PART IV. CIVIL LAW AND COMMON LAW

Common law and civil law are generally believed to be different, like oil and water, which do not mix. A sweeping assertion that English and North American law does not present the slightest analogy with that of Continental Europe was expressed as late as 1930. Not until the 1920's did Continental lawyers have any clear conception of American law, and knowledge of English institutions was a monopoly of a handful of scholars writing on legal history, local government, or commercial law. Some English scholars considered parts of French and German legal history and, following Austin, extended the new "jurisprudence" to Roman law and its aftermath. A new period was heralded by such leaders as Roscoe Pound, Ernest Lorenzen, and Edwin Borchard in the United States, Josef Kohler in Germany, and Edouard Lambert in France. Nevertheless, in the general opinion of lawyers on both sides of the North Sea and the Atlantic, to venture a study in the other half of the legal world was believed a hazardous excursion into a dark continent. Many may think so even today. "Civil" law is considered by others to be uncommon, and "common" law appears somewhat uncivil.

No doubt, a long history has impregnated the nature of both civil and common law. The divergence reaches into the basic conceptions and affects innumerable particulars; it concerns mentality, habits, methods, systems, sources, and results. However, paramount questions arise: Just what are the main structural differences? What is their present scope and significance? And to what shape will they be molded in the unceasing stream of evolution?

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These questions indicate some objects of the all-comprehensive comparative studies which are the most important task of present legal science. I have urged such researches for many years, and after they were started successfully in Europe between the great wars, I have been asking for them in this country. At this moment, our knowledge has not matured enough to meet those questions throughout with assurance. In part, mere impressions must suffice. Nevertheless, one conclusion is safe. Common law and civil law are quite comparable entities. More than that, they are relatives not too remote, and they move steadily nearer to each other.

Let us see first what are the main phases of the two groups that have caused the belief in their unqualified contrariety. If we want to get the full impact of the principles, the sharpest profiles of the contrasts, we ought to look to England rather than to the United States. When the common law traveled with the colonists to British possessions overseas, it split into many varieties and underwent modifications. In the United States the mere fact of application in the several jurisdictions, the overriding constitutional control, and the federal legislation have produced a climate very different from the unity of the British Kingdom, its homogeneous class of traditionally trained lawyers and its ordinary courts ruling over the entire territory of England or the Kingdom.2

I. THE MAIN DIFFERENCES

Historic Separation

The peculiar nature of common law has been designed by history. English law has had a continuous, almost uninterrupted, development by English lawyers, kings and parliament from the coronation of Richard I on September 3, 1189, that is, now for 760 years. Whilst the European continent went from medieval society to the Renaissance, Humanism, Reformation, Thirty Years' War, stagnation, revolutions, and through the crises, wars, and social upheavals of the last century, Great Britain, on its isles, had a revolution and a restoration, and several great wars, but the law was never more than mildly affected. The violent currents of thought stirred up on the Continent came as gentle waves slapping on her shores. British character was more of a barrier than the Channel. That country is still a hereditary

kingdom, the governing law is still the direct descendant from Richard I's law. This is a very great fact.

Sources of Law

British common law has developed by steady tradition in the decisions of the courts, whereas the Continental legal systems rested prevalingly on Justinian's codification and rests now on national codes. Common law learning, said Sir Frederick Pollock, is forensic in its origin, civilian learning is scholastic. Indeed, our heroes, such as Sir Edward Coke, Lord Chancellor Hardwicke, Lord Mansfield, or Chief Justice Marshall, Story, and Holmes, were judges, and Azo, Bartolus, Donellus, Dumoulin, Savigny, and Jhering were professors.

This contrast opposes the sources of law: the judge-made law and the enacted law, with ever-repeated emphasis on the prerogative, or even monopoly, of the English judges in making law, statutes in principle being of inferior force, declaratory of the common law, intended to clarify and simplify the case-law. Even if the statute is reformatory, derogatory to the common law, it is to be construed narrowly as an exception to the great dominating bulk of the previous decisions persistently forming the common law. A number of rules for interpreting statutes insist on the literal sense of the words, and have such quaint flavor as "contemporanea expositio," "eiusdem generis doctrine," or "rule noscitur a sociis."

The contrast, thus, extends to construction and application of the law. It concerns the relationship between law and legal theory. The traditional conception holds judicial decisions superior to both statutes and doctrine. The training of the lawyers has been characteristically influenced. English jurists have been trained by the inns of the court, practically, empirically, in the autonomous continuity of the profession. Continental lawyers have been educated at the universities and taught history and theory. Accordingly, English lawyers have never been interested in legal history, not even in their own, despite its magnificence and the abundance of well-preserved historical sources. (A treasure largely not even printed and neglected, while we busied ourselves reverently with the remainders of the Egyptian papyri, described by sarcastic Romanists as holes with something illegible around.) Maitland has bitterly complained about this defect and thereby also explained the sorry disregard for comparative law:
History involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of the idea of legal history."

The admirable history of English law, written by Maitland in collaboration with Pollock, has stopped in the Middle Ages and few people seem prepared to supply the special studies for complementing Holdsworth's history and the handbook by Plucknett.

On the other side, time and again Continental practice and theory have worked at cross purposes. The great humanists of the sixteenth century, Cuiacius and Donellus, wrote for the German Romanists of the nineteenth century rather than for the contemporary judges who remained unimpressed. Savigny's historical school has immensely influenced the march of scientific progress, but not the courts of their time. When I first entered judicial practice, my superior, an old judge, warned me that I must thoroughly forget my university learning, and as confirmation showed me every week the entirely useless exertions of the current law journals. But the experiences of the twentieth century are entirely different.

**Precedents**

Established upon decisions, the formation of common law has sought stability by the principle of *stare decisis*. A judgment of an ordinary court is binding on this court itself and all coordinated and lower tribunals. A judgment of the House of Lords is binding on all courts, now including the House itself. It can only be changed by an act of Parliament.

This unique doctrine, a consequence of the lack of written rules, has produced, in its turn, a very subtle art of analyzing and distinguishing the operative facts supporting the individual actions and defenses. It has also promoted a basic tendency toward conservatism, of slow and cautious progress from one case to the next one. Many centuries could continue this unhurried advance which, viewed in retrospect, almost appears infallibly purposeful. But the United States has not been able to stand this measure of movement for a long time. The civil law has never known the principle of *stare decisis* nor needed it.

The common law method so acquired is naturally inductive. The cases involving a certain situation are collected and com-

3. Maitland, Collected Papers, 188.
pared as to facts and decisions, and by timidly progressing generalization, in the course of time, rules are reached or something similar to rules. After seven hundred years, a considerable stock of true rules has been accumulated, although prudence is never forgotten. When the members of an international committee report how some problem is treated in their respective countries, a British jurist may state that there is no law on this question, since it has not been decided in court. When, on urgent demand by German and French professors, Jenks published a systematic Digest of English law, some of his colleagues seemed apprehensive. It is a comfort now to exclude any doubt that the use of this book is legitimate, since the last edition has been edited by Professor Winfield.

In theoretical language, Mr. Justice Holmes has formulated correspondingly the essence of judge-made American law, in his famous definition of law as a prediction of what judges will actually do.

No civilian will ever agree with this definition. Law for a Continental lawyer exists irrespective of judges, whether its source may be construed as divine or man-made, and be old custom, judicial decision, or parliamentary enactment. The law is not identical with the code, but it is in being before a lawsuit is brought, and the judgment will state whether or not the right sued upon exists—not whether the court makes this right. It is the oldest and a permanent idea: the judge “finds” the law, and does not make it. The laws, the rights, the duties are the order and guides of the population; they ought to be known to everyone, and at least be ascertainable to counsel giving advice to the public.

This divergence would be formidable, indeed, if Holmes’ dictum were the expression of a dogma, as it is taken so often—and not only a paradox of a skeptic, or if a civil law judge were to read every decision in the statute, as some people believe.

**Equity**

The rigidity of the law obtaining in the law courts necessitated the development of equitable remedies in the Chancellor’s court. A new branch of law developed in the new jurisdiction, a dualism comparable to the competition of legal principles which the Roman pretor gradually established at the side of the old *ius civile*, or to the practice by which the royal officers in the Frankish Kingdom corrected the ancient customary law. But
English equity in the course of time became a second set of formal rules.

Equity in civil laws, including Louisiana's, as in the Corpus Juris, is not a branch of law but an inherent element of legal thought, present in the great majority of legislative solutions and judicial decisions. Aequum et justum, law and equity, is a compound expressing one thing, not two. Only in a part of the system, jus strictum, rigid law, unmitigated formal law prevails: The text of a negotiable instrument must hold firm for the benefit of innocent holders; formalities of marriage or wills must be observed—although even in this matter European courts have tended to leniency; the rules on land register entries must be complied with to the letter.

Formalism, or more politely expressed, a literal approach to statutes and contracts has maintained a much broader sphere in English courts, at law as well as in equity. Its removal is slow. Very recently it has been conceived that a legacy of "my money" may be construed as meaning: my money and my securities. Of a case where the High Court and the Court of Appeal held to the contrary, I privately know that the narrow interpretation manifestly violated the intention of the testatrix.

Other General Contrasts

Among the peculiar rules of statutory construction traditional in English law, it has been emphasized that an ambiguous statutory text must be strictly construed under English rules and not elucidated with the help of drafts, governmental papers, or parliamentary debates. Continental courts do just this, sometimes digging deep into yellowed archives.

Others have contrasted the utilitarian or pragmatic philosophy favored by English lawyers with the multitude of philosophical systems to which French, German, or Italian writers have adhered.

A group of typical divergences concerns the fundamentals of government. Latin American scholars, for instance, seem greatly interested in the American "rule of law," authorizing judicial control of constitutionality of enactments and the administrative tribunals of the French type mentioned earlier.

Specific Differences

A few examples may substitute for the mass of big and small differences of institutions, rules, and conceptions. The excellent land register books of Central Europe have no parallel in England and the Americas. The Anglo-American trust is a subject of high interest for Continental lawyers who feel increasingly the need for this greatest of all individual common law achievements. In more or less extensive scope, an increasing number of American states have adopted this institution, with Panama as pathfinder, thanks to Ricardo Alfaro, and Louisiana as possessing the most complete statute.7

Civil law, as is well known in Louisiana, does not recognize the particular distinction between realty and personality, nor the necessary transfer of an inheritance to an executor or administrator, the "personal representative" of a deceased.

Where the common law has not been reformed by statute, it is inclined, more than the civil laws, to lag behind the developments, and this is its greatest disadvantage in our fast living time. Antiquity appears in the law of "bastards," the "local actions," a theory that corporations "exist" only in the state of their incorporation, a procedure relying on the hazard of personal service of process; here, the theory of consideration and that of ultra vires still survive in shattered ruins—while behind the facade all these doctrines are ripe for demolition in the jurisdictions that have not yet discarded them entirely.

The sins of the civil laws are different but by no means less regrettable. Instability of political and legal orders have produced an overwhelming sense of insecurity. Although European judges have been good and in many cases excellent, the wisdom that common law seems to have infused into judicial rulings is not commonly paralleled. But the main trouble is caused, in striking contrast to the German Civil Code, by hasty, confused, superficial, and contradictory legislation.

II. The Rapprochement

Must we take this suggested antithesis as entirely true? as fully effective still at present? and as significant with respect to the United States?

7. Ricardo J. Alfaro, Adaptación del trust del derecho anglo-sajón al derecho civil, in Cursos Monográficos, cited supra note 1, at 63 et seq.
Unwritten Law and Codification

In the United States, a country of “unwritten law,” there existed in 1947 “274 bulky volumes aggregating 267,777 pages” of statutes, supplemented by 56,701 pages of statutes enacted in two years, 1946-1947, according to Dean, now Chief Justice, Vanderbilt. Of course, the yearly publication of 500 volumes of court reports competes with the statutes for production records.

While organizational and administrative legislation absorbs the greatest part, as in all other modern countries, private law has been advanced by American state statutes in many fields, domestic relations and tort liabilities being merely examples. Even in England the Law Reform Committee of the Lord Chancellor has sponsored drafts to abolish the Statute of Frauds, and the fellow servant doctrine, to change the doctrines of contributory negligence and of consideration; and the statute book has incorporated acts on legitimation and adoption, divorce, family provision in wills, the Law Reform Acts on married women and tortfeasors, 1935; frustrated contracts, 1943; contributory negligence, 1945; and personal injuries, 1948. One may say, every one of these acts is a step in the direction of the civil law.

In the contemporary ocean of statutes much confusion and deficiency are due to the pressure of wars and crises. Yet this alone does not explain the shortcomings of many legislative products. It ought to be perceived that law making is a difficult art and that, although not requiring a genius, it must be learned.

With our abundance of written law, enactments, ordinances, and regulations, what becomes of the common law distinctions between statutes declaratory of the common law and derogatory statutes and the subordination of enactments to decisions?

The answer lies in the indifference shown by the American courts. The British Sales of Goods Act is known as a typical “codifying” statute, merely laying down the common law and giving it a firmer expression, but not touching its great body. Reading American decisions, you may find sometimes the statute ignored, particularly where it affords an identical solution, but never expressly set aside and, when appropriately pleaded, used as the main directive, though not as the only one.

The attitude of the courts toward the Uniform Sales Act is

not in the least different from the methods of a Swiss or Swedish court. The new draft of a Commercial Code attempts to accumulate a great mass of specific solutions and to ensure the primacy of written law in this area. If monumental American codes were openly to declare their rank superior to judicial decisions, statutory drafting should finally free itself from the complicated, clumsily cautious style intended to overcome judicial hostility to statute law.

The English rules of statutory interpretation have been thoughtfully criticized by leading American authors as artificial canons and limitations and as a stultifying technique disguising rational and useful judicial activity. They enjoy so little popularity in this country that their disintegration has been recently demonstrated.

There is no difference, again, in the application of American interstate commerce legislation on carriage or in the construction of insurance statutes, and the corresponding European practices. It should be clear by now that the true intention of a law or of a contract may be discovered without any presumptions fixed by a national law.

The case for true codification not of the judicial cases but of the American law has been convincingly made.

After resolutely abandoning the circuitous style and the massed cases of traditional Anglo-American statutes, what type will future American codification prefer? It is not exact that the present statutes leave more discretion to the courts than European codes. We have noted the opposition between Ger-

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15. The creative work of the French and German courts has been mentioned earlier. For new Swiss achievements see, for instance, Guhl in (1948) 84 Zeitschrift des Bernischen Juristenvereins 524 et seq., note to Federal Tribunal, 73 Off. Coll. II 140: the federal tribunal continues its work of extending the scope of the action against the illegitimate father for recognition of legitimate status on the expense of the ordinary paternity action for alimony. Identical statutory texts are construed to opposite effect in France and Belgium, Germany and Switzerland.

Ernst Wolff, Chief Justice in the British Zone in Germany, in an article, Freiheit und Gebundenheit des englischen Richters," in Festschrift für Wilhelm Kiesselbach (Hamburg, 1947) 280, recommends, under the present ideological battles, that the discretion of German courts should be restricted according to the English experiences.
man massive written rules and Swiss looseness of principles. The first method is exaggerated. The second, after almost four decades, has left gaps still unfilled by an excellent judiciary. Much legal progress is likewise due to the courts of both these countries. Hence, the field is open for reciprocal information and a united effort to improve legislative technique.

Stare Decisis

The much advertised difference in the force of precedent has been greatly reduced. The English professor, Goodhart, has recognized in the United States a system so much looser and freer than the British that he assumes the existence of three modes of evaluating previous decisions, a British, an American, and a civilian. The Supreme Court of the United States and the highest state courts have conquered freedom in overruling themselves. The special situation of this country is commonly explained by the existence of many courts, large and rapid economic development, and the dedication of the federal judiciary to constitutional adjustment rather than to immutable standards.

But what is the practical difference between the American method and the French or German? Anglo-American writers are greatly impressed with the assertion sometimes occurring in France that a single judicial decision is immaterial, while a line of equally construed judgments, a jurisprudence constante, "has a conclusive force of persuasion." The Louisiana Supreme Court has borrowed this principle that "more than one decision is necessary" for forming a jurisprudence, apparently, however, for the purpose of a doctrine of stare decisis, adopted from common law. But the whole idea reflects a misunderstanding. French judges know as well as those in the entire civil law

16. See, for instance, Guhl, 83 Zeitschrift des Bernischen Juristenvereins (1947) 490: the code has introduced but not implemented the right in the surface, and the courts have not been able to fill this gap.
18. This formulation by Lambert and Wasserman, The Case Method in Canada (1930) 39 Yale L.J. 1, 15, has been relied upon by Goodhart and many other writers.
sphere that decisions are never a source of law, but only may
help customary law to crystallize, and that their own force
remains solely in their “mérite intrinsèque,” not in their form—
“rationis imperio, non ratione imperii,” as Gény has expressed
it.\textsuperscript{20} One decision may be discarded, if tentative or ill considered,
but otherwise it may exercise exactly as much persuasive power
as a string of judgments.\textsuperscript{21} Persuasion, moreover, is reinforced by
the desire to preserve judicial prestige and a stable system. The
authority so carried is entirely comparable to the remaining
force of \textit{stare decisis} in the United States. There is more to the
comparison. A decision by the supreme court of the country
has the practical effect that a lower court in cases open to appeal
does not like to risk reversal by deviating; sometimes, a wanton
rebellion may result in a black mark in the personal record of
a censured judge. Judges are traditionally unremovable but
their promotion to higher positions depends on various circum-
stances. A good craftsman tries to make his decision appeal-
proof. And if lower courts in the United States are bound to the
precedents of their highest instance, it may be noted that in
Germany, the Supreme Court has established the rule that any
counsel, attorney or notary, disregarding a decision published in
the quasi-official reports of that court makes himself liable to
his clients for the consequences.\textsuperscript{22} One has to look with a mag-
nifying glass at the real differences in the American and German
practice, in order to continue this opposition of principles.

In England, it is true, for a free construction of what the
law is, created by statutes and decisions, to use the words of one
English author, the judges would have to admit that social needs
must be fulfilled by new interpretation. He seemed to believe
that just this was in the making.\textsuperscript{23} Scottish lawyers certainly
feel binding precedent which “crept in unobserved some one hun-
dred fifty years ago” as a “superstitious fetish of ancestor wor-
ship” and want an end to its “suffocating grip.”\textsuperscript{24}

\textbf{Theory}

No writer in this country would repeat the dictum I believe
I read in a paper of Sir Frederick Pollock: Thank God, we have

\begin{itemize}
  \item \textsuperscript{20} Gény, \textit{Méthode d’interprétation et sources en droit privé positif} (1919)
  \item \textsuperscript{21} Goldschmidt, \textit{English Law from the Foreign Standpoint} 39; Gut-
  teridge, \textit{Comparative Law} (1946) 90.
  \item \textsuperscript{22} Reichsgericht, \textit{J. W.} 1937, 1633 No. 4 (March 2, 1937).
  \item \textsuperscript{23} Wortley, \textit{La théorie des sources} in \textit{Etudes en l’honneur de Gény} at 27.
  \item \textsuperscript{24} Lord Cooper, Lord Justice General and Lord President of the Court
  of Sessions, in his important address, cited supra note 1, at 472, 473.
\end{itemize}
no legal theory in England—this is better than having wrong theories as on the Continent. I do not think that there is no theory in England and I doubt strongly that there is no wrong theory. English judges like all good judges do not like to consider a problem at the bar in terms of large implications. It is the character of the literature during many centuries which failed to organize critical and systematic spirit. Also in the recent past there were not enough Frederick Pollocks. The American scene, again, is quite different.

It is true that the really fundamental contrast of mentality and method persists, particularly in the ways of the judges, and is strongly sensed by the courts working with such mixed systems as those of Louisiana, Scotland, and Quebec. But the learned literature of the western world, in a process of mutual interaction, clearly moves toward an eventual assimilation of purposes and means of legal thought. Already, the controversial problems, similar throughout our countries, are debated not so much between the nations as between the views recurring within every individual country. No one should fear, however, the coming of an era of international monotony. Fortunately, national virtues of theoretical apperception and creation will always be magnificently different.

**Basic Concepts**

Many rules of English coinage have been produced by scholastic method from the fourteenth to the seventeenth century and have been petrified. Such a rule was once the naïve expression of a seemingly obvious observation, then began to unfold its independent life and now lasts apparently forever as dead but cumbersome dogma. This has happened in Rome, in the Mohammedan legal theory, and this is also the explanation of, let us cite as an instance, the doctrine of contributory negligence.

Corporal injury to a person creates liability. But: Quod quisque ex sua culpa damnum sentit non intellegitur damnum sentire. Liability does not exist, when the injured person contributed to the harm. The tort rule is not designed for such a case. This was also the English idea at one period. But while probably the Romans and certainly later Romanistic laws progressed to the consideration that both parties may be imprudent and it is just that they should divide the damage in some pro-

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portion, the English rule froze prematurely, resting on the alternative of burdening either the plaintiff or the defendant. (In the transition to the modern epoque, where such accidents became frequent, other considerations may have upheld the old principle.) This phenomenon is typical for many others in the history of legal dogma; it is only more habitual in common law, that professional product of long standing.

Another example. The Roman doctrine in the first century A. D. contemplated the case where A promises to B an individual slave, Stichus, not knowing that Stichus had just died, and concluded *impossibilium nulla obligatio*; no obligation for an impossible feat, whenever the object of the contract did not exist at the time of contracting. The same rule appears in the Sales Acts and in the German Civil Code of 1896, Section 306. Now, the contract may rightly be deemed to be without content (*inutilis*) and the promisor be free because of his excusable error, or the transaction may be fraudulent (selling the Brooklyn bridge), or just stupid (selling a magic drink). But in many cases the seller must be made liable for damages instead of getting rid of the contract as void.

Thus, an awkward or wrong generalization devised by primitive legal art is dragged along until it acquires the dignity of uncontroversible truth. This is the greatest disadvantage of a continuous legal profession. Progress sweeping away such remnants, also eliminates the most unpleasant differences of legal doctrine.

Even doctrines deeply rooted in the judicial machinery must not be fatalistically continued. At any rate, the traditional contrasts of systems must not be overrated. Consider the following example.

The seller of a horse, instead of delivering it, retains it in his own stable. The buyer wants to sue for delivery. He is allowed to in civil law. The court will adjudge his claim, based on the obligation of the seller to deliver; the judgment commands the seller he must deliver. Under Anglo-American law, in an action at law, no such claim is recognized. Breach of contract leads only to an action for damages. Classical Roman procedure was similar. The historical reasons for both principles of "money estimation" have presumably also been the same: origin from ancient penal action, simplicity of enforcement of

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money claims, and others. Acknowledging this difference, is it correct to proclaim, with eminent authors, that breach of contract at common law is identical with tort, or, less sweepingly, that at common law there is no obligation for the debtor to perform, as at civil law—that is, to give or do or omit something—but only to pay damages for nonperformance, for not giving, et cetera?

What a historian should answer to these bizarre constructions, has been said by the late Professor Buckland, but has apparently not interested the routine writers. If a seller promises a horse and retains ownership and possession of it, and if the horse perishes by accident, the obligation of the seller is admittedly extinguished. This means, he owed the horse, not money. In Rome the classical formula of action for a promisee on the ground of a stipulation or a sales contract expressly made the existence of the obligation to perform specifically, the dare facere praestare oportere, the condition for awarding the interest in money. This is also the common law, whose wonderland we should not exaggerate.

How the two systems work in practice is no less instructive. Common law courts are not permitted to grant specific performance in an action at law. But equity does accord it, hesitantly in England, more freely in the United States. A Continental buyer may sue for delivery of ten tons of steel, but normally—that is, if there is no shortage in steel—will be satisfied with damages in money. A need for specific performance in business is an exception, and where such need is proved, an American and a German court will recognize it practically to the same effect, though in different procedures.

Observant Louisiana professors have declared that Romanistic training has achieved a much superior supply of technical tools and a revolution of concepts is needed in Anglo-American law. While this is undeniable respecting many basic concepts of general nature and their systematic organization, common law has produced a wealth of commercial, maritime, and specialized notions of inspiring force. By a give and take method, again, prejudices are eliminated, concepts remodeled and a coherent legal system established.


Contrasts between Legal Systems

It should finally be borne in mind that all the significant contrasts are by no means to be found in the opposition of Anglo-American and Continental laws. The statutes of the American states and the highly differentiated statutes of the European Continent and Latin America embody rules of every kind. To recall just a few notable matters, common law has accepted a West-European doctrine that ownership may be transferred by consent, forming a group (in which Louisiana especially accentuates the transfer of immovables by consent), while the Central-European countries, Argentina, and others require delivery of movables for the passing of the title. Likewise, the English Statute of Frauds with its American following stands with the French group against German and Scandinavian formlessness of obligatory contracts. But common law and the German-Scandinavian group recognize rescission of contracts by formless declaration, dispensing with those constitutive court decisions such as the French group prescribes with judicial power to grant the debtor days of grace, or, as in Louisiana, without such faculty.

Recognition of illegitimate children by the father is a requirement for their legitimation and for certain, or all, alimony suits in some American states, following the French model, while others base these childrens' position with the Germanic systems, on the blood relationship.

Dowry, once a universal institution, persists in most codes, but in Louisiana and other jurisdictions rather on the paper only, and has been omitted in the Code of Peru, although the French draft proposes an extensive regulation.

The common law doctrine of consideration as a general requirement of contracts is reduced in progressive statutes such as in New York and the English Reform proposal.29 The requirement of a "cause" of obligation in the French law, so influential on innumerable codes, has been maintained in the French Reform work for the exclusive reason that it has become a "classical theory" of French law.30 The Louisiana Supreme Court, it is true,
has proclaimed both requisites, cause and consideration.\textsuperscript{31} We can do without both of them.

Absolute liberty of testators, a dogma of the common law, forced heirship, or other forms of restrictions on wills are no longer characteristic of any family of legal systems.

\textit{Conclusion}

Thus, it may be understood that, as I have always maintained, common law and civil law are not compact masses of opposite institutions. After appropriate initiation, a scholar may carry on comparative research on all eminent members of the Western legal family with not more strain—though more industry—than when he compares closely related systems and with infinitely more reward in stimulating results. Certainly, comparative common law,\textsuperscript{32} or comparison of Louisiana, French, Italian, and Spanish laws, is a highly desirable class lecture. Nevertheless, the former advocates of such restrictions as methodically imperative, may have learned their lesson by now.

The literature begins to seek the true contrast between common and civil laws less in the antiquated historic structures than in various characteristics of the judicial organization, traditional concepts, habits of legislators and lawyers, and methods of fact-finding and enforcement.\textsuperscript{33} I think, wherever we look, we shall easily find innumerable large and small divergencies, yet none excluding fruitful critical analysis, and, I dare say, none incapable of reconciliation, as distinguished from unification.

\textbf{IV. THE PROGRESS OF PRIVATE LAW}

The subject matter of law-making has become increasingly similar. The results in deciding doubtful conflicts of interests have been strikingly analogous in the majority of cases. And the methods of reaching these results begin to resemble each other.

\textsuperscript{31} See Snellinger, \textit{Cause and Consideration} (1934) 8 Tulane L. Rev. 178.
\textsuperscript{33} This trend is visible in the most recent writings, published after these lectures were held, by Sereni, \textit{Book Review} (1950) 24 Tulane L. Rev. 263, and David, op. cit. supra note 1. Sereni approves the conclusion by Eder, supra note 1, that common law is superior in ascertaining facts and means of enforcing court orders, but attributes to the common law "much more law" than facts and states that in truth judicial discretion is more favored in civil law (as also observed above note 15, supra). David notes a series of differences, and especially that French lawyers look to the law, the English to decisions, and that in England tradition is stronger than the spirit of the legal system.
That the discoveries and inventions of the technological era and the social effects of industrialization have produced similar problems in the various countries and led to a partial unification in restricted modern fields, such as communications, transportation, and industrial property, has enlarged the area of universal legal thinking accustomed to the law merchant. The center of isolationism is the private law in the narrowest sense, including the law of family relations, successions, and, surprisingly, contracts and torts. To these we had to call primary attention in the resurgence of international studies. The scientific investigations are still inchoate, but of the highest importance. However, by a remarkable fact to be observed in the recent legislation, even before a comparative research has reached its fully productive stage, the codes of civil law and American statutes show a very great similarity in their choice of subject matters, and certain common features in the solutions. Case law may easily be included in this picture. On one hand, we encounter the old familiar topics in ever renewed discussion, with mere variants in the search for a fair or logically preferable rule. There is an almost constant stock of ancient human achievements which we cannot afford to miss, such as monogamous marriage, common life of spouses and parents and children, inheritance by descendants, binding force of the usual contracts, liability for certain torts. Modern development, of course, has enriched this inventory and shifted emphasis on various points. On the other hand, in advanced society, with a growing mass of varied interests, equalization and standardization as well as differentiation occur without much reference to national particularities. Since the German Civil Code was prepared, the old habit of legislators, of borrowing rules and institutions, has been revived at the occasion of every new code. American courts do likewise among themselves and the English leading authors assert that, for the sake of a common common law with the United States, "English courts always aim as far as possible at securing, uniformity in regard to the law of contract between the two countries,"34 and "that a rule of general law which has been laid down, or approved, to substantially the same effect, in the House of Lords and in the Supreme Court of the United States is the law of the English speaking world wherever it has not been excluded or varied by express legislation."35

34. Lord Wright, of Durley, Legal Essays and Addresses (Cambridge, 1939) 88.
Courts throughout the world must learn to use foreign experiences. The civil codes of the twentieth century, such as those of Switzerland, Mexico, Italy, Greece, Peru, Venezuela, and the Polish Code of Obligations, follow a very similar pattern of arrangement, choice of topics and basic position of the problems. They agree on an immense number of points, and they disagree in limited areas, which tend to shrink.

All of them discuss the same social problems respecting the conditions for marriage and for divorce, the powers of the husbands, the measure of protection accorded to illegitimate children, tutorship by public agencies, individual and collective labor contracts, and so forth. The technical problems coming up everywhere for legislative decision, as, for instance, the binding force of offers, contracting by agents, liability of heirs for debts, are extremely numerous.

It seems to me a most remarkable result of any comparative survey that may be made in the central parts of modern private laws that if recurring problems are differently solved, the area of difference is more and more restricted. The doctrine of misuse of a right, confined in all history to particular situations, was modelled into a general rule by the German Civil Code, Section 226, which declares unlawful the exercise of a right for the exclusive purpose of damaging another person. But who can prove that his neighbor has dug a water well exclusively in order to dry up the plaintiff's well? The French literature, however, went much farther with a theory that no right should be used beyond the scope within which it serves the intended social purposes. Some authors considered a right enforceable only when the plaintiff proves that he sues for a socially desirable purpose. Then, the Swiss Civil Code, Article 2, stated that "The manifest misuse of a right finds no protection in the law." This could mean anything, but the Swiss courts have interpreted the provision with the most sensible restraint. Like the French courts they act in extreme cases, such as when a strike or lockout are conducted with the purpose of ruining the other party. The Italian codifiers have expressly refused the general rule as too much extending judicial powers. This is the present alternative for legislators.

Acquisition of ownership by a purchaser in good faith was energetically opposed in common law. The present laws show a great variety of views. But the most recent codifications tend either to reduce the preference for the legitimate owner to goods stolen from him and assimilated losses, or to grant good title to
any innocent acquirer of possession for value. The American draft of a Commercial Code accepts the latter solution.

Great controversies have raged around the marital property systems. Historic merger of personalities of husband and wife during coverture on one hand, with the effect of gradually limited prevalence of the husband, was opposed by the feminist propaganda for radical separation of property, victorious in most states of the United States. But the systems of community property on one hand, and administration of the wife's not-reserved property by the husband with a half-share for the wife in the surplus—the Swiss solution—have obtained such a respected place that the new Venezuelan Code (Article 148 and following) contains a very detailed regulation of community of acquets and profits, retained as a matter of course in the Italian Code and the French draft. Louisiana will certainly remain in the same camp, although recent privileges of the wife seem not to fit into a balanced system. The Swiss consideration that their middle class handicraft and tradesmen needed the capital contribution usually brought by brides illustrates at the same time the part to be reserved to the local social requirements.

We are able, indeed, to write a table of the usual legislative problems and to categorize their usual solutions. Social organizations and moral convictions have become amazingly similar. Legal technique has still to be freed from local ineptitudes.

Such a study of the recent legislative movements, even a summary survey, would be greatly helpful for the drafting of a new Civil Code in Louisiana. Its legislators cannot wait until comparative research will have accomplished its huge program. But they, more than any other draftsmen, will be forced and eager to adjust the law of Louisiana to the needs of our time, mirrored in the common aspects of the Western laws.

PART V. THE LAW IN THE WORLD

THE ISOLATION OF STATE LAWS

Law is order; law means peace and seeks peace with justice. As human organizations develop, human activities grow in number and kind, and relationships become complicated—the task of law raises myriads of exigencies. Through hundreds and thousands of years, ancient and modern thinkers on state and society, and many generations of professional men, devoted to formulating, applying, and teaching the rules of law, have accumulated an
enormous wealth of knowledge, speculative theory, and technical art.

Law and lawyers, however, are integrated with the life, history, and culture of a sociopolitical unit—of the old Egyptians, of the Chatcha-Indians, of Bolivia. Certain units may embrace empires where one law is influential on the others, such as in the Roman, the Roman-German, and the British Empires. At the end of the eighteenth century, when the codes were formed of which the Civil Code of Louisiana is a descendant, the great enlightenment of the natural law united the nations in a deep conviction. Under its strong impulse, the laws of the sovereign states were thought to be imperfect efforts to approach the constant, ideal, divine law; and the Constitution of the United States, with the Bill of Rights, has remained a permanent monument to a related and profound idea: that principles and rights are stabilized by a higher order that cannot be affected by the ordinary processes of state legislatures or federal enactments.

But where no supreme law or constitutional restriction imposes exceptions, every tribe, people or state has its own law, native or borrowed. Thus, the Greeks, who were not a nation but a plurality of cities, poleis, had distinguishable laws in every one of them. When a citizen from Thebes came to Athens, he was not a participant in the Athenian law, which meant that any Athenian was entitled to seize him as a slave—unless the stranger was protected by a host or proxenos. Later a treaty between the two city-states proclaimed that he should be free of seizure, ἀσύλος esto—the right of asylum. The Greeks were a free people, they founded the idea of democracy, but for them as well as for the Romans, a polis as a matter of course consisted only of the citizens; in the people’s meetings, the citizens voted laws for citizens only. A foreigner had no right, no law. Only by concessions and finally by the great principle of the personal law, he enjoyed treatment according to the law of his own city, the “origo” of the Romans. Barbarians seize foreigners and kill them in honor of their gods, or eat them without ceremony. It is a long way from there to the Judgment (Series A, No. 7) of the World Court in 1926, stating that in the community of nations any state is obligated to grant any foreign national due process of law and refrain from confiscation, even though this state would not accord this minimum of rights to its own subjects.

However, a time came after Alexander the Great, when the Greek dialects merged into a common Greek language and a
rudimentary Hellenistic law could be sensed. The Greek philosophers had not waited so long to speak of law and judges, of Themis and Dike, dikastai and kritai, in a general manner and to develop the eternal idea of justice.

In a comparable evolution, the present leading European nations have formed national units in states, each having its own law. This natural and healthful development, however, suffered a distorted exaggeration just when the industrial and technical age demanded a new regard for international needs.

In the last hundred years, the lawyers of all countries have sat in airtight national compartments, always breathing the same air and highly afraid of a draft from outside. English insularity is the best known; it has lasted for more than seven hundred years; it is monumental and proverbial. When Lord Mansfield, one of the exceptional figures in English legal history, took inspiration from Continental literature and created modern Anglo-American commercial law, Junius in his famous letters bitterly deplored the treason committed by Lord Mansfield who had corrupted the noble simplicity and free spirit of our Saxon laws by importing into the court over which he presided such elements of pollution as the Roman Code, the laws of nations and the opinions of foreign civilians. And an English comparatist finds the English lawyer still in full agreement with these feelings. However, the great majority of the Continental lawyers from the early nineteenth century until the 1920's have by no means excelled in cosmopolitan broad-mindedness. On the contrary, lacking the wide horizon of the British oceangoing commerce, Frenchmen, Germans, and the other Europeans have during a century achieved a plurality of national laws, a conglomeration of secluded legal bodies, living separately and increasingly estranged. Each of these legal organisms thinks of itself as "the law." There is no "law," but only laws in the plural; consequently, it has seemed natural that there is no legal science—apart from a few international branches of law—in the sense of one anthropology, chemistry, or architecture.

This basic idea is intimately connected with the history of modern states, and with the weighty theory of territorialism, still much in vogue in Anglo-American law, as well as with the theory of legal positivism which dominated the nineteenth century on the European continent. It has remained an all pervading conception, formally supported by the prevalence of statutory legis-

lation by sovereign legislatures. Louisiana statutes make law exclusively within Louisiana. Texas law is a foreign law, and for many purposes deemed to be a mere fact, not a law. Even so, ignorance of foreign laws should not necessarily follow—but it does! Cicero called foreign laws almost ridiculous. We lawyers are outstanding examples of conservatism. We are hurt if we are asked to change a word of our language; we are not enthusiastic about suggestions to change a rule or a code.

Division is most striking on the European Continent. France, Spain, Italy, Germany, Switzerland, and Greece have achieved national codifications which unify their former innumerable statutes and usages, but which seal their countries off from each other. The effect of this, probably inevitable, disjunction has been constantly increased by acute nationalistic feelings. And when the twentieth century accumulated the interferences by states in the relations of individuals, the peculiarity of every public policy was so eagerly urged as to oppose an ever present obstacle to international harmony of law.

In the United States, thus far, methods and purposes of foreign law studies are just beginning to become known, although comparative research should by no means be regarded as alien. The coexistence of the several states and of the Federation, all legislating in sovereignty, has resulted in a broad and extremely useful judicial and literary national work. The Federal Constitution and the federal administration represent a measure of unity. Technique and ideals of the common law still form the strongest link of the lawyers. The law schools and the legal literature overcome the diversity of the state laws by crystallizing principles of American law out of disparate rules, adjusting to the national pattern of society and economy. Restatements and uniform state laws purposefully, though tardively and hesitatingly, approach the standardization of American business and living habits. The trend has gone from unification of mentality to unification of rules of law. At this moment, a voluminous and substantial draft of a commercial code opens a new vista. Simultaneously, this country has reached a position in the world which distinctly points to a further enlargement of its legal outlook.

Among all states of the Union, Louisiana stands in a special situation. Common law has made big inroads against which a vigorous reaction has started during the last two decades under the leadership of the two great law schools. A most exciting exchange of ideas is in the making which will find its climax when
the prospective new civil code is debated and the discussion will stimulate interest throughout the country.

You live in Baton Rouge, but also in Louisiana, in the United States, in the American Hemisphere. We do live in larger communities than states. For the first time, it is imperative that we change our outlook from provincialism to larger horizons, to embrace the world. Legal science, indeed, should not have been so content with its departmental successes. Comparative research in foreign laws should not have been so slow and so absurdly neglected, especially in the common law jurisdictions of the United States.

What are in the roughest outlines the international aspects of the present organization of law?

INTERNATIONAL PUBLIC LAW

The civilized states of the earth form a community of states governed by the rules of customary international law—so far as they reach. These rules for war and peace have emerged in the course of milleniums, producing a growing body of rights and duties of sovereign states against one another. On the fundamental thesis that agreements must be performed—pacta sunt servanda—treaties between two states, or multiple treaties, conventions, or unions have expanded to a considerable volume. Certainly, the last two wars, pervading and devastating the globe, have shattered in many honest minds the belief in any law of nations. Skeptics, by their intellectualism, and advocates of unlimited state sovereignty, by their nationalism, reinforce the influence of the doubters; the dreamers and utopians are even more harmful to sober development.

International law is not less necessary when it is more frequently violated. It needs only to be better impregnated upon the consciousness of the peoples. With all crises and reverses, we are irresistibly led to a supranational order, which does not mean a world government. There was a time when the families or clans fought violently for their independence from king or state. Management and labor, in the United States, seem united in the forceful refusal to submit to compulsory arbitration; they want the right to wage war. But since the United States has helped create the Pan-American Union, the United Nations, the Atlantic Pact, and accepted the compulsory jurisdiction of the International Court at least in principle, there can be no doubt of
the final victory of law over force—although we have no illusions that its day can be reached easily or quickly.

Unification

Public international law is a true law in force among the states, deserving the qualification as international. We may term likewise suprastatual those legal rules that by agreement among states are identical. The modern movement for internationally uniform rules originated in the latter part of the nineteenth century, as a reaction against the exaggerated segregation and succeeded in matters of maritime law, cables, railway carriage, copyright, negotiable instruments, radio, and air transportation. But usually either the territorial scope does not include all states of the earth, or the regulation comprehends merely segments of the matter. For copyright two groups exist: the convention of Bern and the Pan-American Convention, which the UNESCO is attempting to merge. The Geneva Conventions on bills and notes and on checks of 1930, the C.I.F. rules of the International Law Association and an international draft for sales of goods have not had, so far, a chance to be accepted by Great Britain and the United States, although eminent “common lawyers” participated in their elaboration.

The International Labor Office has worked with extraordinary zeal and has offered numerous proposals for conventions, a part of which has been carried over into important treaties on conditions of employment; employment of women and children; industrial health, safety and welfare; social insurance; and the protection of emigrants.

The slow satisfaction of the undeniable need for unified law on certain subjects is understandable. Not only are judges and attorneys very reluctant to sacrifice their familiar rules but also national habits, prejudices, and natural sentiments are hostile to alien suggestions; and common law mentality refuses to yield quickly to Continental methods. In the United States, the Constitution makes it difficult, though by no means impossible, to adhere to international conventions on private law. Occasionally, when a treaty such as the Brussels Convention on bills of lading, sanctioning the “Hague Rules,” is styled in American business

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language, resentment in France and Italy smolders against this indigestible addition to Latin prose. This is a counterpart to that bitter complaint of Junius.

The truth is that most diplomatic conventions have been inadequately prepared. We cannot understand each other, and still less agree with each other, if each partner insists on speaking his particular mind in his own idiom. The diplomats have not known and even few lawyers have clearly perceived what thorough comparative work has to be done before convincing proposals can be submitted. While the laws on bills and notes were thoroughly examined in the long preparation of unification, the “Hague Rules” were worked out in a naïve language by eminent experts of maritime carriage, maritime insurance and finance, and were such a delicate compromise that the state conference did not dare to disturb the diction in a professional arrangement. On the other hand, the Continental drafts are usually unacceptable to Americans simply because of their terminology. To breach the isolationist walls, great and worldwide scientific effort is required. The movement in the United States that has engineered the unifying works of the Uniform Laws and the Restatements, in the present epoch has the natural impulse to enlarge unification beyond the geographical frontiers.\(^3\)

**INTERNATIONAL LIFE**

In contrast to international public law—fragmentary and contested but at least supranational—constitutional, private, criminal, procedural, and administrative laws are eminently national. But in our epoch we have witnessed a rapidly and largely expanding sphere of international life of individuals and corporations. Families are dispersed over the globe. Emigration creates problems of various kinds. Associations for religious, educational, professional or charitable purposes embrace many countries, without having an international status which the International Law Association and the International Chamber of Commerce without success demanded to acquire. Business corporations operate in foreign countries. Loans are given to foreign governments, cities, and companies. Carriage by rail, water, and air; selling and buying of goods; insurance, bills of exchange, securities and financial transactions circle the globe.

How does our congeries of national laws and sporadic uniform laws cope with the problems of family relations and in-

\(^3\) Yntema, Unification of Law in the United States, in “Unification of Law,” supra note 2, at 301.
heritance, making and enforcing of contracts, and all conflicts arising out of this multitude of activities and mass of business transactions? To my knowledge, this crucial question has not even been raised in general form, so deeply have we been entrenched in our own national valleys.

The answer is unfortunately obvious. Exceptions notwithstanding, any misdeed, contract or relationship crossing the state borders is something extravagant, unfitted for the scheme, and not often covered by one easily ascertainable and suitable law. Foreigners are no longer broiled on a stake, but what the ancient principle of personal law guaranteed to the person, beyond the law of the forum, is now in doubt.

Allow me to point out four phases of this phenomenon: the legal position of corporations doing business in a foreign country; the actual system used by the merchants in order to take the law into their own hands; the branch of law called conflicts law; and the problem of international tribunals.

*Foreign corporations.* If an American-incorporated company wants to sell machines in a Latin-American country, it has usually to file a petition for a license to do business with the respective government, present a number of documents, pay certain taxes, promise to observe certain or all laws of that state, and to submit subsequently current reports and balance sheets. Many of the duties included are fair. The establishment of a foreigner cannot be privileged in matters of public trustworthiness, labor regulations, workmen's compensation, accounting and other matters of administrative organization.

However, many states grant permission to do business according to the pleasure of the government. Some try to control by their own laws the capital structure or voting method or the business done outside the state and have strangely harsh rules against companies not registered in the country. (Mexico's Supreme Court has denied the right to sue for violation of a trademark to an American company though it had no reason to register there.) Vexatious bureaucratic procedures are added. Of Panama, an excellent expert, Phanor Eder, has collected a long list of sins, including taxation policies deliberately intended to close the country to capital unless it submits to complete domination.5

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There have been companies that ruthlessly exploited their opportunities in backward countries. There have also been countries inviting foreign capital to come in and build up an industry, and finally confiscating the business. Against such unjust or unreasonable treatment of investors the Habana Charter for an International Trade Organization of March 24, 1948,6 contains the general and vague promises that at present can be reached in multilateral, international treaties.

I had suggested that an international model statute should be drafted to formulate more specific rules reconciling the legitimate interests of a country admitting foreigners to use its resources and labor, and the well understood interests of the companies bringing in the much needed capital, managerial skill and technical talent. The Habana Charter has since intervened, but it patently needs such an implementation.

Trade. It is a striking fact that international trade has established an awe-inspiring network of standard forms regulating the points of characteristic interest7 for every considerable branch of trade, according to the special kinds of merchandise and the typical habits of carriage or financing. The facts of the transactions, the customary considerations of a seller or buyer, the local facilities and the personal connections are much more weighty than nationality and national law. Only when the enforcement of the contractual rights is envisaged, there has been a tendency in the many commercial transactions influenced by the British models to submit to the English courts, or to arbitration in London, which implied, in the English conception, application of English law.

Recently a mighty wave of commercial arbitration has run over the business world, in domestic as well as international commerce. In addition to London arbitration, the great arbitration courts of the International Chamber of Commerce in Paris and of the American Arbitration Association in New York, as well as a number of minor commercial arbitration centers have acquired an immense field of operation. The American method excluding the courts from any control of the merits of the award prevails in the world. An award cannot be challenged because of any

7. Grossmann Doerth, Das Recht des Uberseekaufs (Mannheim, 1930); Raiser, Das Recht der allgemeinen Geschäftsbedingungen (Hamburg, 1935); Di Pace, Il negozio de adesione nel diritto privato (1941) 39 Rivista di diritto commerciale (1941) 34.
legal mistake or failure to apply a law, or for the failure to mention any grounds for the decision. Hence, the departure from judicial process is complete. In international matters, this unchecked autonomy of the arbitrators, on one hand, and the standard forms, on the other hand, have accomplished a startling emancipation from all national laws, including the conflicts laws. Their application practically depends on the discretion of the arbitrators. International business, so to speak, floats in the sky on self-made clouds, aloof from the earth—and state-bound legal systems.

Courts. Arbitration is secret. The decisions are presumably excellent and justify the claim that they provide speedy, inexpensive, and fair justice. But we do not know exactly what these tribunals, not bound to law, working in silence and free from our criticism, contribute to the development of commercial law. This by itself is a serious reason for postulating the establishment of international courts which would decide, upon the authority of treaties, litigation in private matters. We need a judiciary of recognized impartiality and objectivity, as familiar with the international business of traders, banks, carriers and insurers as only the privileged courts of a few great centers are. This postulate has been based on the cost and slowness of the national courts, and a certain mutual distrust. But much more important for the general progress of the law than any improvement of the enforcement of the individual rights is the activity of judicial bodies working in contact with international analytical and critical studies. Great learned achievement and high judicial accomplishment have to be joined for balancing experience and theory. They are the primary forces of any legal development, preparatory to treaties and uniform statutes.

Conflict of Laws. Facing any ordinary case of private relations, connected with more than one state, we have to know which of the states involved is competent to govern this case by its law. This question of a choice where there is a conflict of laws,

10. This idea has been expounded in my paper, International Tribunals for Private Matters (1948) 3 Arb. J. (N.S.) 209. As reported in Sanders, Arbitration at Two International Law Conferences (1948) 3 Arb. J. (N.S.) 213, the International Bar Association at The Hague, 1948, accepted the excellent proposal of the Leyden professor Cleveringa that an International Maritime and Aeronautic Law Court should be established.
again, is answered by every state as it pleases. Three states may all claim to have their respective law applied to the same marriage, will, or sales contract; or no state may want it, which is much rarer. Of course, a large theoretical effort in the leading nations and the instinct and fairness of the judges have reduced the inconveniences to a moderate measure. But frictions and doubts occur throughout the entire field of international intercourse.11

A man and a girl arrive from Venezuela and get immediately married, although their home law prohibits their copulation. After a year in New York, the wife goes to Reno and after staying six weeks in an auto court is divorced. In Venezuela they are considered as living in a void marriage, in Nevada as divorced, in New York as married, at least if the man protests. A child born in the meantime may search for his family and inheritance rights. The wife may remarry and some lawyers will have a good time disentangling the legal mess ensuing. A couple has recently become famous in American constitutional law because they were declared married in Nevada and jailed for criminal bigamy in North Carolina. But we think nothing of a child having two legitimate fathers in different jurisdictions.

A manufacturer in Columbus sells by correspondence products to a purchaser in Guatemala. The buyer refuses acceptance and while an American court would adjudge the seller's action on the ground of the Uniform Sales Act, the Guatemalan court dismisses it, applying its own law or practice.

Jute bags are loaded in New Orleans to Rio de Janeiro on an Italian vessel. Half of the goods are stolen. Is the ship company liable? If not prepaid, at what time is freight payable? Louisiana, Italy, and Brazil, under divergent conflicts rules, applies each its own law.

So far, we assumed that the court knows what law it has to apply; often it does not. And the parties, before contracting, do not know what court will be the forum.

We are not accustomed in other branches of law to such a degree of uncertainty, contradictions, and awkwardness. Historical and theoretical particularism has necessarily been damaging to a field where the interdependence of the countries and the significance of private interests require harmony. If the

interest, or what is understood as such, and the national brand of legal tradition and habit, are allowed free extension beyond the domestic affairs, harmony is unobtainable. The community of states, then—if I may quote myself—is an orchestra where every instrument is tuned to a different key.

**Comparative Law**

The primordial steps leading us from isolation to community, in the legal field, are in comparative research. In Europe, this has been perceived in the difficult time after the First World War. We have created institutes for comparative law, at least one of them with full equipment of books and a strong staff. We have studied English law and for the first time American law, discovered suggestions for improving our domestic legislation and jurisprudence, advised business and government on foreign laws, begun to form conclusions about the validity of legal theories and prepared for legal philosophy.\(^\text{12}\)

The United States, if it only chose to attend to an analogous task, could avail itself of incomparable resources, personnel and material. A small but far-seeing group of scholars in this country now postulates assumption by the United States of such full responsibility in the promotion of law as would match the political and economic leadership that has fallen to the United States, almost against its will. What Wigmore postulated in 1920, that American ideas should impress some of their features upon international legislation, while they have remained behind on the highway of international unity,\(^\text{13}\) ought finally to be fulfilled by hard work.

Quite recently the UNESCO has taken sponsorship of an international organization for cultivating comparative law.\(^\text{14}\)

The law schools of Louisiana have recognized the value of comparative studies for two decades and furnished the most important contributions in this country. After having seen Louisiana State and Tulane at work, I am hopeful that they will go further ahead and afford a particularly substantial cooperation in the great task leading the science of law, after thousands of years, to a new, a worldwide destination.

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\(^{12}\) Rheinstein, Comparative Law and Conflict of Laws in Germany (1935) 2 U. of Chi. L. Rev. 232; my article, On Institutes for Comparative Law (1947) 47 Col. L. Rev. 227; David, Traité élémentaire de droit civil comparé (1950) 395 et seq.

\(^{13}\) Wigmore, Problems of Law (1920) 131.

\(^{14}\) Hazard, UNESCO and the Law (1949) 4 The Record of the Association of the Bar of the City of New York 291.