

# Louisiana Law Review

---

Volume 1 | Number 1  
November 1938

---

## The Influence of the Civil Law in America

Roscoe Pound

---

### Repository Citation

Roscoe Pound, *The Influence of the Civil Law in America*, 1 La. L. Rev. (1938)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol1/iss1/14>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kayla.reed@law.lsu.edu](mailto:kayla.reed@law.lsu.edu).

# The Influence of the Civil Law in America

ROSCOE POUND\*

A generation ago a philosopher, writing a book on "The Nature of Existence," held it necessary to consider seriously in a preliminary chapter whether anything exists. The vogue of dogmatic skepticism among law teachers in America today may impose a like necessity upon one who essays to speak upon the civil law. He may have to ask whether there is after all any such thing as law and whether, if there is, there is any such thing as the civil law. Perhaps on such an occasion as this we may assume that law exists as a reality; we may take it without argument that there exist bodies of authoritative materials in which tribunals are expected to and do find the grounds of decision of controversies, and that there are techniques of finding and applying such grounds of decision and of further developing them by judicial reasoning. When it comes to the second question, however, the answer is not so clear. A generation ago, when the historical mode of thought was in fashion, no one doubted that there were two great legal traditions in the world, each in full vigor, each in a sense a universal system, obtaining in many lands and giving order and coherence to local legal precepts, content to locally declared conceptions, and assured general starting points for local legal reasoning. No one questioned that for the English-speaking world the common law, and for Continental Europe and for that part of the world settled from the Continent the civil law, were fundamental legal realities.

Today a conception of law as an aggregate of rules of law, which has grown up along with an extreme nationalism in Continental Europe, is leading many jurists on the Continent to write and speak as if there were no longer such a thing as the civil law. All ideas of a universal system are given up. Laws are local, hence

---

\* University Professor and formerly Dean of the Faculty of Law of Harvard University.

This paper was read at a Symposium on "The Position of the Civil Law in America" held on April 8, 1938, at University, La., in connection with the Dedication of Leche Hall, Law Building of the Louisiana State University Law School.

Law is local. There is only the law of France, as a body of laws authoritatively established in France, a law of Germany, a law of Italy. In the same spirit, since the body of rules of law which obtained in seventeenth-century England has become obsolete or has been transformed in its details, so that there has come to be a great diversity of detail in different English-speaking jurisdictions (e.g., in England real property by statute passes along with personalty to the personal representative, in America very generally personalty passes by statute, along with realty, to the heirs) it is asserted there is no such thing as the common law as something transcending political lines. It is held that there is no more than a common law of some particular state or nation. If, however, one thinks of law as something more significant than a body of rules obtaining in some locality for the time being, if he thinks of law as something giving life to laws and rules and making it possible for them to function as instruments of justice, he cannot fail to see a real unity of spirit and technique and doctrine in the lands whose legal teaching and tradition and authoritative texts are derived historically from Rome. He cannot fail to see, beneath the surface of nationalism, that the tradition coming down from the medieval study and teaching of Roman Law in the Italian universities is still something universal, giving a common background for interpreting and applying legislation, furnishing common starting points for doctrine and for jurisprudence, and enabling lawyers in many lands to understand each other and use each other's texts and develop each other's ideas. In this sense there is still a civil law and a world of the modern Roman Law.

A history of American law must begin with the seventeenth century. Indeed, the era of colonization has been fixed authoritatively for some jurisdictions at the first year of the reign of James I (1603). The competition of the two systems for the new world begins then and the condition of each at this crucial period is significant.

System, classification, orderly development of doctrine, and codifying legislation came first in the civil law. The Italian teachers of law, the glossators and commentators, had followed the order of the texts in the *Corpus Juris*. The commentators had gone so far as to put system into each title of the *Digest*. But down to the sixteenth century there was no order in the law as a whole beyond the minimum, based on the procedural order in the praetor's edict, in the arrangement of the *Digest*. In the sixteenth century the Humanists began to work out a system of Roman law

as a whole. They engaged in a systematic exposition of the law derived from the texts instead of an exposition of the texts in their own order. Then three far-reaching changes in the attitude of jurists on the Continent toward the Roman law compelled new methods in legal science, a new juristic apparatus, and above all a new philosophy of law.

For one thing, the Reformation broke down the authority of the coördinate universal system, the canon law, and left the Roman law without a rival as a universal system. Secondly, the rise of separate nations, conscious of their national existence, the establishment of the idea of nationality in place of the academic idea of the formal political unity of Christendom, struck at the root of the theory of the universities as to the statutory force of the *Corpus Juris* as the law "of the empire." It came to be recognized that Roman law, as it was taught in the Universities, was in force because of a customary reception, as the law of each land. Thirdly, the jurist-theologians of the sixteenth century emancipated jurisprudence from theology; and this emancipation was established in current juristic thought by Grotius in 1625.

Thus, while Roman law was left in possession of the field on the Continent, as the one system of law with claims to universality, it was apparent to jurists and to lawyers that it was a universal system not because it had been enacted by a sovereign having jurisdiction over all Christendom but because Christendom had received it and adopted it. Also it was apparent to jurists that they must find some other test of the authority of a principle or of a legal precept than that it was laid down in a text of the *Corpus Juris*. Hence two movements arose, one practical, the other theoretical, which gave us the civil or modern Roman law. The practical movement was due to recognition that the Roman law of the universities, i.e., of the glossators and commentators, who were university teachers, obtained as law because it had been received through the usage of the courts. Lawyers began to study the course of decision in the courts in order to ascertain what part of the *Corpus Juris* was received and in use and what was not. Thus they worked out the *usus modernus Pandectarum* as a recognized system.

Meanwhile jurists sought to find a philosophical basis for the reception of Roman law, upon which to rest the authority of its precepts. This quest led them to adopt reason as the ultimate test of validity. They fell back upon the theory of natural law (i.e., ideal law), which had been urged by jurists in the sixteenth cen-

ture and by philosophers in the Middle Ages. They used this theory creatively, since the rise of commerce, the era of discovery and colonization and the exploitation of the natural resources of new continents, as well as the rise of nations in place of loose congeries of vassal-held territories, called for a reshaping of legal materials and supplementing of them by materials drawn from outside of the law. The result was a liberal, rational, creative period, strikingly analogous to the classical period of Roman law in the ancient world, and guided by the same philosophical ideas of natural (i.e., ideal) law, the same testing of all things by reason, and the same endeavor to make the legal coincide with the moral.

Later the theory of a law of nature discoverable through reason, in connection with the political ideas of an age of absolute governments, led to belief that jurists might deduce a complete system of legal precepts of universal validity and put them in the form of a code. The way was prepared for codification not only by this sort of juristic thinking but even more, perhaps, by the fullness and finality of the systematic expositions of the law by the continental jurists of the eighteenth century. Notably Pothier (1690-1772) put the results of the seventeenth and eighteenth-century doctrine and jurisprudence, so far as they had to do with the private law, in final form. Codification, begun by Louis XIV at the end of the seventeenth century, came at the end of the eighteenth and early in the nineteenth century. By the time American law was to be formative, the civil law was modern, systematized, set forth in texts of exceptional clearness and reasoned coherence, and was on the eve of restatement in codes of permanent importance.

It was quite different with the common law. The history of the civil law begins in the Italian universities in the twelfth century. The history of the common law begins, for practical purposes, in the King's courts at Westminster in the thirteenth century and the teaching by practising lawyers in the Inns of Court known from the fourteenth century. Through the elaborate educational organization of these societies of lawyers the law developed in the King's courts was made into an established taught tradition which was able to resist the onward march of the Roman law in the progress of its reception in the sixteenth century. Yet as it was at the time of colonization the common law was still essentially medieval. Its chief heads were real property and procedure. It was still to be liberalized by equity and modernized by the law merchant and the legislative reform movement. Natural law,

which was making over the law on the Continent, was not much felt in England till the latter part of the eighteenth century. Coke, in 1609, gave us a jumble of Ulpian's identification of natural right with instinct, of the *lex aeterna* and *lex naturalis* distinguished by Thomas Aquinas, and of the identification of law with morals which was in the air at the time. One would say that he had been at a feast of jurists and philosophers and had stolen the scraps. What he describes as natural law could serve no practical purpose toward liberalizing and modernizing the medieval English law. Holt, at the beginning of the eighteenth century, used civilian treatises freely in connection with commercial law and in the great case of *Coggs v. Bernard* in 1703 put the law of bailments on a civil-law basis on which, in spite of the assaults of historical jurists in the latter part of the nineteenth century, it has stood ever since. Hardwicke made intelligent use of the civil law in equity. Mansfield built our law of quasi contract upon the Roman texts and modernized much of the common law by fusing it with equity wherever possible. Even more he carried out the absorption of the law merchant into the common law by judicious use of civilian texts. In Blackstone's *Commentaries*, on the eve of the American Revolution, we get for the first time systematic institutional exposition of the common law. Here the influence of the civilians is to be seen in almost every page; and the natural law philosophy, developed by the Continental teachers of the civil law, becomes a creative instrument in the hands of Hardwicke and Mansfield, and a systematizing and rationalizing instrument in the hands of Blackstone.

But only the beginnings of system had been achieved when American law entered upon an independent development and but little of these beginnings was accessible in America. Just before and for a generation after the Revolution, Blackstone's *Commentaries* were the chief and much the most accessible source of information as to the common law. Blackstone's account of equity speaks from the generation before Hardwicke and he hardly even suggests the judicial overhauling of the older law which was going on under the auspices of Mansfield. There were no treatises in English on commercial law. Besides Blackstone, Coke's *Institutes*, Hale's *Tracts* and his *Pleas of the Crown*, precedents of pleading and alphabetical abridgements were the books in which an American had to seek a knowledge of the English law. If he by chance had access to English law reports, he would find that in first Cowper (1774) forty per cent. of the cases went on technicalities of the

over-refined common-law procedure of the eighteenth century, while the remainder had to do with technicalities of the old feudal law of real property, with *minutiae* of procedure under the English eighteenth-century bankruptcy legislation, with imprisonment for debt, and with the settlement of paupers.

Thus the common law as it came to America suffered by comparison with the civil law both in substance and in form. Although much had been done in the seventeenth and eighteenth centuries to liberalize and purge it of archaisms, except for a scanty commercial law, it still thought and spoke for a relationally organized society such as no longer existed in England and had never existed in the colonies. As to form, the matter was even worse. Coke upon Littleton and Coke's *Second Institute*, the most authoritative books which the colonists and the first generation after the Revolution could use, are commentaries upon the text of Littleton's *Tenures* and upon Magna Carta and the old English statutes, in which the writer puts down everything suggested to his mind by the text as he goes along, wholly without system or logical connection. Any given subject is apt to be treated in part in many different connections, but seldom anywhere as a whole. Another book constantly in use in our formative era was Serjeant Williams' edition of *Saunders' Reports*, in which the editor commented on the cases in the same wholly unsystematic fashion. Nor was there system of the law behind this utter want of organization in expression. The abridgements with their alphabetical arrangement, aimed at no more under each title—usually the name of a writ or of an action—than an analysis which would serve to afford ready reference to the cases. There was almost no generalization or working out of broad principles. Until after the middle of the nineteenth century it was doubted whether it was worth while to think of a law of torts instead of actions of trespass and of trespass on the case. The work of disentangling negligence as a general substantive heading from procedural distinctions between the actions of trespass and of case was not complete till the last half of the century. It is no wonder that even before the Revolution Americans began to turn to the treatises on the civil and commercial law of Continental Europe. Already in *Novanglus* (1774) John Adams argued against the proposition that the colonists, of legal necessity, had brought over English law with them and were bound by it, as review by the Privy Council implied and many a charter provided. He urged that they were entitled to "just so

much of it as they were pleased to adopt" and "were not bound or obliged to submit to it unless they chose it."

Looking at the country at large, for your case in Louisiana is exceptional and out of my province, the civil law influenced the development of American law in its formative period in three ways: (1) through providing systematic ideas for our text writers and thus indirectly affecting the substance of the law through systematic generalizations into which writers, and courts following them, strove to put common-law precepts, or from which they sought to find new precepts in the absence of satisfactory pronouncements of the common law; (2) through resort to comparative law where precepts of English law were not applicable or in the absence of common-law authority; (3) through a movement after the Revolution and at the beginning of the nineteenth century for an American law and a code on French lines, leading for a time in some states to a large use of French authorities not merely on questions of commercial law but on general questions of private law.

Systematic ideas borrowed from the treatises on the civil law exerted an influence on developing American law in an earlier stage through judicial use of French writers and commentators, especially Pothier, and in a later stage through English analytical jurisprudence, which took its system chiefly from the Pandectists, and through English text writers whose books became current or were borrowed from in America, who made systematic generalizations of the Pandectists do the work of explaining common-law conceptions and precepts and sought to mold to a Pandectist pattern more than one subject, more than one institution, and more than one doctrine of the American received common law.

In our nineteenth-century American law books such systematic ideas as had not been taken by the courts from French writers in the early part of the century were taken by text writers in the latter half of the century from English analytical jurisprudence. The effect of Austin's study in Germany has been pointed out more than once. Many systematic ideas in law books of the second half of the century came from Austin who took them from the earlier Pandectists. But many came directly into the English law books from Savigny's treatise on *Obligations* and passed thence into the American texts. Indeed, Savigny had quite as much influence on the later texts on Contracts as Pothier had had on the earlier decisions. One has only to look at Anson on *Contracts*, long the standard English introduction to that subject, with its civilian

theory of agency, its will theory of contracts, and its analysis of an obligation taken from Savigny, to see how great that influence was. In our law of public utilities down to the end of the first decade of the present century we sought to put everything in a civilian mold. There was a legal transaction of professing a public calling or a legal transaction of dedicating property to a public use. Everything else was to be worked out by inquiry into the implied terms of such transactions.

Throughout the last half of the nineteenth century and well into the present century analytical and historical jurists, law teachers and writers, and more than one court strove strenuously to force our theories of liability into Pandectist ideas of liability as a corollary of fault. The starting point was the individual will. One was to be liable for what he undertook. He was to be liable for intentional aggressions. He was to be liable for negligent injuries. In the last two cases he was at fault. Beyond that the will theory forbade us to go. For a season the common-law categories of liability without fault were conceived of as historical anomalies, soon to disappear. So far was this carried that it was held by more than one court to be arbitrary and unreasonable and so unconstitutional for legislation to impose liabilities of that sort. The first decisions upon Workmen's Compensation Acts went upon this proposition. We have only just been able to deliver ourselves from this nineteenth-century importation. We have had to unlearn some of the details, in their application to the common law. But we did not inherit system along with English law nor have we common-law lawyers invented much system. Blackstone's successor at Oxford still believes in an alphabetical arrangement of unrelated subjects. Moreover, we do not set as much store by classification as we did fifty years ago. With all allowances, however, we must concede that our common law texts owe system to the civilians, and some further systematic ideas, such as the theory of a legal transaction and the doctrine of *culpa in contrahendo*, we might learn with profit also.

Looked at with respect to the extent of permanent influence upon American law, if system of the civil law must be put in the first place, the influence of the civil law by way of comparative law must be recognized as a close second. More than one factor operated in the formative era of American law to lead our lawyers and judges to put their faith in comparative law. They were under the influence of a theory of natural law, of an ideal law of which positive law was but declaratory and from conformity to which

positive law derived its real authority. They believed that reason could discover an ideal, complete, universal code, of which positive legal precepts were but declaratory. For public law they could set up an ideal development of the "immemorial common-law rights of Englishmen" as a universal natural law, taking their philosophical mold from Grotius and Pufendorf and Vattel and Burlamaqui and pouring into that mold a concrete content from Coke's *Second Institute* and Blackstone's *Commentaries*. For the private law generally and for commercial law they could not proceed on the basis of the English legal materials so confidently. To some extent, almost from the beginning, American lawyers set out to identify natural law with an ideal form of the positive law as they had learned it. But the English materials were not sufficient and they needed reshaping. Moreover, they were not always or wholly accessible as to questions which arose in the new world and were far from accessible on some everyday questions in many jurisdictions. A strong inclination toward French law had grown out of the political situation after the Revolution and later under the reign of Jeffersonian democracy. But few of the small number of lawyers and judges who had access to the French books knew how to use them. It was chiefly in the form of comparative law, in the hands of Kent and Story, that French and Dutch authorities could be used to enrich our commercial law or to reinforce a point of common-law doctrine, on a theory that comparative law was declaratory of the law of nature.

To some extent this was no more than a phase of a tendency to rely upon comparative law in all matters of commercial law which begins with Holt in the seventeenth century. In contrast with Coke, who had considered the common law of England in every way self-sufficient, Holt often cited the Roman law and the civilians, and in one case went so far as to justify such citations by saying that "the principles of our law are borrowed from the civil law and . . . grounded upon the same reason in many things." Granting that Holt's legal history was somewhat at fault, his liberality was in marked contrast with Coke before him and Blackstone after him, and largely because of this liberality he was able to become the founder of English commercial law. Later Mansfield cited and quoted from the Roman law and the civilians freely and thus gave an impetus to judicial use of comparative law. The English law books of the latter part of the eighteenth century and the nineteenth century regularly approach every subject from the standpoint of comparative law and make copious references to the

Continental treatises and to the Roman law. Naturally this tendency had its effect in America and that effect was heightened by circumstances peculiar to this country.

In the United States, as new commonwealths were set up successively, each entitled to enact or declare the law for itself, there was need for giving direction to the judicial development by which legal precepts were chiefly worked out and established in the first seventy-five years of our national history. From this need, and from favor toward French authorities for political reasons, a conception became current that a universal commercial law, as set forth in the Continental treatises on that subject, was declaratory of natural law and so furnished a binding rule for any court anywhere except as it was manifestly held to some authoritative precept by legislation. English courts had begun by an actual ascertainment of what the custom of merchants was in fact, made as a question of fact for each particular case. Presently they began to consider what the custom of merchants ought to be, and this ought-to-be at first reflected ideas of what was, even to the extent of an assumption that an ideal form of what was could be taken as evidence of what ought to be. It was no less characteristic of the thinking of the time to assume that when courts had determined, as a matter of reason, what the custom of merchants ought to be, that of itself settled what it was. Thus the question as to what was the rule of English law on any particular point of commercial law had a tendency to become a question of natural law. In the hands of American judges and jurists this conception became a ready and effective instrument of shaping and developing the law. The Continental treatises on commercial law, on which Kent and his brethren rely so frequently in the older decisions in New York, are a medley of general commercial usage, modernized Roman law, and juristic consideration of what ought to be on the basis of legal reasoning in general and of doctrinal development of legal analogies in particular. American courts used those treatises to eke out and reshape the English legal materials and thus they served to liberalize our commercial law and also no less to stabilize it. They provided something to which lawyers might turn with reasonable assurance whether as the basis of advice or as the basis of argument. From commercial law this tendency to rely upon comparative law spread to the private law generally. It may be seen in all the text books of the first two thirds of the nineteenth century. Even as late as 1870, when Langdell wished to present materials for study of the law as to the forma-

tion of a simple contract, he included a nineteenth-century French decision and a discussion by Merlin.

Here, as in commercial law, the conception of an ideal of comparative law as declaratory of natural law was both creative and stabilizing. It gave direction to juristic writing, leading to overhauling of the traditional materials, testing reason by experience and developing experience by reason. It gave stability to judicial decision by making it appear that rules of the English common law in an ideal form were identical with an ideal form of the Roman or modern Roman precepts on the same subjects.

In equity especially this idea of comparative law as a kind of universal super-law was fruitful of results. For historical reasons there was in more than one jurisdiction special hostility to English equity. The decisive factor in our general reception of it was Story's *Equity Jurisprudence*. With much art Story made it seem that the doctrines and precepts established by the English chancellors coincided in substance with those of the Roman law, as expounded by the civilians. Thus it appeared that English equity was a body of statements of universal principles of natural law universally accepted in civilized states. But in this process of comparison the civil-law doctrine not infrequently gave shape or even content to a common-law doctrine to which it had been likened.

In connection with system and through comparative law, the civil law had a general influence on American law in its formative era as a whole. A passing movement for something like a reception of French law, very marked at the beginning of the nineteenth century, left its mark in the reception of a few rules and an occasional doctrine of the civil law here and there without any general reception except on its own ground in Louisiana. As has often been pointed out, after the Revolution there was an era of hostility to or suspicion of all things English, in which the common law was not able to escape the odium of its English origin. After the French Revolution and the rise in this country of Jeffersonian democracy, a strong and presently dominant political party was enthusiastically attached to France and disposed to give over English law along with allegiance to England. There was legislation against citation of English decisions. There were rules of court to the same effect. Where the attack on the common law had not gone so far, individual judges sometimes announced that they would not be bound by the technicalities in Coke and Black-

stone. On political grounds many called for an American code grounded in the "law of nature," and after 1804 it was not infrequently assumed that for most purposes that law of nature could be found declared in the Code Napoleon. Some did not hesitate to favor avowedly a reception of French law. For a time French authority stood very high in many states. Then, too, the common law had to contend with prejudices and hard feelings growing out of the economic instability and depression which followed the Revolutionary War. It was a time of imprisonment for debt and strict foreclosure, and the inevitable hardships of the depression aggravated by these legal institutions gave a handle to demagogues who declaimed against lawyers and law and demanded a code made for the new world. Nor was this all. Lawyers were found insisting on the treaty rights of British subjects and Tories whose property had been confiscated. Others were found challenging the validity of legislation by which the obligation of contracts was impaired or vested rights were arbitrarily done away with. Courts were seen to invoke the common law as to misdemeanors against disturbers of the peace in the troubles incident to the bad economic situation. Such things increased popular feeling against the law. It became a party cry that the common law did not obtain in this country otherwise than by reason of and to the extent of enactment. For a time there was no little likelihood that many states, at least, would abandon the Anglo-American legal tradition and enact codes. Following the New York Constitutional Convention of 1846, there was legislative provision for an elaborate series of codes and the Field draft codes which ensued were a subject of controversy in that state for some forty years thereafter. In the end, but three states adopted these codes. But they were far from well drawn and almost from the start were construed as declaratory of the common law. They were copied, not too wisely, in the codifying legislation of British India. On the whole, they have had little permanent effect and the influence of the civil law by means of them has been negligible.

An incident of the movement for an American code along French lines was a practice of referring to French authorities on purely common-law questions, even where by statute the common law was in force whenever applicable. On questions of commercial law and to a less extent in equity there was warrant for this, as there was also where applicability of a common-law precept to this country was in issue. But in New York especially, in the first three decades of the nineteenth century, the civilian law books

and Roman texts were used, not merely in commercial law, equity, and conflict of laws, but on such subjects as damages on a covenant for title, original acquisition of property, and rights as between owners in common. As late as 1860 the Court of Appeals of New York decided a question of the law of fixtures on the basis of French authorities although there was abundant common-law authority for the result arrived at and no difference of result was involved. This would have been understandable if the applicability of the common-law precept had been raised. As the case stood, it was but a fashion surviving from the time when French law was competing with English law in the texts and so in the courts. A few rules and a doctrine or two came into the law of some of our states through this movement. The New York courts adopted the doctrine that a surety might call upon the creditor to exhaust his remedy against the principal before pursuing those secondarily liable. A few states followed by judicial decision, and others followed by statute. Today the tendency is to limit the doctrine wherever it is received. In Massachusetts, the Supreme Court adopted from the French Civil Code the rule as to riparian rights which now obtains throughout the common-law world. Ohio took over from the civil law its doctrine as to cases where an agent acts in good faith without knowledge of termination of the agency through death of the principal before the transaction. The net result was very little. Before much had been absorbed from the French books, the era of faith in natural law, the legal age of reason, had come to an end, and the age of history was at hand. Where the eighteenth century and the first part of the nineteenth century had ignored the legal past and had felt equal to making a whole system of law anew, out of whole cloth, by sheer reason (even if inspired at times by French or civil-law treatises) the later nineteenth century was putting its faith in historical continuity and so was looking back to Blackstone and Coke and the Year Books.

As one studies the text books and the reports of the formative era of American law, he may well wonder how it came about that notwithstanding its marked advantage of form and system, as compared with the common law, notwithstanding the appeal which the idea of codification made to the laity, as promising us an American law made to order, like our political institutions, for the new world, notwithstanding the popularity of things French and unpopularity of things English in the Jeffersonian period, the

civil law was not received and the direct taking over of rules and doctrines from the French code and French treaties was so small.

There were many reasons and they are not without instruction for us when we come to consider what is to be the future of the two systems in this country.

Probably the reason which was primarily responsible is to be found in the nature of law as distinguished from laws. Law is characteristically a taught tradition and, as Maitland puts it, taught law is tough law. The law teaching of our formative era was of the apprentice type, as it had been in England after the sixteenth century. Many of the leaders of the American bar on the eve of the Revolution had been trained in the Inns of Court. Many of the leaders after the Revolution had been apprentices of those pre-Revolutionary lawyers. Generations of apprentice trained lawyers handed down a tradition of the common law which resisted systematic text books, reform legislation, and popular demand for a code. Law schools did not begin to take the lead in the training of American lawyers until the second third of the last century, nor was that lead achieved until the twentieth century. Until the end of the nineteenth century there were relatively few academic law schools in the United States. By far the greater number of lawyers came from apprentice training in offices or from apprentice type law schools. The real growth of the university law school, such as now definitely prevails in the United States, does not begin until 1870. Before that there were apprentice type law schools under the eaves of universities and gradually absorbing more and more of the university spirit. The law teacher as a distinct branch of the legal profession and the law school as a definitely academic institution, and above all a profession almost wholly trained in academic law schools by professional teachers of law, are phenomena of the present century. Thus right down to the present century a common-law tradition was handed on from the English trained bar of the colonial era. The obstinacy and persistence of such a tradition is a commonplace of legal history.

No mean factor in the vitality of this tradition was its political aspect—the tradition of the common law as the birthright of the colonists, standing between the citizen and oppressive action on the part of those who wielded the power of politically organized society for the time being. It was taught as an inherited body of safeguards, protecting the individual colonist against the Crown, the royal governor, and even, as Coke taught, against Parliament. The contests between the courts and the Stuart kings put

the courts in the position of standing between the Crown and the subject and vindicating the immemorial common-law rights of Englishmen. Coke's *Second Institute*, the classical exposition of this doctrine, was published by order of the Long Parliament. It set forth ideas most congenial to the Puritans, capable of application wherever there was friction between colonists and royal governors or between colonial legislatures and the powers of the king in council. As far back as 1728, the first item in the series of events which led to the Revolution, the pamphlet of the elder Daniel Dulaney, grew out of provincial legislation in Maryland which was afterwards disallowed at Westminster as inconsistent with English law. Andrew Hamilton's argument at the trial of Zenger (New York, 1735), Otis' argument against the writs of assistance (Massachusetts, 1761), the tract of the younger Daniel Dulaney against the Stamp Acts (Maryland, 1765) and the Declaration of Rights of the Continental Congress (1774) all insist upon the common-law rights of Englishmen as the rights of the colonists. In 1776 the Virginia bill of rights all but enacts Coke's *Second Institute*. Thus the very events that were separating the colonists from England politically tended to make for a reception of the common law. They gave to Blackstone's *Commentaries*, published at the psychological moment to be a quarry of arguments for the colonists, a position as an authoritative statement of the fundamentals of law which the book has held for the average American practitioner outside of Louisiana ever since. The idea of the common law so transmitted was thoroughly congenial to the pioneer, and much of America, even today, is not far removed from pioneer conditions and modes of thought.

Again, the civil law is characteristically a law of the universities. In Continental Europe it grew up in the Italian universities and it has been developed and handed down in the universities ever since. Its form, next to codes, has been doctrinal treatises coming from university faculties. Its oracles have been professors of law. In formative America there was no university teaching of law to propagate the civil law. When university teaching of law became the rule in the United States, the time had gone by when the civil law might have been received.

Again, American lawyers are not polyglot and translations were not at hand at the crucial time. If English books were not to be had easily, French books were doubly inaccessible. There were no such law publishing houses as we have today to push the sale of a law book throughout the land. Books published by local

printers had a very restricted circulation. Pothier on *Obligations* was translated by Francois Xavier Martin in 1802, but the translation was not widely known. Pothier's treatise on *Sales* was not translated till 1839, nor his treatise on *Partnership* till 1854. There was an American edition of Domat in 1850. Except in Louisiana, few read French, and the translations came too late. When they began to be available, equity had crystallized, the law merchant had been absorbed, comparative law had become decadent, the dominant historical school of jurists was preaching the duty of historical continuity, and a long line of excellent text books, headed by those of Chancellor Kent, and Mr. Justice Story, had made the common law on all important subjects accessible and, indeed, familiar. Where the older American law books had seriously discussed in almost every connection the doctrines and precepts of the civil law in comparison with those of the common law, references to the civil law degenerate in the later books to not much more than a flourish, and in the last quarter of the nineteenth century become an empty flourish and disappear.

Are we to say, then, that the story of the influence of the civil law in America, outside of Louisiana, came to an end in the third quarter of the last century? I do not think so. Two events of the immediate present, namely, the renaissance of the civil law in Louisiana through teaching in the law schools of the universities, and the revival of comparative law throughout the world, seem to me of capital significance. The future of the civil law in Louisiana is for another to discuss this afternoon. It was not long ago that I discussed the revival of comparative law before the bar of Louisiana. I need not repeat. It is enough that comparative law takes its whole scheme and system from the civil law and will ever find a chief quarry of legal materials in the Roman law books and the development of the modern Roman law out of the *Corpus Juris*. An influence of comparative law will carry with it an influence of the civil law, and one cannot doubt that comparative law is coming once more into its own wherever law is taught and studied. The freeing of the science of law from the shackles imposed by the historical school, the economic unification of the world (going on in spite of nationalism everywhere), and the need of overhauling nineteenth-century law and reshaping it to the exigencies of justice in the twentieth century, repeat the conditions that made comparative law an instrument of the first moment in our formative era. Along with comparative law will come the civil law as at the bottom of any canons of comparison.