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Hans W. Baade

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REFLECTIONS ON THE RECEPTION (OR RENAISSANCE) OF CIVIL LAW IN TEXAS

Hans W. Baade*

RECEPTION, to legal historians, means principally the revival of Roman law in late medieval Italy and its expansion into countries such as Germany, France, and the Netherlands.¹ That term is also used on occasion to describe the process by which modified versions of English common law became part of the legal system of British colonies, especially in North America,² and to explain why England, unlike Scotland, received so little of the “Civil Law” (modern Roman law; *ius commune*) as part of its common law.³ More recently, “reception” also figures in discussions about the respective places of common law and civil law in “mixed” systems, especially in uncoded ones like Scotland and South Africa. In the latter context, a recurring subject has been the place of rules of Roman law not expressly received into the law of the Province of Holland.⁴

As this last example shows, however, it is more or less generally assumed that a rule of law prevailing at the capital of a metropolitan power (the Custom of Paris; English common law; Castilian law) will also prevail in the overseas possessions of that country unless expressly excluded or modified, or manifestly unsuitable to local conditions. For that reason, the applicability of the law of the metropolitan power in its overseas possessions is usually seen as due to expansion or transmission, not reception. One consequence of this generally prevailing frame of reference has been that legal historians have paid relatively little attention, until quite recently, to the actual operation of the law of the former metropolitan

* Hugh Lamar Stone Chair in Civil Law, The University of Texas, Austin; Honorary Fellow, Faculty of Law, Edinburgh University.

1. See 2 HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN PRIVATRECHTSGESCHICHTE: NEUERE ZEIT (1500-1800), Das Zeitalter des Gemeinen Rechts (H. Coing ed., 1976 & 1977).

2. See B. H. McPherson, *The Mystery of Anonymous* (1722) 141 AUST. L.J. 169, 180 (2001).

3. Scholarly discussion of this subject goes back to F. W. MAITLAND, *ENGLISH LAW AND THE RENAISSANCE* (1901). As late as 1976, Professor M^cKnight faulted English legal historians for all but ignoring the “Roman elements” of English law, which were “perfectly plain and obvious” to him. J. W. M^cKnight, *Some Historical Observations on Mixed Systems of Law*, 1977 J.R. 177, 178 (Stair Society Lecture 1976). The studies cited in notes 8 & 9 below have somewhat redressed the balance.

4. See *Demerara Turf Club, Ltd. v. Wight*, [1918] A.C. 605, 614 (P.C.); *Bank of Lisbon and South Africa Ltd. v. DeOrnelas and Another*, [1988] 3 S.A.L.R. 580, 604-06 (A.D.).

power. This is particularly true with overseas possessions that passed, like the Southwestern United States, to another sovereign and another legal system.

This dismal mold was broken (or at least, it was cracked irreparably) by none other than Professor Joseph W. McKnight. The initial "reception" (now in the literary sense) of his efforts in this direction can hardly have been encouraging. I recall his telling me that when he informed a friend at Oxford that he intended to go into legal history, the initially approving response became one of incredulity when the friend found out that Joe's subject of study was to be American legal history—to say nothing of his real interest, which for want of a better term I will call non-American American legal history.

By way of background, I pause to note that Joe is both a Son of the Republic and a Rhodes scholar. For almost half of its short life (until March 16, 1840, to be precise) the Republic of Texas was, in private law at least, a civil-law country.⁵ Oxford, one of the two or perhaps three⁶ places of legal learning for some five centuries in the formative period of the common law in its mother country, taught nothing but civil law until Mr. Viner's endowment of a chair in English law in 1758.⁷ Even after that, it educated mainly civil lawyers for the Church and for Doctors' Commons⁸ and continued to teach civil law after the judicial reforms of 1857.⁹ Joe, we may surmise, was a beneficiary of this tradition, which had received an infusion of new blood (and new legal perspectives) through the endowment of a Readership in Roman-Dutch law at Oxford by none other than Cecil Rhodes himself,¹⁰ whose munificence also benefited Joe more directly.

5. See Law of Jan. 20, 1840, §§ 1-2, 1840 Repub. Tex. Laws 3, 2 H. GAMMEL, LAWS OF TEXAS 177, 178 (1898). Pursuant to section one of the Act of Jan. 16, 1840, enactments of the Republic of Texas generally became effective on the fortieth day after adjournment. See Law of Jan. 16, 1840, § 1, 1840 Repub. Tex. Laws 6, 7, 2 H. GAMMEL, LAWS OF TEXAS 180-81 (1898). The Fourth Congress of the Republic of Texas adjourned on February 5, 1840. See 1 JOURNAL OF THE FOURTH CONGRESS OF THE REPUBLIC OF TEXAS 356 (Smither ed. 1839-40).

6. See J. H. Baker, *The Third University of England, The Inns of Court and the Common-Law Tradition* (Selden Society Lecture, July 4, 1990). The Inns of Court and Chancery were called the "third university" in England, along with Oxford and Cambridge, in the late Tudor period. *Id.*

7. William Blackstone was its first incumbent. S. N. KATZ, INTRODUCTION TO BOOK I, WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND iii, iv, Vol. 1 (orig. 1765; facsimile ed. 1979).

8. See D. R. COQUILLETTE, THE CIVILIAN WRITERS OF DOCTORS' COMMONS, LONDON (1988). For biographies, see J. H. BAKER, MONUMENTS OF ENDLESS LABOURS: ENGLISH CANONISTS AND THEIR WORK, 1300-1900 (1998).

9. The transfer of probate and matrimonial jurisdiction from the ecclesiastical to the secular courts and the phasing out of the College of Advocates in England are chronicled in G. D. SQUIBB, DOCTORS COMMONS, A HISTORY OF THE COLLEGE OF ADVOCATES AND DOCTORS OF LAW 102-115 (1977).

10. A Chair in Roman-Dutch law was endowed by the Rhodes Trustees in 1919, and R. W. Lee was its first incumbent. F. H. LAWSON, THE OXFORD LAW SCHOOL 1850-1965 at 104 (1968).

But let us not forget: Professor Joseph W. M^cKnight was to become a towering figure in the drafting, exposition, and teaching of current Texas family law, and Texas has been a common law jurisdiction, both as an independent country and as a State of the United States, for some 162 years. Judging by his publications, Joe's initial interests included civil procedure—Texas civil procedure. Yet even in this latter field, he was able to trace “Spanish” (and more generally civil-and canon-law) influences on present-day Texas law: a single form of action pre-dating Field's Code but without distinction between law and equity; set-off and (initially in those words) “reconvention” or counterclaim; venue reflecting the maxim *actor sequitur forum rei* and arbitration.¹¹ In family law, the Castilian ganancial community readily comes to mind (as it, and much else, readily did to Joe). Indeed, community property survived in Texas (although not in Mexico¹²), and it would not be fanciful to characterize the present prevalence throughout the United States of the separation-during-marriage, community-upon-death model as a Castilian reconquista traceable to the decision of the Fathers of the Republic of Texas to adopt the “Spanish” model¹³—aided more recently by the Internal Revenue Code.¹⁴

Let us return briefly to the notion of reception. In conventional terms, “Spanish” law (or more accurately, the law of Castile and of the Indies, of Mexico, and of the Mexican States of Tamaulipas, Coahuila y Tejas, and Chihuahua) was not “received” in Texas. This mostly composite, but latterly fractional system was also not “received” by the Lone Star Republic or State of Texas. It was transmitted or extended there by the prior sovereign(s), and whatever survived of it did so to the extent that “Anglos” preferred civil-law institutions or rules to those of the common law.

Professor M^cKnight has initiated the documentation of these surviving civil-law institutions or rules in such diverse areas as the law of water-courses,¹⁵ the homestead exemption,¹⁶ and in three areas of family law: matrimonial property,¹⁷ protection of the surviving spouse,¹⁸ and adop-

11. J.W. M^cKnight, *The Spanish Influence on the Texas Law of Civil Procedure*, 38 TEXAS L. REV. 24, 26-45 (1959).

12. For a historical and comparative survey, see S. T. MARTINEZ ARRIETA, *EL REGIMEN PATRIMONIAL DEL MATRIMONIO EN MEXICO* (1984). The author lists the Federal District and ten states as belonging to the separation-of-property camp, with community property a contractual option. See *id.* at 23. In several of the remaining states, this pattern appears to be reversed.

13. This legislation is traced by J. W. M^cKnight, *Texas Community Property Law—Its Course of Development and Reform*, 8 CAL. W. L. REV. 117, 118-22 (1971).

14. See M^cKnight, *supra* note 3, at 186.

15. J.W. M^cKnight, *The Spanish Watercourses of Texas*, in *ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER* 373 (M.D. Forkosch, ed., 1966).

16. J. W. M^cKnight, *Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle*, 86 S.W. HIST. Q. 369 (1983).

17. See M^cKnight, *supra* note 13, at 117.

18. J.W. M^cKnight, *Spanish Law for the Protection of Surviving Spouses in North America*, 57 ANUARIO DE HISTORIA DEL DERECHO ESPAÑOL 365 (1987).

tion and legitimation.¹⁹ This alone (plus the obituary of the *légitime*²⁰) was no mean task since prior or contemporaneous scholarship in the area was non-existent (or worse). Almost as importantly, however, he has pioneered research into variants of “reception” which, in this combination, are possibly unique. How did “Spanish” and Mexican law spread to Spanish and Mexican Texas? Did the “Anglo” judges and lawyers applying (and thereby adopting) this body of law “get it right” initially? If not, did they later or should they now?

In his equally pioneering “Observations on Mixed Systems of Law” (a Stair Society lecture dating from 1976), Joe pointed out that the distinction between a mixed legal system and one which “has already been blended to the extent that origins of rules are lost in ordinary legal practice” is “a practical and psychological one, for whether a system is or is not a mixed one is in the minds of the Bench and Bar.”²¹ Even at the time, though, the name of Lord Cooper (the President of the Court of Session at the crucial time) would have leaped to mind in this connection only together with that of Professor Tom Smith of the Edinburgh University Law Faculty, who started Scotland’s *bellum iuridicum* and brought it to a successful conclusion with the Stair Memorial Encyclopedia.²² A “partnership between academic writers and the judiciary” has saved the civil-law component of the South African legal system²³ and, perhaps, of the Scottish one. I have suggested elsewhere that such a partnership—“with professors at least somewhat ‘more’ equal than judges”—might be “a sine qua non of the Civil Law.”²⁴ Whatever the proper mix for a “mixed” system, it is not likely to survive (or, as here, to be revived) without academic authors like Professor Joe M^cKnight.

In the Stair Society address just referred to, Professor M^cKnight noted that at the time (1976), the mixed nature of the Texas legal system was “everywhere apparent and admitted because it has an important bearing on the rules of law and their application.”²⁵ Yet, some ten years earlier, he had characterized the end of the nineteenth century as the “dark period of ignorance before the bar rediscovered the Spanish law.”²⁶ It was his view that the “thread of Hispanic learning” of the Texas bench and

19. J.W. M^cKnight, *Legitimation and Adoption on the Anglo-Hispanic Frontier of the United States*, 53 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 135 (1985).

20. J.W. M^cKnight, *Spanish Legitim in the United States—Its Survival and Decline*, 44 AM. J. COMP. L. 75 (1996).

21. M^cKnight, *supra* note 3, at 178.

22. See Lord Hope, *Foreword to COMPARATIVE AND HISTORICAL ESSAYS IN SCOTS LAW, A TRIBUTE TO PROFESSOR SIR THOMAS SMITH* QC xi, xiii-xiv (D.L. Carey Miller & D.W. Myers, eds. 1992).

23. D. Visser, *Placing the Civilian Influence in Scotland: A Roman-Dutch Perspective, in THE CIVILIAN TRADITION AND SCOTS LAW: ABERDEEN QUINCENTENARY ESSAYS* 239, 252 (D. L. Carey Miller & R. Zimmermann, eds. 1997).

24. Hans W. Baade, Book Review of D. Visser, *Placing the Civilian Influence in Scotland: A Roman-Deutch Perspective* 4 EDIN. L. J. 97, 100 (2000).

25. M^cKnight, *supra* note 3, at 178-79.

26. M^cKnight, *supra* note 15, at 379.

bar was “lost in the period following the Civil War”²⁷—a thread, incidentally, that had been rewoven by the Hemphill-Lipscomb-Wheeler triumvirate of the late Republic-early Statehood Texas judiciary or, perhaps more accurately, woven by these and other Texas judicial pioneers entirely by their own efforts. For as Joe meticulously documented in a painstaking account of “Law Books on the Hispanic Frontier,” Spanish and Mexican Texas were not blessed at any time with an adequate supply of Hispanic legal literature or even documentation—to say nothing about properly trained Spanish or Mexican lawyers.²⁸

What, then, led to the late flowering of Spanish and Mexican law in Texas after Independence (March 2, 1836), to its decline in the late nineteenth century, and to its revival as a matter of practical necessity in the most recent half-century? A brief answer to the former question is supplied by Professor M^cKnight’s detailed summary of what was expressly left in place when the Congress of the Republic of Texas adopted the English common law in 1840.²⁹ We may add to this the initial need of the judiciary to deal with transactions and events prior thereto,³⁰ and leave the rest to the first volume of a History of the Texas Supreme Court now at last on the drawing board, in good part due to the efforts of Professor M^cKnight.³¹ Let me pursue instead, as befits the occasion, the revival of the interest of the Texas bench and bar in the law of the former sovereigns of the Lone Star Republic.

Before turning to that subject, however, I must acknowledge some institutional blame for what Joe has called our “dark period of ignorance” as to such matters in the late nineteenth century. It corresponds, nearly enough, with the formalization of Texas legal education, dating from the establishment of The University of Texas in 1882. As I hope to have shown elsewhere, the University was, initially, a law school with a small college attached. By 1892, it had graduated 231 bachelors of law against a total of 76 holders of all other degrees.³² The senior professor, Oran M. Roberts, had been a member of the antebellum state Supreme Court and had authored one of the more famous opinions of that Court on Mexican land titles.³³ Moreover, as a former governor of Texas, he was bound to be familiar with the importance of historical land rights for this State and its people.

It is surprising and disturbing, therefore, to find the “Old Alcalde” (as he was called by his students) actually opposing Spanish and Mexican law as an academic subject at The University of Texas, which he was largely

27. *Id.* at 374.

28. J.W. M^cKnight, *Law Books on the Hispanic Frontier*, 27 J. WEST 74 (1988).

29. M^cKnight, *supra* note 15, at 373 n.4.

30. *State v. Valmont Plantations*, 346 S.W.2d 853, 855 (Tex. Civ. App.—San Antonio 1961), decision adopted, 355 S.W.2d 502 (Tex. 1962).

31. This project, under the auspices of the Texas Supreme Court Historical Society, is in the hands of a committee chaired by Professor M^cKnight.

32. Baade, *Law at Texas: The Roberts-Gould Era (1883-1893)*, 86 SW. HIST. Q. 161, 166 (1983).

33. *Chambers v. Fisk*, 22 Tex. 504 (1858).

instrumental in founding in 1882.³⁴ Speaking as the senior professor of law at the annual meeting of the Texas Bar Association in November, 1884, he stated that "the Spanish civil law, so far as it enters into the rights of property in Texas, [will have] to be learned in the course of practice, as . . . might be practically required in attending to business in our Courts."³⁵ His own familiarity with the subject is further demonstrated by his detailed lecture notes, which have been preserved. However, Roberts' list of books of authority to be studied for candidates for admission to practice before the state supreme court omits any text on Spanish or Mexican law, although several were available in English at the time.³⁶

Whatever the motives for such an unhelpful attitude, its effects were soon manifest. As Professor M^cKnight has noted, the thread of Hispanic learning, once gained, seems to have been lost in the period following the Civil War.³⁷ Even as recently as 1927, Dean Hildebrand did not devote more than a few lines of his study of riparian water rights in Texas to Spanish and Mexican water law.³⁸ Decisions continued to cite domestic judicial precedent which in turn relied on other decisions plus a few references to English language civil law texts.³⁹ The original sources were largely forgotten. To be sure, much of what had been inherited from Spain survived, but it had, in Professor M^cKnight's terminology, "already been blended" into the predominant Texas legal system "to an extent that origins of rules are lost in ordinary legal practice."⁴⁰

All of that, however, was to change completely (if only in one area of the law) after the second World War. The beginnings of the remarkable revival of historic Spanish and Mexican law in Texas has been chronicled by Professor M^cKnight in a study entitled "The Spanish Watercourses of Texas," which appeared in the Felix Frankfurter Festschrift edited by Morris Forkosch in 1966.⁴¹ I have drawn on it repeatedly above, and it has been at my side through many a forensic battle in the last two decades.

The revival coincides with the so-called "Tidelands Oil" litigation in which the State of Texas, after initial defeat, vindicated its claim to sovereignty over a three-league territorial sea adjacent to its Gulf coast.⁴² In that epic bellum iuridicum with the U.S. over the oil resources of the territorial sea, the State of Texas employed a panoply of out-of-state legal

34. For his account, see O. Roberts, *A History of the Establishment of the University of Texas*, 1 SW. HIST. Q. 233 (1898).

35. O. Roberts, *Legal Education and Admission to the Bar*, Proceedings of the Third Annual Convention of the Texas Bar Association, 43, 47 (1884).

36. See Baade, *supra* note 32, at 23 n.133.

37. M^cKnight, *supra* note 15, at 374.

38. I. Hildebrand, *The Rights of Riparian Owners at Common Law in Texas*, 6 TEXAS L. REV. 19, 46 (1927).

39. See M^cKnight, *supra* note 15, at 374; *id.* at 382-83.

40. M^cKnight, *supra* note 3, at 178.

41. M^cKnight, *supra* note 15, at 373.

42. *United States v. Texas*, 339 U.S. 707 (1950); *United States v. Louisiana*, 363 U.S. 1, 36-64 (1960). For a brief summary by a leading participant, see P. Daniel, *Tidelands Controversy*, in 6 THE NEW HANDBOOK OF TEXAS 490 (R. Tyler et al., eds. 1996).

talent. While neither “civil law” nor Mexican law were of much relevance in this connection, the interaction between leading foreign and internationally renowned U.S. legal experts and the Texas public legal “establishment” had brought about a veritable sea change in juridical attitudes. This was, to a considerable extent, the “work of J. Chrys Dougherty, a well-connected Texas lawyer with fluency in Spanish and in French who recruited and marshalled the Texas legal forces.”⁴³

An offshoot of this epic struggle was extensive litigation between the State of Texas and littoral landowners over the delimitation of the seashore.⁴⁴ Since Texas delimits Spanish and Mexican grants by the law in effect at the time of the grant, these cases did, indeed, raise questions of Spanish and Mexican law. The legal position of the State in this regard was developed for the first time by a Mexican lawyer—Professor Santiago Oñate, Sr. of Mexico City, soon to become the leading authority on Spanish and Mexican historic water rights in Texas.

The first reported Texas decision actually incorporating findings on Roman law and nineteenth century Mexican law brought to the attention of the court by foreign civil-law experts is *McCurdy v. Morgan*, decided in 1954.⁴⁵ It involved the question whether the bed of a non-perennial creek belonged to the State or to the encompassing landowner of a Mexican grant. In that case, the pertinent civil-law authorities were brought to the attention of the court through two lengthy opinions authored by Professors Felipe Sánchez-Román and Ramón Martínez-Lopez, presented by Mr. Dougherty in the appendix to his brief on appeal. The Court relying on civil-law authorities, held that the *alveus* of the non-perennial Chilipin Creek had passed with the Coahuiltecan land grant of 1834.⁴⁶

Modesty aside, let me interject at this point that *McCurdy* left open the question of whether the waters of such non-perennial creeks belonged to the State or to the landowner—a question answered some three decades later in the former sense.⁴⁷ *Quarum rerum parva pars fui*. My (ultimately successful) labors for the Lone Star State in that connection, however, were but a relatively small step forward from Jack Pope’s 1961 opinion in the *Valmont* case,⁴⁸ rightly described by Professor McKnight as “a masterpiece of historical analysis of ancient law, commentaries and primary

43. The next paragraph is based on a letter dated May 6, 1992, by J. Chrys Dougherty to the author, qualifying my previous account in Hans W. Baade, *Roman Law in the Water, Mineral and Public Land Law of the Southwestern United States*, 40 AM. J. COMP. L. 865, 871-72 (1992) (letter in possession of the author).

44. These cases were *Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167 (1958), and *Humble Oil & Ref. Co. v. Sun Oil Co.*, 190 F.2d 191 (5th Cir. 1951), opinion on rehearing, 191 F.2d 705 (5th Cir. 1951), cert. denied, 342 U.S. 920 (1952).

45. 265 S.W.2d 269 (Tex. Civ. App.—San Antonio 1954, writ ref’d).

46. *Id.* at 272.

47. *In re Adjudication of Water Rights in the Medina River Watershed of the San Antonio River Basin*, 670 S.W.2d 250 (Tex. 1984), reversing 645 S.W. 596 (Tex. App.—San Antonio 1982), where my views are summarized in the dissent, 645 S.W.2d at 612-14.

48. *State v. Valmont Plantations*, 346 S.W.2d 853 (Tex. Civ. App.—San Antonio 1961), decision adopted, 355 S.W.2d 502 (Tex. 1962).

sources of the Spanish colonial regime in Texas.”⁴⁹

In that case, the Texas courts held that lower Rio Grande riparians holding under Spanish or Mexican surface grazing and/or dry farming grants had no riparian irrigation rights in and to the waters of that river. In *Cibolo*,⁵⁰ that holding was extended to perennial streams in Coahuila y Texas proper. It is based on a careful analysis of the water law of the Indies by Mr. Justice (later Chief Justice) Jack Pope, who concluded that under that law, water rights, like mineral rights, did not pass with the surface estate but required express grants from the sovereign. The relevant authorities had been brought to the attention of the court by the expert testimony of Santiago Oñate, Sr. and by his “Memorandum on Water Rights in the Lower Rio Grande in the Spanish Colonial and Early Mexican Periods.”⁵¹

Since *Valmont*, at the latest, no major reported Texas water rights, riparian, or littoral delimitation case involving a Spanish or a Mexican grant has been tried without some attention to historic Spanish and/or Mexican law. As recently reported in the *New York Times*, the Rio Grande failed to reach the Gulf Coast in the year 2000 and “water mining” from aquifers is in the offing. Drought, we may predict with some assurance, will limit the supply of water, but not of forensic disputes calling for this specialized legal talent. Even (or especially) when it flows, water delimits riparian and littoral land and, most importantly, rights to minerals thereunder. These, too, are much worth fighting for (or over).

Let me return, in conclusion, to Professor M^cKnight’s insightful concept of a “mixed” legal system. Whether or not it is such depends, in his words, “on the minds of the Bench and Bar.” The decisive question is whether “the mixed nature of . . . the (Texas) system is everywhere apparent and admitted because it has an important bearing on the rules of law and their application.”⁵²

At least as to Texas lands granted out of Spanish or Mexican sovereignty, the state-of-mind requisite for a “mixed” system is very much present in Texas today. Texas judges have this state-of-mind, and so, perforce, have Texas lawyers. As Professor M^cKnight has shown, however, the knowledge of historic Spanish and Mexican law in Texas has had its ups and downs. That law came here through transmission and expansion. Local knowledge of it by professional jurists was very much an “Anglo” show in the Republic and the antebellum State.

49. M^cKnight, *supra* note 15, at 384.

50. *In re Adjudication of the Water Rights of the Cibolo Watershed of the San Antonio River Basin*, 568 S.W.2d 155 (Tex. Civ. App.—San Antonio 1978, no writ).

51. Two copies of that Memorandum, dated January, 1959, are catalogued in the Law Library of The University of Texas, Austin, under Mex. 76 On lOl. Lic. Oñates’s testimony in *Valmont* will be found under KF 228 T4 T41: *State v. Valmont Plantations*, N. B-20791 (Dist. Ct. of Hidalgo County, 93rd Judicial Dist. Of Texas, Jan. 8, 1959), 2 Statement of Facts 594-786.

52. M^cKnight, *supra* note 3, at 178-79.

That knowledge atrophied even as legal education became—for want of a better word—legal education. But the state of mind survived. The current element of “non-American American law” that makes (or keeps) the Texas legal system a mixed one became a robust reality once again not through reception but through renaissance (aided by thirst). Or perhaps that is a difference without a distinction. It took *quattuor doctores* to rekindle the Roman law in Northern Italy. About the same number of Texas lawyers put our Lady, the Civil Law, back on the Texas legal map. Prominent among them, as befits the senior legal tradition, was one professor: Joseph W. McKnight.

