing [...] from another and asserts that he is the owner [...]", an action *in rem* lies. Bracton then, unlike the *Institutes*, differentiates between immovables and movables, saying that in the latter case the action is *in personam*, "because he from whom the thing is sought is not bound to return the thing absolutely but disjunctively, to restore it or its value." (f. 102b)⁷¹ The criteria is a procedural one, the **remedy**. A third approach is taken in fs. 364b-372b and fs. 439-441: Here, the procedural criteria of the **mesne process** (default proceedings) is used to make the distinction.⁷²

The three different criteria for the classification of actions naturally lead to incoherence and contradictions. Maitland comments, "the Roman division of actions is giving Bracton a great deal of trouble. He cannot fit his English material into it."⁷³ It must always be remembered, though, that copyists have altered the text, and it is unknown what the original text looked like. In any case, the classification of common law actions according to divisions from the *Institutes*, as the author of the original work attempted to do, was a demanding task. The medieval English law could not be forced into classifications based on Roman law so easily. An English action might contain elements from various areas of Roman law, which meant that depending on the criteria, it belonged into different places. Further, the characteristics of an action could change over time, also leading to an action being misclassified. Numerous examples of such difficulties can be cited, making it ultimately altogether unclear which criteria were used where to classify the actions.⁷⁴ Maitland critically observed: "These divisions of actions never [...] well fit the native stuff; they always cut across the

⁷⁰ KANTOROWICZ, *supra* note 46, at 99 et seq.; MAITLAND, *Bracton and Azo*, *supra* note 57, at 165 et seq.; ZIEGENBEIN, *supra* note 9, at 46, 50, 57. For a discussion on the different opinions about the criteria used in Bracton see ZIEGENBEIN, *supra* note 9, at 38 et seq.; WILLIAMS, *supra* note 22, at 396-400.

⁷¹ For a comment see MAITLAND, *Bracton and Azo*, *supra* note 57, at 172-173. In Bracton's time, the courts used to award money damages rather than the restoration of the thing in actions for movables. Many movables of the middle ages were of a perishable kind and their value could be easily appraised. MAITLAND, *Forms of Action*, *supra* note 28, at 50, 60.

⁷² ZIEGENBEIN, *supra* note 9, at 57; MAITLAND, *Forms of Action*, *supra* note 28, at 62.

⁷³ MAITLAND, *Bracton and Azo*, *supra* note 57, at 169.

⁷⁴ ZIEGENBEIN, *supra* note 9, at 45, 47, 49-50; MAITLAND, *Bracton and Azo*, *supra* note 57, at 169-171. The same actions are sometimes classified as real, sometimes as personal, *id.* at 45, 53.

form of the writs."⁷⁵ And: "On the whole the lesson of this part of our legal history should be that it is dangerous to play with foreign terms unless we know very well what we are about."⁷⁶

5. The Late Medieval Common Law

Despite the fame of Bracton's treatise from the start,⁷⁷ the Roman material, including the institutional scheme, did not affect the English courts and lawyers to any marked degree.⁷⁸ Lawyers and judges, who were no longer also clerics, soon ceased to be knowledgeable in Roman law.⁷⁹ With Bracton, the influence of Roman law had reached its peak and turning point. Bracton's *De Legibus* would become the last book for a long time that presented the law as a system of substantive rules.⁸⁰ The common law, under the influence of legal practitioners, educated in court and by the inns of court,⁸¹ went on to be developed independent of Roman legal ideas. In the courts, the actions were the point of focus. A development took place which was completely removed from Roman legal thought: From the middle of the 14th century on, the writ of trespass had begun to be allowed in cases of damage where there was no violence, no breaking of the king's peace *vi et armis*. And soon, trespass actions were employed, sometimes with the help of fictions, even to remedy contractual wrongs. The generic name for all the non-forcible trespass actions became trespass on the case;⁸² and if used in connection with contracts, it became the action of assumpsit.⁸³ This in origin tortious action would soon replace the *praecipue* actions of covenant and debt.⁸⁴ Yet despite the trespassory guise, the liability had its origin in a reciprocal agreement, and therefore was contractual in nature.⁸⁵ But what did it matter? Important was which action applied, and not if it could be classified as contract or tort. The reason behind this use of different actions was that an action determined the rights of a plaintiff, and the lawyers tried to accommodate the facts of a given case to whichever action would best help their clients: For example, if there was no deed, the contractual action of covenant did not lie. But trespass on

⁷⁵ MAITLAND, *Forms of Action*, *supra* note 28, at 59.

⁷⁶ MAITLAND, *Forms of Action*, *supra* note 28, at 63.

⁷⁷ MAITLAND, *Bracton and Azo*, *supra* note 57, at xxxi-xxxiii.

⁷⁸ SCRUTTON, *Bracton*, *supra* note 57, at 440; ZIEGENBEIN, *supra* note 9, at 73. Cf. also Baker, *supra* note 28, at 28.

⁷⁹ S. F. C. MILSOM, *Historical Foundations of the Common Law* 41 (2nd ed. 1981) [hereinafter MILSOM, *Foundations*].

⁸⁰ MILSOM, *Foundations*, *supra* note 79, at 43.

⁸¹ BAKER, *supra* note 28, at 155 et seq.; ZIEGENBEIN, *supra* note 9, at 66.

⁸² Baker, *supra* note 28, at 63; ZWIEGERT, KÖTZ, *supra* note 23, at 182, 608. But see MILSOM, *Foundations*, *supra* note 79, at 305 et seq.

⁸³ BAKER, *supra* note 28, at 337-339.

⁸⁴ MILSOM, *Foundations*, *supra* note 79, at 283 et seq., 329; BAKER, *supra* note 28, at 329 et seq.

⁸⁵ BAKER, *supra* note 28, at 341 et seq.

the case was flexible enough (decided the courts) to be applied.⁸⁶ Also procedural reasons were responsible for the preference of certain actions over others, procedure always being part of an action. In particular the rules of proof could be decisive for the success of an action. A similar development as in the law of contracts took place in the law concerning movable goods: A withholding could also be seen as a wrong, and the tortious conversion and trover actions replaced the older but more specific detinue action.⁸⁷ Lawyers and judges were thinking in terms of actions, and trespass was allowed to expand, while other actions, such as covenant, were not. By the 18th century almost all litigation was being conducted in *ostensurus quare* actions, mainly trespass and case.⁸⁸ A decisive shift from using *praecipe* actions to the use of *ostensurus quare* actions had taken place, without any regard for ideas like property, based on proprietary rights, contract, based on consensual agreements, or tort, based on wrongs outside agreements.⁸⁹ The important distinction in English law became the one between law and equity. The latter had slowly been established by the chancellors as an independent set of rules between the 13th and 17th century, easing the strictness of the common law.

Notwithstanding this development, the division of actions into *in rem* and *in personam*, or **real** and **personal actions**, which had originated with Bracton,⁹⁰ had taken hold in the English law and was frequently employed in legal treatises. Britton, Fleta, Littleton, Coke, to name a few, all made use of the division.⁹¹ And it was the **relief** which became the controlling factor for the classification: A real action was one where the person was given the very thing he or she wanted, instead of providing for monetary compensation as it was the case in personal actions.⁹² This orientation on the remedy and not on the right fit the

⁸⁶ The extension of royal jurisdiction to cover all contracts was possibly also connected with the fact that the common law courts wanted to conquer back some lost ground from the equity courts, which extended validity also to non-formalized agreements. EUGEN BUCHER, *England und der Kontinent. Zur Andersartigkeit des Vertragsrechts - die Gründe und zu consideration*, 105 Zeitschrift für Vergleichende Rechtswissenschaft (ZVglRWiss) 188 (2006). The breach of a contract was considered, like a tort, as a one-sided action, which lead to damages. BAKER, *supra* note 28, at 338 *et seq.*; BUCHER, 188 *et seq.*, 205. Under this approach, the promise was the focal point, and not the consensual element. BUCHER, at 191 *et seq.* 204. The nexus between the parties was created by the requirement of a bargained for exchange, the consideration. BUCHER, at 196 *et seq.*; BAKER, *supra* note 28, at 341.

⁸⁷ BAKER, *supra* note 28, at 391 *et seq.*

⁸⁸ MILSOM, *Foundations*, *supra* note 79, at 283.

⁸⁹ MILSOM, *Foundations*, *supra* note 79, at 243-246. But see ZIEGENBEIN, *supra* note 9, at 73, with reference to some decisions starting to discuss theoretical concepts again already at the end of the 16th century.

⁹⁰ ZIEGENBEIN, *supra* note 9, at 41-42.

⁹¹ ZIEGENBEIN, *supra* note 9, at 66-67.

⁹² MAITLAND, *Forms of Action*, *supra* note 28, at 62; ZIEGENBEIN, *supra* note 9, at 67 (referring to Littleton and Coke); WILLIAMS, *supra* note 22, at 398, 405; BUCKLAND, MCNAIR, *supra* note 8, at 61. See also F. H. LAWSON, *International Encyclopedia of Comparative Law*, vol. VI, II 24-25.

English legal thought.⁹³ The determination which relief was granted depended on the legal classification of the property under the rules of feudal law: Only freehold interests, where the holder was seised of the property, were restored in specie.⁹⁴ Such interests not only comprised physical things, but also incorporeal rights.

Connected to this division of actions was the classification of property into **real and personal property** (or realty and personalty) in the common law.⁹⁵ Freehold interests were recoverable *in specie* by real actions, and the property was called realty. This concerned mainly property interests in land, but also some interests in movables⁹⁶ and in non-corporeal things, i.e., intangibles.⁹⁷ For all other property rights, damages were awarded, and the property was called personalty. This concerned movables foremost, but also certain interests in land,⁹⁸ like the term of years (the equivalent of a modern lease), for which there existed no real action, and certain interests in intangibles.⁹⁹

A division of *actions* and *property* in real and personal¹⁰⁰ and the (now historical) orientation on the remedy, which to this day affects the common law, is alien to the civil law system. The civil law divides *things* according to their physical properties in movables and immovables, and *rights* according to their meaning under substantive law into real and personal rights, and accordingly, the law into a law of property (in German: "law of things") and a law of obligations. Real rights apply to movables as well as to immovables, and therefore both are part of the law of property, which only concerns itself with physical objects.

While the classification of actions into real and personal continued to be used by scholars, the courts were concerned with other questions, as has been shown, and the Bractonian division for the moment did not bring about the development of a system of property, contracts and torts. It could not well have done so as long as the prevailing criteria for the classification was a procedural one. However, the idea of associating actions with a substantive law meaning in order to classify them would return in later times. The development which led to that situation began with Blackstone.

⁹³ Cf. MAITLAND, *Forms of Action*, *supra* note 28, at 63; ZIEGENBEIN, *supra* note 9, at 86.

⁹⁴ BAKER, *supra* note 28, at 259, 298, 380; ZIEGENBEIN, *supra* note 9, at 75, 94. CURZON, *supra* note 30, at 319. For the concept of seisin see *id.* at 313.

⁹⁵ Since Littleton and Coke. ZIEGENBEIN, *supra* note 9, at 93, 95. See also P. W. D. REDMOND AND PETER SHEARS, *General Principles in English Law* 19.6 (7th ed. 1997). The terms real and personal property replaced the old terms *terrae et tenementa* and *bona et catalla*. MAITLAND, *Forms of Action*, *supra* note 28, at 60. See also WILLIAMS, *supra* note 22, at 405-408.

⁹⁶ For purposes of inheritance. BAKER, *supra* note 28, at 380.

⁹⁷ BAKER, *supra* note 28, at 223, 380; ZIEGENBEIN, *supra* note 9, at 93-95.

⁹⁸ ZIEGENBEIN, *supra* note 9, at 96. See also BAKER, *supra* note 28, at 298, and the table on 246.

⁹⁹ BAKER, *supra* note 28, at 223, 380; LAWSON, *supra* note 92, at 25.

¹⁰⁰ In addition, the common law also divides rights, jurisdictions and judgments in real and personal. See ZIEGENBEIN, *supra* note 17, at 13 et seq. For the present inquiry, however, the classifications of actions and property is the most relevant.

6. Blackstone

The English medieval law was not easy to grasp. It was based on cases, and lacking an obvious system or structure which would help to communicate its rules.¹⁰¹ Oliver Cromwell spoke of the law of real property as an "ungodly jumble".¹⁰² Thomas Wood, precursor of William Blackstone, described the common law as "a heap of good learning".¹⁰³ And Sir Matthew Hale came to the conclusion that the origin of the common law was "as undiscoverable as the Head of the Nile".¹⁰⁴ Throughout the English legal history, the commonest system to classify the law has been the alphabet.¹⁰⁵ But confusion in the law is close cousin to injustice,¹⁰⁶ and many English scholars have set about to remedy the situation since Bracton. Blackstone listed as his predecessors "who have labored in reducing our laws to a system" Glanvill, Bracton, Britton, Fleta, Fitzherbert, Brook, Lord Bacon, Sir Edward Coke, Dr. Cowell, Sir Henry Finch, Dr. Wood, and Sir Matthew Hale.¹⁰⁷ Blackstone's work was indeed a synthesis of other writings,¹⁰⁸ but it would become the most influential book on English law since Bracton. A former judge and lecturer at Oxford, holding the first chair in English law at any university, Blackstone published his lectures between 1765 and 1769 in four books under the title *Commentaries on the Laws of England*. The treatise was clearly the work of a university lecturer, who was not primarily concerned with legal practice, but with the substance of the law. This set his work apart from other legal literature of the time. Blackstone's achievement¹⁰⁹ was that he presented the common law as a systematic set of substantive rules, with little reference to procedure. It was a comprehensive summary of the law, aimed at students and laypersons.

The four volumes of the *Commentaries* are entitled "The Rights of Persons", "The Rights of Things", "Private Wrongs" and "Public Wrongs". The principal division into rights and wrongs is made at the beginning of Book I chapter 1: Rights are commanded, and wrongs forbidden by the laws of Eng-

¹⁰¹ Cf., e.g., WATSON, *Roman Law*, *supra* note 3, at 166, 168.

¹⁰² Reference in BAKER, *supra* note 28, at 289.

¹⁰³ Reference in S.F.C. MILSOM, *The Nature of Blackstone's Achievement*, in S.F.C. MILSOM, *Studies in the History of the Common Law*, 204 (1985) [hereinafter MILSOM, *Blackstone*].

¹⁰⁴ SIR MATTHEW HALE (1609 - 1676), *History of the Common Law*, ch. 3.

¹⁰⁵ BIRKS, MCLEOD, *supra* note 1, at 24.

¹⁰⁶ Quoted from PETER BIRKS, *Definition and Division: A Meditation on Institutes 3.13*, in Peter Birks (ed.), *The Classification of Obligations* 17 (1997) [hereinafter BIRKS, *Definition*]. "Confusion in the law is close cousin to injustice, since it means that parties lose litigation they should win, and vice versa."

¹⁰⁷ WILLIAM BLACKSTONE, *An Analysis of the Laws of England* v (1st ed. 1756). See also BIRKS, MCLEOD, *supra* note 1, at 25 et seq., for a list of predecessors.

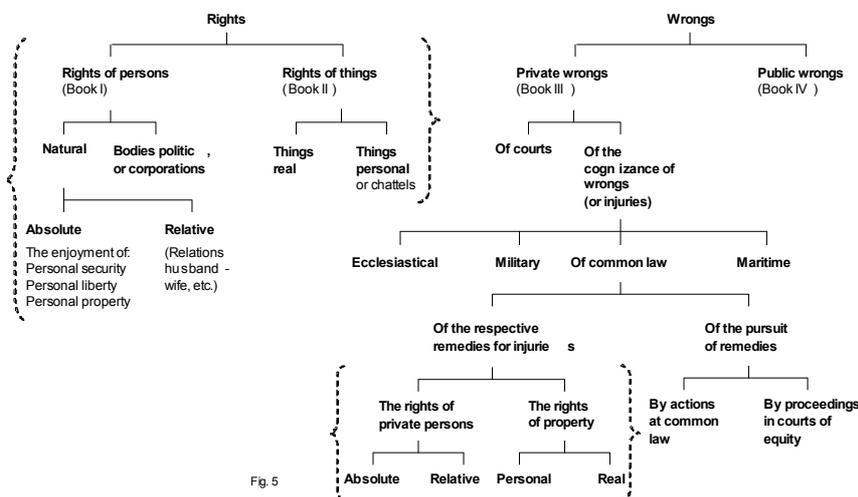
¹⁰⁸ "[Blackstone] was, rather, a synthesizer, a mixer and a translator of the ideas of others; but he produced a work that had style, balance and impact." WAYNE MORRISON, (ed.) *Commentaries on the Laws of England* v (2001).

¹⁰⁹ See MILSOM, *Blackstone*, *supra* note 103, at 198, 200, 201, 205.

land. Each book then contains an elaborate system of divisions and subdivisions (fig. 5 shows only the main headings). The inner structure is presented in tabular form at the beginning of the *Commentaries* and has its origin in Blackstone's lecture syllabus and synopsis, *An Analysis of the Laws of England*, from which he developed the *Commentaries*.¹¹⁰

The public wrongs of Book IV deal with criminal law, and are outside the scope of the system in Books I to III, which contain non-criminal law.¹¹¹ Book I and II contain substantive law rules, divided into the rights of persons and the rights of things.¹¹² Book III contains actions, or remedies to the infringement of the rights listed in Book I and II. Book III also embraces all other procedural aspects of the law.

Blackstone (1756)



Structurally, the remedies in Book III for the rights discussed in the first two books mirror the organization of the first two books (see brackets in fig. 5): As Blackstone states in chapter 8 of Book III "[...] [wrongs] are nothing else but an infringement or breach of those rights, which we have before laid down and explained [and therefore] it will follow that this negative system, of wrongs, must correspond and tally with the former positive system, of rights. As there-

¹¹⁰ WATSON, *Roman Law*, *supra* note 3, at 171; MILSOM, *Blackstone*, *supra* note 103, at 204.

¹¹¹ This concerns mainly private law, but not exclusively. The right of persons for example deals also with public relations and institutions, such as the relationship between magistrates and the people, or parliament, or the monarchy.

¹¹² BLACKSTONE, *Commentaries*, Book I Chapter 1, 122. Page references for the *Commentaries* follow the '*page' reference system, which is the traditional way of the pagination of editions, going back to the 9th edition. MORRISON, *supra* note 108, at ix.

fore we divide all rights into those of persons and those of things, so we must make the same general distribution of injuries into such as affect the rights of persons, and such as affect the right of property."¹¹³

The similarity to the *Institutes* of Justinian is intriguing: Blackstone's division may, at first glance, well be read as persons, things, actions, and crimes.¹¹⁴ The similarity was no coincidence: Blackstone was indeed well acquainted with Roman and civil law.¹¹⁵ He even expressly quotes the *Institutes* and other parts of the *Corpus Juris Civilis*.¹¹⁶ Unlike Bracton, however, Blackstone had no overt intention to apply the institutional scheme to the English law. In the preface to the *Analysis*, he criticizes Cowell for trying to apply the *Institutes* (title by title) to the common law. Cowell was one of many scholars who used Justinian's *Institutes* as a model, and even the terms *Institutes* or *Institutions* were frequently employed in the titles of treatises.¹¹⁷ Blackstone claimed to have followed principally the arrangement of Sir Matthew Hale's *Analysis of the Law*.¹¹⁸

¹¹³ BLACKSTONE, *Commentaries*, Book III chapter 8, 119. See also Book III chapter 1. One of the problems Blackstone faced was that the substantive law and procedural law were interwoven in the common law of his time. WATSON, *Roman Law*, *supra* note 3, at 168, 173-174. According to KENNEDY, *supra* note 28, at 234, the right - wrong distinction can neither be reduced to one between substance and procedure, nor to that between right and remedy, but must be seen as a division substantive law into a "rational" exposition of causes of action derived from rights, and a "technical" exposition according to the traditional pleading categories. Wrongs are not to be confused with torts.

¹¹⁴ See BIRKS, MCLEOD, *supra* note 1, at 24. Detailed WATSON, *Roman Law*, *supra* note 3, at 166 et seq. (chapter 18). But see the comments about Watson below. See generally on the structure of the *Commentaries* KENNEDY, *supra* note 28, at 222 et seq., 311 et seq. Kennedy, however, does not take into account the influence of Justinian's *Institutes* on Blackstone's scheme. He inquires about hidden political intentions beneath the surface of the legal exposition, which has to be seen in connection with the critical legal studies movement, which Kennedy was a part of. For a historian's comment on Kennedy's essay see WATSON, *supra* note 3 (only in the version in the Yale Journal), at 802. Blackstone also used an external division into four books, as in the *Institutes*. However, since this division does not seem to be of a conceptual significance in the *Institutes* (see above, at note 16), and because of the differences in approach of the *Institutes* and the *Commentaries*, this does not appear relevant. Watson, on the other hand, assigns significance to the fact that both texts employ a division into four in his comparative analysis. See WATSON, *Roman Law*, *supra* note 3, at 170, 171, 173, 175, 176, 177, 180; see also (implicit) MORRISON, *supra* note 108, at xlv (at note 94). Blackstone was not the only legal scholar dividing his work into four, see MORRISON, *supra* note 108, at xlv et seq.; WATSON, *Roman Law*, *supra* note 3, at 171.

¹¹⁵ Blackstone first intended to become a professor of civil law. BIRKS, MCLEOD, *supra* note 1, at 24.

¹¹⁶ BLACKSTONE, *Commentaries*, Book III, chapter 8, 116-118.

¹¹⁷ WATSON, *Roman Law*, *supra* note 3, at 168, 169; ALAN WATSON, *Justinian's Institutes and Some English Counterparts*, in P. G. Stein and A. D. E. Lewis, *Studies in Justinian's Institutes in memory of J. A. C. Thomas* (1983), 181-186 [hereinafter WATSON, *Counterparts*]. The title of these treatises does not necessarily stand in connection with their content: Coke in his *Institutes* deliberately distances himself from Roman and civil law. See SCRUTTON, *Roman Law*, *supra* note 44, at 129-133.

¹¹⁸ Detailed WATSON, *Roman Law*, *supra* note 3, at 169 et seq.; MORRISON, *supra* note 108, at xliii.

Yet Hale's scheme also bore an obvious resemblance to the *Institutes*.¹¹⁹ The Roman institutional character of Hale's work could not have gone unnoticed by Blackstone. And Blackstone's system is even closer to that of Justinian than Hale's.¹²⁰

In content, on the other hand, there exist substantial differences between the *Commentaries* and the *Institutes*.¹²¹ The division of the rights of persons into absolute and relative is one into rights which "belong to particular men, merely as individuals", and rights "which are incident to them as members of society, and standing in various relations to each other."¹²² Neither did the Romans employ the terms relative and absolute, nor is there an equivalent of Blackstone's division in the *Institutes*.¹²³ The rights of things are divided into real and personal ones according to their physical characteristics, that is, whether they are immovable or movable. The text, however, goes on to treat them according to the traditional English notions of realty and personalty.¹²⁴ Finally, torts and contracts are dispersed among persons (e.g. employment contracts) things (e.g. contracts for the sale of property) and wrongs (e.g. torts, breach of contract).

On the other hand, Blackstone treated the law not as a collection of actions, as the other English authors did, but as a comprehensive system based on

¹¹⁹ PETER STEIN, *Continental Influences on English Legal thought, 1600 - 1900*, in Peter Stein, *The Character and Influence of the Roman Civil Law* 215 (1988) [hereinafter STEIN, *Continental Influences*]. Hall divided the law into a criminal and a civil part, the latter being subdivided into Civil Rights or Interests, Wrongs or Injuries relative to those Rights, and Relief or Remedies applicable to those Wrongs, and subdividing the Rights into *Iura Personarum* or Rights of Persons and *Iura Rerum*, or Rights of Things. Hale too attempted a division between substantive law and procedure. See WATSON, *Roman Law*, *supra* note 3, at 169; MILSOM, *Blackstone*, *supra* note 103, at 204.

¹²⁰ In addition, Hale's work was in content dominated by procedural forms and feudal ties. MORRISON, *supra* note 108, at xliv. See also WATSON, *Roman Law*, *supra* note 3, at 175, 176. WATSON, at 176 et seq., draws a comparison between the *Commentaries* and the *Institutes* of Dionysius Gothofredus, an important editor of the *Institutes*, showing many parallels between him and Blackstone's tabulation. The question why Blackstone is never mentioning the *Institutes* in relation with his work must remain unresolved. Cf. WATSON, *Roman Law*, *supra* note 3, at 179. But that way, there was less of a danger that his work was perceived as an intrusion of Roman law into the English law, which would not have helped its spreading in England.

¹²¹ See for a description MILSOM, *Blackstone*, *supra* note 103, at 203; KENNEDY, *supra* note 28, at 222; WATSON, *Roman Law*, *supra* note 3, at 173-175. The authors differ from each other in their allocation of contract and tort in the *Commentaries*.

¹²² BLACKSTONE, *Commentaries*, Book I, chapter 1, 123. See also KENNEDY, *supra* note 28, at 272 et seq., 317. Blackstone characterized as absolute rights "the right of personal security, the right of personal liberty, and the right of personal property." (*Blackstone*, *supra* note 103, at 129, KENNEDY, *supra* note 28, at 275), and as relative rights the legal relationships between individuals, like marriage (KENNEDY, *supra* note 28, at 281).

¹²³ See KASER, *Roman law*, *supra* note 8, at § 4 I; DUBISCHAR, *supra* note 9, at 73. For the use of these terms in the civil law see below, at note 146.

¹²⁴ BLACKSTONE, *Commentaries*, Book II, chapter 2, chapter 23, Book III, chapter 9; WILLIAMS, *supra* note 22, at 407. For the traditional division into realty and personalty see above, at note 95 et seq. Kennedy criticizes Blackstone's assertion that Book II of the *Commentaries* deals with the relations between persons and things. Kennedy, *supra* note 28, at 313.

substantive law.¹²⁵ In that regard, he returns to the approach taken in the *Institutes*, although Blackstone was thinking in terms of rights,¹²⁶ and not objects of the law, as the creators of the institutional scheme did. But this difference is not of great consequence; the civil law too transformed the institutional system into a system of rights. An important inquiry with regard to the inner relation between the *Commentaries* and the *Institutes* is again the one into the existence and treatment of the concepts of real and personal. The definition of **real and personal actions** is located in the beginning of Book III on wrongs, chapter 8. Blackstone says: "Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof, and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs; and they are the same which the civil law calls 'actiones in personam [...]'¹²⁷." Real actions, [...] which concern real property only, are such whereby the plaintiff [...] claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee simple, fee tail, or for term of life. Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained."¹²⁸ This definition is straight out of the *Institutes* (Inst. 4.6.1), Blackstone at one point even cites the *Institutes* directly.¹²⁹ Personal actions are founded in contracts or wrongs. Real actions are those whereby somebody claims title. Basis for the definition is the ground for the claim. The criteria for the division is the **substantive law**, and not the nature of the legal redress.¹³⁰

In the future, this view would prevail in the common law. Personal actions became associated with contract and tort, and real actions with claims for property.¹³¹ However, the traditional content of real and personal actions remained the same, and the resulting allocation of actions under the new substantive law categories led to certain differences between the systems of the common law and the civil law. In particular, Bracton's rule that there is no action in rem for movables remained unchanged. Accordingly, the pursuit of movables

¹²⁵ MILSOM, *Blackstone*, *supra* note 103, at 202, 208.

¹²⁶ KENNEDY, *supra* note 28, at 233, 240, 256, 294. Kennedy's interpretation is that Blackstone wanted to defend the writ system, but indirectly also helped to defeat it. *Id.* at 233, 256.

¹²⁷ It follows a citation from Inst. 4.6.15.

¹²⁸ BLACKSTONE, *Commentaries*, Book III, chapter 8, 117-118.

¹²⁹ See above, note 127.

¹³⁰ ZIEGENBEIN, *supra* note 9, at 73; KENNEDY, *supra* note 28, at 227, 239, 240, 256; MAITLAND, *Forms of Action*, *supra* note 28, at 60.

¹³¹ MILSOM, *Foundations*, *supra* note 79, at 243; ZIEGENBEIN, *supra* note 9, at 98. Unlike in the civil law, there is at least historically no general concept of unjust enrichment in the common law. See for this ZIEGENBEIN, *supra* note 9, at 98-101, discussing the consequences of the dichotomy contract - tort in the common law. There existed, however, actions which had restitutional functions.

became part of the law of torts in the common law,¹³² while in the civil law, it is part of the law of property, since the claim is based on a right of property.¹³³ Maitland described this as follows: "having said that every action in which a chattel or its value is claimed is personal, are we not compelled to say that every such action is either founded in contract or in tort? Yes, that conclusion has been drawn, it is expressly drawn by Blackstone."¹³⁴

One would expect that the division into real, personal, and mixed actions would occupy a central place in the *Commentaries*: Blackstone himself said "[u]nder these three heads may every species of remedy by suit or action in the courts of common law be comprised."¹³⁵ But where does it fit into Blackstone's overall system? Where are the divisions into real and personal actions, into contract, tort and property in the table of titles? They appear nowhere. In his tabulation, the terms real and personal are employed to classify property and the corresponding rights. But the notion of real and personal actions being connected with the substantive law concepts of contract, tort and property as Blackstone described it, the central legal definition and *sine qua non* for the structuring of the Roman and civil law, had last been employed in England by Bracton and his successors Britton and Fleta.¹³⁶ After that, it did not prevail, neither in the courts, nor in the treatises.¹³⁷ The most important books of the following centuries, Littleton, Fitzherbert and Coke, do not describe the law this way. The concept was not prominent in the *Commentaries*, and its restoration does not seem to have been intended as a deliberate, historic change of course. But Blackstone's book went on to become one of the most influential treatises on the common law. And while the system of the *Commentaries* itself did not prevail, it carried the seed for the transformation of the law into rules of substantive law, and for the connection between the by this time thoroughly English terms of real and personal actions and the Roman concepts of contract, tort and property.¹³⁸

¹³² MAITLAND, *Forms of Action*, *supra* note 28, at 38, 50, 60, gives as a reason for the development the conclusion in Bracton according to which there was no action in rem for movable goods and says that the results are regrettable (at 60). See also WILLIAMS, *supra* note 22, at 405-408; ZIEGENBEIN, *supra* note 9, at 74. The strict adherence to the rule that there can only be damages awarded for movables had in time become abandoned.

¹³³ In the civil law, the damage of property is a tort, as in the common law; the difference lies in the pursuit of movable property: Since in the civil law the proprietor has a property right to get his property back (*vindicatio*), there are no economical damages, and therefore no tort. VON TUHR/PETER, *supra* note 8, Bd I, at 85. See also ZIEGENBEIN, *supra* note 9, at 98 et seq., 101, with further examples for the broader application of torts in the common law.

¹³⁴ MAITLAND, *Forms of Action*, *supra* note 28, at 60. See also JOLOWICZ, *supra* note 13, at 476-478.

¹³⁵ BLACKSTONE, *Commentaries*, Book III, Chapter 8, 118.

¹³⁶ ZIEGENBEIN, *supra* note 9, at 98.

¹³⁷ ZIEGENBEIN, *supra* note 9, at 73.

¹³⁸ Cf. ZIEGENBEIN, *supra* note 9, at 74; MILSOM, BLACKSTONE, *supra* note 103, at 208.

7. The Civil Law

All continental European laws trace their structure back to the Roman institutional scheme. However, some important changes were made: The extensive notion of the term "things" was to be abolished. It did not fit the concept of things even for classical Roman law, which was restricted to corporeal things.¹³⁹ The law of obligations accordingly became detached from things. In medieval Europe, the French Brachylogus of the 12th century, followed in the 16th century by works of Johannes Apel, Hugo Donellus, and others, introduced a modified system with four parts: Persons, property and law of inheritance, obligations, and procedural law.¹⁴⁰ The German Pandectists in the 19th century added a general part.¹⁴¹

A parallel development was that the institutional scheme began to be seen as a **system of rights**. It is the right that leads to the remedy, and not the other way around. *Ubi ius, ibi remedium*. *Actiones in rem* and *in personam* became replaced by rights *in rem* and rights *in personam*.¹⁴² According to the definition in the *Institutes*, the first was concerned with the right of a person to a thing and the latter with the legal relation between persons. This concept, still dispersed among things and actions in the *Institutes*, was now completely part of substantive law. Thinking in terms of rights allowed the combination of the pairs of property - *in rem*, and obligation - *in personam*. A property right is a right *in rem*, and the claim based on an obligation is a right *in personam*. At the beginning of the 19th century, the objects of the law are rights.¹⁴³ It is on this basis that the civil law became codified in the various continental European countries. And while a plaintiff needed an *actio* in order to bring a matter before the court in the classical period of Roman law, the rights in the civil law system became abstract concepts, which could be applied directly, without the existence of a particular action.

¹³⁹ BERTHOLD KUPISCH, *Institutionensystem und Pandektensystem: Zur Geschichte des res-Begriffs*, 25-27 *The Irish Jurist* 294, 295 note 11, 299; Dubischar, *supra* note 9, at 100.

¹⁴⁰ Cf. DUBISCHAR, *supra* note 9, at 33 et seq. The Brachylogus was an excerpt from the *Institutes* with an unknown author. See generally KUPISCH, *supra* note 139, at 295 et seq.; BEHREND, KNÜTEL, KUPISCH, SEILER, *supra* note 1, at 294 et seq.

¹⁴¹ Defining general principals, such as legal capacity, etc. See KUPISCH, *supra* note 139, at 298. There are differences in the employment of a general part in the different civil law systems. See DAVID, GRASMANN, *supra* note 38, at 143 (1988).

¹⁴² This was an evolutionary process, and it is difficult to point to an exact time when it happened. See DUBISCHAR, *supra* note 9, at 31, 39, 40, 82. German jurisprudence calls individual rights 'subjective rights'. This is contrasted with 'law' (*objektives Recht*). The English word 'right' already contains the meaning of a subjective (i.e. individual) right.

¹⁴³ DUBISCHAR, *supra* note 9, at 76 et seq., 78. For a history of the institutional scheme on the continent see ALAN WATSON, *Civil Law*, *supra* note 15, chapter VI, *The Institutes*; STEIN, *Fate*, *supra* note 9 (generally). In Germany, Windscheid in addition developed the theory about the claim (*Anspruch*). See, e.g., JOLOWICZ, *supra* note 13, at 479; DUBISCHAR, *supra* note 9, at 108 et seq.; KASER, *Roman law*, *supra* note 8, at § 4 I 2.

Other changes affected the subcategories: The quasi-categories were abolished and their content dispersed. This was not an easy task, leading to different solutions in different countries.¹⁴⁴ Quasi-contract, under which the Roman *condictiones* fell, became unjustified enrichment and the quasi-contract *negotiorum gestio* a subdivision of contract.¹⁴⁵ Quasi-delict, under the Romans mostly liability without fault, became part of tort law and (in some systems) also part of unjustified *negotiorum gestio*. Rights of use and enjoyment were grouped with security interests under the generic name of restricted real rights and became part of the law of property.

Modern Civil Law

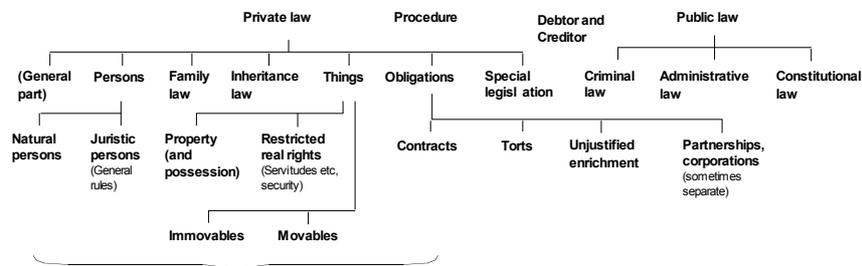


Fig. 6 Civil law code (General Part - Obligations)

In the search for a comprehensive scheme to classify all rights, German scholars at the beginning of the 19th century also started using the terms absolute and relative rights. Absolute rights are directed against everybody. They encompass rights *in rem*, incorporeal rights (intellectual property etc.) and personal rights (privacy, name, etc.). Relative rights allow to demand a performance and are directed against a certain person, they are the rights *in personam*.¹⁴⁶

¹⁴⁴ See ZIMMERMANN, *supra* note 8, at 19-21; and concerning the quasi-categories, above, note 8.

¹⁴⁵ See ZWEIGERT, KÖTZ, *supra* note 23, at 538 et seq.; BUCKLAND, MCNAIR, *supra* note 8, at 254 et seq. (chapter IX); KASER, *Roman law*, *supra* note 8, at § 44 II. English law did not develop *negotiorum gestio* as a general concept. BUCKLAND, MCNAIR, *supra* note 8, at 258. The Roman *condictiones* had a restitutionary function.

¹⁴⁶ For the first time, the categorization appeared 1803 in Hufeland's *Institutionen*, but was used outside of jurisprudence before by Descartes, Kant and Fichte. DUBISCHAR, *supra* note 9, at 73 et seq., 91 et seq. It is to be noted however, that the terms were already applied by Blackstone in a legal context, although not in the same way the German scholars did. See above, at note 123. In the civil law, the violation of an absolute right leads to the creation of a relative right, a claim against the wrongdoer. An exception is the deprivation of property. Here, an action is aimed against the thing, unless the claim is for damages against the bad faith possessor. Cf. ZIEGENBEIN, *supra* note 9, at 30. In a real action for the surrender of the thing, no responsibility of the person possessing the thing is necessary. However, in order to avoid injustice, the civil law in such situations applies the concept of the bona fide right protection. See PETER FORSTMOSER, *Einführung in das Recht* 141 (3rd ed., 2003).

Later, a third group of *Gestaltungsrechte* was added, comprising rights which allow unilaterally to create, alter or terminate a legal relationship. The categories of absolute and relative are based on those of *in rem* and *in personam* and therefore can likewise be traced back to the Roman division of actions.¹⁴⁷

8. The Modern Common Law

Blackstone did not intend to bring about a revolution in the law, he wanted to present it in a more structured and accessible way. But shortly after Blackstone, and led by his example, a revolutionary process did take place, albeit a silent one: There began to appear systematic textbooks which treated the law according to substantive law rules rather than lists of actions. Among them were titles like Sander's *Essay on the Nature of Uses and Trusts* (1791), or Cruise's *Digest of the Laws of England respecting Real Property* (1804).¹⁴⁸ The final, determining step towards a thinking in terms of property, contract and tort, came with the revival of academic law schools at the universities in the 19th century. Textbooks, as before Blackstone's *Commentaries*, were now generally written by academic scholars. And under the influence of the Roman legal theory on the continent, in particular the German Pandectists,¹⁴⁹ English scholars began to organize the law according to the divisions of property, contracts and torts.¹⁵⁰ There were titles such as Pollock's *Law of Torts* (1887) or Anson's *Contract* (1876).¹⁵¹ The development was furthered by the abolition of the forms of action in different procedural reform acts from 1832 to 1873,¹⁵² and the issuance of statutory law by parliament.¹⁵³ The centuries where the law was shaped by legal practitioners, beginning after Bracton, had come to an end.

The structure of the modern common law nevertheless remained compartmentalized, not being as much a closed, unified, and hierarchical system as the civil law. Property, contract, tort, etc. form rather isolated packages. The common law is hesitant to bring together contract, tort and unjust enrichment under the principal concept of a law of obligations.¹⁵⁴ Generally, the divisions are not made as resolutely in the common law as in the civil law: The Roman law divisions of *in rem* and *in personam* are technical legal abstractions that have

¹⁴⁷ KASER, *Roman law*, *supra* note 8, at § 4 I. But see DUBISCHAR, *supra* note 9, at 3-4. Dubischar, however, primarily examines the question about the existence of the concept of rights in the Roman law.

¹⁴⁸ MILSOM, *Blackstone*, *supra* note 103, at 205.

¹⁴⁹ STEIN, *Continental Influences*, *supra* note 119, at 224, 226. One of the principal founders of the movement was John Austin.

¹⁵⁰ BAKER, *supra* note 28, at 192; KENNEDY, *supra* note 28, at 286 (with further references).

¹⁵¹ MILSOM, *Foundations*, *supra* note 79, at 308; BAKER, *supra* note 28, at 192.

¹⁵² See CURZON, *supra* note 30, at 91; BAKER, *supra* note 28, at 67-69.

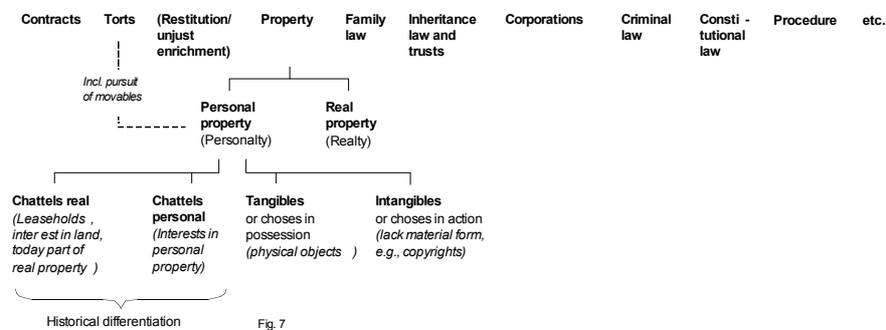
¹⁵³ STEIN, *Continental Influences*, *supra* note 119, at 228.

¹⁵⁴ An exception is for example the textbook by JOHN COOK, DAVID OUGHTON, *The Common Law of Obligations* (3rd ed. 2000). See further BIRKS, *Definition*, *supra* note 106, at 2-4, 14 et seq.

less to do with actual life situations as a division into inheritance- or family law. There exists a tendency in the common law to take such aspects into consideration when categorizing the law.¹⁵⁵

But the division of the law into a substantive and a procedural part, and of the substantive part into the major categories of property, contract and tort provides the central structural concept of the common law. This system is based on the model of the *Institutes*.¹⁵⁶ The *Institutes* may in part just have served as the vessel for Roman law theory, but it was within the structure of the *Institutes* that the ideas have traveled.

Modern Common Law¹⁵⁷



Despite the structural parallels in the common law and the civil law, there exist numerous differences under the surface. In the history of the common law, there was never an open, comprehensive reception of the Roman law, no intention to adopt the Roman law in its entirety, as it was the case on the European continent. Notions of property, tort and contract in the sense used in Roman law had existed since Bracton,¹⁵⁸ although not as abstract, consolidated entities, but dispersed under different actions. Medieval writs such as covenant and debt, for example, were used to protect certain contracts, yet no general concept of the enforcement of private promises existed. When such ideas did begin to take

¹⁵⁵ Cf. ZWEIGERT, KÖTZ, *supra* note 23, at 144.

¹⁵⁶ See also BIRKS, *Definition*, *supra* note 106, at 3, 35. A comprehensive category of a law of persons did not develop in the common law.

¹⁵⁷ The terminology in the law of property is not always consistent, and new developments change the treatment. Historically, the differentiation between tangibles and intangibles has been made on the level of things. See WILLIAMS, *supra* note 22, at 408. See even for the modern law REDMOND, SHEARS, *supra* note 95, at 19.9. Also the term chattels is not always employed the same way. Sometimes, it is used as a synonym for personal property, sometimes for tangible personal property, as opposed to land. See, e.g., LAWSON, *supra* note 92, at 24; BAKER, *supra* note 28, at 223 note 1, 380.

¹⁵⁸ ZIEGENBEIN, *supra* 9, at 98, criticizing POLLOCK, *The Law of Torts* 413, who says that the division between contract and tort is not historical. See also BAKER, *supra* note 28, at 339, 341.

hold, the actions had to be broken up and distributed under the system encompassing property, contracts and torts.¹⁵⁹ But, as Maitland famously observed, "[t]he forms of action we have buried, but they still rule us from their graves"¹⁶⁰, and many characteristics of the old actions show up in the new law: Gift promises for example are not enforceable, because the action of *assumpsit* since the 16th century required consideration, a counter promise, as a means to decide on the legal significance of a promise. Torts are comprised of numerous individual case constellations stemming from the medieval tort actions, and a general concept is applied only to negligence and strict liability cases,¹⁶¹ while in the civil law, it is the other way around. The law of property is called the "law of things" in the civil law, and it applies to all things, movable or immovable. The common law of property excludes the pursuit of movables, which is part of tort law (conversion),¹⁶² but includes intangible property. It does not align with the concept of physical objects. Furthermore, unlike in the civil law, all leases of real property (leaseholds) create a right *in rem* in the common law, since they used to be protected by a real action.¹⁶³ A big obstacle was the main division in the common law between law and equity. It is possible to integrate equitable property, contract, and tort concepts under the respective titles in an institutional scheme.¹⁶⁴ But in a case like a trust, this would mean to dismember and therefore destroy the idea of the legal concept, which is a major legal achievement of the common law. A trust creates property rights, but some aspects of it are obligatory in nature. Sometimes, trusts are discussed in the law of property, sometimes in connection with the law of inheritance, sometimes as a category by itself. A further example for the disparities is restitution or unjust enrichment. Traditionally, the notion of unjust enrichment did not exist as a unified concept, but in the form of various independent actions or equitable remedies. A general term used was quasi-contract, although it only encompassed money-remedies. The expression later was replaced, in particular in the U.S., with the broader term restitu-

¹⁵⁹ BIRKS, *Definition*, *supra* note 106, at 28. See also above, at note 131.

¹⁶⁰ MAITLAND, *Forms of Action*, *supra* note 28, at 59.

¹⁶¹ Cf. ZWEIGERT, KÖTZ, *supra* note 23, at 610 et seq.

¹⁶² See also BIRKS, *Definition*, *supra* note 106, at 10; MILSOM, *Foundations*, *supra* note 79, at 243, according to which the modern common law of obligations consist mainly of "contract, tort, and personal chattels". Because today recovery *in specie* (as opposed to damages) is also possible, the difference is not very great. One distinction remains, unlike a claim *in rem*, a tort involves responsibility of the tortfeasor.

¹⁶³ The lease of real property is two-sided in the common law. The right of possession and use is a right *in rem*, while the other rights and duties are part of the law of contract. The lease of movables (lease) is usually dealt with in the law of contracts, while the lease of real property (leasehold) focuses on the right *in rem* and is part of the law of property. The right to land used to be subject to a real or a personal action, depending if it was a freehold estate or not. Since the middle ages, the courts began to grant an ejectment-action, which was a real action, also in the case of leaseholds, and not just for freeholds. For such leases, the term "chattels real" was coined, since until 1925, they continued to be considered personalty. See REDMOND, SHEARS, *supra* note 95, at 19.7; BAKER, *supra* note 28, at 298.

¹⁶⁴ BIRKS, *Definition*, *supra* note 106, at 14. For the trust, see *id.* at 31, 32-33.

tion, which includes equitable remedies like constructive trust and specific restitution.¹⁶⁵ The term unjust enrichment¹⁶⁶ does not usually designate a cause of action, but the undesired result that should be averted, a general principle underlying the various legal doctrines and principles. The terminology varies, and unjust enrichment, restitution and quasi contract are today often used synonymously.¹⁶⁷ As a concept, restitution is often dealt with in contract law.

These are some of the major differences in categorization, but the list of own solutions the modern common law introduced when merging with Roman law concepts could be continued.

9. Epilogue

The common law and the civil law today are structured according to principles that go back to the same source, the Roman *Institutes*. Some writers have interpreted the situation by stressing the differences between the common law and the civil law systems or are of the opinion that the institutional system did and does not fit the common law.¹⁶⁸ Others have emphasized the similarities.¹⁶⁹ In the end, this is a matter of interpretation. But the fact that currently a legal language comprehensible to both sides is spoken in the two systems should be appreciated. This paper intended to give an overview on how this commonality came about. The institutional arrangement and with it the basic ideas of Roman law have been a companion of the common law from early on and have to a

¹⁶⁵ See A. ELLEN FARNSWORTH, *Farnsworth on Contracts* § 2.20 (3rd. ed. 2004); PETER HAY, *Law of the United States* section 344 et seq. (2002).

¹⁶⁶ The term 'restitution' is usually used for the cause of action (e.g. by the Restatement in the United States), but originally describes a remedy. See BIRKS, *Definition*, *supra* note 106, at 20-21. "To say that every obligation arises from contract, wrong, restitution [...] is like saying that animals are mammals, reptiles birds, yellow [...]". *Id.* at 21. The term unjust enrichment is modern and obviously derived from the civil law, where it existed since a long time. The correct translation would be "unjustified" enrichment (see also, e.g., the term in Zimmermann, *supra* note 8, chapter 26, or in H. C. GUTTERIDGE and R. J. A. DAVID, *The Doctrine of Unjustified Enrichment*, 5 Cambridge Law Journal 204 (1935)). BIRKS, *Definition*, *supra* note 106, at 20-21, describes how the term unjust enrichment was discarded for the term restitution, because the latter did not give rise to notions of distributive justice (in a time of the communist threat).

¹⁶⁷ HAY, *supra* note 106, at section 346.

¹⁶⁸ E.g. WATSON, *Patterns*, *supra* note 20, at 247 et seq.; DAVID, GRASMANN, *supra* note 38, at 61 (but see 51), 485; MAITLAND, *Forms of Action*, *supra* note 28, at 59; WATSON, *Roman Law*, *supra* note 3, at 167; WATSON, *Counterparts*, *supra* note 117, at 186; JEFFREY HACKNEY, *More than a trace of the old philosophy*, in Peter Birks (ed.) *The Classification of Obligations*, 128, 140, 141 (1997).

¹⁶⁹ E.g. BIRKS, *Definition*, *supra* note 106, at 3, 35; STEIN, *Roman Law*, *supra* note 6, at 1591; SCRUTTON, *Roman Law*, *supra* note 44, at 150-151, 187-195; PRINGSHEIM, *supra* note 44, at 347 et seq., 364; STANOJEVIC, *supra* note 44, at 269-274 (1990). See also references to Milsom and others in Hackney, *supra* note 168, at 137, and references to Milsom, Buckland, McNair, van Caenegem and Pringsheim in WATSON, *Patterns*, *supra* note 20, at 247. The lists in this and the foregoing note do not differentiate between comparisons of the common law with the civil or the Roman law.

substantial extent merged with it in the 19th and 20th centuries. The Anglo-American law nevertheless maintained its own character. Whether the common law and the civil law will grow closer still or drift apart again remains to be seen.