

Louisiana Law Review

Volume 10 | Number 1
November 1949

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Ernst Rabel

Repository Citation

Ernst Rabel, *Private Laws of Western Civilization*, 10 La. L. Rev. (1949)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol10/iss1/8>

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Private Laws of Western Civilization

Ernst Rabel*

Human history has entered a new phase. That it should have produced "one world" we cannot very well see. But that the countries of western civilization have awakened to a better consciousness of their historical relations and the immense stock of their common vital beliefs, endeavors, and cultural resources—this is an overwhelming event that should never again be obliterated. The lawyers have compelling reasons and magnificent opportunities of sharing the great work of consolidation, cooperation, mutual understanding, reciprocal aid, universal progress, and international scientific development. Our foremost task is to bridge the age-old cleft that runs through the western laws, separating the Anglo-American "common law" from the "civil law."

"Common law" is a popular term denoting the law of England and the United States as a whole, or at least inasmuch as it is not changed by statutes or special doctrines. "Civil law" indicates the law of all the countries in which Roman law was, at one time, received or one of the romanistic codes has been imitated. Their territories include all of Western, South and Central Europe, Louisiana, Quebec, Puerto Rico and all countries of Central and South America, the Philippines, Egypt, South Africa, Ceylon, Japan, China and Siam. Moreover, the law of several states of the United States has been considerably influenced either by French or Spanish law.

Study of foreign laws and comprehensive comparison of purposes and effects of the various legal systems affords the answer to many of our gravest problems.

In the United States, comparative legal research has been

* Research Associate, University of Michigan. Formerly Professor of Law at the University of Berlin, Director of the Kaiser Wilhelm Institute for Foreign and International Private Law, and judge in international courts.

The Louisiana Law Review begins herewith the publication of papers read by the author as guest lecturer of the Louisiana State University in April-May 1949. The lecture on Roman law was also a part of the unprinted lecture series, *The Conception of Civilization: A Historical Analysis*, at the University of Chicago, on July 16, 1947.

The other papers in this series, "The French Civil Code," "The German and Swiss Codes," "The Civil Law and the Common Law" and "Our Laws and the World" will be published in the following issues of this volume. The Louisiana Law Review will also republish the entire series of papers on "Private Laws of Western Civilization" in booklet form.

cultivated in an extremely useful judicial and literary work, because of the coexistence of the several states of the United States, all legislating in sovereignty. Out of disparate rules, principles of American law are crystallized and through restatements and uniform state laws uniformity is growing, in better harmony with the standardized habits of American life and business. But everywhere in the states with the only exception of Louisiana, the Anglo-American law is the basis. Here, a French code with Spanish elements is posited against the background of the Anglo-American surroundings. In this state, civil law and common law, these allegedly irreconcilable antagonists, are parents to the actual law. This, indeed, is an ideal place where the two halves of our juristic heritage may be examined and judged.

Many avenues are available to approach the foreign and international legal phenomena. But an American student leaving the familiar scene of his domestic law may prefer to look first of all on the most outstanding phenomena of the civil law: the Roman law whose body and soul migrated through so many transformations, and the civil codes of France, Germany and Switzerland. Hereafter we shall examine the famous antithesis between civil law and common law. Finally, we ought to raise the question whether the present condition of our laws satisfies the requirements of the contemporary international life.

PART I. THE SIGNIFICANCE OF ROMAN LAW¹

On the main gate of the Imperial Palace of Vienna, the seat of the House of Hapsburg who ruled the core of Europe for six hundred years, the inscription reads: *Justitia Fundamentum Reg-*

(1) Introductory Note. The Periods of Roman and Romanistic Law.

The Twelve Tables (450 B.C.) reflected the law of a small patriarchal community. But the juriconsults from about 100 B.C. to the end of the Republic (28 B.C.) and subsequently, those of the "classical jurisprudence" (until about 250 A.D.) reached a height unrivalled in antiquity and middle ages. In the early Byzantine period (from Constantine, 300 A.D.) the Roman legal conceptions and rules to a certain extent were mixed with Oriental, Greek, and Christian elements in practice and in the law schools of the Orient. On the order of the Emperor Justinianus, the (later so-called) *Corpus Juris* was compiled, consisting of the *Institutions*, the *Digest* and the *Code* (A.D. 529-534). This work was taken as basis for the law of the Church (Canon law) and was most thoroughly but uncritically studied in Bologna and other universities by enthusiastic scholars, the "Glossators" (1080-1250 A.D.). One of them, Vacarius, was the first to teach Roman law in Oxford, England (from 1149 or a little later). The subsequent school of "Legists" or "Postglossators" adjusted the "Glossa" to the practical needs of the Italian cities and obtained a comprehensive legal system (1250-1400 A.D.), which in the course of several centuries was adopted in most parts of the European Continent, not only as a scientific model but as the law in actual force, though blended in very different dosages with Germanic conceptions. This system was the object of all the following juristic efforts inspired by such

normum. In these three words, justice is the fundament of government, which have significance for international life as well as internal administration, the function of law was summarized exactly as under the Roman emperors. It was not by accident that the motto was in Latin. In the origin and the consolidation of the European monarchies at the dawn of the modern state, Roman law was an essential factor.

I. THE CAUSES FOR ITS SURVIVAL

But this is only a part of the answer to the question what Roman law has meant to the Occident. Another part is in the words of a Canadian writer of 1907, that "the Roman law is a great step toward the growth of the human mind, although one which has been strangely neglected in professed histories of civilization."²

Roman law, the law of ancient republican and imperial Rome, was essentially developed by a class of professional lawyers, similarly as was its counterpart, the English law. In the Roman republic, the lawyers were originally high priests, but relatively early, from about 300 B.C., were followed by laymen belonging to the same aristocratic ruling class as the pontifices. During the following period of the principate, that is, the early or Roman Empire (from 28 B.C. to 250 A.D.) the lawyers were high functionaries including former consuls and governors. The last great jurists were prime ministers. They were not judges as were the English leading jurists. Only their personal reputation supported

great currents of mind as the earlier and later humanism, moral theology, the reformation, the philosophy of natural law, and furnished in its latest aspect much of the materials of which the European codifications were composed. Around 1800 A.D. the immensely scattered laws of Prussia, France, and Austria were unified in codes. In a third of Germany, "Roman" law remained in force until the Civil Code (1900). These and similar codes in Italy, Spain, et cetera, have been highly influential in most countries of the world. These laws are called "romanistic" to the extent that their content goes back to the teaching of the Italian doctors.

Literature:

- Wigmore, *A Panorama of the World's Legal Systems* (St. Paul, 1928)
3 vols.
- Sherman, *Roman Law in the Modern World* (3 ed., New York, 1917)
3 vols.
- Vinogradoff, *Roman Law in Medieval Europe* (2 ed., Oxford, 1929).
- Buckland and McNair, *Roman Law and Common Law* (Cambridge, 1936).
- Articles (in English) on Roman law in the British Empire and in the United States, by Lee, Sherman, and Radin in (1934) 2 *Atti del Congresso Internazionale di Diritto Romano*.
- Schulz, *Principles of Roman Law* (Oxford, 1936).
- Koschaker, *Europa und das Römische Recht* (Muenchen, 1947).
- Stintzing and Landsberg, *Geschichte der deutschen Rechtswissenschaft* (1880-1910).
2. Lefroy, *Rome and Law* (1907) 20 *Harv. L. Rev.* 606.

them when they gave unofficial consultations, drafted contracts, taught and wrote, and in a continuous vivid forensic debate counseled prudent little changes in the law, which accumulated to a soberly practical, all-inclusive transformation of a small town's law into the richest and most effective set of legal thinking the world ever knew before and for a millenium thereafter. On the background of an empire expanding to the borders of the known world, legal art grew in periods, comparable to the stages of painting from Giotto's stiff beauty to the faultless perfection of Leonardo and Raphael. The terse responses of Papinianus have been reputed in subsequent times as enigmatic and our eager text critics have impugned quite a number of them as spurious. Not at all. It needs a highly equipped modern jurisconsult to comprehend the wisdom and concentrated thinking of this classic prince of jurisprudence, as he was called in the fourth century.

Of course, it did not yet amount to what we call legal science. The discussion was primarily concerned with cases, quite as in English common law, originating in the tribunals. And again, as in common law, the case was envisaged as a problem of court proceedings rather than in the terms of right and duty among citizens outside litigation. But if we turn over the pages of English legal history, we sometimes wait breathlessly: will finally the same result be reached as once in Rome? Titus has sold by mouth a slave to Gaius for 100,000 HS., or stated in the English manner, Brown has orally sold four horses to Jones for 200 pounds. Can the seller sue the buyer? Yes, said the Romans from times before Christ; the answer in England was no, as late as in sixteenth century, and has been no again from the year 1677 A.D. On to this day, in England and the United States, when there is a memorandum in writing, the seller may sue in our courts for damages for nonacceptance just as in classical times, but not always for the price as under Justinian, and as it will be the rule in the future American sales law.

The jurists in Rome thought in terms of cases of litigation but each of their solutions fitted into the pattern of a growing body of categories and rules. They were eminently conscious of the main purpose of law, namely, that of creating peace and order. Without formulating a system, they created the materials for building one. And this is what in an awkward and hesitating manner the Byzantine epigones of the great masters gradually attempted to do; and what the Postglossators many centuries

later achieved, brilliantly in the opinion of their successors, although our own ambitions go higher.

Thus it happened that the *Corpus Juris*, as elaborated by the medieval scholars of Bologna, presented itself to the educated classes of the European continent as an enormous collection of gnomonic wisdom plastically manifested in a mosaic of single decisions, but for the first time clothed in persuasive theoretical language.

There was much more to it, however. The most important portion of the Roman law in the third century A.D. had been freed from its archaic and national formalities and limitations. A business law was established suitable for every one of the multitudes of peoples living in the Empire. Subsequently, the center of this world shifted to the East—where from time immemorial deep thought and legal custom and thriving trade were flowing in mysterious richness; where the most ancient laws mingled with Greek city laws and the governmental ordinances of the kings, the successors of Alexander the Great; and the Roman rule superimposed new elements upon this baffling fusion. This Byzantine period, the period between the great classics (250 A.D.) and Justinian's compilation (529 A.D.) was fertile not only in academic studies but changed the spirit of the Roman institutions. We have learned to recognize many Greek and important Christian innovations, and modern scholars are hoping to diagnose more exactly the measure of the various Oriental influences. We may say that much of the oldest and best proved social experiences of mankind is laid down in the so-called Roman law.

In the Middle Ages, however, this inheritance was treasured as something more than the product of learned jurisprudence. The German emperors of the Middle Ages considered themselves as the legitimate successors of the Roman emperors. Justinian, the sponsor of the *Corpus Juris*, was their vaunted predecessor. The *Corpus Juris* was a symbol of the continuous empire, its law book. At the same time, the Roman church based its own law on the Roman traditions. Empire, Papacy, and Roman law were the three great pillars remaining upright in the collapse of the ancient world, all three of universal significance "for all peoples,"³ the pillars on which the medieval civilization rested; and the Roman law was the only secular cultural possession secured by the authority of both the church and the emperor.

3. Justinian addressed his "*Constitutio Tanta*" introducing the Digest to the Senate and all peoples ("*ad Senatam et omnes populos*"), the Greek version adds "of our oecumenicity."

All this must explain the firm conviction prevailing from the eleventh until far into the fifteenth century that there was only one law, the authoritative, written, wise and eternal law of Bologna, the *ratio scripta*—the embodied legal reason. The most astonishing in this sequence of events is the so-called reception of the Roman law in Germany, in the course of several centuries, from the fourteenth to the eighteenth, without any historical preparation, as was the case in South France, without any legislative act, a book in a foreign dead language.

To gain such a conquest, Roman law had developed new attractions. Two only may be mentioned. The law of the ancient world offered a system of commercial institutions, which after successive adjustments could support the very considerable business life of the many flourishing Italian cities such as Florence, Pisa, Genoa, and Venice, as well as of all the trading centers such as Marseilles and Paris, Bruges and Ghent, Augsburg and Hamburg and Novgorod. Maritime law can trace its evolution directly back to the Rhodian Sea law; the "general maritime law" (in the parlance of English and American courts) has been strikingly uniform throughout the seafaring nations. On the other hand, the states emerging from the decay of the feudal system needed and used the lawyers trained in Roman law as administrators, judges, notaries and advocates. The consolidation of the modern European state was intimately connected with the birth of bureaucracy—the civil servants being selected from the ranks of the lawyers. The Hanseatic league chose its office heads not otherwise: the secretary of the "factory" in Bergen (Norway) was always a doctor of laws and in the great steelyard in London ultimately the most influential representative was regularly a man trained in Roman law.⁴

Toynbee speaks of an Italistic Age of western history.⁵ He refers to a new era of the old Italian culture set into motion by the achievements of the city-states of Northern Italy during the Renaissance and continuing in the North of Europe from the fifteenth into the nineteenth century. This is quite true with respect to the formation of law and state, although the historian does not mention this aspect.

Finally, the thinkers in all the great spiritual movements from the Fathers of the Church to Canonists, Humanists, and social emancipators, have referred to the ideas of law and justice

4. Cheyney, *The Dawn of a New Era 1250-1453* (1936) 26f.

5. Toynbee, *A Study in History* (reissue, 1948) 6 vols.

with their eyes on the Roman law or what was so called at the time. It is curious to read Christian Wolff and his deductions from the postulates of Natural Law. Almost invariably, his conclusions end in a Roman rule of law.

At present there are not many law courts left in the world where the *Corpus Juris* is applied as a living statute. It is still in force in South Africa and Ceylon. Even there, as soon as the South African Supreme Court has decided a problem, this decision becomes a source of law, and makes the Roman law obsolete. Yet the innumerable transformations, through which the Roman law has gone during the thousands of years in the distant places of the earth, are the object of continued passionate studies conducted by scholars of all nations. The fragmentary monuments of this antique legal world still appear as an inexhaustible storehouse for the most diverse subjects. A learned American lady, Mrs. Mary Brown Pharr, confirmed this in *The Classical Journal* of April 1947 by an article on *The Kiss in Roman Law*.

II. SIGNIFICANT FEATURES

1. Roman law in all its stages has increasingly abandoned its national character; it was the common law of the Roman empire, pagan and Christian, of northern Italy, of the European continent. In all these periods many local customs and laws changed the picture from people to people, from region to region, from town to town. Even at the time of the *Imperium Romanum* after the *Constitutio Antoniniana* which conferred citizenship on broad classes of inhabitants, many other laws remained alive. And the "Roman" code, in substance, was less Latin than an average American Statute book is English.

It is this peculiar ability of the Roman law of living in symbiosis (union) with diverse legal organisms that has promoted its functioning as the medium of legal science. In fact, we may recognize at last that no legal science, in the usual meaning of the word, is produced by isolated nations. Cicero, disgusted by the casuistry of his contemporaries, asked for a thoroughly elaborated system of legal rules; but the time was not ripe for it, the old city law had not yet experienced the full impact of the needs of the empire. In the North, nearer to our times, Scandinavia and England have demonstrated what self-sufficient laws may and may not achieve. The invasion of the cosmopolitan Roman system into these secluded countries was successfully resisted. When Vicarius in the twelfth century imported the *mos Italicus* (teach-

ing law in the exegetic manner of Bologna) into Oxford, King Stephen was induced to prohibit his lectures. And the Barons at Merton, A.D. 1236, declared, "*Nolumus leges Angliae mutare,*" marking the divorce of English law from Canonistic and Roman legal thought. In the sixteenth century the acute rivalry between the ecclesiastical and civilian jurists—the Doctor's Commons—and the common law courts was won by the latter under the mighty leadership of Sir Edward Coke. Now, strong particularistic feeling is a natural phenomenon, and the British Isles and remote Scandinavia were fortunate in being spared the continental turmoil. What the English lawyers achieved by themselves is extraordinary. But if we look to the beginnings, we see that old customs could not provide the logical definiteness, the generalizations and abstractions needed for legal system building. When Glanville (1187) and Bracton (1250), the founders of the English law, attempted to bring order into the mass of decisions, they simply resorted to the Glossa. The Glossator Azo prepared the ground on which Bracton discussed law and justice, king and people, the binding force of judgments, usage, and sovereignty. Of course, he took "logic, method, spirit rather than matter."⁶ Again, the modern evolution of Anglo-American theory started with John Austin's analytical jurisprudence under the influence of the German Pandectists; and the highest achievements have been due to such scholars as Sir Frederick Pollock and Roscoe Pound whose broader and superior knowledge of the outside world revealed the "spirit of the common law." Roman law has encountered in both hemispheres as much enmity as enthusiasm. It is well recognized that "the true grounds and reasons of law were so well delivered in the Digest that a man could never understand law as a science so well as by seeking it there."⁷ Everywhere, the transition to a new era of civilization required essentially more and better coordinated thought on the relations between man and man and on the function of legal rules than the original development could afford.

2. Conceptions of state constitution and administration have changed so much in the course of history that the ancient methods of governmental organization are inapplicable. Only by specious arguments, the doctors of Roman law bolstered the claims of their masters, emperors and kings, through quotations from the

6. Maitland, *A Sketch of English Legal History* (1915) 42, 44.

7. Hale, quoted after Bishop Burnet by James Bryce (1901) 2 *Studies in History and Jurisprudence* 477. See also Buckland, *Equity in Roman Law* (1912) 131; Lefroy, *loc. cit. supra* note 2.

Corpus Juris. A favorite device was to invoke the fragments that in Justinian's meaning elevated him over mankind and human law, as the mediator between God and men. We may, however, note the legend about the Glossator Bulgarus, riding on the right hand of the Emperor Frederic Barbarossa, while Martinus rode on his left. Barbarossa asked them whether the emperor was not by right Dominus, lord, of everything held by his subjects. Bulgarus replied that he was lord politically but not the owner.⁸ And when Thomas Cromwell quoted to Henry VIII the sentence that all was law what pleased the emperor, and turned to the "civilian," that is Romanist, Stephen Gardiner for support, Gardiner told the king that it were better the king make the law his will than make his will the law.⁹

3. The most lasting and intensive Roman influence has been exercised on private law. The Romanistic doctrine offered adequate basic concepts, sharply defined in concise and consistent terminology; mature rules; a complete system; logical firmness tempered by a high sense of equity—all this stabilized by the principle of civic equality. It was a law designed for maintaining justice in the social intercourse of free individuals. Modern international law, in its efforts for peaceful coordination of sovereign states, has never found a better model.

The institutions of Roman private law, so smoothly practicable and easily adjusted to new purposes, were capable also of a sort of transmutation. Out of the materials furnished them by history, the Postglossators developed maritime insurance, negotiable instruments and the first doctrine for the conflict of laws. In the sixteenth and seventeenth centuries such basic legal subjects as contracting by consent, agency, assignment of debts, and contracts in favor of third persons were brought to their simple completion on the lines of their ancient evolution, an achievement that Justinian's compilers had been unable to perform.

4. We should stress the social purposes more than technical qualities of the law.

Germanic judicial contests were often decided through battle. Church and Roman law united against this deeply rooted custom. In a long struggle, the medieval ordeals were replaced by the modern principle that litigation is decided by production of evidence. It has taken even longer, however, to regain the prin-

8. Bryce, *supra* note 7, at 95.

9. Plucknett, *The Relations between Roman Law and English Common Law Down to the Sixteenth Century* (1940) 3 U. of Toronto L. J. 24, 46.

ciple natural to the classical Roman procedure that the judge should evaluate evidence brought before him according to his own conscientious conviction, and not bound by formalized legal rules determining what this or that document is worth, how many witnesses are needed, of what kind, et cetera. Common law lawyers, it is true, have never adhered to this Romanistic view. To weigh the merits of the excellent big American compendiums of rules on evidence against the continental systems may well be one of the many topics for which comparative research is desirable, with due appraisal of jury procedure.

That men are free and equal, in antiquity, was a principle restricted to the citizens, but philosophers and jurists expressed views that inspired the modern school of natural law in its successful fight to free the serfs, the peasants attached to the lord's land—the persons of the serfs as well as their land. "Nothing is sweeter than freedom," said Cicero; "other nations may endure servitude, our nation cannot." Lawsuits were decided, wills construed "in favor of freedom." Divorce was permitted because marriage must be free. And under Justinian freedom is declared "inestimable" in money. Freedom of speech under the most ill-famed emperors shames many modern states. And it was a firm axiom respected throughout the old empire that the Italian soil was free. Free ownership was incompatible with tributes and stipends and forced labor, in strict contrast with the situations in the Roman provinces, the Middle Ages, and all the manifold English tenures up to 1925. America has returned to these simple ideals.

In the Spanish *Siete Partidas*, most influential on Spanish and Latin-American laws, you may find quoted the Supreme Commands of Law,¹⁰ which Justinian took from the classics.¹¹ They illustrate what Dean Roscoe Pound has called the Roman idea of a moral rule of conduct backed by the authority of the state.¹²

Jus est ars boni et aequi. Law is the art of finding the good and the equitable. *Cuius merito quis nos sacerdotes appellet*—of which rightly we may be called the priests, and so on. *Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*—The commands of law are three: to live honestly; not to wrong another; and to attribute *suum cuique*. To each his own! This was not just a high-sounding phrase; the

10. *Siete Partidas*, Part. III, tit. 1, c. 3.

11. *Ulp. Digest* 1, 1, 1.1 pr. § 1; 1.10, § 1.

12. Pound, *The Task of Law* (1944) 50.

sources bear overwhelming testimony to the serious effort made to bring reliable and equitable justice into the social relations. Man is an individual with his clear cut rights in his own sphere, which the state respects and impartially guarantees. Man is protected as an individual, not as the member of a group or class,¹³ a guild or inn, lord or vassal, knight or burgher, squire or serf. What it means, that public and private spheres are neatly distinguished, we could recognize in observing the increasing worship of the state in the totalitarian absorption of the individual. No wonder that the Nazis hated Roman law. If the citizen from his cradle to his grave is merely the leader's soldier, he has no right of his own, and no private law is left indeed. *Alterum non laedere*. Do not violate the right of others. The Romans knew the conflict hidden in this maxim. Asking when does one injure another, they were the first to crystallize the profound Greek ideas of volition and action into a foundation of legal responsibility. The thought process of more primitive nations resembles the story told in the Arabian Nights: A traveller lost in a lonely place finds a few dates and after eating them throws the stones of the dates away. Suddenly a demon appears and accuses him of having murdered by a stone the ghost's invisible son. Such is archaic law. The deed makes one liable, not evil intention nor negligence. The Romans gradually refined their concepts of *dolus*, *culpa*, *factum*, *imperitia*, *neglegentia* and so forth. On the basis of their doctrine of fault, an immense discussion by canonists, criminalists, and philosophers has since turned the problem of responsibility over and over. As early as in the Twelve Tables, the universal ancient right of blood vengeance was, for minor crimes, replaced by fines. The state already was well on its way to a monopoly of penal jurisdiction.

Qui suo iure utitur neminem laedit, use of my right cannot be taken from me because it injures another. As a consequence of individual property, you may dig in the ground all the water or build a high wall near the boundary of your land, depriving your neighbor of his water or light;¹⁴ or you may blast your rocks and undermine thereby the neighbor's house. But the Roman rule was restricted more and more; "for we ought not to use our right badly"¹⁵ and after a long evolution it finally yielded to a doctrine of forbidden misuse of right. In contrast, as late as in

13. Pincoffs, *The Object and Value of the Study of Roman Law* (1881)
15 *Am. L. Rev.* 555, 570.

14. *Marc.-Ulp. Dig.* 39, 3, 1, 12.

15. *Gai. Inst.* 1.53.

1895, Lord Halsbury held that where my neighbor diverts or appropriates water within his own land so as to deprive me of it, nothing can be done; it is a lawful act, however ill the motive might be.¹⁶ Again, American decisions disapprove an unnatural, unusual or spiteful exercise of land ownership.

Honeste vivere. Pandectists have said that this precept prohibits not only what is penalized by express provision but also whatever is contrary to good customs, all that offends morals and decency. Equity and honesty in the Romanistic tradition permeate the entire law; no barrier is erected dividing law and equity. The Christian Byzantine sources abound with such terms as *pietas*, *fides*, *humanitas*, *aequitas*, *officium*.

This is another remarkable contrast with the harshness of English common law from which, however, American courts have in almost every instance emancipated themselves—in fact though not in theory. Take the right of a voluntary agent to be compensated for expenses. This goes back into the earliest known phase of Roman law. When the owner of a place went abroad, it was customary that a neighbor intervened for his interest, and according to his presumable intention, defended him in a lawsuit, repaired his fence or healed his horse. The civil law codes have inherited an elaborate institution of *negotiorum gestio* starting from the rational idea that, as Ulpian said, it is in the public interest that absentees should be defended, and influenced by the Christian idea that altruistic action is laudable. In England, as late as in 1911 a judge refused any claim for expenses of a voluntary agent, because “according to English law liabilities are not to be forced on people behind their backs.”¹⁷ Yet American courts will grant recovery of money spent by a neighbor who supports another’s house threatened by collapse, or the fee of a doctor who treats an unconscious man. Recovery for salvage at sea has always been an exception simply because it belongs to the general maritime law, also recognized in England.

Also the history of the so called action for unjust enrichment is characteristic. The Romans perceived the force of the idea that transaction made in perfectly legal forms may offend the sense of justice, and framed conditions for allowing a plaintiff to recover where his property is retained by the defendant without just ground. The rules of the classical period were much enlarged by the *Corpus Juris* and certainly too much in the eigh-

16. *Mayor of Bradford v. Pickles* [1895] A.C. 537, 594.

17. *Lord Bowen in Falcke v. Scottish Imperial Ins. Co.* [1886] 34 Ch. D. 234, 248.

teenth century where the maxim prevailed: no one shall be made richer to the detriment of another—a dangerous principle which Lord Mansfield used with prudence. But whereas the German doctrine progressed on the rediscovered Roman lines to genuine rules, to a definite doctrine of unjust enrichment, the English courts disapproved Mansfield's principle as "vague jurisprudence"¹⁸ and "well-meaning sloppiness of thought"¹⁹ with the result that English law now lacks a firm theory in this field, although it once had the same conceptions as the classical jurists. Anglo-American law has not yet a sure foundation, but it has developed a great mass of decisions, rich in ideas, rivalling the German practice.

III. ROMAN LAW AND COMMON LAW

I certainly do not wish to imply that everything in the Romanistic system is blameless, or that the long after effect of ancient and fragmentary sources of law always worked as a blessing. By no means! I only want to convey to you the feeling of its significance in human history. In comparing Roman law with its only true rival, the Anglo-American law, which looks back to a proud and unbroken evolution of eight hundred years, we should hesitate to pronounce any general judgment. Their formative stages contain striking similarities, as also in the organization of both the English and Roman empires parallels are manifest. Why Romans and Britons knew at the same time how to build durable reigns over other nations and how to promote private law may be conjectured.²⁰ Not only were both peoples successful also in business, industry, commerce and agriculture,²¹ but above all both respected, in the limits of their situations, the personality of individuals and the autonomy of nations.

Nevertheless, we perceive that the influence of Canon and Roman law upon England was limited to two fields: an often repeated inspiration to scientific efforts, and a direct incorporation of rules into some special branches of law administered by special courts: ecclesiastical, chancery, admiralty, and probate courts, and the law merchant. The true common law as pronounced by the Kings Bench impresses foreign jurists as entirely peculiar because of its quaint Norman-Latin-French terminology, venter-

18. Lord Sumner in *Sinclair v. Brougham* [1914] A.C. 398. Cf. Lord Wright, *Legal Essays and Addresses* 1.

19. Lord Scrutton in *Holt v. Markham* [1923] 1 K.B. 504, 513.

20. No explanation seems possible to Koschaker, *supra* note 1, at 82.

21. William H. Page, *Statutes as Common Law Principles* (1944) Wis. L. Rev. 175.

able formulas, remainders of feudalism, a law made by great judges rather than codes, the inductive approach and pragmatic outlook, a very special atmosphere. It is a most imposing, mature product grown by an indigenous, continuous discipline.

However, by indirect radiation from the science of Roman, Byzantine, Italian, French, Dutch and German scholars, incessant work went on through the centuries. This source of inspiration has been attested by the *regii professores* in Oxford and Cambridge who have been teaching "civil law" from Henry VIII to this day. Roman law, strong in Scotland, has made itself felt also in the United States. No doubt, teaching and studying of Roman sources is not usual in many American law schools and is in eclipse also in most other countries. Its value, however, is not exhausted, either as a unique history of legal thought, or as an immensely suggestive object of comparative research.

This should be recognized in this country even more readily than in England. The United States has undergone a radical development toward a more universal legal pattern. From the beginning, English feudalism could not root here. The great variety of conditions in the vast and expanding country and the amalgamation of French and Spanish elements favored the same trend away from old English law. The tremendous effects of the machine age continued this approach to the outer world. We may think of one particularly attractive illustration: The "Nolumus" of the Barons in Merton was occasioned by the desire of the church to achieve recognition of the legitimation of children born out of wedlock through subsequent marriage of the parents, an institution of imperial Roman law. England denied it until 1926 A.D. But in the United States, all but three state statutes have successively adopted such legitimation, since Virginia introduced it in 1785.