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# THE TRANSMISSION OF LEGAL INSTITUTIONS: ENGLISH LAW, ROMAN LAW, AND HANDWRITTEN WILLS

R.H. Helmholz\*

Dean Michael Hoefflich, organizer of this Conference and founder of the Roman Law Society of America, has been a leader in tracing the tangled, continuing, and important relationship between Roman law and Anglo-American law. Through a series of articles, he has lifted the curtain on more than one of the facets of this subject, always showing his readers something of value about the inner nature of that relationship.<sup>1</sup> This article attempts to follow his lead by looking at one particular aspect of the law of testamentary succession, the validity of unattested, handwritten wills. In one sense this is a very small topic, perhaps worthy of only a footnote or two in treatises on the law of wills. However, the subject does provide an excellent example of the much larger phenomenon of the transmission of institutions from one legal system to another. In aspiration at least, this article shows something about the process and about the range of choices available to lawyers in dealing with that kind of transmission.<sup>2</sup> It attempts to show how institutions and doctrines may be taken and transplanted into foreign soil, but then turn out to look quite different than they did in their original setting.<sup>3</sup>

This article discusses two specific incidents related to the validity of handwritten wills in England. The first is the controversy about proper interpretation of Soldiers' and Sailors' wills, which occurred in the twentieth century. The second is the development allowing handwritten wills more generally, which occurred in the sixteenth century. The former stirred the spirit of several famous English judges and academics, while the latter has received little or no notice among judges and academics. Both involved the use of Roman law, and both turned Roman law in a direction quite different from that taken in either classical or medieval civilian jurisprudence.

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1. See Michael Hoefflich, *Roman Law in American Legal Culture*, 66 TUL. L. REV. 1723 (1992); Michael H. Hoefflich, Comment, *Edward Gibbon, Roman Lawyer*, 39 AM. J. COMP. L. 803 (1991); Michael H. Hoefflich, *Roman and Civil Law in American Legal Education and Research Prior to 1930: A Preliminary Study*, 1984 U. ILL. REV. 719 (1984).

2. See generally ALAN WATSON, *LEGAL TRANSPLANTS* (1974).

3. See, e.g., PETER STEIN, *LEGAL INSTITUTIONS: THE DEVELOPMENT OF DISPUTE SETTLEMENT* 173 (1984) (discussing the range of possibilities in systems based upon Roman law).

## SOLDIERS' AND SAILORS' WILLS

A holographic will is a testamentary instrument entirely in the handwriting of the testator. It is signed by the testator, but it is not attested by the two or three witnesses otherwise necessary for sustaining the validity of any last will and testament under the Statute of Wills.<sup>4</sup> The theory behind the exception to the ordinary requirements of the law of wills is that the testator's own handwriting serves as an adequate guarantee that the document constitutes the testator's true last wishes. The handwriting, in effect, takes the place of the witnesses. Today, such wills are not permitted in England, but they were valid as to personal property until the passage of the Wills Act in 1837.<sup>5</sup> Before the enactment of the Statute of Frauds in 1677,<sup>6</sup> handwritten wills provided a permissible way for men and women to dispose even of real property at death.

One of the few toe-holds left for handwritten wills in current English law is the Soldiers' and Sailors' will. The Statute of Frauds (1671) permitted an exception to the requirement of attestation where a testamentary instrument was written by "any soldier being in actual military service."<sup>7</sup> Such a soldier was declared capable of disposing of his personal estate, "as [he] might have done before the making of this act."<sup>8</sup> That meant that a handwritten will was valid for all soldiers who were in actual service at the time. The 1837 legislation left the exception intact and a 1918 statute approved and extended the validity of military testaments.<sup>9</sup>

The fact that this exceptional or "privileged will" was an import from the Roman law has never been open to doubt.<sup>10</sup> It is found in separate titles within the Digest, the Codex Justinianus and the Institutes, described as a concession by Julius Caesar to his troops that was later made permanent by his successors.<sup>11</sup> Over the course of suc-

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4. See THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 75 (2d ed. 1953); W.J. WILLIAMS, THE LAW RELATING TO WILLS 57 (3d ed. 1967); Ernest G. Lorenzen, *Holographic Wills and Their Dating*, 28 YALE L.J. 72 (1918).

5. Wills (Soldier's and Sailor's) Act, 7 Will. 4 & 1 Vict. § 9.

6. Statute of Frauds, 29 Car. 2, c. 3.

7. *Id.*

8. *Id.* at § 23.

9. Wills (Soldiers and Sailors) Act, 7 & 8 Geo. 5, c. 58 § 2.

10. W.W. BUCKLAND & ARNOLD D. McNAIR, ROMAN LAW AND COMMON LAW 158 (2d ed. rev. by F.H. Lawson, 1965); C.E. BRAND, ROMAN MILITARY LAW 124, n. 1 (1968). For American law on the subject, see Egbert Oakley, *Wills of Soldiers and Seamen*, 2 MINN. L. REV. 261 (1918).

11. DIG. 29.1.1-44; CODE J. 6.21.1-18; G. INST. 2.11.1-6. For modern discussion of the Roman law doctrine on the subject, with fuller reference to literature, see MAX KASER, ROMISCHES PRIVATRECHT § 67(c) (13th ed. 1984); FRITZ SCHULZ, CLASSICAL ROMAN LAW 244 (1951).

ceeding centuries, it figured in virtually every discussion of the law of testaments by writers within the civilian tradition.<sup>12</sup> Indeed, more than a few treatises devoted exclusively to the subject of military testaments were written and published on the Continent during the sixteenth and seventeenth centuries.<sup>13</sup>

The fact that military wills found their way into England is not altogether surprising. The English law of testamentary succession has been shaped at many points by the civil law. The Common law left most probate matters to the courts of the Church prior to the nineteenth century, and these ecclesiastical courts took most of their law from the *ius commune*, the amalgam of canon and Roman laws that dominated European legal education prior to the modern era. The pages of the treatise by Henry Swinburne (d. 1590), England's first and most influential writer on the law of wills, are themselves testimony to the extent of Roman law influence.<sup>14</sup> It was the Roman law institution of military wills that Swinburne described, and it was this institution that passed into the Common law by virtue of the exception allowed by the Statute of Frauds.<sup>15</sup>

But was it the *same* institution? This question was raised in a practical and poignant context by several cases decided during the Second World War. The precise issue involved the Statute's requirement of "actual military service." There was no doubt that this wording was a rough translation of the Roman law's requirement that the soldier have been *in expeditione* (on an expedition) at the time of writing his will.<sup>16</sup> Did it therefore follow that English law had also imported the civilian interpretation of the phrase? Did the importation mean that English lawyers were to be bound, or in any event guided, by what Continental lawyers had thought?

For a long time, it did. The Roman law, as interpreted by the Continental jurists, had always required something more than that the sol-

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12. See, e.g., ARNOLDUS VINNIUS, IN QUOTUOR LIBROS INSTITUTIONUM has a separate title (Lib. II, tit. 11), DE MILITARI TESTAMENTO 294 (3d ed. Amsterdam 1659).

13. 2 MARTIN LIPENIUS, BIBLIOTHECA REALIS JURIDICA 45 (Leipzig 1757) (listing sixteen separate works on military testaments published between 1577 and 1744).

14. HENRY SWINBURNE, A BRIEF TREATISE OF TESTAMENTS AND LAST WILLS, Pt. 1 § 14 (1st ed. 1590) (treats military testaments).

15. According to some, it was the result of the efforts of Sir Leoline Jenkins (1623-85), the most eminent civilian of his day. See 1 WILLIAM WYNNE, THE LIFE OF SIR LEOLINE JENKINS liii (1724) ("He had likewise some hand in preparing the Statute of Frauds and Perjuries, especially that provision it which excepts the Wills of Soldiers and Seamen from the strict formalities required in the wills of other persons, leaving them to the full privilege of the old Roman Military testament.")

16. See CODE J. 6.21.17; Glossa ordinaria ad DIG. 37.13.1 (Venice 1606 ed.).

dier-testator have been in uniform at the time he wrote out his will. Though the exact dividing line was subject to uncertainty,<sup>17</sup> the law certainly required that the testator have been in combat, or at least be preparing for combat. During peacetime, or while a soldier was home on leave, he could not take advantage of the privilege. One of the reasons given for this exclusion was that only during actual military service would the soldier normally be "destitute of [legal] counsel (*inops consilii*)" and deserving of special treatment in law.<sup>18</sup> This reason for the privilege would obviously have disappeared at any time the soldier-testator was more civilian than combatant.

From 1837, the English courts consciously followed this principle from the civil law. They held that since it could not be denied that, "the principle of the exception was borrowed from the civil law, . . . in order to ascertain the extent and meaning of the exception, the civil law may be fairly resorted to."<sup>19</sup> This was so even though the English judges knew that following the civil law might create complications and difficulties for them: "[I]t is well known that very subtle distinctions are to be found in the writings of the commentators."<sup>20</sup> Under this view, authorities as venerable as Henricus de Segusio, the canonist and cardinal bishop of Ostia who died in 1271, were legitimate tools for interpreting an English statute passed in 1837.<sup>21</sup> Thus, the English courts used a civilian understanding of the law to disqualify a will executed by a soldier lying in a London hospital;<sup>22</sup> a will made by a lieutenant-colonel in the Dental Corps serving at distinct command headquarters;<sup>23</sup> and a will executed by a member of the Royal Air Force sent to Canada for training.<sup>24</sup>

The link to Roman law was broken in 1948 through an appeal in the last case cited. The dispute over the airman's handwritten will was taken to the Court of Appeals, which reversed the decision of the Pro-

17. See FRANCISCUS PINHEIRO, *Tractatus de testamentis*, Disp. 2, Sect. 7 § 3, nos. 175-77 (Coimbra 1681) (acknowledging the regional variation that existed in interpreting the phrase).

18. This was not the only justification. It was also said that their service to the republic merited special treatment and that they were commonly "inexpert and simple" in such matters. See, e.g., CASPAR MANZIUS (d. 1677), *TRACTATUS RATIONALIS DE TESTAMENTO*, Tit. 1, no. 33 (Augsburg 1680).

19. *Drummond v. Parish*. See also *In re Goods of Hiscock* (PCC 1843), 3 Curt. 522, 531, 163 Eng. Rep. 812, 815, 70 L.J.P. 22 (1901).

20. 3 Curt. 532, 163 Eng. Rep. 815.

21. 3 Curt. 538, 163 Eng. Rep. 818. The reference is apparently to the *Hostiensis* (Henricus de Segusio) *Summa aurea*, Lib. III, tit. *De testamentis et ultimis voluntatis*, nos. 4-5 (Venice 1574).

22. *In re Estate of Gray*, 91 L.J.P. 34 (1922).

23. *In re Goods of Gibson*, 2 All E.R. 91 (1941).

24. *In re Wingham*, 1 All E.R. 208 (1948).

bate Division. The Court held that it was enough to validate the will that the man had been "liable to be ordered to proceed to some area in order to take part in active warfare."<sup>25</sup> The court thus gave its own reading to the words "in actual military service," and rejected the notion that it was in any way bound to follow the long-standing civilian interpretation.<sup>26</sup> Most forceful on this score was the opinion of Lord Denning, then Master of the Rolls: "This supposed throw-back to Roman law has confused this branch of the law too long," he wrote, adding the stunning non-sequitur, "It is time to get back to the statute."<sup>27</sup>

The case attracted immediate academic attention,<sup>28</sup> and almost all of it welcomed the Court of Appeal's rejection of the notion that English courts should follow the civil law's lead. Only Patrick Duff, then Regius Professor of Civil Law at Cambridge University, spoke up (somewhat plaintively) for those he described as "the faithful few who profess the Roman law."<sup>29</sup> Duff suggested that Julius Caesar probably understood the condition of soldiers better than the English judges did. In his opinion, life had not changed so fundamentally between Caesar's time and the 1940s that any reform in this small corner of the law of wills was required. But Professor Duff's was a solitary dissenting voice.

There was, nonetheless, considerable variety in opinion, among the all but unanimous praise, over exactly where the decision by the Court of Appeals had left the Soldiers' and Sailors' will. To a Cambridge academic lawyer, the decision was particularly welcome because it "greatly enlarged the scope of the privileged will."<sup>30</sup> However, D.C. Potter, even while applauding the case's "explosion" of what he called "the Roman law fallacy," thought, contrary to the Cambridge lawyer's view, that the decision was properly read only in a limited sense, as allowing the privileged will where the soldier was actually contemplating the possibility of imminent death.<sup>31</sup> At the other extreme, the Editor of the *Law Quarterly Review*, the transplanted American Arthur

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25. *Wingham, Andrews et al. v. Wingham*, 2 P. 908, 911 (Eng. CA. 1948).

26. It may be that this step was prompted by the most learned of the contemporary academic treatments of the subject: Robert E. Megarry, "Actual Military Service" and *Soldiers' Privileged Wills*, 57 L.Q. REV. 481, 487 (1941).

27. *Wingham* at 913.

28. Besides the fuller treatments described below, see these briefer case notes arising out of the case: 64 SCOT. L. REV. 94 (1948); 60 JURIS. REV. 58 (1948); 92 SOLIC. J. 660 (1948); 24 NEW ZEALAND L.J. 48 (1948); 15 SOLIC. 50, 276 (1948); 12 CONV. PROP. LAW. 303 (1948); 27 CAN. B. REV. 199 (1949). For American comment on the problem, see Grant & Palmer, *Soldiers' and Sailors' Wills in New York*, 12 ALB. L. REV. 68, esp. 70-71 (1948); 13 ALB. L. REV. 10 (1949); and *Soldiers' Wills—What Constitutes 'Actual Military Service'*, 30 VA. L. REV. 481 (1944).

29. Patrick W. Duff, 65 L.Q. REV. 299 (1949).

30. J.D. Ward, 10 CAMBRIDGE L.J. 281 (1949).

31. D.C. Potter, *Soldiers' Wills*, 12 MOD. L. REV. 183, 190 (1949).

Goodhart, thought that the decision was important primarily as paving the way for the entire abolition of Soldiers' and Sailors' wills.<sup>32</sup>

The new definition of "actual military service" also turned out to be subject to real difference of opinion. An Australian commentator thought that the definition of the operative words should, in the future, be derived from Section 189(1) of the Army Act of 1881.<sup>33</sup> But a Scottish observer thought the uncertainty of the statutory definition in the wake of the decision was sufficient to declare that it was "time for the legislature to intervene."<sup>34</sup> In other words, the commentators were agreed in thinking that the decision had been right and that the unhappy influence of Roman law had been rightly rejected. However, they were not united in the sentiment about exactly where this rejection left the definition of "actual military service" for future cases.

There it has remained. The Soldiers' and Sailors' will still exists in English law, but its boundaries are uncertain.<sup>35</sup> There have not been enough cases to permit orderly development, and it is difficult to predict what its future will be, though no one can suppose that we have seen our last war or our last controversy over the validity of a soldier's will.<sup>36</sup> Whatever the ultimate outcome, from the comparative legal historian's point of view, its story is nonetheless valuable. It shows the range of choice always open to lawyers who have taken over an institution or rule of law from a foreign system. They may receive the institution whole, or they may receive it in parts. It is up to them. In England, the history of this kind of privileged testament has a little of both.

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32. Arthur L. Goodhart, 65 L.Q. REV. 6 (1949).

33. Added to balance with footnote 32 in text.

34. Raphael Powell, *Actual Military Service*, 61 JURID. REV. 172, 184 (1949).

35. See, e.g., J.B. Clark, THEOBALD ON WILLS 50 (14th ed. 1982) ("The phrase 'in actual military service' has caused considerable difficulty in interpretation.")

36. The two subsequent cases on the subject found by the author suggest an expansive interpretation. It was held that a soldier on leave in England from garrison duties in Germany after the Second World War was "in actual military service," *In re Colman's Estate*, 1958 2 All E.R. 35. It was also held that a soldier involved in security duty against terrorism in Northern Ireland was "in actual military service," *In re Jones* 1981 All E.R. 1. Subsequent Australian law on this subject has been of particular interest. See *In Will of Graham*, 67 N.S.W.W.N. 23 (1949) (validity allowed where will was made by a soldier not ready to proceed to combat, by virtue of proclamation by Governor-General that he was "on active service" at the time); *In the Will of Anderson*, 75 N.S.W.W.N. 334 (1958) (validity allowed where will was made in Australia while soldier was under orders to prepare for expedition to Malaya to deal with attempt to overthrow the government by force); *In re Gillespie*, 1968 Q.R. 1 (validity allowed where soldier was under orders to proceed to Vietnam); *In re Spann*, 1965 Q.R. 15 (validity not allowed where soldier was in barracks during peacetime).

## HOLOGRAPHIC WILLS

There was a time when every English testator enjoyed the privilege now held only by soldiers and sailors. As was noted above, prior to the passage of the Statute of Frauds, testaments written in the hand of any person were valid for wills of real property and they remained so for personal property up to 1837. Was this also an import from the European *ius commune*? The answer, I think, is that it was, but that the process by which it came to be imported was quite different from that of the privileged Soldiers' and Sailors' will. The holographic will was an institution inspired, or at least promoted, by the use of the texts of the Roman law. However, the form it assumed in England was actually contrary to the rule of the Roman law itself.

Scholars have long been unsure about the origins of the holographic will, although several answers have been suggested.<sup>37</sup> It is common ground that holographic wills were allowed only in exceptional cases in ancient Roman law, that the institution appeared in some of the "Barbarian Codes" of the early Middle Ages, that it fell out of use at least from the time of the revival of juristic science in Europe during the eleventh and twelfth centuries, that it was revived in some but not all parts of Europe during the sixteenth and seventeenth centuries, and that it was expressly sanctioned by the Napoleonic Code. But beyond these facts, it has been very hard to be sure. Probably, the dominant theory today is that holographic wills originated in the customs of the people of France, and this habit was given lasting sanction in the sixteenth century when customary law was written down. From there it passed to modern law via the Napoleonic Code.

For England, the question has been particularly difficult because the validity of holographic wills ante-dates the Napoleonic Code and the idea that French customary law influenced practice in the English ecclesiastical courts, where probate jurisdiction was lodged prior to the nineteenth century, seems extravagantly unlikely. Most modern treatments omit the subject entirely. Commentators who have dealt with the subject have often stated simply, that since the early English common law left most probate matters to the ecclesiastical law, this meant that ho-

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37. See MONIKA BEUTGEN, DIE GESCHICHTE DER FORM DES EIGENHÄNDIGEN TESTAMENTS 27-38 (1992). See also TEODORA F. TORRES, EL TESTAMENTO OLOGRAFO 97-136 (1977); HEINZ HOLZHÄUER, DIE EIGENHÄNDIGE UNTERSCHRIFT—GESCHICHTE UND DOGMATIK DES SCHRIFTFORMERFORDERNISSES IM DEUTSCHEN RECHT (1973); JEAN-PIERRE COTTIER, LE TESTAMENT OLOGRAPHIE EN DROIT SUISSE 11-19 (1960); E.M. MEIJERS, Testaments olographes, in ÉTUDES D'HISTOIRE DU DROIT I 146 (Leiden 1956); Reginald Parker, *History of the Holographic Testament in the Civil Law*, 3 JURIST 1 (1943); HERMANN STERN, EINE HISTORISCHE STUDIE ÜBER DAS EIGENHÄNDIGE TESTAMENT (1908).



lographic wills were valid until they were abolished by statute.<sup>38</sup> This is true, but it does not answer the question of how handwritten wills came to be accepted in the ecclesiastical courts in the first place. That is a puzzle, since holographic wills were not accepted in the *ius commune* (canon law that largely determined the shape of jurisprudence in the English). How did it happen, then, that handwritten wills came to be accepted?

The answer, as shown by the evidence of manuscript reports and treatises from the pens of the English ecclesiastical lawyers,<sup>39</sup> is that the holographic will was introduced into ecclesiastical practice in England during the late sixteenth century by applying to the law of succession the procedure called *comparatio litterarum* found within the tradition of the *ius commune*. This acceptance was an innovation inspired, rather than directed, by the civil law. Medieval court practice had not sanctioned the use of unattested handwritten wills, and the civilians were themselves conscious of the precariousness of what they were doing.<sup>40</sup> Nonetheless, holographic wills were gradually accepted as valid methods of testamentary disposition and, by the second quarter of the seventeenth century, they had begun to appear in the routine act books and cause papers of the diocesan courts.

The process by which this happened depended upon the Roman Law. The Codex contains a text, in its Fourth Book under the title *De fide instrumentorum*, that authorizes proof by comparison of examples of a person's hand with the handwriting of a private document in dispute.<sup>41</sup> For example, in a suit upon a written obligation, if it could be shown that the writing on the obligation was unlike the hand of another document that was undoubtedly in the hand of the defendant, then that comparison tended to prove that the defendant had not written the document in question. Hence, it might be a forgery and could be accepted as proof for the defendant's case. The reverse was true of course, if the handwriting on the two documents were identical. Then it would count

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38. E.g., THOMAS JARMAN, TREATISE ON WILLS I 132-34 (2d Am. ed. 1849). This is essentially the treatment in 3 WILLIAM HOLDSWORTH, HISTORY OF ENGLISH LAW 536-41 (5th ed. 1942).

39. See the description in R.H. HELMHOLZ, ROMAN CANON LAW IN REFORMATION ENGLAND 137-41, 198-99 (1990).

40. Research through the medieval court records of the English Church has so far produced no examples of holographic wills, though nuncupative wills were relatively frequent. William Lyndwood, the English canon lawyer who wrote during the middle of the previous century, said nothing about them in his treatment of the requirements for a testament's validity. See *Provinciale* (seu *Constitutiones Angliae*) (Oxford 1679) 179 s.v. probatis. And, most tellingly, the lawyers who argued cases about holographic wills in the sixteenth century treated them as something new, of doubtful validity and requiring special legal justification before they could be upheld.

41. CODE J. 4.21.20 19 (Comparationes).

for the plaintiff's case. Similarly, a letter written by one person could be used as evidence against him in the traditions of the *ius commune*, and the technique of comparison of letters was used to establish that the letter was the authentic act of the writer.<sup>42</sup> As an English civilian stated his understanding of the matter, "It is because of the difficulty of proof that *comparatio litterarum* may prove a private writing."<sup>43</sup>

The possible application of this text, and the commentary that went with it, to the law of testamentary succession seems obvious. However, this was very far from a self-evident or necessary step. The Codex's text said nothing about its application to the law of testamentary succession. Nor did the medieval and early modern civilian commentators on the Continent refer to it as having any relevance to wills in general.<sup>44</sup> The corpus of the medieval canon law also contained two papal decretals that specifically required the presence of two or three witnesses to a testament, one of whom was to be the parish priest of the decedent.<sup>45</sup> Roman law itself was even stricter about attestation in ordinary circumstances. A more natural reading of the *ius commune* literature would lead English lawyers to reject the holographic will, as did most German speaking lands.<sup>46</sup> There were many obstacles.

However, these obstacles were overcome. The winning argument was made in the English ecclesiastical courts, that since *comparatio litterarum* was clearly valid for purposes of ordinary contracts, there was no reason it could not be used for purposes of validating wills.<sup>47</sup> If, as was suggested in an early case on the subject, "the proof that is made by *comparatio litterarum* can be called full proof according to rule," there

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42. See JOSEPHUS MASCARDUS, DE PROBATIONIBUS II, Concl. 626 (Frankfurt 1593) for a discussion of the law on the subject.

43. Bodleian Library, Oxford, Tanner MS. 427, f. 148v. See also Stapleton C. Clerke, Tanner MS. 427, f. 131v (use of *comparatio litterarum* to test the validity of a written composition of 1564 in a tithe dispute).

44. See, e.g., Bartolus de Saxoferrato (d. 1357), COMMENTARIA AD CODE. J. 4.21.20 (Lyons 1554); Baldus de Ubaldis (d. 1400), Commenataria ad *id.* (Venice 1586); Johannes Sichardus (d. 1557), Commentaria ad *id.* (Frankfurt 1586); Jacobus Menochius (d. 1607), De Arbitariis iudicium quaestionibus et causis (Cologne 1587), Lib. II, c. 114.

45. X 3.26.10 & 11, in 2 CORPUS JURIS CANONICI 541 (A. Friedberg ed., 1879).

46. See the discussion in SAMUEL STRYK (d. 1710), TRACTATUS DE CAUTELIS TESTAMENTORUM 10, 19 (Magdeburg 1736).

47. E.g., Newton c. Brooke (1597), in British Library, Lansd. MS. 130, f. 136v. (citing the text from the Codex and a commentary upon it by Albericus, and in counsel's argument, works by Ludovicus Zuntus, Albericus de Rosate [d. 1360], Michael Grassus [fl. 1580], and Marcus Antonius Natta.)

should be no reason it could not logically be applied to the law of testamentary succession.<sup>48</sup>

Taking a rule from one class of cases and applying it to another was a familiar method in the *ius commune*. For instance, the compiler of an English formulary from about 1620, and now in the Cathedral library at Canterbury, noted that in marriage cases, "The Doctors . . . hold the opinion that consent can be proved by gestures and signs, taking their reasons chiefly from the law of legacies and *fideicommissa*." *Comparatio* was used in other areas of English practice, as shown by a tithe cause from 1600.<sup>49</sup> If this could be done without danger in other areas, why could it not be done in the law of wills?

From an internalist perspective, it should not have been entirely unexpected that this development might occur, though it is of course true that the exact moment it occurred may have depended upon social factors such as a rise in literacy. The English courts had long made the enforcement of the last wishes of a decedent the pole star of their testamentary jurisdiction. They carried it to the length of allowing a later nuncupative will to supersede an earlier written will, though this was contrary to the civilian texts on the subject. The reason given for this deviation—perhaps a dangerous one—was that the decedent's last wishes should at all costs be enforced. The civilians justified this by arguing that, "Proof in testamentary matters is not restricted to two witnesses by the *ius gentium*" and by citing various existing exceptions to the rules requiring witnesses in Roman and canon law.<sup>50</sup>

This attitude towards the last wishes of decedents obviously could justify accepting holographic wills as valid. Such wills might well be the only evidence of what the last wishes of any person had been. As one of the manuscript reports described the reaction of a prominent civilian, "Sir John Benet said he would indistinctly admit proof by comparison in a will, because sometimes a will might be proved only by comparison."<sup>51</sup> Or, as the same sentiment was expressed in another contemporary manuscript report, "By the law which we use, a testament

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48. *E.g.*, *Yelverton c. Yelverton* (1588), British Library, Lansd. MS. 129, f.31v: "probatio quae fit per comparisonem litterarum regulariter dicitur plena probatio . . . [citing Alexander of Imola, *Consilia* 114], . . . et hec est communis opinio."

49. *Stapleton c. Clerke* (c. 1600), in Bodleian Library, Oxford, Tanner MS. 427, f.131v. (in which an indenture from 1564 was introduced apparently to prove the authenticity of a later document).

50. *Id.* ("Probatio iuris gentium non restringitur ad duos testes in testamento. Vasquius, Lib. 2, De testament. § 13, nu. 23.")

51. GUIDHALL LIBRARY, London, MS 11448, f. 102v.

will be proved wherever the wishes of the testator can be discovered.”<sup>52</sup> The institution of *comparatio litterarum* then became the textual authorization for taking a step that was entirely consistent with the civilians’ customary attitude towards carrying out the last wishes of all decedents. In a sense, admitting the holographic will into English practice was a natural step.

This is not to say that there was no resistance. There was a good deal of counter-argument. For example, in one case it was argued that such holographic writings should be properly considered “preparations for making a testament rather than the testament itself.”<sup>53</sup> That was not a frivolous point. The English civilians also pointed to language in Continental treatises denigrating the value of *comparatio litterarum*. For example, according to Oldendorpius it was an inherently “imbecillis, fragilis et fallax probatio.”<sup>54</sup> There was considerable thinking along these lines among contemporary writers on the *ius commune*,<sup>55</sup> and it found expression in the English cases.

There was hesitation about this step in many quarters. Henry Swinburne, whose *Brief Treatise of Testaments and Last Wills* (1st ed. 1590) provides the best contemporary guide to testamentary practice in the English ecclesiastical courts, was at his most judicious in discussing the reliability and the validity of holographic wills. He seems to have been in favor of accepting them. However, he took that position only in the most guarded terms, ascribing their reception in English practice only to the *stylus curiae* of individual ecclesiastical courts.<sup>56</sup>

Nevertheless, the evidence shows that despite all hesitation, the holographic will was generally accepted in the English ecclesiastical courts during the late sixteenth and early seventeenth centuries. For example, in a 1640s case from the diocese of Chichester the act book records a petition by a party seeking to prove the handwritten testament of Thomas Knight, “that experts in the art of writing be chosen and re-

52. See WILLIAM TRUMBELL’S NOTEBOOK OF CASES, Berkshire Record Office, Reading, MS. D/ED O 48, p. 109 (“Iure quo utimur testamenta probantur si de voluntate testantis constare possit nam omnia testamenta nunc sunt militaria quae probantur per probationem iuris gentium. Viglius, De milit. test. § plane.”) See also JOHN AYLIFFE, PARERGO JURIS CANONICI ANGLICANI 526 (London 1726) (“[b]ecause all our Wills are military Testaments.”).

53. Yelverton c. Yelverton (1588), in British Library, Lansd. MS. 129, f. 30v. (“[p]rima scriptura est potius dicenda preparatio ad testandum quam testamentum.”).

54. *Id.* (per Dr. Creake) (citing the commentary on the Decretals by Panormitanus).

55. E.g., Joannes Petrus Ancharanus (fl. 2d half 16th C.), *Familiarium Iuris Quaestionum Libri Tres* (Venice 1580), LIB. II, Quaest. 56, nu. 9 (“Cum notum sit quantum periculosa sit et fallax litterarum comparatio.”).

56. *Compare . . .* HENRY SWINBURNE, *BRIEF TREATISE OF TESTAMENTS AND LAST WILLS* Pt. 4 § 25 (1st ed. 1590) and J. GODOLPHIN, *ORPHANS’ LEGACY OR TESTAMENTARY ABRIDGMENT* Pt. I, c. 21:2 (noting the latter’s confident statements approving wills in the hand of the testator).

quired, under oath, to faithfully compare" the documents exhibited.<sup>57</sup> The court granted the petition, naming two notaries public to make the comparison and report their findings to the court. One also finds references to the validity of handwritten testaments in the comments made by proctors in some of England's consistory courts,<sup>58</sup> and in contemporary precedent books.<sup>59</sup> Their routine character in the records underlines the establishment of the holographic will as an accepted and normal part of the English ecclesiastical law. By the mid-seventeenth century, it could be said by the civilians that in practice, all English wills were treated as military testaments.<sup>60</sup>

### CONCLUSION

One reason for having described these two examples of the treatment accorded handwritten wills in English law is that it throws some light into a dark corner of the history of Anglo-American law. From the perspective of comparative legal history, however, this cannot be reason enough. Nor is it all that the description achieves. Both of the instances described here present cases in which Roman law has been changed in the course of its transmission into English law.<sup>61</sup> These examples—and they are no more than examples—demonstrate the compatibility of receiving foreign legal doctrines or institutions with the emergence of something quite transformed from what had existed in the original system of law.<sup>62</sup>

In the case of Soldiers' and Sailors' wills, the process was long and drawn out. It took more than a century for the civilian interpretation of "in actual military service" to disappear and to be replaced by a more uncertain (though English) interpretation. In the case of holographic

57. Act Book Ep I/10/45. f. 196v. (1641) in East Sussex Record Office, Chichester ("Quare petiit comparationem fieri . . . et peritos in arte scribendi eligi et iuramento onerari de fideliter comparando premissa et ferendo eorum iudicium in ea parte in proximo.")

58. E.g., Mark Tabor, *Marginalia* (c. 1645), in FRANCIS CLERKE, *PRAXIS* (Wells Cathedral Library, MS. f. 71f.) ("Se quis sua manu totum testamentum vel codicillum conscripserit et hoc specialiter in scriptura reposuerit quod manu sua hoc fecerit, sufficit.")

59. Canterbury Cathedral Library, Z.3.27, f. 79 (taken from the assignment of four proctors as comparatores literarum et scripturarum in a testamentary cause from 1581).

60. See Dr. Bird's statement (London 1726), in WILLIAM TRUMBELL'S *NOTEBOOK OF CASES*, MS. D/ED O 48, 109 ("Iure quo utimur . . . omnia testamenta nunc sunt militaria quae probantur per probationem iuris gentium."). See also JOHN AYLIFFE, *PARERAGON JURIS CANONICI ANGLICANI* 526 (London 1726) ("[b]ecause all our Wills are military Testaments").

61. See WATSON, *supra* note 2, at 97 ("[a] voluntary reception or transplant almost always . . . involves a change in the law.")

62. See also Robin Evans-Jones, *Unjust Enrichment, Contract and the Third Reception of Roman Law in Scotland*, 109 L.Q. REV. 663 (1993) (providing another interesting example with perceptive remarks about the problem).

wills more generally, a transformation occurred at the very moment of transmission. The ingenuity of the English civilians fashioned from Roman sources a legal institution that Roman law itself had not allowed. Both examples add something to our understanding of the complex relationship between Roman law and Anglo-American law, a relationship Dean Hoeflich has done so much to elucidate.

