

COMPARATIVE LAW IN ANTEBELLUM AMERICA

M.H. HOEFLICH*

Historians of Hellenistic religion frequently characterize it as one in which the teachings and practices of a number of ancient religions were both known and influential. Individuals were free to select, from among these different religious traditions, those tenets and rituals with which they felt most comfortable. They were thus able to fashion completely new religions to their liking. I often have thought this notion of syncretism is equally useful for understanding the first period in the legal history of our nation.

The Founding Fathers, their children, and their grandchildren found themselves living in a new nation where they were not just free to innovate legally, but obligated to do so. They had at their disposal, of course, the long English tradition of common law. They also had the system of Roman law, particularly the works of which they had some knowledge from their study of Latin literature, Cicero and Quintilian,¹ new scholarship on both Roman law and modern civil law coming from Germany and France, as well as, basic knowledge of some exotic legal systems brought back by the British from their Asian empire.² Finally, they had laws which they had created themselves in the thirteen colonies.

At the time, lawyers, legislators, and judges also recognized the need to create a unique system of laws suitable for their new experiment in democracy. Virtually every new state passed legislation formally receiving the common law of England as it had existed prior to the Revolution, but each state refused to be bound by post-revolutionary statutes or decisions.³

* John H. & John M. Kane Distinguished Professor of Law, University of Kansas. The text here printed is as delivered at the Centennial Conference of the 1904 Congress of Comparative Lawyers held at Washington University School of Law and St. Louis University School of Law in October 2004. I would like to thank all those involved in this meeting for their hospitality and their useful comments.

1. See Stephen Botein, *Cicero as a Role Model for Early American Lawyers: A Case Study in Classical Influence*, 73 CLASSICAL J. 313 (1978); Michael Hoeflich, *Roman Law and Forensic Oratory in Antebellum America*, 120 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE, ROM. ABT. [JOURNAL OF THE SAVIGNY FOUNDATION FOR LEGAL HISTORY, ROMAN DEPARTMENT] 189 (2003) [hereinafter Hoeflich, *Roman Law and Forensic Oratory*]; OLGA TELLEGEN-COUPERUS, QUINTILIAN AND THE LAW (2003).

2. See generally MICHAEL H. HOEFLICH, ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY (1997) [hereinafter HOEFLICH, ROMAN AND CIVIL LAW].

3. See LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 107–15 (2d ed. 1985).

Obviously, this generation of lawyers and judges had been trained in the English common law, and they were not going to abandon it completely. But, they faced the choice: whether to continue the English legal line or to strike out on a new path.

Influential in their decision-making was a recognition that English cases and statutes suffered from several practical disabilities to implementation. First, the physical and financial context of English law was different from that of the new nation. The English common law developed in a context in which property was scarce and labor generally cheap. However, in the new American nation, property was cheap and plentiful but labor was often scarce. Second, the political wounds of the Revolution were slow to heal and were reopened by the War of 1812. Therefore, by the second decade of the nineteenth century, the English common law was widely seen as the legal system of a tyrannous enemy regime. Thus, in the early decades of our national history, there were reasons for American jurists to look seriously at other legal systems as well as a number of other legal systems at which to look.

We may categorize antebellum jurists as falling within three groups: (1) those who favored a wholesale abandonment of the common law and its replacement by a new, uniquely American system, based perhaps on Roman or European models; (2) those who favored giving priority to the common law system, while recognizing that English precedents and statutes would, of necessity, often need to be replaced; and (3) a few hardy souls who sought to maintain, as much as possible, the common law tradition. It is the members of these first two groups, whom we may label as “proto-comparativists,” who most interest us today.

Before I begin to address in greater detail what I am calling “proto-comparativism,” I must spend a moment on the definition of comparative law as a discipline. Today, the very definition of what constitutes comparative law is unsettled.⁴ For the purpose of this paper, I use a very crude definition of comparativist activity, one drawn from early nineteenth century sources: an activity is comparativist when an individual makes a conscious decision to study a foreign legal source and compare it to a native source. When I use this definition I must also clarify that virtually no theoretical comparative study occurred during the antebellum period. Lawyers and judges approached foreign sources purposefully with an eye to deciding whether to adopt such sources into American law or to

4. See generally ESIN ÖRÜCÜ, *THE ENIGMA OF COMPARATIVE LAW* (2004); PIERRE LEGRAND & RODERICK MUNDAY, *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* (2003).

demonstrate why the Anglo-American common law rules were superior to another system's rules.⁵

Early American legal culture was awash with foreign law and interest in foreign law. Foreign laws and foreign legal thinking impacted virtually every facet of the culture. As I have already noted, there were both pragmatic and political reasons for this. But whatever the reason, most American lawyers found themselves exposed to foreign law to a far greater extent than they are today.

Long before most students would ever encounter a legal text, they would be exposed to the basic concepts of Roman law: they studied the orations of Cicero as part of their secondary education. These texts were particularly interesting because they presented law in a classical republican context; perfect for students in the new nation.⁶ Of the students who went on to college, those destined for a career in law or politics would likely study rhetoric. In so doing, they would undoubtedly read the classical rhetoricians, such as Quintilian, as well as the writings of more modern sources, such as the Scottish professor Hugh Blair.⁷ These works focused on forensic rhetoric and were steeped in Roman legal principles. The first uniquely American work on rhetoric and oratory, John Quincy Adams's *Boyleston Lectures*, delivered at Harvard College, were to a large extent the first modern American work on legal ethics and explicitly compared Roman and American legal practice and practice rules.⁸ In short, by the time a would-be lawyer began his professional legal studies, either at a law school or in a law office, the lawyer would already have been exposed to Roman law and would have been well prepared to view the study of American law with a comparativist's perspective.

The nature of early American law practice also helped foster the comparativist perspective. Much of the practice of law, particularly in major urban centers, centered around trade and commerce. Such practice frequently involved transactions either on the high seas or with foreign countries. This meant that those attorneys who chose to pursue such clients were forced to become familiar with the basic principles of admiralty law, a subject which incorporated classical and post-classical Roman law as well as modern European civil law. For example, Robert

5. HOEFLICH, *ROMAN AND CIVIL LAW*, *supra* note 2, at 43–49.

6. For a discussion of the importance of Roman models in the early Republic, see M.N.S. SELLERS, *AMERICAN REPUBLICANISM* 31–66 (1994); *see also* CAROLINE WINTERER, *THE CULTURE OF CLASSICISM* (2002).

7. *See* Hoeflich, *Roman Law and Forensic Oratory*, *supra* note 1.

8. JOHN QUINCY ADAMS, *LECTURES AND ORATORY DELIVERED TO THE CLASSES OF SENIOR AND JUNIOR SOPHISTERS IN HARVARD UNIVERSITY* (1810).

Rantoul, a prominent Massachusetts lawyer and politician of the early Republic, won praise for his knowledge and use of foreign legal materials in his admiralty cases. Those who represented clients engaging in international trade also needed knowledge of foreign systems, particularly foreign commercial law. This partly explains why texts on foreign commercial law found a ready market in the United States during this period.⁹

Of course, mere knowledge of foreign legal materials is not the same as the use of these materials in a comparative manner. Indeed, perhaps the best evidence of the widespread adoption of the comparative method in law during the antebellum period are law books themselves; the comparative approach to law is the most common one found in these texts.

At the beginning of the nineteenth century, American lawyers found themselves with little uniquely American law, either case law or statutes, and few law books. Griffith's *Annual Law Register of the United States*, published in 1822, provides a survey of legal texts published in each of the states.¹⁰ There are very few books listed, and even those listed tend to be either practice guides or short treatises on quite narrow subjects. By the 1830s, however, law book production had increased enormously. By the Civil War, legal texts formed a substantial portion of the new books published each year. Joseph Story, who did as much as any jurist to contribute to this flood of published law books, actually complained in one of his lectures that the flood of legal publications would soon overcome the profession and make competent lawyering virtually impossible.¹¹ What is most interesting to us about this new wave of American law books is that so many of them incorporated the comparative method.

This incorporation of the comparative method into antebellum American law books took two forms. First, the comparative method could be used in the text of the work. The best examples of this are the works produced by Joseph Story between his appointment as the first Dane Professor at Harvard Law School in 1829 and his death in 1846. The Dane endowment at Harvard was created by Nathan Dane (after whom the school was first named), and he personally suggested that the incumbent to the chair produce legal works incorporating foreign law.¹² Story took this

9. See Michael Hoeflich, *Translation and the Reception of Foreign Law in the Antebellum United States*, 50 AM. J. COMP. L. 753, 753–75 (2002).

10. WILLIAM GRIFFITH, ANNUAL LAW REGISTER OF THE UNITED STATES (1822).

11. Joseph Story, *The Progress of Jurisprudence*, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 198, 237 (W.W. Story ed., 1852).

12. See CHARLES WARREN, THE HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 451 (1908) [hereinafter WARREN].

instruction seriously, and from his appointment until his death he produced a series of *Commentaries* on primarily private law subjects.¹³ These works cited and used both European law and Roman law in several ways, all comparative. Story was, in my opinion, the champion of what may be called “partial reception.” Whenever possible, he favored the use of Anglo-American precedent. But, he also recognized that there were situations in which there was either no precedent or the precedent was unsuitable for the unique situation of the new American nation. In these cases, Story would look to foreign law for a rule. But, it is quite clear from his works that he was not a proponent of blindly replacing Anglo-American precedent with foreign rules, rather he used foreign law comparatively. He measured the common law rule against the foreign rule to see which better accommodated the needs of the new nation. If the common law rule and the foreign rule were consistent, then he used this comparison to show the wisdom of the common law rule. If the common law rule and the foreign rule differed and he could justify using the common law rule, he would reject the foreign rule and often give his reason for doing so. If the common law rule was unsuitable for continued use, or if there was no common law rule, only then would he analyze the foreign rule, modifying it if necessary and adopting it as a rule of American law. In effect, Story used the comparative method as a key tool of selective legal reception.¹⁴

Story’s inspiration for this approach may well have come, in part, from text that is underappreciated by legal historians today: Sir William Jones’s *Essay on the Law of Bailments*.¹⁵ Jones was a polymath; he was a scholar of Asian languages, a judge in Calcutta, and a prolific author. Early in his career he published this historical treatment of the law of bailments centered on the famous case of *Coggs v. Bernard*.¹⁶ Jones was fascinated by this case because he believed it was a clear example of how English law received and was consistent with Roman legal principles.¹⁷ His analysis in *Essay* was a sophisticated attempt to both understand the process of reception and to show the benefits of the comparative approach

13. See, e.g., JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833); JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA (1836).

14. HOEFLICH, ROMAN AND CIVIL LAW, *supra* note 2, at 36–43.

15. But see David Ibbetson, *Sir William Jones as Comparative Lawyer*, in SIR WILLIAM JONES 1746–1794: A COMMEMORATION 21 (Alexander Murray ed., Oxford University Press 1998) (stating Sir Jones’s “*Essay on the Law of Bailments* of 1781 is justifiably regarded as one of the most analytical and comparative works on a single legal topic.”).

16. *Coggs v. Bernard*, 92 Eng. Rep. 379 (1703).

17. See Ibbetson, *supra* note 15.

to law and selective reception.¹⁸ Jones's book was one of the first law books reprinted in the United States and was widely read.¹⁹ Story knew the piece exceptionally well and used it to great advantage in his own *Commentaries on the Law of Bailments*, one of the earliest works of his Harvard tenure.²⁰

The second form in which one finds the use of the comparative method, is in the footnotes to legal texts. The best example is found in one of the most widely distributed books on foreign law in antebellum America. In 1756, George Harris published his English translation of Justinian's *Institutes*.²¹ This was a milestone in the study of Roman law in the English-speaking world. It was the first separately published, full English translation of the historic post-classical text on Roman law, itself derived from an earlier textbook by the jurist Gaius.²² Harris's translation was more than adequate to convey the basic structure and rules of the Roman legal system to its English readers.

Thomas Cooper was a lawyer, chemist, political radical, and follower of Joseph Priestly who came to the United States at the end of the eighteenth century in self-imposed political exile. He progressed through a series of jobs, both legal and scientific, until he became president of South Carolina College.²³ Cooper took it upon himself to republish an edited version of Harris's translation of Justinian's *Institutes*.²⁴ Harris's translation was only lightly footnoted; Cooper added substantial notes, the majority of which were comparative in nature. Harris's translation was not aimed at practicing lawyers in search of useable precedent. Cooper's comparative notes transformed his edition into a text that could be used in practice. The notes did not only provide American equivalents and differences to the Roman rules set out in the texts; they also provided additional historical material and referenced other legal systems of potential interest. For this reason, it is not at all surprising that Cooper's

18. *Id.*

19. See J. Oldham, *The Survival of Sir William Jones in American Jurisprudence*, in *OBJECTS OF ENQUIRY: THE LIFE, CONTRIBUTIONS, AND INFLUENCES OF SIR WILLIAM JONES* 92–101 (Garland Cannon & Kevin Brine eds., New York University Press 1995).

20. HOEFLICH, *ROMAN AND CIVIL LAW*, *supra* note 2, at 36–43.

21. *THE FOUR BOOKS OF JUSTINIAN'S INSTITUTES* (George Harris trans., 1761).

22. See *THE INSTITUTES OF GAIUS* (Cornell University Press 1988).

23. South Carolina College, located in Columbia, South Carolina, was the predecessor to the University of South Carolina.

24. For more on Cooper and his translation of the *Institutes*, see Michael Hoeflich, *Vinnius and the Anglo-American Legal World*, 114 *ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE, ROM. ABT.* [JOURNAL OF THE SAVIGNY FOUNDATION FOR LEGAL HISTORY, ROMAN DEPARTMENT] 345, 359–61 (1997) [hereinafter Hoeflich, *Vinnius*].

edition was frequently cited in American cases on a range of legal topics, including admiralty law and commercial law.²⁵ In the antebellum period much comparative scholarship was found, not in the text of books, but in the notes. This was especially true of English texts reprinted in the United States after 1830.

Naturally, as the decades passed, American law developed greater independence from the law of England. More state and federal court decisions were published, and more statutes filled the books. By the 1830s, the United States was developing its own literature and its own legal systems. American lawyers still saw themselves as very much a part of an Anglo-American legal community and were unwilling to simply give this up. Daniel Mayes, in his 1829 *Introductory Lecture to the Law Class at Transylvania College*, bragged to his students that when they graduated they would be as well prepared to practice in the courts of Westminster as in the courts of Lexington.²⁶ But, American lawyers were equally aware of the growing difference between English law and American law and the need to treat English law comparatively, at least to some degree. Law publishers during this period continued to publish English treatises for the American market, but they also recognized that this market demanded that these treatises be accompanied by “American annotations.” These footnotes provided analogous American cases as well as commentary pointing out the similarities and differences between American and English holdings. Publishers’ advertisements touted these annotations and the utility of these comparative notes. Examples of such annotated English texts are common. For instance, Grigg & Elliott, Philadelphia specialist law publishers, published an edition of Sir Samuel Toller’s *The Law of Executors and Administrators* in 1834.²⁷ This edition was reprinted from the London edition with notes by Francis Whitmarsh. It also contained American notes by Edward D. Ingraham, a Philadelphia lawyer and legal editor. These were advertised as containing “references to the statutes of Pennsylvania, and the Principal American Decisions.”²⁸ The publisher’s catalogue advertisement for this book boasted that “the copious notes added to this edition by the American editor . . . render it very valuable.”²⁹

25. *Id.* at 365–68.

26. Daniel Mayes, *An Introductory Lecture to the Law Class at Transylvania College*, in *THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES* 154 (Michael Hoeflich ed., 1989).

27. SAMUEL TOLLER, *THE LAW OF EXECUTORS AND ADMINISTRATORS* (Grigg & Elliot eds., 1834).

28. *Id.* title-page.

29. *Id.* at page 2 of catalog insert.

A reader who opened a text like the 1834 Philadelphia reprint of Toller was immediately transported into a world of comparative law. The text contained the English law, as Toller understood it. The first set of notes contained annotations by Whitemarsh, primarily references to English cases, decided after Toller wrote the text. A second set of notes by Ingraham set out relevant American cases and statutes as well as comments contrasting them. Like it or not, any reader of this or similar texts was exposed to the comparative method.

The near universal practice of reprinting English and European texts with comparative notes owed its existence to two causes. First, during the first decades of the nineteenth century, the relative paucity of published legal materials in the United States necessitated importation of English treatises to supply the American Bar with legal sources. However, bare reprints without any American annotations were less useful—and less patriotic—than those with American notes. Second, under the Copyright Act of 1790, works by foreign authors were not protected under U.S. copyright laws.³⁰ Thus, a publisher who simply reprinted an English text was liable to have that text pirated by a competitor. American source material, on the other hand, was copyrightable. By appending American notes publishers were able to copyright their books. Thus, books with such notes were more economically viable than those without.

The publication of comparative legal materials in the United States during the antebellum period would not have been possible without a cadre of lawyers capable of translating and annotating foreign materials. Interestingly, there was such a cadre, but it was quite small. Some were immigrants to the United States: Thomas Cooper was an Englishman;³¹ Peter Stephen Du Ponceau was French by origin;³² and Charles Follen, the first professor of German at Harvard and lecturer in Roman law at Harvard Law School, emigrated from Germany.³³ Others were native born. Edward Ingraham was a prominent Philadelphia lawyer who made a career of annotating English texts for the American market.³⁴

30. See MEREDITH L. MCGILL, *AMERICAN LITERATURE AND THE CULTURE OF REPRINTING 1834–1853* (2003) (detailing the vast industry of reprinting foreign works in the antebellum United States).

31. DUMAS MALONE, *THE PUBLIC LIFE OF THOMAS COOPER* (1961).

32. See Jennifer Henderson, *A Blaze of Reputation and the Echo of a Name: The Legal Career of Peter Stephen Du Ponceau in Post-Revolutionary Philadelphia* (2004) (M.A. thesis, Florida State University), available at http://etd.lib.fsu.edu/thesis/submitted/etd-07122004-134112/unrestricted/thesis_henderson.pdf.

33. See CHARLES FOLLEN & ELIZA LEE CABOT FOLLEN, *THE WORKS OF CHARLES FOLLEN WITH A MEMOIR OF HIS LIFE* (1842).

34. See Edward Ingraham, *Popular Portraits with Pen and Pencil*, in *UNITED STATES MAGAZINE*

Other factors were at play in the spread of comparative thinking during this period. One important source of this movement was the rise of university affiliated legal education at such places as Harvard and Transylvania College. One may speculate as to why these early law schools took a comparative approach to law. In part, this may be due to the work of early legal educational writers such as David Hoffman, who recommended a comparative approach in his *Course of Legal Studies*, first published in 1817 and reprinted in 1836.³⁵ Another source of this is surely Nathan Dane's suggestion to Joseph Story that he include comparative materials in his teaching and writing.³⁶ A third source for this impulse, often overlooked, may well have been the need for these early university-based law schools to establish a market niche in American legal education. When Harvard, Transylvania, Virginia, and other universities established law schools, the dominant form of legal education in the United States was still apprenticeship, which had several major advantages. It was relatively inexpensive, it was local, and it often required a relatively short time actually in residence. In a period in which requirements for admission to the Bar were loose, these were significant advantages. The new law schools had none of these advantages. They were expensive (Harvard cost \$100 per year in 1829), they required students to come to Cambridge, and students generally spent at least a year there. In order to win students, university-based law schools had to offer something apprenticeships could not. The law schools advertised that they offered a "scientific" approach to the law as well as extensive law libraries and numerous lectures. At the heart of the "scientific" approach was the notion that law was a set of rational principles that could be learned and applied.³⁷ This led to the comparison of legal systems to discover universal rules when they existed, and, when they did not, to compare the various rules to determine which were the best when measured against each other.

A second factor, which helped foster the comparative approach to the law during this period, was the remarkable progress being made in German law, especially legal history and comparative law. American periodicals were filled with accounts of German legal research. General periodicals like the *North American Review* carried articles on the latest

AND DEMOCRATIC REVIEW 77–81 (1849), available at <http://cdl.library.cornell.edu>.

35. DAVID HOFFMAN, A COURSE OF LEGAL STUDIES (1817).

36. WARREN, *supra* note 12 and accompanying text.

37. See Michael H. Hoeflich, *Introduction* to THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES 8 (Michael H. Hoeflich ed., 1989).

legal progress in Germany. The *American Jurist* listed new law books published in Europe. Young American lawyers seeking greater legal expertise studied in Germany, particularly at the University of Gottingen. Established American jurists like Joseph Story and Hugh Swinton Legare sought out German legal scholars as correspondents.³⁸ As German jurisprudence discovered the comparative approach, Americans became increasingly interested in this perspective.

Finally, another factor that played an increasingly important role as the century progressed, was the rise of European colonial empires. The rise of comparative law studies in England was tied intimately to the rise of the British colonial empires.³⁹ Schools like Haileybury College, established to train administrators for the East India Company, were centers for comparative legal study.⁴⁰ Colonial administrators had to know both English law and the native laws to govern effectively. Some of the most important English comparative lawyers of the nineteenth century, Sir William Jones and Sir Henry Maine to name but two, were former colonial administrators. This interest in colonial laws led to the publication of studies of books on these exotic legal systems. These books made their way to the American market where they were widely distributed.

A good example of this phenomenon is Nathaniel Brassey Halhed's *A Code of Gentoo Laws*, published in London in 1777.⁴¹ The book was prepared at the direction of Warren Hastings, the then Governor-General of Fort William in Bengal, to the Court of Directors of the East India Company. The first paragraph of Halhed's introduction exhibits his understanding of the relationship between knowledge of the native laws and the success of the British colonial enterprise:

The importance of the commerce of India, and the advantages of a territorial establishment in Bengal, have at length awakened the attention of the British legislature to every circumstance that may conciliate the affections of the natives or ensure stability to the acquisition. Nothing can so favorably conduce to these two points as a well-timed toleration in matters of religion, and an adoption of

38. Michael Hoeflich, *Transatlantic Friendships and the German Influence on American Law in the First Half of the Nineteenth Century*, 35 AM. J. COMP. L. 599 (1987).

39. A more in-depth discussion of the relationship between the rise of the British colonial empire and comparative law is beyond the scope of this paper.

40. RICHARD SYMONDS, *OXFORD AND EMPIRE* (1986); see also Report from the Select Committee on Legal Education, 10 BRIT. PARLAMENTARY PAPERS 1, 46-56 (Aug. 25, 1846).

41. NATHANIEL HALHED, *A CODE OF GENTOO LAWS, OR, ORDINATIONS OF THE PUNDITS* (1777).

such original institutes of the country, as do not immediately clash with the laws or interests of the conquerors.⁴²

The only means of accomplishing the task laid out by Halhed was, of course, comparing of the native laws with those of Great Britain. Once this comparison was completed, it was inevitable that the virtues of the comparative method would be self-evident.

The extensive Anglo-American trade in legal texts ensured that Halhed's book was widely available in the United States. Copies were listed for sale by most of the major law booksellers of the antebellum period. Both individual and institutional library catalogues list the work as contained in collections. The extensive influence of books, like Halhed's, in the United States is difficult to estimate, but the contemporary American interest in such books is undeniable.

These developments in comparative legal thinking came to an end with the Civil War. New conditions in the post-war world led to new questions, new approaches, and new answers.⁴³ I hope to impress upon readers that the comparative approach to law was far from unknown to American lawyers and jurists in the first half of the nineteenth century, and that its growth and development was brought about not simply by academic curiosity, but, rather, by perceived, practical needs.

42. *Id.* at 9.

43. The evolution of comparative legal thinking in the aftermath of the Civil War is a topic for another day.