Comparative law, as Professor Wigmore has said, is a convenient but loose term. It serves to embrace all those studies which, characteristically, do not confine their attention to domestic law. These, however, vary in purpose and method. All of them are not really comparative, even today; there is still a tendency to comprehend the mere study of foreign laws in the term "comparative law." Studies which are truly comparative fall into several categories. They may compare foreign systems with the domestic system with a view toward ascertaining likenesses and differences, or analyze objectively and systematically the solutions which the various systems offer for any given legal problem. They may investigate the causal relation between different systems of law or compare the several stages of various legal systems. In addition, those studies which endeavor to ascertain the evolution of specific legal institutions in various legal systems or to examine legal evolution generally according to periods and systems are included in the term "comparative law."
Using the term in its broadest sense, it appears that interest in this branch of legal science has expanded greatly on the Continent during the last decade,\(^4\) and that a significant revival is at hand in this country.\(^4\) Undoubtedly, comparative law as a distinct branch of legal science is of recent origin, and no common opinion yet prevails as to the tasks it should fulfill, the objects of its studies, and the methods it should pursue. However, the study of foreign laws appears to have been a subject of interest whenever legal science was developing and had reached the stage of realizing that no legal system can claim perfection.\(^5\)

There has never been a comprehensive attempt to trace the history of comparative law,\(^6\) and it seems that even the many Insti-
tutes of comparative law on the Continent have never undertaken any research in this direction. Lerminier remarked one hundred years ago that the science of law demands more than ever an eagerness to examine its own history and that nothing can be achieved in the present without a profound knowledge of the past. While today this statement has undoubted validity for legal science as a whole, it seems particularly necessary to study the history of this branch which is still struggling for recognition and striving toward a clarification of its purposes and an ascertainment of the best available methods.

The present study is undertaken for the purpose of forming a solid basis for the discussion of tasks and methods. It is confined to the study of comparative law in Europe and America and does not purport to include the history of comparative law in the legal systems in force in other parts of the world.

THE ANCIENT WORLD

The process of comparative study probably began with the observation that the rules and principles of law or the legal institutions of another state were in some way superior and were therefore deliberately to be imitated or adopted. Thus, it is now well established that some of the Greek city states adopted the law of others, either as a whole or in parts; this, however, was not regarded as an adoption of foreign law but merely as an adoption of a better form of their own. But it is not unlikely that the same process of adoption or imitation of foreign law took place on a larger scale in the ancient world, and the intensive research in ancient legal history which is now under way might well result in throwing light upon the influence or the interdependence of one antique legal system on another.

That Greek law had a distinct influence upon the old Roman law

1 La Revue du Droit 385. Professor Nathan Isaacs studied the "Comparative-Apologetic Schools" and listed a number of the foremost scholars working in this field. See The Schools of Jurisprudence (1917) 31 Harv. L. Rev. 373, 400.
7 See Hug and Ireland, supra note 3, at 70-71.
9 See Weiss, Griechisches Privatrecht auf rechtsvergleichender Grundlage (1923) 7.
10 See Wenger, supra note 5, at 123-27.
is revealed by the *XII Tables*, the oldest sources that have come down to the present time. Whatever the date of their origin or the extent of their authority may have been, it seems that much deliberate imitation of Greek legal institutions occurred.\(^{11}\)

Throughout the formative period of Roman law, Greek legal ideas, rather than specific rules or institutions,\(^{12}\) exercised a considerable influence in the development of that part of the Roman law which was called the *jus gentium*.\(^{13}\) But in the republican period this law did not seem to develop on the basis of comparative inquiry. When cases had to be decided in which one or both of the litigants were not Roman citizens, it became necessary to establish rules to govern their transactions. In this way the *jus gentium* grew empirically from the every-day administration of justice which was carried on by the *praetor peregrinus*.\(^{14}\) The
immediate practical need was the decisive factor causing its formation; one would be justified in believing that, in this period, this law was formulated to a large extent by the adoption of existing mercantile customs which had been shaped under Greek influence and were commonly in use among Mediterranean traders. We know, for example, that the Rhodesian sea law was received into the *jus gentium*. However, there is no trace of any scientific development of the rules thus taken into Roman jurisprudence. Even in Cicero’s time when the *jus gentium* became a scientific conception, it was not considered as the law which was in use by other nations and which could be ascertained by comparative observation, but rather as that part of the positive Roman law which governed every free man irrespective of whether he was a Roman citizen or a *peregrinus*.

It was in the classical period of Roman law that the further development of the *jus gentium* came to be influenced by comparative inquiries. The great Roman jurists were, as Bruns has observed, not theorists but ingenious practitioners who knew how to satisfy new needs by developing the existing law and how to handle the legal technique as a creative art, the *ars boni et aequi*. These jurists of the classical time freed the *jus gentium* from the national particularities which it still had in the republican period. The *jus gentium* became world law which, as Mommsen has suggested, was denationalized as much as possi-

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Karlowa thinks that it developed in law suits between Roman citizens and from thence was applied in cases where at least one of the parties was a foreigner. *Id.* at 454; cf. Krüger, op. cit. supra note 11, at 48.


16 For Cicero the characteristic feature of the *jus gentium* is the fact that it constitutes the *jus commune omnibus hominibus*. See 1 Voigt, op. cit. supra note 15, at 62, 71; 1 Karlowa, op. cit. supra note 14, at 451. Cicero still separates very clearly the *jus gentium* from the *jus naturale*. But since he sometimes held that that part of the law which is in use by all nations is *jus gentium* and belongs to the *jus non scriptum* and is based upon *conventa hominum et quasi consensus*, the two conceptions are already approaching each other. See De Off. 3, 5, 23. Krüger, op. cit. supra note 11, at 46.

17 See Bruns-Lenel, op. cit. supra note 11, at 356.

18 Dig. I, 1, 1, pr.

ble. This was accomplished by a "combination of comparative jurisprudence and rational speculation;" that is, partly by the philosophical attempt to state a natural law and partly by comparative inquiries which reached the conclusion that certain legal institutions and a great number of rules were in use by all contemporary nations, even though they were not always entirely identical. The composite process of developing the *jus gentium* resulted in a significant change in its conception. For Gaius, the application of the *jus gentium* by all nations and the fact that it was based on the *naturalis ratio* seems to have been more important than its applicability to every man in any court of the Roman Empire. This shift in emphasis caused the *jus gentium*

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20 See Muirhead, *op. cit. supra* note 11, at 216.


While Krüger is of the opinion: "diese vergleichende Rechtswissenschaft ist den Römern nicht mehr als eine theoretische Spielerei," Voigt holds that comparative jurisprudence and its results were important for the development of the *jus gentium* in three directions: (1) It furnished to the law-making power the material of the *jus gentium* because its results were recognized as *jus gentium* by the historical process of the growth of the law. (2) It was held to be the medium by which the material of the *jus gentium* could be ascertained by speculation. (3) The material which was found in this way was recognized as *jus gentium* by the law-making power. See Voigt, *op. cit. supra* note 15, at 408; Krüger, *op. cit. supra* note 11, at 135.

22 "Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur. Nam quod quisque populus ipse sibi *jus* constituit, id ipsius proprio est vocaturque *jus civile*, quasi quasi proprium ipsius civitatis. Quod vero *naturalis ratio* inter omnes homines constituit, id apud omnes populos peraequus custoditur vocaturque *jus gentium*, quasi quo jure omnes gentes utuntur. Populus itaque Romanus partim suo proprio, partim communi omnium
to become identified with the *jus naturale.* Although the conception of the *jus gentium* lost its practical significance during the later imperial period, it was embodied in Justinian’s law books and defined as the law “*quod naturalis ratio constituit*” and “*quo omnes gentes utuntur.*” Used synonymously with the *jus naturale,* it was destined to be of immediate practical importance to the latter.

Although in the later imperial period Roman law claimed validity throughout the whole Roman Empire, we know today that in the eastern provinces it did not succeed in entirely superseding the old national laws. These continued to survive even though the authority of Roman law could not be openly challenged, which may explain the absence of any studies comparing these old laws with Roman law. There is only one comparative attempt dating from that time, namely the *Lex Dei,* which is an exposition of Roman law together with Mosaic precepts, and is therefore also called the *Collatio legum Mosaicarum et Romanorum.* It shows the similarities and differences of the two legal systems mainly with respect to tort and criminal law, and must be considered as one of the earliest known works on comparative law.

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23 See [Voigt](#) *op. cit. supra* note 15, at 403, 408, 413.
24 See [Bruns-Lenel](#) *op. cit. supra* note 11, at 331; [Buckland](#) *A Textbook of Roman Law from Augustus to Justinian* (1921) 53; [Voigt](#) *op. cit. supra* note 15, at 424.
25 See *id.* at 483.
26 *Inst.* 1, 2, 1-2; *Dec.* I, 1, 1, 4; I, 1, 9.
28 The Syro-Roman Law Book contains mostly Roman law even though it shows many influences of the old national law. It seems to have originated in the Church and was designed to serve ecclesiastical purposes. See [Syrisch-römisches Rechtsbuch. Mit deutschen Übersetzungen und Kommentar von Bruns und Sachau](#) (1880). In its oldest part it seems to date back to the pre-Constantinian period. It was translated into many of the oriental languages and had a strong influence on the administration of justice in the eastern part of the Roman Empire. It persisted even after the codification of Justinian. See [Kipp](#) *Geschichte der Quellen des Römischen Rechts* (4th ed. 1919) 150; [Buckland](#) *op. cit. supra* note 23, at 48.
29 In the manuscript it is entitled: *lex Dei quam praecepit Dominus ad Moysen.* It seems to have originated around the year 400 A.D. See [Kipp](#) *op. cit. supra* note 28, at 148. As to the various opinions on its purpose, see [Wenger](#) *supra* note 28, at 113.
30 [Sherman](#) *Roman Law in the Modern World* (1922) 111.
Although it does not give any scientific analysis, it presents a valuable collection of material which seems to be quite unique for that time. Its importance is made apparent by the fact that the conceptions of Roman law which it contains have been received into the canon law.

**THE MIDDLE AGES**

After the fall of the West Roman Empire, Roman law remained almost exclusively the law of the East Roman Empire and was codified under Justinian. Although he was strongly opposed to any critical study of his law books they became an object of scientific attention in the East. In the western part of Europe, the principle of the personality of law came to prevail after the Germanic peoples had permanently settled down in the territory of the Roman Empire. Each individual was subject to the law peculiar to his nation or his tribe. It followed that Roman as well as Germanic laws were applied in the same territory. Their mere co-existence at one and the same place makes it probable that acquaintance with both Roman and Germanic laws was not exceptional. As a result of this existence side by side, the customary law of the German tribes was reduced to writing in the various *leges barbarorum,* and the Roman law was restated from pre-

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31 Although the Hebrew legal system was further developed during this period, and preserved its significant individuality, no other study was undertaken to compare it with Roman law. Whether it was influenced by Greek or Roman legal ideas or itself exercised a considerable influence on the development of Roman law, is still a matter to be ascertained. See Wenger, *supra* note 5, at 117. The interesting work of Sulpicius Severus (about 400 A.D.) should be mentioned, for it attempted to state the Mosaic legal precepts in terms of Roman law. See Bernays, *Über die Chronik des Sulpicius Severus* (1861).

32 See Triebs, *Studien zur Lex Dei* i (1905), II (1907).


34 See i Bressaud, *Cours d'Histoire Générale du Droit Français* (1904) 53; Calisse, *Storia del Diritto Italiano* (2d ed. 1902) in A General Survey of Events, Sources, Persons and Movements in Continental Legal History (1912) 60. In cases of conflict of laws, the following principles were applied: (1) all the competing laws were to be given effect so far as possible; (2) when only one of the several laws must be followed, the preference was to be given to the law of the person whose interest was the predominant one. *Id.* at 66.

35 See Calisse, *supra* note 34, at 45; i Bressaud, *op. cit. supra* note 34, at 76.
Justinian sources in the *leges Romanorum*. But it did not result in the creation of a common law, nor in comparative studies, though the actual conditions would undoubtedly have been favorable. The explanation for this failure would seem to lie in the absence of a trained legal profession and the modest scope of legal learning.

When learning was revived, it was in the hands of the Church, and the development of the canon law, which has always been regarded as of Roman origin, followed. In the field of secular law, the Lombard School was the first to undertake scientific studies. These scholars were familiar not only with the Lombard law, including the growing feudal law, but also with canon law and Roman law. While their studies apparently did not extend to the laws of non-Italian territory, feudal law and canon law were already part of the common law of western Europe, and some of the most important parts of Roman law in its pre-Justinian form were still alive. It would seem, therefore, that

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37 It was only in the Frankish period that a new source of common law sprang up from the emperor's authority. The capitularies of Charlemagne were royal laws which were applied throughout his empire. They did not supplant the pre-existing systems but stood alongside of them. They were the most important legal sources in their own day since they introduced the element of the universality of law. However, the division of the empire among the successors of Charlemagne prevented its further development. See Calisse, *supra* note 34, at 56; 1 BRISSAUD, *op. cit. supra* note 34, at 106; 1 Schröder, **Lehrbuch der deutschen Rechtsgeschichte** (6th ed. 1922) 280.

38 See 1 SAVIGNY, **Geschichte des Römischen Rechts im Mittelalter** (2d ed. 1834) 459, 463.

39 See 1 BRISSAUD, *op. cit. supra* note 34, at 126, 137; A General Survey of Events, Sources, Persons, and Movements in Continental Legal History (1912) 705; 2 SAVIGNY, *op. cit. supra* note 38, at 274; Hazeltine, *supra* note 33, at 704. The maxim "Ecclesia vivit lege Romana" was established in the early middle ages. See 1 SAVIGNY, *op. cit. supra* note 38, at 142.

40 The Lombard School dates back to the 900's and had its center in Pavia. It undertook to compile the great mass of statutes and capitularies and produced in the 1000's a systematic commentary known as the *Liber Papiensis*. Calisse, *supra* note 34, at 95, 97, 101.

41 The common elements of European law during the middle ages, their origin, and their combination in the laws of the various countries, are analyzed in the short but most illuminating paper of Smith. *A General View of European Legal History* (1928) 1 ACTORUM ACADEMIAE UNIVERSALIS JURISPRUDENTIAE COMPARATIVAE 198.

42 See 2 SAVIGNY, *op. cit. supra* note 38, at 1, 37, 83, 172, 205, 209.
these mediaeval scholars, though they did not create the scientific study of comparative law, succeeded for the first time in extending their knowledge to all the major legal systems of their time and civilization.\textsuperscript{43}

The Lombard School was superseded by the Glossators, who brought about the great revival of Roman law. Both the Glossators and their followers, the Commentators, who adapted Roman law to the needs of western mediaeval society,\textsuperscript{44} neglected the study of the customary law of Germanic origin and applied Romanistic methods to the Lombard feudal law, which was even formally annexed to Justinian's law books.\textsuperscript{45} Due to the influence of these scholars, Roman law became another body of European common law.\textsuperscript{46} This process was facilitated by the abandonment of the principle of personality of law; its replacement by the principle of territoriality of law brought about the creation of a locally uniform law.\textsuperscript{47} The great diversity of these customary laws called for some method of unification, and since the law-making or law-finding organs necessary for the creation of a new general law did not exist, Roman law was adopted wherever the need for a more developed and uniform law arose. Both the science of law and the growing legal profession were dominated by a cosmopolitan tradition of Roman law which was regarded as the universal law of western civilization. The study of Roman and canon law was the sole object of legal education and of legal re-

\textsuperscript{43} In the later period of the Lombard School the jurists were divided into the antíquí and the moderni. While the former devoted themselves chiefly to the native Lombardic law, the latter, better learned in the Roman Law, used it as a means for the practical improvement of their system. Calisse, supra note 34, at 98. Among the latter was Lanfranc, who later became very influential in England. See 2 Holdsworth, History of English Law (3d ed. 1923) 147.

\textsuperscript{44} While the Glossators were entirely concerned with Justinian's code and were not interested in the needs of their own generation, the very merit of the Commentators was their practical viewpoint which led them to adapt the old Roman law to the city statutes, to the feudal and Germanic customs, and to the principles of canon law. Like the jurists of the Lombard School, they were familiar with the major legal systems of their time, but they used this knowledge only to further the adaptation of Roman law to modern requirements. Calisse, supra note 34, at 124, 142, 145.

\textsuperscript{45} See i Stintzing, Geschichte der Deutschen Rechtswissenschaft (1880) 27.

\textsuperscript{46} See Salvioli, Storia del Diritto Italiano (8th ed. 1921) 127.

\textsuperscript{47} See Calisse, supra note 34, at 80.
From Bologna spread the gospel of a law which by its tradition and its character as *ratio scripta* claimed universal validity. It was received in nearly all the European countries and was taught in all the university centers, which were then rapidly increasing in number. But this Roman law which crossed the Alps and formed the basis of the "Reception" was, as Gierke has reminded us, the mediaeval Roman law of the Bartolists which was only partly ancient and Roman, and which was partly composed of mediaeval and Germanic elements drawn from the Lombardic law as well as from Italian city statutes. Consequently, it was not the text of Justinian nor even the classical Roman law that enjoyed the greatest authority, but the Glosses

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48 See 1 Stintzing, *op. cit. supra* note 45, at 21; Salvioli, *op. cit. supra* note 46, at 124; 1 Brissaud, *op. cit. supra* note 34, at 221. Only at the University of Paris was the teaching of Roman law forbidden by a papal decree confirmed by royal ordinance, the reason being to preserve the predominant position of canon law. *Id.* at 154; 3 Savigny, *op. cit. supra* note 38, at 366.

49 It must be remembered that "we find in the south-east of France a distinct center of knowledge and reflection on the subject of Roman law, characterized by a practical tendency and developing on its own lines, although evidently influenced by intercourse with Italy. . . . The existence of this French center of the legal revival helps to show that the more powerful and influential revival of Bologna was an event arising out of the spontaneous growth of ideas and requirements in different localities of the more civilized regions of Europe." Vinogradoff, *Roman Law in Medieval Europe* (2d ed. 1929) 47.

50 In his paper, *The Renaissance and the Laws of Europe*, Professor Hazeltine traces admirably the connection of the Renaissance with the preceding period and its significance for the future era, and sums up the comparative legal history of the Reception in Europe. Cambridge Legal Essays (1926) 139-44.

51 See 3 Savigny, *op. cit. supra* note 38, at 152. As early as the twelfth century Roman law was taught at Oxford by Vacarius, an Italian scholar from Bologna, who is to be considered as "the first teacher and the real founder of the study both of the civil and of the Canon law" in England. A flourishing school of Roman and canon law grew up at Oxford. See 1 Pollock and Maitland, History of English Law (2d ed. 1898) 118; 2 Holdsworth, *op. cit. supra* note 43, at 147; Vinogradoff, *op. cit. supra* note 49, at 62.

and Commentaries of the mediaeval jurists. Since this Roman law of the Bartolists was adapted to the requirements of the time, it was readily accepted by the countries which were in need of a more developed legal system. Linked up with mediaeval Scholasticism, this Roman and canon law came to enjoy an absolute authority. For this reason no interest in comparative study arose on the Continent in this period.

In England, where canon law was applied in the ecclesiastical courts, where Roman law influenced the writings of Glanville55 and to an even greater extent those of Bracton, and where both canon and Roman law formed the main sources of the early devel-

53 "Wie Thomas von Aquino und Duns Scotus die Grundsaulen der Dogmatik wurden, so traten Bartolus und Baldus neben der Glosse in die Reihe der Autoritaten ein: und der letzte Bruch mit den Quellen war geschehen. Nicht mehr was diese enthielten, sondern was jene Autoritaten dariiber gedacht und gesagt hatten, gab bei den mit unendlicher Weitlaufigkeit und dialektischer Spitzfindigkeit ausgesponnenen Quaestionen und Distinctionen den Ausschlag. Im steten Anschwellen der Commentarien hatte sich die Autoritat der Tradition, die Fulle der Meinungen wie ein unubersteiglicher Wall vor die Quellen gelagert, den zu durchbrechen Muth und Kraft erlangelten." 1 STINTZING, op. cit. supra note 45, at 89.

54 See 1 STINTZING, op. cit. supra note 45, at 88, 102, 106, 110. The mediaeval philosophers developed a new conception of the jus gentium, which they thought formed part of the jus naturale: "Das jus gentium im Sinne des bei allen Völkern übereinstimmend anerkannten Rechts betrachtete man als den Inbegriff der aus dem Naturrecht mit Rücksicht auf die seit der Verderbniss der menschlichen Natur nun einmal gegebenen Verhältnisse abgeleiteten Folgesätze, und sprach daher auch ihm, wie es von den konstituirten Gewalten nicht geschaffen sondern nur recipirt sei, so diesen gegenüber einen Antheil an der Unantastbarkeit und Unabhänglichkeit des Naturrechts zu." GIERKE, JOHANNES ALTTHUSUS UND DIE ENTWICKLUNG DER NATURRECHTLICHEN STAATSTHEORIEN (2d ed. 1902) 273–74. But by making the distinction between jus gentium primaevum and secundarium they found a way to depart from at least some of its principles.

55 Glanville's TRACTATUS DE LEGIBUS was written between 1187 and 1189. It exhibits in a marked degree the legal ideas and legal forms familiar to the civilian and the canonist. The preface and introductory chapters are taken from Justinian's INSTITUTES. Roman rules were, as Holdsworth has pointed out, "more or less adapted to the fabric of English law." See 2 HOLDSWORTH, op. cit. supra note 43, at 176, 202; 1 POLLOCK AND MAITLAND, op. cit. supra note 51, at 162, 165.

56 Bracton's treatise on the laws of England was written in the middle of the thirteenth century. The extent of the influence of Roman law on his work has been variously estimated. Maitland holds that it is "Romanesque in form and English in substance." See 1 POLLOCK AND MAITLAND, op. cit. supra note 51, at 207. Holdsworth traces a far greater influence and states that "it is clear that he has used Roman terms, Roman maxims and Roman doctrines to construct upon native foundations a reasonable system out of comparatively meagre authorities." See 2 HOLDSWORTH, op. cit. supra note 43, at 267.
opment of equity, the study of both Roman and canon law did not result in the scientific comparison of the domestic legal systems with the Roman law. The absence of such studies can probably be explained by the fact that both Glanville and Bracton were interested in and made use of the civil law only insofar as it offered a means for developing the English legal system. They worked civil law principles and rules into the English common law in a way very similar to that in which the Commentators had incorporated principles and rules borrowed from both the Germanic and the canon law into their modernized Roman law. It was not until the second half of the fifteenth century that Fortescue made the first comparison of the English common law with the civil law. But Fortescue’s treatise is in no way an objective analysis of the two legal systems; it is rather a plea for the goodness and soundness of English legal institutions and the superiority of the English common law over its rival, the civil law.

THE RENAISSANCE

The great scientific and literary revival of the Renaissance in the sixteenth century produced a movement in legal science which resulted primarily in a new and intensive study and a brilliant exposition of the classical Roman law sources. Alciat in Italy, Zasius in Germany, and, above all, the French Humanists, Cujacius and Donnellus, protested against the continued domination of legal thought by the mediaevalism of the Bartolists and demanded a critical and historical study of the sources of the pure Roman law. Thus they gave, as Hazeltine puts it, the first blow which had ever been struck at the foundations of that elaborate Romanic edifice of law which the middle ages, inspired by the ideas of universality and authority derived from Roman times, had slowly

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58 Calisse, _supra_ note 34, at 147; i Brissaud, _op. cit._ _supra_ note 34, at 347; i Stintzing, _op. cit._ _supra_ note 45, at 88, 139, 155, 367, 375.

59 Hazeltine, _supra_ note 50, at 156.
reared." The abandonment of the Bartolist method, however, resulted not only in disregard for the adaptation which Roman law had undergone in the hands of the Commentators, but led also to the foundation of modern development. The old customary law of Germanic origin, which was held in contempt by legal science in the middle ages, had remained alive and was applied, to a considerable extent, in the every-day administration of justice. Under the influence of the juristic Renaissance which the Humanists inaugurated, an enlargement of native or national influences in legal growth took place. Both in France and Germany there arose a school of national jurists who made the customary law an object of scientific treatment and systematic comparison. This in turn caused the writing of a number of works in which the Romanic and the native laws were compared.

In France the customs were reduced to writing at the beginning of the sixteenth century. This reduction raised the customary law, as Esmein has observed, "to the rank of science; it rendered possible its methodical study and it created the literature of customary law, that principal source of modern private law." The leading jurists were well acquainted with both Roman and the customary Germanic law. Many of the national jurists had been trained in the School of the Humanists, and Dumoulin was the last of the great Bartolists in France. While Hotman proposed to amalgamate the Roman law with the customary law by the creation of a uniform code, and royal legislation marked the beginning of national unification, Dumoulin and his followers vigorously attempted to make the customs the dominant source

60 I ESMEIN, COURS ÉLÉMENTAIRE D'HISTOIRE DU DROIT FRANÇAIS (1892) 703; I BRISSAUD, op. cit. supra note 34, at 362.
61 I ESMEIN, op. cit. supra note 60, at 712.
62 Thus, e.g., Coquille, Loyel, Pasquier, and Pithou were all humanists while also practitioners. Coquille wrote the well-known INSTITUTION AU DROIT FRANÇAIS; while Loyel, who had studied under Cujas, became famous by his INSTITUTS COUTÔMIÈRES. See I BRISSAUD, op. cit. supra note 34, at 392; I ESMEIN, op. cit. supra note 60, at 702.
63 "La filiation du romaniste Du Moulin n'est pas niable; par la forme comme par le fond, c'est le dernier des grands Bartolistes. . . . Comme jurisconsulte, il fut universel, semblable en cela à beaucoup d'hommes du xviè siècle; il fut à la fois romaniste, canoniste, jurisconsulte coutûnier et toujours supérieur." Id. 715, 729.
64 HOTMAN, ANTI-TRIBONIANUS (1567); cf. I BRISSAUD, op. cit. supra note 34, at 348, 353.
of French law. However, despite the existence of the Roman and the customary law side by side and the attention which legal science gave to each, comparative studies were not undertaken. The Roman law jurists were concerned only with the classical sources, and the national jurists, with their preference for the customary law, had just as little interest in comparing the two competing systems.

In the other European countries, however, the rise of the national jurists produced a number of works in which Roman and Germanic laws were compared. Ferretti, a Ravenna jurist, wrote a treatise on the differences between the Roman and Lombard laws. In Spain, where the compilation of the *Siete Partidas* had prepared the way for the amalgamation of the Roman and the Germanic laws but had only resulted in strengthening the Romanistic influence, various works were written during the sixteenth century for the purpose of showing the differences between the Roman and the native systems. The foremost of these is the treatise of Martinez de Olano, who fully recognized the value and the importance of the indigenous Spanish system. Toward the end of the century, a tendency became manifest in Germany also, mainly represented by the Saxon jurists, to supplement the ex-

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65 Id. at 390; 1 ESMIEIN, op. cit. supra note 60, at 714; Aubepin, *De l'influence de Du Moulin sur la législation française* (1853) 3 REVUE CRITIQUE DE LÉGISLATION 603; (1854) 4 id. 261; (1854) 5 id. 32, 305.
66 See Hazeltine, supra note 50, at 162.
68 Also the discovery of the new world inspired a few Spanish scholars to study the laws of the Indies. Thus Gregorio García in his book, *Origem de los indios de el Nuevo Mundo e Indias occidentales*, published in 1607, investigated the origins of the legal system which the conquerors found in the Indies and, strangely enough, compares this system with the Hebrew legal system. See Altamira, *Les Études du Droit Comparé en Espagne* (1928) 1 ACTORUM ACADEMIAE UNIVERSALIS JUSPRUDENTIAE COMPARATIVAE 97, 99.
69 Martinez de Olano, *Antinomia Juris Hispanorum et Civile*; see Hazeltine, supra note 50, at 162.
70 Among the works of those jurists the following may be mentioned: MOD. PISTORIS, *ILLUSTRIUM QUAESTIONUM JURIS TUM COMMUNIS TUM SAXONICI* (1599-1601); HARTM. PISTORIS, *OPERA OMNIA* (1679); CARPZOV, *JURISPRUDENTIA FORENSIS ROMANO-SAXONICA* (1684). See 1 STINTZING, *op. cit. supra* note 45, at 558, 566; 2 id. at 55. Carpzov and Conring are the founders of the science of Germanic law. See 2 STINTZING, *op. cit. supra* note 45, at 3, 6; 1 GIERKE, *op. cit. supra* note 52, at 87, 89.
position of Roman law by the study of Germanic law insofar as it was still applied. They not only collected all the available authorities both domestic and foreign, and laid a foundation for the scientific amalgamation of Romanic and Germanic law in the so-called usus modernus, but they also studied the differences between the two legal systems. This study gave rise to the so-called differentiae literature, namely concise expositions of the differences between Roman and Saxon law, originally prepared by Reinhard and Fachs. They were republished several times and later revised by the law faculties of Wittenberg and Leipzig, which reveals the great authority they enjoyed. Another interesting work of a similar character is the treatise of Busius. Following the arrangement of the Digest, it presents a commentary on Roman law, the main feature of which, however, is not the usual discussion of conflicting authorities interpreting Justinian law books, but the comparative study of the deviations from the rules of Roman law which had been developed in canon law and which could be found in the customary laws of Germanic origin. The study of these customs was not restricted to those which existed in German territories but included those of the whole Continent.

71 Among these collections the most valuable were: DIONYSIUS GOTHOFREDUS, praxis civilis ex antiquis et recentioribus autoribus germanis, italuis, gallis, hispanis, belgis et alis collecta (1591); Kirchovi, Consilia s. Responsa praeantissimorum germaniae Galliae Hispaniae Jureconsultorum (1605).

72 The collection of Reinhard originated between 1549 and 1551 while Fachs' collection must have been made even earlier. The latter was first published under the title, Differentiae aliquot juris civilis et Saxonici in quatuor partes divisae, nunc primum in lucem editae (1567). It was republished in 1569 with the addition of Reinhard's collection. See 1 Stintzing, op. cit. supra note 45, at 549.

73 The revisions took place in 1571 and 1572. A number of new editions followed until 1616. See id. at 550.

A comparative study of Dutch and Roman law was made by Huber. Institutiones juris Frisici quatenus a Romano discrepat in 2 Opera minora (Wieling ed. 1746) 301-450.

74 BUSIUS, COMMENTARIUS IN UNIVERSAS PANDECTAS DOMINI JUSTINIANI, CUM DIFFERENTIIS CONSUETUDINUM COMMUNIUM, ET GERMANIÆ, GALLIÆ, BELGIÆ, SINGULARIUM, JURIS CANONICI ITEM ATQUE (1608-1614). Although this work is cited by Gierke, it seems to be entirely forgotten. See 1 Gierke, op. cit. supra note 52, at 86, n.161.

75 Busius gives in his commentary first the authorities, on Roman law, then usually the deviations which canon law had developed, and finally the various
In England, although the Roman law was still taught at Oxford and Cambridge and, as in the age of Bracton, was again exercising a strong influence on the development of English law, a few comparative studies were produced. The continual friction between the temporal and the spiritual jurisdictions inspired Christopher St. Germain, with a view to conciliation, to attempt a comparative exposition of the common law and the canon law. His book, *Doctor and Student,* in which the two systems were represented by the doctor of divinity and the student of the laws of England, contains, as Sir Frederick Pollock says, "No historical inquiry and very little direct criticism, but there is comparison of two systems of legal ideas and rules undertaken with a definite purpose and conducted by an author well acquainted with both." At the beginning of the next century a more ambitious attempt was made by William Fulbecke, who covered the common law,

Germanic customs. The deviations are marked by marginal notes. *E.g.,* in his commentary to Dig. 3, 1, 1, he states first the Roman law, then the *mores Germaniae et Hollandiae,* then *mores Germaniae et Belgicae,* then the *Jus Canonicum,* then the *Consuetudo Cameræ Supremæ,* and finally the *Aulae Frisiorum.*

The reformation in England led to a change in the position of the canon law. Its teaching was stopped and degrees ceased to be taken in it. But due to the fact that the study of civil law had usually been combined with the canon law, the change in the position of the canon law reacted on the study of the civil law. To obviate this result, Henry VIII established the Regius professorships of Civic Law both at Oxford and Cambridge. This encouragement of the study of civil law as well as the rise of an unofficial body of Civilians, the Doctors' Commons, led to a renewed reception of Roman law principles into English law. See 4 Holdsworth, *op. cit.* supra note 43, at 228, 235.

Maitland, *English Law and the Renaissance* in *Select Essays in Anglo-American Legal History* (1907) 157, 168, 185; 4 Holdsworth, *op. cit.* supra note 43, at 252, 285; Plucknett, *op. cit.* supra note 57, at 213. While Maitland went so far as to suggest that during the reign of Henry VIII the common law itself was in danger from the Civilians, Holdsworth and Plucknett are of the opinion that the continued existence of the common law was never in serious danger. However, its supremacy as the one and only legal system in England was vigorously challenged by the prerogative courts as well as the court of chancery which became "infected with the same spirit" and was more and more inclined to rely upon the civil law system.

Published 1523–30; cf. 5 Holdsworth, *op. cit.* supra note 43, at 266.

(1903) 5 J. Soc. Comp. Leg. (N.S.) 82.

Fulbecke, *Parallele or Conference of the Civil Law, the Canon Law and the Common Law of this Realme of England* (1601). He cast his discussion of the resemblances and differences between these laws into the form of
the canon law, and even the civil law, but failed to achieve an accurate statement or a scientific comparison of these three legal systems.82

Thus we see that in the sixteenth century a few comparative studies were produced. They were, however, confined to the laws which were existing side by side in the same country.83 There is little doubt that at the beginning of the seventeenth century the average European jurist was well acquainted with only the law of his own territory. Insofar as these laws formed one of the bodies of European common law (Roman and canon law, feudal law, law merchant) he was still studying and relying upon ancient and foreign authorities. The continental jurist was familiar with neither the customary Germanic law outside his own country nor the English common law, while the English jurist did not possess either a knowledge of the Germanic customs on the Continent or an acquaintance with the content of modern Roman law.84

THE SEVENTEENTH AND EIGHTEENTH CENTURIES

While the Reformation, with its breach from authority, had prepared the way for the emancipation of legal science from the text twenty-two dialogues between a canonist, a civilian, and a barrister upon various legal topics. Cf. 5 Holdsworth, op. cit. supra note 43, at 22.

81 Sir Frederick Pollock thinks that "as a whole the book is tedious, ill-constructed, and uncritical." See loc. cit. supra note 79.

82 See also Cowell, Institutiones Juris Anglicani, ad Methodum et Seriem Institutionum Imperialium Compositae & Digestae (1st ed. 1605). This work combines an attempt to recast English law with the terminology and in the system of Justinian's Institutes so as to make a comparison between the Roman and the English legal system.

In Scotland also comparative studies begin to appear in the seventeenth century. See Stair, The Institutions of the Law of Scotland, Collated with the Civil, Canon and Feudal Laws and with the Customs of Neighbouring Nations (1681). As to the character of this investigation, see i id. (More ed. 1832) xi.

83 All these studies fall in that group which Sauser-Hall in his Fonction et Méthode du Droit Comparé (1913) calls "Droit comparé interne" and justly distinguishes from modern comparative law which he calls "Droit comparé externe."

84 Even the knowledge of most Civilians who were members of the Doctors' Commons seemed to be confined to the old Roman law, since the instruction at Oxford and Cambridge was based upon Justinian's law books and on the classical Roman law. Most of the incumbents of the Regius professorships were followers of the Humanists, with the exception of Albericus Gentilis who, as professor of Civil Law at Oxford, bitterly opposed "the French Humanizers and
of the *Corpus Juris* and the Renaissance had led to an objective appreciation of the various bodies of law, the rising Law-of-Nature School with its aim at uniformity and its method of speculative rationalism did not promote empirical studies in comparative law. Most of the jurists of this school, which dominated the seventeenth and eighteenth centuries, found the principles of their system of natural law by mere deduction and, though they did not consider any other system, they relied unconsciously upon the system of law with which they were most familiar. Only a few of the leading minds thought of using the available comparative material.

Bacon, the foremost juridical thinker of his time in England, a man of great idealism with a complete command of legal learning,
embracing to a considerable extent also the civil law, urged the development of a system of universal justice by which one might test and improve the law of each country. But while he contended that these universal propositions should be based, at least partly, on various legal systems, he laid them down without supporting them with foreign legal material. On the other hand, Leibnitz, who mastered the whole scientific knowledge of his time, advocated in his proposals of new studies in the law a universal historical and comparative survey as one of the desiderata. However, he never attempted to undertake such a study himself because he turned his interest and manifold activities to other

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88 See Holdsworth, op. cit. supra note 43, at 238, 246, 248; Great Jurists of the World (1914) 144.

89 See Bacon, De dignitate et augmentisscientiarum (1623) bk. viii, c. 3: Tractatus de justitia universali sive de fontibus juris, Pr.: "Qui de legibus scripsent, omnes vel tamquam philosophi, vel tamquam jurisconsulti, argumentum illud tractaverunt. Atqui philosophi proponunt multa, dictu pulchra, sed ab usu remota. Jurisconsulti autem, suae quisque patriae legum, vel etiam Romanarum, aut Pontificiarum placitis obnoxii et addicti, judicio sincero non utuntur; sed tamquam e vinculis sermocinantur. Certo cognitio ista ad viros civiles propri spectat, qui optime norunt, quid ferat societas humana, quid salus populi, quid aequitas naturalis, quid gentium mores, quid rerumpublicarum formae diversae, iddoque possunt de legibus, ex principis et praeceptis, tam aequitas naturales, quam politices decernere. Quamobrem id nunc agatur, ut fontes iustitiae, ut utilitates publicae, petantur, et in singulis iuris patribus, character quidam et idea iusti, exhibeatur; ad quam particularium regnorum et rerumpublicarum leges probare, atque inde emendationem moliri quisque, cui hoc cordi erit, et curae, possit; hujus igitur rei, more nostro, exemplum in uno titulo proponemus."

THE HISTORY OF COMPARATIVE LAW

The only men in this period who made use of comparative material on a large scale and for various purposes were Selden, Grotius, Vico, and Montesquieu.

Selden was the contemporary of Bacon. Bacon was one of the first common-law lawyers to appreciate the need for, and the value of, some form of general jurisprudence, whereas Selden’s main interest in the law was historical. In addition to being a profound common-law lawyer, he had a profound knowledge of other systems of law, and his studies extended to the history of law in both eastern and western countries. In various passages in his writings he stresses the necessity and importance of comparative studies which, based upon a clear understanding and thorough knowledge of the history of law in each country and in each age, should be developed inductively by observation. He investigated the influence of Roman law on English common law, and applied the principle of comparison in the History of Tithes, one of his greatest works, and in his many large works on Oriental and Hebrew law. “It is this world-wide survey of legal develop-

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91 See 3 Landsberg, Geschichte der deutschen Rechtswissenschaft (1898) pt. 1, 23, 30; Great Jurists of the World 283, 287, 295.
92 See 5 Holdsworth, op. cit. supra note 43, at 407. A full appreciation of Selden’s work as a historian is given by Hazeltine. See Selden As Legal Historian (1910) 24 Harv. L. Rev. 105, 205; see also Great Jurists of the World 185.
93 Selden was, in Milton’s words, “the chief of learned men reputed in this land.” See 5 Holdsworth, op. cit. supra note 43, at 407.
94 See the prefaces to the History of Tithes and Titles of Honour, as well as the essay, End and Purpose of Writing the History of Tithes. “His wide studies in the legal systems of many eastern and western lands gave him the broad outlook and the knowledge necessary to a comparative historian of law. . . . There is here a perception of the fundamental maxim of all comparative studies that the two or more things to be compared must first of all be studied and known separately and individually, and that only then can a comparison prove of any theoretical or practical value. He sees indeed, with great clearness, the necessity of studying by itself the history of law in each country and in each age, in order that the results thus obtained may be made the basis of an inductive comparison. By proceeding in this fashion the comparative legal historian may note the features that are common to the development of law in many countries and in many ages and also the features that are peculiar to one or more countries or one or more ages. In this way too the influence of one legal system upon another may be definitely traced, and the great outlines of legal development throughout the centuries may be drawn with some scientific precision and thus with actual helpfulness in the guidance of the present and future generations of men.” Hazeltine, supra note 92, at 214.
95 See Dissertatio ad Fletam (1647).
96 De diis Syriis (1617); De successionibus in bona defunctorum ad leges
ment which strikingly characterizes the work of Selden and makes it of lasting significance in the history of comparative legal studies.  

Although he did not attempt to trace the great outlines of legal development throughout the centuries with a view toward establishing a universal legal history, it would seem that his works mark the beginning of comparative legal history.

While Selden's primary aim was the discovery of the historical truth which, as Maitland once said, involves comparison, Grotius, with his encyclopedic knowledge, used legal material from all lands and ages for the purpose of furnishing illustrations

EBRAEORUM (1631); DE SUCCESSIONE IN PONTIFICATUM EBRAEORUM (1636); DE JURE NATURALI ET GENTIUM JUNTA DISCIPLINAM EBRAEORUM (1640); EUTYCHYI AEGYTII PATRIARCHAE ORTHODOXORUM ALEXANDRINI ECCLESIAE SUAE ORIGINES (1642); UXOR EBRAICA SEU DE NUPTIIS ET DIVORTIIS VETERUM EBRAEORUM LIBRITRES (1646); DE SYNERGIS VETERUM EBRAEORUM (1650–53).

Hazeltine, supra note 92, at 215.

"History involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of the idea of legal history." Maitland, Why the History of English Law is not Written in 1

COLLECTED PAPERS (1911) 488.

and confirmations for his system of natural law. Since he believed that the universal validity of his propositions of natural law could be proved, not only by a mere deduction from reason but also by the fact that certain rules and legal institutions were recognized in all legal systems,\textsuperscript{101} he used this comparative material in order to prove his own theories. In his system of natural law, comparative studies in the modern sense had no place, nor did he follow the mediaeval practice of using foreign materials as binding authorities.\textsuperscript{102}

Vico, the prominent Italian legal philosopher, utilized comparative examples by a similar method, but for a different purpose.\textsuperscript{103} Being convinced that the laws of all nations are based upon the common sense of mankind and were therefore originally identical, he regarded it as one of the main tasks to prove that this natural law originated independently in the legal history of each nation.\textsuperscript{104} Thus, from his metaphysical point of view, he anticipated Hegel by conceiving a universal philosophy of history, and the general truths and metaphysical principles which he deduced were illustrated by legal material from all times and places.

Montesquieu differed from Grotius as well as from Vico in aim and method.\textsuperscript{105} Like Selden, he was interested in an objective

\textsuperscript{101} See \textit{De jure beli ac pacis} I, i, xi, i (Molhuysen ed. 1919) 28:
\begin{quote}
"Esse autem aliquid iuris naturalis probari solet tum ab eo quod prius est, tum ab eo quod posterius. Quorum probandi rationum illa subtilior est, haec popularior. A priori, si ostendatur rei alculius convenientia aut disconvenientia necessaria cum natura rationali ac sociali: a posteriori vero, si non certissima fide, certe probabiliter admodum, iuris naturalis esse colligitur id quod apud omnes gentes, aut moratoires omnes tale esse creditur. Nam universalis effectus universalem requirit causam: talis autem extimationis causa vix uta videtur esse posse praeter sensum ipsum communis qui dicitur."
\end{quote}

\textsuperscript{102} In the same way as Grotius use of comparative legal material, though to a lesser extent, has been made by other scholars of the Law-of-Nature School, particularly Pufendorf. See 3 \textit{Landsberg}, \emph{op. cit. supra} note 91, at 12.

\textsuperscript{103} See \textit{Great Jurists of the World} 345, 362, 371.

\textsuperscript{104} His legal philosophy and his philosophy of history are revealed in the following works: \textit{De uno universi iuris principio} (1720); \textit{De constantia iurisprudentiae} (1721); and above all, \textit{Scienza nuova} (1725).

\textsuperscript{105} See \textit{Great Jurists of the World} 417, 427.
observation of historical facts, but he undertook this comparative study of legal institutions, not for the mere sake of discovering historical truths, but for supporting the legislative reforms which he suggested. He wanted historical facts to speak for themselves without any preconceived theory of their importance or development. Therefore, the significant feature of his comparative method is his use of foreign legal materials not as illustrations, as his predecessors had done, but as sources of legislative experience and for the purpose of inspiring legal science with the breadth of a broad intellectual outlook. Although his work is mainly devoted to public law and suffers from shortcomings, both his universal outlook and his method of empirical observation make him the foremost precursor of modern comparative law.

Montesquieu himself expressed the purpose of his Esprit des Lois (1748) in a pamphlet in defense of his work as follows: "Ceux qui auront quelques lumières verront, du premier coup d'œil, que cet ouvrage a pour objet les lois, les coutumes et les divers usages de tous les peuples de la terre. On peut dire que le sujet en est immense, puisqu'il embrasse toutes les institutions qui sont reçues parmi les hommes; puisque l'auteur distingue ces institutions; qu'il examine celles qui conviennent le plus à la société, et à chaque société; qu'il en cherche l'origine; qu'il en découvre les causes physiques et morales; qu'il examine celles qui ont un degré de bonté par elles-mêmes; et celles qui n'en ont aucun; que de deux pratiques pernicieuses il cherche celle qui l'est plus et celle qui l'est moins; qu'il discute celles qui peuvent avoir de bons effets à un certain égard et de mauvais dans un autre. Il a cru ses recherches utiles, parce que le bon sens consiste beaucoup à connaître les nuances des choses." This elaborate statement elucidates what he had expressed already in the preface of his work: "Chaque nation trouvera ici les raisons de ses maximes; et on tirera naturellement cette conséquence, qu'il n'appartient de proposer des changements qu'à ceux qui sont assez heureusement nés pour pénétrer d'un coup de génie toute la constitution d'un État." In the preface he explains, "Je n'ai point tiré mes principes de mes préjugés, mais de la nature des choses." Montesquieu and Sociological Jurisprudence (1916) 29 Harv. L. Rev. 582; Laboulaye, Études sur l'Esprit des Lois, de Montesquieu (1869) 1 Revue de Droit International et de législation comparée 161.

This merit has been attributed to him by writers of various times and countries: "Montesquieu a fait rentrer le droit et la politique dans la classe des sciences expérimentales; et il a créé du même coup l'histoire du droit et la législa-
The work of these men, however, should not obscure the fact that during this period comparative studies remained exceptional. The seventeenth and eighteenth centuries were the time of the growth of national laws on the Continent and the national jurists concentrated their efforts on mastering their own traditional legal material. They were absorbed in the growing bulk of case law and in the adaptation of law to modern national needs. As far as legislative improvements were envisaged, the jurist looked to natural law, and while the student of natural law was familiar with the work of its foreign exponents, he was not interested in the foreign systems of law in which they had been trained. It would seem that in the eighteenth century, only in England was foreign law studied to an extent that it again became an influential factor; there the study of Roman and modern civil law helped to develop and liberalize the common law. Whenever the law-
yers did not find an express rule in the common-law authorities, they turned to the Roman law books, which were regarded as an embodiment of pure legal reason. Thus, Lord Holt relied strongly on the civil law and Lord Mansfield worked the law merchant, which had grown up on the Continent and had been shaped by civil law doctrines, into the fabric of the English common law.

THE FIRST HALF OF THE NINETEENTH CENTURY

The legal development of the nineteenth century is characterized by the national unification and simplification of law on the Continent. Under the influence of eighteenth century rationalism, the idea of codification, by which law was to be reconstructed

manes of Theodosius and Justinian [and] if an Englishman must be ignorant of either the one or the other, he had better be a stranger to the Roman than the English institutions." 1 BL. COMM. *5.


114 In Lane v. Cotton, Lord Holt laid down the reason for his inclination: "The principles of our law are borrowed from the civil law, and therefore ground upon the same reason in many things." 1 Ld. Raym. (1701) 646, 652. This confirms the impression, that "he was in no sense a profound Romanist yet he had been a careful student of Bracton, and through his decisions some of the academic speculations of Bracton became living common law." PLUCKNETT, op. cit. supra note 57, at 168, 215.

115 "He (Lord Mansfield) saw the noble field that lay before him, and he resolved to reap the rich harvest which it presented to him. . . . As respected commerce, there were no vicious rules to be overthrown, he had only to consider what was just, expedient, and sanctioned by the experience of nations farther advanced in the science of jurisprudence. His plan seems to have been to avail himself, as often as opportunity admitted, of his ample stores of knowledge, acquired from his study of the Roman civil law, and of the juridical writers produced in modern times, by France, Germany, Holland and Italy, not only in doing justice to the parties before him, but in settling with precision and upon sound principles a general rule, afterwards to be quoted and recognized as governing all similar cases." 3 CAMPBELL, LIVES OF THE CHIEF JUSTICES (3d ed. 1874) 275. But he was bitterly attacked: "In contempt or ignorance of the common law of England, you have made it your study to introduce into the Court where you preside, maxims of jurisprudence unknown to Englishmen. The Roman code, the law of nations, and the opinions of foreign civilians, are your perpetual theme." Id. at 372. In Lord Campbell's opinion, however, this charge was not supported by "the slightest colour of pretence. He did not [consider] the Common Law of England . . . a perfect code . . . but in no instance did he ever attempt to substitute [Roman] rules and maxims for those [of the Common Law]. He made ample use of the compilation of Justinian, but only for a supply of principles
upon the basis of new principles deduced by reason and expressed in simple and concise formulæ, became an accepted concept in the late 1700's and early 1800's. With the creation of various national codes, the jurists of these countries concentrated all their efforts on the interpretation and analysis of their codes. This conception of the function of legal science, which was based entirely on immediate practical needs, resulted inevitably in the narrowing of its outlook and in the limitation of its objects of study. An atmosphere was created in which studies in foreign and comparative law were regarded as having no value. Although the Historical School of jurisprudence vigorously objected to the attempts to codify the law and advocated the application of a method of observation to law and its creative force, national genius, the school was not interested in any law except classical Roman law. Its followers disregarded the growing laws of the time, which were merging and amalgamating the common elements of European law of Roman origin with the diversified customary law of Germanic tradition, because they considered it inferior to the classical Roman law which was regarded as the "common law of all civilized nations." But in spite of these adverse tendencies which prevailed in continental legal science during the first half of the nineteenth century, the interest in foreign and comparative law was rising in France as well as in Germany, fostered and promoted by various causes; the same was true in England and in the United States.

In Germany, classical philosophy, with its broad vision and its influence on legal science through the metaphysical jurists, would

to guide him upon questions unsettled by prior decisions in England. He derived also similar assistance from the law of nations, and the modern continental codes."

Id. at 314. See also 1 Holdsworth, op. cit. supra note 43, at 572; 5 id. 129, 147; Plucknett, op. cit. supra note 57, at 170, 215.

116 See Alvarez, Une nouvelle conception des études juridiques et de la codification du droit civil, 1900 in The Progress of Continental Law in the Nineteenth Century (1918) 1, 4, 12.


119 See 1 Savigny, System des heutigen roemischen Rechts (1840) 13.

120 See 1 Puchta, Cursus der Institutionen (6th ed. 1865) 94.
seem to be responsible for the reviving interest in studies of foreign and comparative law. Anselm von Feuerbach, the leading scholar in criminal law of his time, was the first to conceive the science of comparative law. Although strictly adhering to the critical rationalism of Kant and to his conception of an absolute principle of justice which may be deduced from reason, Feuerbach nevertheless realized that legal science is an empirical science, and he admitted that its findings must be based on empirical observation. But since legal science is not limited in time and place, he believed that this observation must be as comprehensive as possible and must include the law and legal institutions of all times and nations. He stressed the fact that such an extensive comparison is necessary to supplement the results which are obtained by philosophical and legal reasoning and that, on the other hand, comparative studies must be guided by a philosophical method of jurisprudence.

While Feuerbach’s philosophical view was Kantian, Eduard Gans, the decided opponent of Savigny and the Historical

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122 Feuerbach stressed the necessity of a comparative jurisprudence, first in a preface which he wrote to the book of Unterholzner, Juristiche Abhandlungen (1810), which reads in translation: “Why does the legal scholar not yet have a comparative jurisprudence? The richest source of all discoveries in every empirical science is comparison and combination. Only by manifold contrasts the contrary becomes completely clear; only by the observation of similarities and differences and the reasons for both may the peculiarity and inner nature be recognized in an exhaustive manner. Just as the comparison of various tongues produces the philosophy of language, or linguistic science proper, so does a comparison of laws and legal customs of the most varied nations, both those most nearly related to us and those farthest removed, create universal legal science, i.e., legal science without qualification, which alone can infuse real and vigorous life into the specific legal science of any particular country.” Feuerbach, Kleine Schriften vermischten Inhaltes (1833) 163.

Later, he discussed the idea of a universal legal science based on comprehensive comparative material at length in his essay, Idee und Notwendigkeit einer Universaljurisprudenz, which was published posthumously. 2 Feuerbach’s Biographischer Nachlass (2d ed. 1853) 378.

123 Feuerbach, himself, did not undertake such comparative studies as he envisaged, except in a short essay, Betrachtungen ueber den Geist des Code Napoleon und dessen Verhaeltnis zur Gesetzgebung und Verfassung deutscher Staaten ueberhaupt und Baierns insbesondere in Themis, oder Beitraege zur Gesetzgebung (1812) 1.

124 See 3 Landsberg, op. cit. supra note 121, at 354, 369.
School, was a faithful disciple of Hegel, and strongly believed in Hegel's metaphysical interpretation of history. Gans criticised severely the historical positivism, the retrospective tendency, and the "antiquarian micrology" of the Historical School. He argued for a philosophical interpretation of legal history that would reveal the development of governing legal ideas and basic legal principles which have come to be part of the reality of the legal world. Since he thought that the legal history of any nation represents but a definite stage in the universal legal development, it necessarily followed for him that historical jurisprudence must be comparative in method and universal in outlook. In this way Gans conceived the comparative and universal legal history; he attempted to undertake such studies on a large scale himself and to prove his thesis by investigating the entire history of a whole field of law, namely the law of inheritance. His treatise deals with the development of inheritance law in all the known systems of law and in spite of shortcomings which were strongly criticised by the Historical School, it still forms one of the outstanding contributions to comparative and universal legal history. Both by his ingenious conception which he reasoned and

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125 "Hegel und seine Schriften habe ich, der ich im Zwiespalt zwischen meinem abstrakten Denken und meiner Wissenschaft begriffen war, die vollere Versoehnung mit der letzteren zu danken: namlich ist mir seit dem Erscheinen der Rechtsphilosophie zuerst ein heller Tag geworden, wo ich mir nur eines dunklen Herumtappens bewusst war. Was mir vor dieser Zeit auch schon als einzelner Pfeiler und Bogen haltbar geschienen hatte, das habe ich nicht ohne die kraeftigste Anregung in der einfachen und grossen Architektonik eines tiefbegruendeten Gebaeudes wieder erkennen koennen. So hat denn nicht allein dieses Studium den unmittelbarsten Einfluß auf die folgende Abhandlung gehabt, sondern alles, was vielleicht von einigem Werth sein duerfte, gehoert nicht mir an, sondern demselben."

1 GANS, op. cit. supra note 87, at xxxix.

126 See 1 GANS, op. cit. supra note 87, at xxxi: "Die Rechtsgeschichte, in so fern sie nicht blosse Abstraktionen zum Inhalte haben will, begreift in sich notwendig die Totalitaet der Entwicklung des Rechtsbegriffes in der Zeit, sie ist daher ebenso notwendig Universalrechtsgeschichte; denn sie gestehet keinem Volke und keiner Zeit eine ausschliessliche Wichtigkeit zu, sondern jedes Volk wird nur beruecksichtigt, in so fern es auf der nun aus dem Begriffe folgenden Stufe der Entwicklung steht."

127 1 GANS, op. cit. supra note 87. It bears the significant sub-title, Eine Abhandlung der Universalrechtsgeschichte. As to the criticism of the Historical School concerning this work, see 3 LANDSBERG, op. cit. supra note 121, at 353.

128 In connection with the studies of the legal history on the law of succesions, Gans made several trips to England, and another result of his study of the common law was an interesting article on the English courts of equity. See (1838)
expressed, though in Hegelian terms, with such admirable astuteness and by his work in the field, it would seem that Gans deserves the honor of being considered the first universal legal historian.129

In contrast to the philosophical attitude which formed the basis of Feuerbach's and Gans' conception of comparative law, the works of a widely cultured, broad-minded, and politically active group of jurists in southern Germany were mainly directed toward obtaining practical results by studies in foreign and comparative law. The adoption of the French Civil Code in the western part of Germany had brought a number of German jurists into close contact with French law, and Zachariae130 was one of the first to write an outstanding treatise on French civil law, which was highly esteemed in French legal science. The interest of this group of men was, however, not confined to the foreign law which was received in German territory, but extended to all the modern laws. They were familiar both with Roman and Germanic law and with their influence on modern laws, and they strongly believed that legal development and legal science in any civilized nation is

10 Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes 46. He said at the end of the article that he intended to make a comparative study of the English equity jurisdiction and the law-making function of the Roman praetor. Unfortunately, his death the following year prevented the materialization of this very interesting plan.

129 Before Gans, another opponent of Savigny, Thibaut, had attacked the narrow conception of legal history which had come to prevail in the works of the Historical School, and had emphasized the necessity of including the legal development of all nations in the study of legal history. See Ueber die Notwendigkeit eines allgemeinen burgerlichen Rechts fuer Deutschland in Civilistische Abhandlungen (1814) 404. Thibaut there made the following remarks which were taken by Gans as a motto for his book:

"Das ist nicht die wahre, belebende Rechtsgeschichte, welche mit gefesseltem Blick auf der Geschichte eines Volkes ruht, aus dieser alle Kleinigkeiten engherzig herauspflueckt, und mit ihrer Mikrologie der Dissertation eines grossen Praktikers ueber das et cetera gleicht. Wie man den europaeischen Reisenden, welche ihren Geist kraeftig beruehrt und ihr Innerstes umgekehrt wissen wollen, den Rat geben sollte, nur ausserhalb Europa ihr Heil zu versuchen; so sollten auch unsere Rechtsgeschichten, um wahrhaft pragmatisch zu werden, gross und kraeftig die Gesetzgebungen aller andern alten und neuen Voelker umfassen. Zehn geistvolle Vorlesungen ueber die Rechtsverfassung der Perser und Chinesen wuerden in unsern Studierenden mehr wahren juristischen Sinn wecken, als hundert ueber die jaemmerlichen Pfuschereien, denen die Intestaterbfolge von Augustus bis Justinianus unterlag."

130 See 3 LANDSBERG, op. cit. supra note 121, at 100-10.
of importance and of great interest to jurists in any other nation.\textsuperscript{131} The center of this group was Heidelberg and its leading spirit, Mittermaier, a disciple of Feuerbach, who, like his master, was one of the most prominent scholars in criminal law and procedure.\textsuperscript{132} His works on criminal law and criminal procedure are significant in that they are based on the most comprehensive comparative material and include not only continental law but much English and American law.\textsuperscript{133} Both Zachariae and Mittermaier felt the necessity of broadening the horizon of the German jurist, and with this purpose in mind they founded, in 1829, in collaboration with a number of foreign jurists, the \textit{Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes}.\textsuperscript{134} The twenty-eight volumes of this periodical contain a

\begin{itemize}
  \item \textsuperscript{131} Zachariae expressed this view as follows: "Wenn nun aus dieser Uebersicht des jetzt unter den Europäischen Völkern bestehenden literarischen Verkehres und des dermaligen Rechtzustandes der Europäischen Staaten der Schluss gezogen werden darf, dass das, was in irgend einem Europäischen Staate für die Gesetzgebung oder für die Rechtswissenschaft geschehe, auch die übrigen Europäischen Staaten und Völker mehr oder weniger interessire, so bedarf wohl der Plan der vorliegenden Zeitschrift, der Versuch, dem Deutschen Publikum die Bekanntschaft mit den Rechten und den rechtswissenschaftlichen Schriften des Auslandes zu erleichtern, nicht erst einer Entschuldigung." (1829) \textit{1 Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes 25}.
  \item \textsuperscript{132} See 3 LANDSBERG, \textit{op. cit. supra} note 121, at 430–37.
  \item \textsuperscript{133} Of his numerous works, the following are of interest in this connection: \textsc{Théorie des preuves im péinlichen Procès nach den gemeinen positiven Gesetzen und den Bestimmungen der französischen Criminalgesetzbìng} (1809); \textsc{Handbuch des péinlichen Procès, mit vergleichender Darstellung des gemeinen deutschen Rechts und der Bestimmungen der französischen, österreiciclien, baiériclien und prussischen Criminalgesetzbìng} (1810-12); \textsc{Die Mündlichkeit, das Anklageprinzip, die Öffentlichkeit und das Geschworenengericht, in ihrer Durchführung in den verschiedenen Gesetzgebungen dargestellt und nach den Forderungen des Rechts und der Zweckmäßigkeit mit Rücksicht auf die Erfahrung der verschiedenen Länder geprüft} (1845); \textsc{Erfahrungen über die Wirksamkeit der Schwurgerichte in Europa und Amerika, über ihre Vorzüge, Mängel und Abhilfe} (1864–65); \textsc{Das deutsche Strafverfahren in seiner Fortbildung durch Gerichtsgebrauch und Partikulargesetzbücher} und in genauer Vergleichung mit dem englischen und französischen Strafverfahren} (1827); \textsc{Englisches, schottisches und nordamerikanisches Strafverfahren} (1851).
  \item \textsuperscript{134} In 1826 R. Mohl, who later became one of the co-editors of Mittermaier's periodical, founded the \textit{Kritische Zeitschrift für Rechtswissenschaft}, which to a certain extent may be regarded as a forerunner of the former and was discontinued in the year 1829 when the former commenced to appear. It contains very comprehensive reviews on legal literature and was from the very beginning designed to include also the more important foreign works. See (1826) \textit{1 id. v.} One has
wealth of material which, from a practical point of view, offers most interesting suggestions. Warnkoenig, one of its later editors, was well justified in asserting that they represent “an almost complete panorama of the state of legislation and legal science in foreign countries during a thirty year development.”

One of the periodical’s characteristic features is that, for the first time, continental jurists displayed a keen interest in and an understanding of the development and traditional technique of the common law in England and America. The cyclopedic knowledge

but to look at the survey on recent literature of commercial law to see how carefully foreign juristic writings were studied by this group. See (1828) 4 id. 285.

138 See (1865) 28 Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes 391.

139 From a great number of articles on English and American law the following may be cited as the more important: Mittermaier, Das Englische Criminalrecht in seiner Fortbildung (1829) 1 id. 28; Georg Phillips, Die Reception und das Studium des Römischen Rechts in England (1829) 1 id. 400; Schulin, Englisches Wechselrecht (1831) 3 id. 177; Schirach, Das Nordamerikanische Common Law oder ungeschriebene Recht und die Codification (1831) 3 id. 444; Lagarmite, Criminal-Statistik von Nordamerika (1832) 4 id. 103; Birnbaum, Ueber nordamerikanische Gesetzgebung und Rechtswissenschaft im Allgemeinen, insbesondere über das Criminalrecht der nordamerikanischen Freistaaten (1833) 5 id. 254, 366; Mohl, Nordamerikanisches Staatsrecht (1835) 7 id. 1; Zachariae, Constitution der Vereinigten Staaten (Nordamerika) (1836) 8 id. 1; Story, Ueber Amerikanisches Staatsrecht (1837) 9 id. 1; Mittermaier, Die neueste Criminalgesetzgebung von Nordamerika (1837) 9 id. 126; Michaelis, Story über Billigkeit (1837) 9 id. 420; Gans, Ueber die Geschichte der Billigkeitsgerichte in England (1838) 10 id. 46; Mittermaier, Über die Fortschritte der Codifikation und Jurisprudenz in Nordamerika (1838) 10 id. 471, (1839) 11 id. 151; Mohl, Nordamerikanisches Staatsrecht (1840) 12 id. 161; Mittermaier, Die englischen Anstalten zur Ausbildung des Rechtsgelehrten (1847) 19 id. 130; Mittermaier, Ueber den Zustand der juristischen Literatur in Nordamerika (1845) 17 id. 312; Mittermaier, Neueste Forschungen in England in Bezug auf die Geschichte und die Bedeutung der Schwurgerichte (1852) 24 id. 360; Warnkoenig, Das Gesetz des Staates Massachusetts, betreffend die Verbesserung des Civilprozesses (1853) 25 id. 1; Mittermaier, Das englische Strafrecht in seiner neuesten Fortbildung durch die Gesetzgebungserarbeiten in Malta, in Nordamerika, in England und in den englischen Inseln Jersey und Guernsey in Bezug auf den normanischen Prozess (1854) 26 id. 129, 212; Mittermaier, Nordamerikanisches Recht (1854) 26 id. 152; Mittermaier, Die neuesten Leistungen auf dem Gebiete der Rechtswissenschaft in Nordamerika (1856) 28 id. 108; Mittermaier, Die neueste wissenschaftliche Bearbeitung des Strafrechts in Nordamerika (1856) 28 id. 466.

The periodical also contains a number of most valuable reviews on the works of Story, Wheaton, Greenleaf, Bishop, and Parsons.

This group of jurists followed very closely not only the legislative development in the common-law jurisdictions, but also the trend of judicial decisions. The collection of decisions rendered by John Marshall is thoroughly discussed in vol-
of Mittermaier and the untiring interest of this group of jurists in all the laws of the modern world and in the legal science and education of all great nations has scarcely ever been at

ume 12 (pp. 161-65), and in volumes 17-19 a great number of English criminal law cases are presented.

These jurists displayed a very remarkable understanding of the common-law technique. They clearly saw its great advantage in the development of law, but they also realized the deficiency of such a system. Zachariae, for example, made the following observation: "The English common law seems to approach more and more the period which sooner or later begins for every system of law whose main basis is formed by case law, namely, the period when it becomes necessary to summarize the rules of law which have been deduced little by little from the decision of individual cases. In spite of the many advantages that such a system has which is developed by case law and therefore almost independently, there will come a time when the sources, namely the traditional decisions, will accumulate to such a degree that one human life is no more sufficient to absorb them, and where the rules which have been found are limited by so many and such fine distinctions that instead of securing the interests of the individual they only serve as means of litigation." (1829)

137 In his time Mittermaier's work and personality was well known in all the civilized countries and it seems that outside of Germany he enjoyed an even greater admiration than Savigny. GREAT JURISTS OF THE WORLD 544, 560. He is "one of the founders and the most influential representative of comparative law and the main mediator between German and foreign legal science." GOLDSCHMIDT, VERMISCHE SCHRIFTEN (1901) 651, 671.

138 The practical tendency of this group of comparative jurists explains why they confined themselves to a comparison of the mature and developed systems of law. See 3 LANDSBERG, op. cit. supr

139 With the same ease, Mittermaier reports on the development of legal science in any country of the Continent as well as in England and America, and the main works of all the foreign jurists are carefully reviewed. See note 136, supra.

140 In (1831) 3 Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes 461, Schirach, a Danish jurist, reproduced from an article in (1828) 27 No. AM. REV. 167, 181, the following remarks of an anonymous writer in regard to the method of instruction in the common law, which would seem to anticipate the case method several decades before it was introduced by Langdell at Harvard: "We wish also to see some books of reports put earlier into the hands of youth for their legal education, than they have been hitherto. It appears to us, that they should soon be taught to read them in the order in which they are published. If we are not greatly mistaken, they would, with proper facilities for their explanation, find them far more interesting and instructive to read, and infinitely more easy to remember, than codes, or digests, or elementary treatises. We believe these last to be commonly too abstract and general, and best suited to the minds of those, who are somewhat advanced in the science of the law. . . . The young pupil . . . cannot long retain them accurately in his memory. . . . Not so, however, with that [knowledge] acquired by reading interesting law reports. The facts in these cases serve as bonds of association, by which the principles interwoven with them are held together, and kept long and strongly fastened in the
tained on the continent in later times. But the discontinuance of this periodical in 1856 and the cessation of the comprehensive study of comparative law with the death of Mittermaier indicates that these endeavors were confined to a very small group of jurists. The time had not yet come for a general interest in this field and the early efforts of this Heidelberg group fell under the overpowering influence of the positivism which in the 1850's became omnipotent in German legal science.¹⁴¹

The great legislative activity which the Napoleonic period had produced in France and the marked success of the great Napoleonic Codes led the French jurists in the beginning of the 1860's to an almost superstitious belief in the perfection of their legal system. They not only disregarded the legal world outside of their country, but also their own legal history. Before long, however, a reaction set in which created new interest in historical studies¹⁴² as well as in studies of foreign law.¹⁴³

Under the influence of Gans and his works, Lerminier pub-

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¹⁴¹ See 3 LANDSBERG, op. cit. supra note 121, at 732 et seq., 834 et seq.
¹⁴² The most active center for these historical studies was the periodical THEMIS, founded in 1819. See COIN-DESLISLE & MILLON, TABLES ANALYTIQUES DES REVUES DU DROIT ET DE JURISPRUDENCE, with a historical introduction by Laferrière (1860) vi, 1-37.
¹⁴³ The first who, after the enactment of the Napoleonic Codes, seems to have stressed the necessity or the value of studying foreign laws appears to have been Camus. See LETTRES SUR LA PROFESSION D'AVOCAT (4th ed. by Dupin 1818) 102. He deals with the study of foreign law and lists four reasons which determine the extent and the manner of this study; namely, (1) One who studies the relation between nations has to study their public law while their private law is of interest only in so far as it adds to his knowledge of foreign nations. (2) If a certain part of the law should be reformed, it would seem convenient to study what has been done elsewhere in the same field. (3) Every jurist who in the midst of his occupation finds time to study foreign law will find it as a means "d'apercevoir les règles sous différents jours, de s'enrichir de nouvelles reflexions." (4) If foreign law has to be applied in a French court, it is indispensable to consult it. It is interesting to see that the first editions of Camus' work did not contain any remarks on the study of foreign laws. It is only in the edition of 1805 that these remarks are inserted for the first time. See Hayem, L'Étude du Droit Comparé (1909) 8 REVUE TRIMESTRIELLE DE DROIT CIVIL 318, 330, n.1.
lished a comprehensive history of legal science since the Glossators; and in 1830 he became professor of comparative legal history at the College of France. With a more practical purpose in mind, and obviously following the example which had been set in Germany by Mittermaier, Foelix founded the *Revue étrangère de Législation* in 1834 to serve as a medium between French and foreign jurists. The information on foreign law was not only to promote the knowledge of the French lawyer but also to give suggestions in regard to the improvement of French law. Although Foelix was untiring in establishing contacts with jurists all over the world and in giving to his French readers a complete and true picture of foreign law, legislation, and legal science, the periodical never attained the standard of Mittermaier's journal. More and more the former deviated from its original purpose and had to give room to discussions of domestic law. The periodical was finally discontinued in 1850, due to the indifference of

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144 Lerminier, *Introduction Générale à l'Histoire du Droit* (1829). The title is misleading because the book does not give a history of law, but a history of the main schools of jurists in the period from 1200 to 1800. Lerminier is full of praise for Gans and accepts his fundamental ideas. See *id.* at 193.

Unfortunately, the later works of Lerminier and his activity as the first incumbent of the newly established chair of comparative legal history seems not to have been in accordance with the expectations which his first book created. He did not publish any study in comparative legal history of any scientific value. See (1835) 7 *Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes* 208 and (1837) 4 *Revue étrangère et Française de Législation* 349. See (1837) 4 *id.* 350; sauser-Hall, *op. cit.* supra note 83, at 37.

146 See (1834) 1 *Revue étrangère de Législation* 2.

147 Foelix, himself, lacked the comprehensive knowledge of Mittermaier. His particular field was conflict of laws which he developed in France for the first time by a series of articles in his periodical. See (1840-43) 7-10 *id.* He adopted Story's doctrines almost completely and was his foremost follower on the Continent. Although the periodical contains a number of articles on English and American law, it does not give evidence of the same thorough understanding of and interest in the common law as Mittermaier's periodical, and the reviews of works of American jurists are fewer and less thorough. See the reviews of Story, *Conflict of Laws* in (1834) 1 *id.* 758, *Treatise on Equity* in (1842) 9 *id.* 199, and Kent, *Comm.* in (1839) 6 *id.* 69.

148 This development is indicated by the two changes in title which the Review had to make. Already with the third volume the Review was entitled, *Revue étrangère et Française de Législation*, and the trend towards a periodical of domestic law becomes even more apparent with volume ten, when it assumed the title *Revue de Droit Français et Étranger*, and Foelix was confined to the editing of the foreign part while two new editors were appointed for the domestic part.

149 A certain interest in foreign laws is also to be seen in the *Revue de Légis-
the average French lawyer and to the growing influence of the spirit of positivism. Nevertheless, Foelix had laid the foundation for the study of foreign and comparative law in France.

The same practical tendencies which were underlying Foelix's periodical led to the works of Foucher and Saint-Josef, who

lication et de jurisprudence, founded in 1835 by Wolowski. Due to the same influences which had forced Foelix to discontinue his periodical, this journal also had to give up its independent existence in 1853 and was merged with another periodical of extreme practical tendency into the Revue critique de législation et de jurisprudence, in which the study of foreign and comparative law played only a minor rôle. See Laferrière, op. cit. supra note 142, at xxx, xliii, xlv, lv.

150 In reviewing the history of this periodical, Laferrière exclaims in despair, "O praticiens trop exclusifs! Je vous respecte, parce que vous formez le gros bataillon pour les abonnements, mais je déplore votre domination trop absolue. C'est vous qui avez tué la Revue, plus encore que la révolution de 1848, ou qui du moins l'avez laissée mourir par votre abandon ou votre indifférence! C'était un recueil savant, sans doute, mais bien pratique aussi puisqu'il était le lien, dans la science et la législation, entre les divers peuples de l'Europe." Id. at xxviii.

151 In 1846 a chair for comparative criminal law in the law faculty of Paris University was founded. See Esmein, Le droit comparé et l'enseignement du droit (1900) 31 Bulletin de la société de législation comparée 374. Its first occupant was Ortalan, who had already become famous by his studies in and courses on comparative criminal law. See (1848) 5 Revue étrangère et française de législation 783. Besides the already existing courses on comparative legal history and comparative criminal law, Foelix advocated most strongly the establishment of courses in comparative civil law, although at the same time he was aware of the inherent difficulties of such an undertaking. See (1847) 4 Revue étrangère et française de législation 970, 971.

152 Due credit for his accomplishment is given to Foelix by Laferrière in his review of this periodical. "M. Foelix, qui a tout résumé ou examiné, constitutions, codes, lois diversifiées, déclarations, s'est trouvé, sans l'avoir prévu peut-être, en possession des fondements d'une science nouvelle, la législation comparée." "Ce ne serait donc pas assez, pour la réputation de Foelix, de dire que de la Revue par lui dirigée est né un bon traité de droit international; il faut reconnaître qu'il en est sorti, pour la science du droit, une branche nouvelle, la législation comparée. La science est faite aujourd'hui, et il ne lui manque qu'une chose, c'est une chaire pour l'enseignement relatif au doctorat, dans la Faculté de droit de Paris." "La Revue de droit français et étranger aura, du moins, rempli une partie de sa mission; elle aura fondé la science de la Législation comparée et du Droit international privé. C'est là son titre principal, et ce sera, dans l'ensemble des recueils juridiques du XIXe siècle, son caractère distinctif et impérissable." Op. cit. supra note 142, at xix, xx, xxx.

153 Between 1833 and 1862 Victor Foucher published a collection of foreign statutes and codes whose publication by the Imprimerie Royale was authorized by the French ministry. See (1834) 1 Revue étrangère de législation 4.

154 Anthoine de Saint-Joseph published a treatise entitled, Concordance des codes civils français et étrangers (2d ed. 1856). It contains an analytical introduction and reproduction of texts of foreign statutes and codes. This treatise was
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attempted to bring the French jurist into contact with and to give him an understanding of the modern development of foreign law. However, neither these works nor most articles in Foelix's periodical were comparative in the strict sense.

While in the English cases of the 1800's the influence of civil law is much less marked than in the previous generation under Lord Mansfield, nevertheless, legal scholars continued to direct their attention toward it. But the object of study was the classical Roman law rather than the modern continental laws. On the other hand, the analytical jurists made an extensive use of the civil law. Bentham, whose knowledge of foreign laws was neither comprehensive nor profound, borrowed many illustrations for his proposals from them, and Austin who was very well trained in modern Roman law based his principles and conceptions to a large extent on civil law doctrines. Yet, on the whole, it would

followed by two others of the same character; namely, Concordance entre les Codes de Commerce et le Code de Commerce français (1844), and Concordance entre les Lois Hypothécaires Etrangères et Françaises (1847). These collections of statutes and codes were highly praised as a source of comparative material by Mittermaier. See (1844) 16 Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes 174.

The English courts, while not recognizing the Roman law as authority, still take it into consideration in cases where English authorities have not been found in point or where the principles of both English and Roman law appear to be similar. "The Roman Law forms no rule binding in itself upon the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion to which we have come, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries in Europe." Acton v. Blundell, 12 M. & W. 324, 353 (1843).

See, e.g., Wood, New Institute of the Imperial or Civil Law (4th ed. 1739); Irving, An Introduction to the Study of the Civil Law (4th ed. 1837); Spence, Inquiry into the Origin of the Laws and Institutions of Modern Europe (1826); Halifax, An Analysis of the Roman Civil Law Compared with the Laws of England (Geldart ed. 1836). In a lengthy preface the author follows Blackstone's Introduction to his Commentaries, and discusses the value of the study of civil law. These works usually are introductions to or outlines of courses on civil law and they do not have any considerable scientific value.


See Austin, Lectures on Jurisprudence or the Philosophy of Positive Law (1832). Cf. an interesting review by Zachariae in (1833) 5 Kritische Zeit-
seem that the average English lawyer of the first half of the nineteenth century was not interested in the continental laws, nor did he make a creative use of foreign and comparative legal material.

However, two very important factors, in addition to the interest in improving the existing English law, promoted studies in comparative law in England toward the middle of the nineteenth century. The fact that the highest appellate tribunal of the British Empire, the Privy Council, had to administer a considerable number of foreign legal systems made it highly desirable to give to the English profession "a more ready access to the sources from whence an acquaintance might be derived with these systems of foreign jurisprudence." Burge aimed to accomplish that object with his Commentaries on Colonial and Foreign Laws, which was hailed as the main work on comparative

SCHRIFT FÜR RECHT WISSENSCHAFT UND GESETZGEWIRK DES AUSLANDES 199–212. In his article, On Uses of the Study of Jurisprudence, he applied the name of general or comparative jurisprudence to the process of "exposition of the principles, notions and distinctions which are common to systems of law, understanding by systems of law the ampler and maturer system which by reason of their amplitude and maturity are permanently pregnant with instruction." 2 LECTURES ON JURISPRUDENCE (5th ed. 1885) 1071, 1079. He stressed the value of the study of Roman law which, as he says, "is of all particular systems, other than the law of England, the best of the sources from which such illustrations might be drawn." Ibid. Having studied in Germany, he was well acquainted with the works of the Historical School and his library contained the works of Savigny, Hugo, and others. See 1 id. at ix–xii. While Austin was thoroughly familiar with the civil law, at least with the usus modernus of the Roman law, it has been said by Mr. Justice Holmes that "he did not know enough English law." See The Path of the Law (1897) 10 HARV. L. REV. 457, 475.

159 See 1 BURGE, COMMENTARIES ON COLONIAL AND FOREIGN LAWS (1907) xix.
160 BURGE, COMMENTARIES ON COLONIAL AND FOREIGN LAWS (1837). As Burge explains in the dedication of his work to Lord Landale, the following legal systems are comprised in his work. "1. The civil law, the great source from which every other code has largely borrowed. 2. The law of Holland as it existed before the formation of the code civil. 3. The law of Spain. 4, 5, the Coutumes of Paris and Normandy. 6. The present law of France. 7. The law of Scotland. 8. The law of England. 9. The local laws of the colonies in the West Indies and North America. 10. The laws of the United States of America." 1 id. xix. The work of Burge fulfills a three-fold purpose: first, it gives a comprehensive survey of all legal systems and their sources which are in force in the British empire; secondly, it attempts a comparative study of the law of persons and domestic relations, property and successions; and thirdly, it develops the principles of conflict in the various fields of the law. A new edition of the Commentaries under the editorship of A. W. Renton and G. G. Phillimore was published in five volumes from 1907 to 1928.
law, both on the Continent \[^{161}\] and in the United States.\[^{162}\] It still forms one of the outstanding contributions in this field.\[^{163}\] In addition, the world-wide trade of English merchants and their relations with foreign traders made it necessary for the English lawyer to have access to the commercial laws of the world. Leone Levi\[^{164}\] attempted to solve the problem in his remarkable work on comparative commercial law.\[^{165}\] It is significant in two respects: first, because the author compares the commercial laws of the whole world with those of England; \[^{166}\] and secondly, because Levi was evidently inspired by the idea of a common, international commercial code for which his volumes should form a workable basis.\[^{167}\] Thus an Englishman was the first to give expression to

\[^{161}\] See a comprehensive review by Mittermaier in (1839) 11 Kritische Zeit-

\[^{162}\] See Story, Commentaries on the Conflict of Laws (2d ed. 1841) iv.

\[^{163}\] See Rabel, Aufgabe und Notwendigkeit der Rechtsvergleichung (1925)

\[^{164}\] The many writings of Leone Levi are inspired by the idea of promoting

international commerce. Professor Nathan Isaacs, to whom I am indebted for in-

formation about Levi's works tells me that, "The writings of Levi will show

at a glance the range of his interests. All of these interests are in a way related. He

begins with problems of international commerce, proceeds through his great

work in comparative commercial law, and reaches out into the more general sub-

ject of international law and peace as conditions precedent for the extension of

foreign trade. Even his hobbies, such as the organization of chambers of com-

merce and tribunals of commerce and the Channel tunnel are related to this cen-

tral idea of his."

\[^{165}\] Commercial Law, Its Principles and Administration; Or the Mer-

cantile Law of Great Britain Compared with the Codes and Laws of

Commerce of the Following [59] Mercantile Countries (1850-51).

\[^{166}\] In his treatise, at the beginning of each subject Levi gives a short and sys-

tematic analysis of the English law. Then he reproduces the corresponding legal

precepts from codes and statutes of the various countries. At the end of each

topic, he gives an "analysis of the law," where he shows briefly the likenesses and

differences of the domestic and the foreign laws. Although his information in re-

gard to foreign laws is mostly confined to statutory law, he nevertheless also gives

limited information in regard to case law. With respect to statutory law he relies

to a great extent on the collection of Saint-Joseph. See note 154, supra.

\[^{167}\] In the preface to his work, which is addressed to the Prince Consort of

Great Britain, Levi expresses his conviction that a formal assimilation of commer-
cial laws would be feasible. He acknowledges that two events had confirmed this

conviction, namely the enactment of the Uniform Negotiable Instruments Law of

the German Confederation, which succeeded in abolishing by one stroke nearly

sixty different bodies of law, and the opening of the International Exposition at

London, promoted by the Prince Consort. His plan was to call two international

conferences, composed of delegates from every principal commercial country, and
the idea that in the field of commercial law comparison should be followed by unification.  

When the United States emerged from colonial days, a number of circumstances precluded an immediate and complete reception of the English common law and "operated in the formative period of American law to lead the lawyers to put their faith in comparative law." The foremost jurists to make a skillful and creative use of comparative law were Kent and Story. As judges, writers, and teachers of law their judicial activity, their various publications, and their importance in the profession were most influential in shaping the American law. Both were familiar with Roman and modern continental law and frequently re-

he expected by this scheme to see the great work completed within a short time. The future growth of his commercial code should be secured by the method of holding periodical conferences. However, the Prince Consort, though he recognized the merits of Levi's proposition, did not think that such a scheme would be practical. See 1 Levi, op. cit. supra note 165, at xv; 2 id. xi; cf. an interesting review by Mittermaier in (1851) 23 Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes 442, 448.

168 See Cohn, Drei Rechtswissenschaftliche Vorträge (1888) in The Progress of Continental Law in the Nineteenth Century (1918) 347, 351.

169 See Pound, Comparative Law in the Formation of American Common Law (1928) 1 Actorum Academiae Universalis Jurisprudentiae Comparativae 183, 191. According to Dean Pound these factors were: (1) the then condition of English law; (2) the needs of American law to which seventeenth century English law was inapplicable or ill-adapted; (3) Puritan views as to law and lawyers; (4) political feeling in America after the Revolution; (5) the economic situation after the Revolution. Id. at 187.


171 Of all the continental laws French law had a predominant influence. See Pound, The Influence of French Law in America (1908) 3 Ill. L. Rev. 354. Mittermaier remarks in (1838) 10 Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes 489 that the works of French writers are far more in use in the United States than the works of the German jurists. See also (1845) 17 id. 316. Story was very familiar with the French civil code which he highly praised in describing it "the most finished and methodical treatise of law that the world ever saw." (1829) 1 Am. Jurist 32.

In an address delivered before the members of the Suffolk Bar in 1821 at Boston, Story strongly advocated a number of principal improvements in the jurisprudence of this country which he expected from a more thorough education and a more methodical and extensive range of studies. Among those studies which every lawyer should pursue should be the study of foreign law, which he praises as follows: "A mine abounding with the most precious materials to adorn the edifice of our jurisprudence is the study of the foreign maritime law and above all of the civil law. . . . Where shall we find the law of contracts so successfully, so philosophically
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sorted to its rules and doctrines by showing the "identity of an ideal form of the English common law rule with an ideal form of the Roman law or civil law rule, and thus demonstrating the identity of each with a universally acknowledged law of nature." 172 Hence, the civilians are frequently cited in the judicial decisions 173 and they play an important part in the writings of both Kent 174 and Story. 175 Nor was the interest in Roman and civil

and so persuasively expounded as in the pure, moral and classical treatise of Pothier? Where shall we find the general doctrines of commercial law so briefly yet beautifully laid down as in the modern commercial code of France? Where shall we find such ample general principles to guide us in new and difficult cases as in that venerable deposit of the learning and labors of the jurists of the ancient world, the Institutes and Pandects of Justinian? The whole continental jurisprudence rests upon this broad foundation of Roman wisdom and the English common law, churlish and harsh as was its feudal education, has condescended silently to borrow many of its best principles of this enlightened code. The law of contracts and personality, of trusts and legacies, and charities in England have been formed into life by the soft solicitudes and devotion of her own neglected professors of the civil law. There is no country on earth which has more to gain than ours by the thorough study of foreign jurisprudence. We can have no difficulty in adopting in new cases such principles of the maritime and civil law as are adapted to our own, and commend themselves by their intrinsic convenience and equity. Let us not vainly imagine that we have unlocked and exhausted all the stores of judicial wisdom and policy. Our jurisprudence is young and flexible, but it has withal a masculine character which may be refined and exalted by the study of the best models of antiquity." Id. at 29.

172 Pound, supra note 169, at 195.
173 A great number of these cases are listed in the two papers of Dean Pound. See notes 169, 171, supra. See also Pound, The Ideal Element in American Judicial Decision (1931) 45 HARV. L. REV. 136, 138.
174 See 1 KENT, COMM. (12th ed. 1873) 516 et passim.
175 Story, in his Commentaries on the Conflict of Laws, Foreign and Domestic, draws very largely from the civilians. On the other hand, this treatise had a tremendous influence on the continent. See GUTZWILLER, DER EINFLUSS SAVIGNY'S AUF DIE ENTWICKLUNG DES INTERNATIONALPRIVATRECHTS (1923) 110. Story's Commentaries on the law of agency, partnership, bills of exchange, and promissory notes, all contain, as he indicates in the title, "occasional illustrations from the civil and foreign law" or "from the commercial law of the nations of Europe." Story made a large collection of foreign law books, and when he began his teaching at Harvard he sold to the school his law library which consisted of 384 books in English and 123 in foreign languages. See THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL 1817-1917 (1918) 19.

Story was in close contact with the development of comparative law on the continent. He was a contributing editor to both the German and French periodicals in the field. In (1837) 9 KRITISCH ZEITSCHRIFT FÜR RECHTWISSENSCHAFT UND GESETZEBUNG DES AUSLANDES 1, he published an introductory article on the American Common Law, and in (1837) 3 REVUE ÉTRANGÈRE ET FRANÇAISE DE
law and in their comparison with the English common law by any means confined to these two of America's greatest jurists. However, toward the middle of the century interest seems to have diminished, and by the time of the Civil War, which marks the end of the formative period of American law, the interest in foreign legal development and legal science had entirely vanished.

LÉGISLATION 65 an article on the Organization and Jurisdiction of the Law Courts in the United States.

176 See 1 Sherman, op. cit. supra note 30, at 407. The group of jurists who founded and edited the AMERICAN JURIST AND LAW MAGAZINE were alert to keep in close contact with the legal development abroad and they stressed particularly the great value which the American lawyer might derive from a study of Roman law. A learned reviewer of two works on Roman law anonymously points out that “in the liberal course of professional studies general or comparative jurisprudence must be a constituent part.” (1829) 2 AM. JURIST 60. This appears to be the first use of the term “comparative jurisprudence.” He also advocated the creation of a chair for civil law at the Harvard Law School. “While then we are endeavoring to advance the science of law in our own country, particularly by means of law schools and lectures on the common law, we ought at the same time to take care that the civil law should not be wholly neglected. We have just had an illustrious example of professional liberal- ity in the donation made by our learned countryman, Dr. Dane, to the University of Cambridge for the advancement of American law and we earnestly hope that some benefactor of equal liberality will soon be found who will devote a portion of the well-earned fruits of an honorable life to a chair for the civil law in that ever cherished institution. This would complete the department of Jurisprudence in our University Law School and at once give it the preference over every other.” Id. at 61.

Although no special chair for civil law was created at the Harvard Law School, in the time of Story and Greenleaf the instruction included some study of the civil law. The circular giving the outline of the plan of instruction and course of reading (Published in (1830) 4 AM. JURIST 217, 220) included a section on civil law, recommending, among others, the study of Justinian's Institutes, Pothier's Obligations, and Domat's Civil Law. But only during the years 1848-49 and 1850-51 were special courses on the civil law given by Cushing, one of the editors of THE AMERICAN JURIST. See THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL 1817-1917 (1918) 75, 203.

177 See Pound, supra note 169, at 196. This change is also reflected in the law schools, particularly the Harvard Law School. “Science, the aim of Story and Greenleaf, was no longer regarded as the object of study in a law school. The purpose of students of this time in the schools as well as in the later career of their generation at the bar, usually was practical and self-centered in the highest degree. There was, as Judge Phelps has said, a distinct anti-Story reaction.” But it is probably not wholly accidental that the failure of the school in the 60's due to “lack of vision, of progress, self-satisfaction apparently justified by the continued outward success of the school, failure to read the signs of the times,” coincided with the fact that “the library was richer in the literature of the foreign law than any other in the country but none of the works of these foreign jurists was read
In fine, the first half of the nineteenth century witnessed the beginning of studies in comparative law on a larger scale. They were directed mostly to those foreign laws that were of practical importance, but only in a very few instances were they comparative in a strict sense. With the exception of Gans all those studies were undertaken for practical reasons. The universal validity of any one system was challenged; Bentham led the reform movement in England; Foelix realized that no legal system, not even the Napoleonic Codes, could claim perfection; and while Mittermaier was aware that Roman law was inadequate to the needs of modern Germany, both Story and Kent were fully conscious of the fact that the common law had to be reshaped in order to meet the conditions in this country. For this reason these men felt the necessity of broadening the scope of their learning and of taking advantage of legal experience in other countries. It was taken for granted that the value of such studies consisted entirely in giving suggestions for improvements in domestic law which were immediately needed. In this manner they absorbed the foreign legal material wherever it was available and made the best possible use of it. It was but a tentative beginning under the pressure of practical needs and had neither the breadth of Grotius, the vision of Vico and Gans, nor the comprehensiveness of Montesquieu. Naturally, it did not give rise to any discussion as to the objects of such studies and the methods to be followed, but it developed a method of empirical observation and practical application of the results thus obtained and was imbued with a keen and lasting interest, which may be regarded as a standard, even in our time. Comparative law was, so to speak, still in embryo and it was only in the last part of the nineteenth century that it emerged as a distinct branch of legal science.

Before this stage was attained, the interest in comparative

by any student.” See The Centennial History of the Harvard Law School 1817–1917 (1918) 21–22. See also Matile, Les Écoles de Droit aux États-Unis (1863) 9 Revue Historique de Droit Français et Étranger 539–57. He remarks particularly that Roman law still enjoys the reputation of great wisdom, but that it is neither taught nor studied in the United States during this period.

One of the few studies which followed Gans in purpose and method is the first writing of Unger. Die Ehe in ihrer welthistorischen Entwicklung (1850). But in his later works Unger, who became the foremost scholar in Austria, never attempted to carry further studies in universal legal history. 3 Landsberg, op. cit. supra note 121, at 917.
studies which had been so strong in the 30’s and early 40’s died out almost completely. It had been confined to a small group of jurists, broad-minded and broadly cultured, but not sufficiently strong to withstand the increasing power of the positivists who regarded the organizing, analyzing, and exposing of their existing national law as the sole object of legal science, and who were inclined to believe that the principles of their law could claim universal validity. By the middle of the century this spirit of positivism had become dominant in legal science in all the western countries. Legal philosophy was at its lowest ebb; the interest in legal history had greatly diminished, and the study of foreign and comparative law disappeared. Thus, when in 1852 Jhering published the first volume of his famous treatise on the Spirit of Roman Law he bitterly, but justly, remarked: “Die Wissenschaft ist zur Landesjurisprudenz degradiert. Eine demütigende, unwürdige Form für eine Wissenschaft!”

Walther Hug.

170 Only in the field of commercial and maritime law did the interest in comparative law remain alive. Comparative studies were continued, partly under the influence of Goldschmidt’s universal outlook, and partly because of the unification movement. 3 LANDSBERG, op. cit. supra note 121, at 938; COHN, op. cit. supra note 168, at 352; Ripert, The Progress of The Unification of Maritime Law in The Progress of The Law in The Nineteenth Century (1918) 396, 406.

180 The work of the early 1800’s seems to be entirely forgotten in France and Germany. Lévy-Ullmann does not mention Foelix and his periodical at all, nor does Rabel give any reference to Mittermaier and his journal. See notes 6, 163, supra.

181 JHERING, GEIST DES ROMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG (4th ed. 1878) 15.