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International Congress of Comparative Law

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INTERNATIONAL CONGRESS OF COMPARATIVE LAW

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In conformity with resolutions passed by the International Academy of Comparative Law at its plenary sessions in 1929, 1930 and 1931, it was resolved that an International Congress of Comparative Law should be held at The Hague from the 2nd to the 6th of August, 1932. It is hoped that like Congresses may be held every three years in other cities. The official languages of the Congress were English, French, German, Italian and Spanish. The objectives of this Congress were threefold: (1) An understanding of the legal systems of laws of different countries, (2) comparing these systems, (3) trying to arrive at their correlation or uniformity, in order to facilitate the resumption of international exchange of commodities and cultures.

This was the first international congress of its kind in history and has no doubt laid the foundation for other similar congresses in the future.

Dean Pound of the Harvard Law School, in an address to the Louisiana State Bar Association, called attention to the fact that the necessity of facing new situations always causes lawyers to turn to comparative law for light and assistance.

In the United States today as well as in every other country the people have a new problem to face which calls for the aid of comparative law. This is the problem which has grown out of the establishment of more efficient and rapid facilities for carrying on all kinds of international exchange of goods, investments and populations. This has brought each nation and its people to the front door of the other nations. The result has made it imperative for each nation to know the laws and systems of laws of the other, in order to achieve that mutual understanding and confidence which is necessary to the continuance of uninterrupted, peaceful and profitable business.

The practice of following goods and investments into foreign countries with one's own local laws as a guide to legal rights and responsibilities, only to have the foreign customer receive those goods or investments with ideas of rights and obligations under totally different laws which prevail in his country, has

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been a great breeder of international conflicts and misunderstandings as well as a cause of heavy financial losses. It makes for empty ships and the disruption of international good will. The same dire result follows when local self-centered and often antagonistic laws not only greet the foreigner's goods but the foreigner himself who personally visits or moves to another land.

It was for the foregoing reasons and with the foregoing objectives in view that the congress met.

Attending this meeting were some three hundred delegates from over fifty countries. These delegates represented the three classes of the legal profession, the law faculties, the bench and the bar. From the United States were such prominent men as Dean Wigmore of the Law School of Northwestern University, Professors Sunderland and Dickenson of the University of Michigan Law School, Professor Borchard of the Yale Law School, several federal judges and members of the bar of Massachusetts, New York, Illinois, Pennsylvania, Tennessee, South Dakota, Missouri, Louisiana, Maryland, Ohio, Texas, Indiana, numbering fifty in all. From England, such eminent men as the Rt. Hon. Lord McMillian, Lord of Appeal in Ordinary; the Rt. Hon. Lord Hansworth, Master of The Rolls; Lord Justice Greer of the King's Bench Division; Sir William Holdsworth, Professor of Law at Oxford; Professor Lee of Oxford; also prominent members of the bar of England and Scotland. From France were Judges of the Court of Cassasion. The Minister of Foreign Affairs of the Netherlands was present, as were Judges of the Permanent Court of International Justice and other outstanding men of the profession.

The congress was divided into five sections and delegates could attend the meetings of any section they might desire.

Section 1 was the General Section. In this was discussed all the main sources of law and their relation to each other in different systems of law which prevail in various countries of the world. There was a rather general discussion of Common Law as compared with Civil Law, the two great systems. An interesting report was made on the sources of law in the United States by Professor Colvin of Tulane University. He brought out that the Civil Law (Continental European Law) first entered the United States by the extension of French explorations and scattered settlements from Quebec down the Mississippi River to the Gulf of Mexico. Out of this territory six states have been carved.

Spanish conquests subsequently swept across the South from Florida and up the Mississippi River to the southern boundary of present-day Illinois. In the meantime, the Dutch introduced Roman Dutch Law into New York. So we see that the law which was first introduced into most of present-day United States was some form of the Civil Law.

After independence and purchase gave the United States the above territory, she acquired by way of cession a large portion of the northern part of Mexico whose people were governed by Spanish Civil Law. Out of this territory six states were created.

In all of the five insular possessions of the United States except one, the Spanish Civil Law predominates. English Common Law was brought to this country by twelve of the original thirteen colonies. As the settlers of these colonies pushed westward they carried with them the Common Law of England, and as establishers of an English-speaking nation they gave an immense impetus to the carrying westward of English Law, which soon penetrated the Civil Law territories above described. This resulted in an interesting fusion of the Civil and Common Law. And so today Common Law predominates in all of central, western and southern United States with the exception of Louisiana. This Common Law so operating is far from pure English Common Law, but has been permeated by the Roman Civil Law which originally existed there.

Section 2 was the Civil Law and Procedure Section. In this group was considered the civil and commercial law of all legal systems. Taking up specifically the formation of contracts and consequences of their breach.

In regard to commercial law, it is interesting to note that in neither the English nor American systems of law does there exist any separate commercial code, nor any very exact idea of what commercial law means, nor any special tribunal for its administration. In most continental countries, however, there is a commercial code administered by commercial courts.

In England one of the judges of the King's Bench Division sits specially to hear commercial cases, and his court is called the commercial court, but no hard and fast line exists as to the kind of case which may be allotted to it. In the United States no such court as this exists. In both England and the United States what might be termed commercial law in other systems is practically absorbed in the ordinary law of contracts. As you know, Article I of our Federal Constitution aims at securing freedom of commercial intercourse, but this article has been

interpreted very broadly and has been made to include many things which we do not usually think of as exchange of goods. You are also, no doubt, familiar with the attempt made by the Supreme Court of the United States to develop a body of uniform commercial law, but this development has met with disappointing results.

Resolution was moved in this section that there should be established a uniform commercial code to be adopted by all the great commercial nations. This resolution was defeated and rightly so, I think. What is needed is not a uniform code the same in all countries, but for those commercial countries which do not now have commercial codes to adopt one, and then for all of the countries to understand the commercial code of the others.

It is worth noting, finally, that in both England and the United States there is a strong tendency to submit commercial disputes to arbitration rather than risk the delay and expense of litigation.

In this section there was also a most interesting discussion of declaratory judgments. Professor Borchard of Yale gave a splendid report. Declaratory judgments began in France, went from there to Scotland, thence to England, thence to the United States where it has been adopted in some thirty-eight states. It has many advantages, especially in the case of long term industrial contracts, where the common law rule that the contract must be broken before the rights of the parties can be determined works many hardships. A good example of this is the recent Beaverbrook case in the House of Lords. There an English concern had agreed to furnish coal to a German industrial plant from 1910 until 1935. There was a provision in the contract that war would suspend the performance. War came, and after the war in 1919 with the changed conditions that existed, the question arose: Must the English firm continue to perform?

You can readily see the advantage of a declaratory judgment, parties can have their rights declared without breaching the contract. In this case their Lordships said that the English concern did not have to perform. As Lord Gilbert said in discussing declaratory judgments, "Under the common law a party to a contract takes a step, then turns on the light to see if he has stepped into a hole; while by use of a declaratory judgment, the party turns on the light, then takes the step."

I leave it to you gentlemen which is the more sensible procedure.

The declaratory judgment should be used instead of the abusive use of the injunction. Congress, instead of cutting down the use of the injunction, should introduce in its stead in certain cases the declaratory judgment. But the United States Supreme Court was so misguided that it has held that a declaratory judgment is unconstitutional because not involving any case or controversy.[1] The Supreme Court failed to make the distinction between a declaratory judgment and an advisory opinion. It is hoped that the Supreme Court may see its error when another case comes before it, and that the remainder of our states may soon adopt the Declaratory Judgments.

Section 3 was the Banking and Copyright Section. In this section were considered the questions of limited liability companies, voting rights of shareholders, and other similar problems of corporate workings. Also bank credits were discussed and the protection of international current information by the use of newspaper copyright and broadcasting protection.

Section 4 was confined to Criminal Law and Administrate Law. Under the head of administrative law was discussed the rise in the United States of administrative boards such as the Interstate Commerce Commission, Public Utility Commissions, Industrial Boards, and the like.

In continental countries these commissions have long existed, but in the United States they are of a comparative recent origin. In America, as you know, the problems presented by the organization of these administrative commissions involve questions as to what powers belong to each of the three branches of the government, and to what extent these powers of the judicial branch may be delegated to administrative bodies. The reason for the growth of these bodies may be found in the inadequacy of the courts in coping with technical problems. Experts were needed, rather than ordinary lawyers. The workings of these commissions have on the whole, been highly satisfactory.

Section 5 was concerned with International Law, Public and Private. Under this head was discussed the subject of conflict of laws, especially in the formation and dissolution of marriage,

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[1] Editor's Note: At the time Mr. Bracken prepared this paper the case of *Nashville, etc., R. R. Co. v. Wallace* (1933), 53 Sup. Ct. 345, had not been decided. In view of the implications of this case it may be that a federal declaratory judgment statute is not unconstitutional. See Gavit, Procedure Under the Uniform Declaratory Judgments Act (1933), 8 Ind. L. J. 409, 413; Borchard, The Constitutionality of Declaratory Judgments (1931), 31 Col. L. Rev. 561, 581.

and the execution of foreign judgments, and the nationality of foreign corporations. A question that has caused a great deal of difficulty between nations is the paradoxical query, "When is a treaty not yet a treaty?" A great deal of the time of the Section was devoted to an attempt to clear this question, by considering modes of properly concluding international treaties.

It might be well to mention in connection with this section on International Law, an organization which has been developed at The Hague called the International Intermediary Institute. This Institute was founded in 1918 by a group of Dutchmen, for the purpose of supplying all the information which a lawyer or business man constantly requires for the study of international relations. Through certain resolutions passed in this Section an attempt was made at bettering this Institute by appointing representatives in various countries through which persons may obtain the desired information.

The Congress was closed by a general meeting in which the results of the sectional meetings were summarized and reviewed.

As for concrete results of this Congress, it would be hard to give any definite ones. A tentative plan for a permanent world-wide coordination of the legal profession was presented, which would bring into closer contact the legislators, the law faculties, the bench and the bar. Nothing definite, however, was decided upon, but it is hoped that in the near future a definite plan for such an organization will be submitted.

I think, however, that the delegates to the Congress from the United States could certainly profit a great deal from the realization that the law as practiced in the United States is not in every sense the best in the world. In this regard, I do not criticize the substantive law as we find it here. I think that the greatest criticism of our system is on the side of procedure. Our courts, especially our state courts, are operating under an antiquated system of procedure, which was all right in the days when there were few litigants, and few cases, but this procedure is far from adequate for dispensing justice in these modern times.

In France or in England, it is unheard-of for a court of review to be more than one year behind, while, as you know, in our own state our courts of review are from five to six years behind. Certainly it is time for the lawyers in any state where this condition exists, to remedy this deplorable situation. I feel that a study of the procedure systems of England, or any continental country would aid immensely in revising our own.

The General Section of the Congress unanimously passed a resolution asking for the creation, under the auspices of the International Academy of Comparative Law of (1) an International Faculty of Law, and (2) an International Comparative Law Review which would be the Academy's official organ. The resolution also asks that Comparative Law be taught in all the law faculties of the various law schools in the different nations.

In regard to the seat of the proposed Faculty of Law, it seemed that The Hague, being the seat of the Permanent Court of International Law, would be the logical seat for an International Faculty of Law. The teaching of Comparative Law is gaining ground every year. Institutes of Comparative Law exist in connection with the law schools of Paris and Lyons.

The formation of a similar institute in connection with Columbia University was planned, but the idea seems to have been postponed for the lack of funds.

I know of but one bar examination which requires a knowledge of Comparative Law, and that is the examination given by the Province of Quebec.

However, through the better understanding of various national laws, far-reaching results will surely come. For the United States this result has an especial interest. The United States as an industrial nation, whose mass production must find markets, as a creditor nation whose investments are planted in all countries of the world, as a culture seeking nation, and as a country which aspires to live up to its position of moral and economic leadership, it must, if it prosper, understand the laws of other countries and get on well with other nations. And only through Congresses such as the International Congress of Comparative Law can this desired understanding of national laws ever be achieved.

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* Mr. Harding was chosen to replace Mr. Franklin G. Davidson of Crawfordsville who died September 27, 1932.