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RESEARCH IN INTER-AMERICAN LAW AT THE UNIVERSITY OF MICHIGAN

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IN the Americas, the historic trade routes have run east and west, more than north and south. Geographic necessity has decreed that, subject to possible reorientation with the future development of aviation, the dominant factor influencing the course of commerce with this hemisphere should be the open sea. Westward across the Atlantic, came the explorers, the conquistadors, the pioneers, succeeded by wave after wave of immigration to the New World, seaborne on argosies that, laden with the fabulous spoils and profits of empire, returned to the homelands the tribute of the New to the Old World. Achievement in the Nineteenth Century of political autonomy by the American republics, despite the growth of local industries and markets, did not alter the primary channels of international commerce. Nor did the epochal building of the railroads in place of the more primitive turnpikes and canals do so; from the viewpoint of world trade, these still lead to the great maritime ports, the nerve centers of American civilization, through which the raw materials of the hinterlands are forwarded in exchange for foreign goods. Among the most precious of these goods have been the languages, the laws, the institutions, inventions, ideas, customs, and beliefs that those who came to America brought from Europe. For this reason, generations after the declarations of independence, the main currents of culture lay across the Atlantic to America. In this invisible commerce, the balance has been long and largely in Europe's favor.

It is therefore not surprising that, with the outstanding exception of constitutional doctrine, legal science in the United States, as indeed in other parts of the Americas, should have retained a species of colonial status long after political emancipation. From Joseph Story to Roscoe Pound, the purveyance of current European juristic ideas has been the royal road to distinction in legal scholarship. It is symptomatic that, for generations, the principal treatise on private law in this country was Blackstone's *Commentaries*, and it is not without significance that a new edition of this historic epitome of the English Common Law, long since laid on the shelf in London, has recently been published in In-

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dianapolis. The dominant factors in the slow development of an indigeneous legal science in the United States have been: primarily, the reception of the principle of the Common Law, supplemented by the conception of national historicism, which, exported to the United States *via* England, stimulated for a time an infectious, if temporary, interest in the *arcana* of the jurisprudence evolved by the central British courts; second, a convinced reliance on empirical legislation as the efficacious means of progress, a view traceable to the writings of Jeremy Bentham, which, in conjunction with the doctrine of the separation of powers, long served to segregate traditional jurisprudence from the social needs of reform; and, third, the implantation of the sociological doctrines developed on the European Continent by Auguste Comte and his successors, representing the belief that social phenomena are susceptible of scientific study, in various new social sciences, organized independently of the professional law schools. Thus, until but recently, historical attachment to the Common Law as a bond of Anglo-Saxon unity, acceptance of the formal, authoritarian notion of law developed by Austin as the instrument of utilitarian reform, and the approach to government as a branch of social science, the last outside the pale of law proper, incongruously joined to form a basic philosophy of law in the United States, that while it persisted, doomed legal science to exegetic impotence.

This is but to say that America long remained a subordinate area within the orbit of western civilization—a colony of European culture, in law as in other parts of science. Parenthetically, it may be added that the hereditary umbilical relation of legal science in the United States to European influences has its counterparts beyond the Rio Grande. Substitute *Las Partidas* for the *Yearbooks,* Pothier for Blackstone, the Code Napoléon for the English Reform Acts, France for England, and the parallel is in essential aspects complete. To borrow from the expressive folklore, all Latin-Americans originally come from Paris.

There are, however, signs that America is coming of age. Twice within a generation, it has been necessary for the nations of this hemisphere with tremendous sacrifice to intervene to save Europe from itself. While in a sense this may be taken to evidence a filial interest in the perpetuation of the European democracies in the *statu quo ante bellum* and in any event as proof that America is inextricably enmeshed in the bloody toils of European power politics, it also inevitably has affected the relation of the New World to the mother continent. The first world war cast upon a reluctant America leadership in the develop-

ment of international law. Aside from this mark of maturity, there are also other, if less conspicuous, signs that the evolution of American legal culture has progressed beyond the stage of colonial imitation. Legislative reforms, for example in the field of agriculture and labor as well as in government and administration, are no longer inspired by the current modes in Europe but by the conscious needs of intelligent and forward-looking populations. In this country, attention has shifted from the antiquities of the English Common Law to the extraordinary variety of our own jurisprudence; a highly effective and characteristic mode of legal instruction has been evolved; and there is emerging a philosophy of law reflecting American needs and conditions. Legal research, following the stimulating examples in other social sciences and exploiting new materials and techniques of inquiry, is accorded recognition as an essential function of the law school in a university. These are indicia of an autonomous legal culture.

An autonomous culture, be it noted, does not require or even comport with isolation. The glory that was Greece, the splendor of Rome, and the apogees of cultural development in the Italian and Iberian peninsulas, in the Netherlands, England, France, and Germany, wherever from time to time the torch of civilization has most brilliantly burned, did not close the gates on foreign commerce and ideas. On the contrary; the vigorous, assured activity of a golden age dissipates the sense of inferiority that breeds provincialism. It opens the windows of the soul to whatever may be true and beautiful, irrespective of its place of origin. In such places at such times, the social criteria favor the development of the sciences and arts, for these, the essential means and vehicles of human progress, inherently transcend political frontiers.

Thus science, having the purpose to ascertain and to state the truth, must necessarily be comparative, taking into account any and all phenomena that may bear upon the myriad problems and issues that deserve investigation. Obviously, any social science that is predicated upon political prejudices or is concerned exclusively or preferentially to serve a special class, creed, race, or nation, is fundamentally unsound. This means specifically that, while each individual scientific community must cultivate its own yard—the legal science of the United States, for instance, the tremendous variety of problems offered by the laws of this country—it can as little afford to ignore as to copy merely what is going on in the world outside. Comparison, the objective examination of legal phenomena in other times and countries alongside of familiar local institu-

tions, is an essential function of a mature or, in other words, a true legal science. The community of science is humanity; its currency is the truth, not the trademarks of prestige, domestic or foreign.

These considerations inspire the limited efforts that have been made in the United States to develop the comparative study of law. In this respect, legal education and research in this country has been in a parlous state indeed. While the specialist in almost any other field of science is expected in his instruction and research to take account of achievements in other countries, pertinent to his particular subject matter, the great majority of our law students go to the bar, doubtless well enough equipped in the craft of the profession, but with inadequate understanding of general legal theory, without an intelligent perspective of the great legal traditions of the United States and their cultural background, and in abysmal ignorance of the laws of other lands or even of the Roman law, which has been characterized by Buckland, next to Christianity, as "the greatest factor in the creation of modern civilization."[1] This is a hard statement, but, even allowing for the graduate courses provided in the leading law schools to remedy these deficiencies, it is notoriously and uncomfortably true. The fact is that the exigent and time-consuming requirements of the case-system, the multitudinous mass of local precedents that must accordingly be encompassed in each subject, the consequent tendency to split up the field of law into ever-narrower topics without compensating synthesis, and the all too brief period of three years allowed for legal instruction, have conspired in the present system of legal education in the United States to accent professional proficiency at the expense of scientific understanding. It is a system that produces many smart lawyers, but relatively few substantial legal scholars. Even in England, where study of the classical Roman law forms an important stage in the education of a lawyer, the outlook is not so provincial.

It is not necessary to dwell at length upon the pertinence of the foregoing observations at the present time. Under the tremendous impact of the present world conflict, the people of the United States have come to a stern realization of their international commitments; they have been forced, and it would seem definitively, to abandon the traditional policy of isolation. Millions of our citizens, now quartered under the Stars and Stripes in all parts of the globe, will soon return home, many with new ideas and interests engendered by their sojourn

[1] J. SOC. PUB. TEACH. LAW 25 (1931).

in foreign lands. Even so, it might perhaps be possible for the country to resume a provincial policy, were it not for the stimulus given to aviation by the war. The resultant, technical development of aeronautics opens revolutionary vistas in foreign trade. Commercial aviation within its ambit displaces the seaboard as the necessary focus of traffic; the seaboard of the air is the whole earth. So far as physical geography goes, Dayton or Emporia would serve as well as New York or San Francisco as centers of airtransport. Consequently, it may be anticipated that the legal problems arising from foreign commerce will be in the future more widely distributed and not so much concentrated as in the past in a few major ports, particularly if, as may be anticipated, the industries of this country extend their foreign markets. Such a development would render it entirely possible within a few years that any sizeable law firm without appropriate representation in international and comparative law will be behind the times and any law school that is not in position to provide training in these subjects, derelict in its function.

In this light, comparative study of the laws of the Americas, especially those affecting international commerce, is of special and immediate interest. Here in the New World, the significant legal systems of Europe have been received and are being adapted to modern conditions, affording a unique basis to explore the diversities and essential similarities of the two principal legal cultures, the Romanic and the Anglo-American. Such exploration is needed to supplement the corresponding studies of the European laws, inaugurated in Europe after the last war; indeed, the tragic interruption of these studies by the present conflict may be thought to impose on America, in this as in other branches of science, a primary responsibility for the continuance of comparative legal research, as one of the essential endeavors making for international understanding and civilization.

Moreover, the subject matter presents an exceptional opportunity to contribute to reciprocal comprehension of the respective legal systems and in this way to implement the established policy of inter-American solidarity. Only by this means—by careful scientific comparison of the existing institutions, as contrasted with unilateral efforts to propagate a particular system—can a sound basis be laid for such reconciliation of the laws in this hemisphere as is possible and desirable. The aspiration, magnificent and long persistent, to an international public and private law for the Americas, evidenced in the resolutions of the successive international conferences of American states since 1889, has thus far remained abortive, at least so far as private law is concerned, in the

absence of the essential preparatory comparative research. Progress toward this end supposes mutual conciliation, which, even with the best intentions, cannot be accomplished without mutual understanding of the views to be reconciled. From a more immediate point of view, while some may deem the objective distant or even illusory, meanwhile the results of such research will directly benefit and facilitate international relations and trade.

The opportunity is exceptional, and for reasons above remarked. Legal scholarship in the United States, once obsessed by the provincial myth of European superiority and latterly engrossed in the profusion of domestic jurisprudence and legislation, has all but ignored the legal institutions of the sister republics to the south. As a result, except for a limited number of specialized practitioners in a few large cities, the members of the legal profession in this country have grown up in corresponding ignorance of the monuments of legislation, the distinguished jurists, and the legal problems of Latin America. Indeed, if an average member of the bar or even a law teacher in this country at present were to seek to inform himself adequately on such matters, he might well be daunted by the difficulties; aside from familiarity with the languages and some acquaintance with the Civil Law, access to one of the few libraries containing adequate documentation, and arduous study of the literature and legislation in each country would be requisite. We may scarcely solace ourselves with the observation that legal science in Latin America, dominated by Continental legal doctrines, is to a degree also segmented on national lines and that its jurists are, apparently and for analogous reasons, blessed with comparable ignorance of the system of private law in the United States. The recent establishment of the Inter-American Bar Association, a notable step in establishing relations between the branches of the legal profession in the respective American countries, is a recognition, not an effective solution, of the condition. It remains for American legal scholarship in each country to discover the other laws of America and to remedy the prevailing nationalistic isolation in this respect by providing facilities for reciprocal understanding. This is a new world for comparative legal science.

With a view to contributing to these important objectives, the Faculty of the University of Michigan Law School, who have long had a sympathetic interest in the development of comparative legal studies, recently authorized the writer to undertake, on an experimental basis, a survey of the existing commercial laws in the Americas as a part of the legal research program of the Law School. This general subject

matter was selected for investigation after consultation with a number of individuals, some in official positions, whose advice was sought on account of their expert knowledge of and interest in, the international aspects of law. Among these was the late John H. Wigmore, that great scholar and generous patron of international legal understanding, who, in a typically illuminating and exhaustive communication to the writer, characterized the proposed undertaking as "of the highest importance." In the light of the many helpful suggestions thus received, it was decided to concentrate attention first on the field of commercial instruments, partly on account of its practical importance for international trade and its intrinsic theoretical interest, partly since, as a result of the adoption of the Negotiable Instruments Act in all the states in the United States, the analogous reception of the Bills of Exchange Act throughout the British Empire, and the extensive efforts in Europe to unify the Continental systems of commercial paper, culminating in the Geneva Uniform Law of 1930, substantial progress toward the consolidation of the subject matter has already been made, and partly and finally since, of all the fields of commercial law, this is the most distinctively technical and nonpolitical and therefore forms a relatively promising field to test comparative methods and to explore the possibilities of legislative unification.

As a preliminary, an exhaustive bibliographical survey of the necessary materials was made by a talented European-trained lawyer, familiar with library problems. On the basis of this study, supplemented by the efficient services of the staff of the Law Library under the sympathetic direction of the Law Librarian, accessions have been made to the pre-existing substantial collection, such that there is now available for research and for consultation by the members of the bar in the Middle West a relatively comprehensive collection of Latin-American legal materials, to which further additions are constantly being made. Thereafter, with the generous cooperation of the Department of State, a talented group of representative legal scholars, recently graduated from the leading universities in Latin America, have been brought to Ann Arbor to participate in the enterprise, described as Research in Inter-American Law. Each has undertaken to prepare a monographic study of the laws in this hemisphere, relating to some significant aspect of the laws on commercial instruments. In due course, this series of studies will be published in the *Michigan Legal Studies.*

In order to make certain of the results of this research available to the public at an earlier date, the present series of articles, to appear for

the most part in the *Michigan Law Review*, will include selected chapters from the above monographic studies or special essays on topics that it is hoped may be of interest. The first of these articles, dealing with the "Unification and Present Status of Negotiability Legislation" and forming the introduction to the study of "The Extrinsic Requirements of Bills of Exchange," prepared by Dr. Hugo Bunge Guerrico of the Universidad de Buenos Aires, is appearing in the current issue of the *Minnesota Law Review* through the courtesy of Professor Henry Rottschaefer. This article provides a compact account of the efforts that have been made since 1863, primarily in Europe, to unify the laws affecting commercial instruments and also a summary review of the chief characteristics of the respective American laws on the subject. The informing treatment of legal capacity under the American negotiable instruments laws, accompanying these remarks, is a part of the study of "Negotiation of Bills of Exchange" prepared by Dr. Ramírez, but, as will appear from the contents, it is of general interest, covering the capacity of minors and of married women under the various systems of matrimonial property, to enter into commercial contracts.[2]

[2] For the translation of these two articles, originally prepared in Spanish, special acknowledgement is due Mrs. Roberta M. Garner of the research staff. It should be explained that, to facilitate the work, the studies prepared in connection with the Research in Inter-American Law are originally written in the native languages of the authors. The difficulties in translation are not inconsiderable; they derive in part from differences of style but more importantly also from differences in the legal systems, ordinarily taken for granted in juristic discussions. In a degree, the process makes the conceptual problems of comparison more explicit than appears in the framework of a single legal language.

By way of illustration, reference may be made to the concept, "relating to negotiable instruments," which is typically represented in Spanish by the adjective, *cambiario*, and by corresponding terms in Portuguese, Italian, and certain other languages. Unfortunately, there is no equally convenient shorthand expression in common English use; in the absence thereof, except as other language seems more appropriate, the somewhat unusual word, "negotiatory," has been pressed into service in the translation of these studies, to denote the concept. The term, "exchange," seems less satisfactory for the purpose, at least on this side of the Atlantic; moreover, it has conflicting meanings and suggests an outworn doctrine of negotiability.

The truth is, however, that *cambiario*, e.g., in *la ley cambiaria*, *derechos cambiarios*, *obligación cambiaria*, and the like, virtually defies rendition, since the terminology is both ambiguous and supposes fundamental distinctions unknown to Anglo-American law. The terminology has been taken over by the current Spanish literature from the Italian usage, in which *la cambiale* and its derivatives refer, according to the context, either to bills of exchange generically, i.e., commercial instruments, or to the bill of exchange specifically.

The uncertainty in the Spanish usage may be illustrated by the following passage from the well-known commentary on the Spanish Code of Commerce by Gay de

The desire for reform, particularly on the part of those members of the profession who conceive of codification or restatement as a specific remedy for the diversity and uncertainty of the laws, is typically impatient. For this reason, it is perhaps worth observing that, as the experience in the development of this research once again demonstrates and as the linguistic difficulties alluded to in the preceding footnote may illustrate, the problems of comparative legal research are subtle and complex. Mere formal collocation of the laws to be compared is not adequate; account must be taken of the interpretative doctrines and their illuminating applications by the courts to specific problems, as well as of the differing structures of ideas, the historical backgrounds, and the special procedural and practical aspects, relating to each question. The problem is to examine not mere formulations *in abstracto*

Montellá, referring to the circumstance that a bill of exchange (*letra de cambio*) may contain an obligation either to pay or to cause payment to be made:

"En la primera forma, la letra de cambio se presenta como una obligación personal, directa, y toma propiamente el nombre de *cambial*, o *pagaré cambiario*. . . .

"En el segundo caso, la cambial se presenta en forma de carta o de orden, dirigida o dada a una persona para pagar determinada cantidad, en cuyo caso toma el nombre de letra de cambio dentro del grupo de las obligaciones llamadas de asignación o delegación (*anweisung*), de una persona a otra para reclamar de un tercero dinero, títulos u otros bienes por cuenta del asignante." 3 R. GAY DE MONTALLÁ, CÓDIGO DE COMERCIO ESPAÑOL COMENTADO 455.

The *letra de cambio* thus first is taken in a generic sense, including as one form the *cambial* or promissory note. But the *cambial*, thus specifically identified as one form of the *letra de cambio*, has a second form, termed *letra de cambio* proper or bill of exchange. This supposes that, since $A = A$ or B, $B = A$, which destroys the specific significance of both A and B.

The difficulty with respect to this terminology does not however spring principally from its ambiguity. As is well-known, in the legislations patterned after those of the European Continent, a division is made between the civil and the commercial laws, on the order of the Anglo-American distinction between law and equity. Moreover, a right arising on a negotiable instrument under the commercial laws in those legislations is typically implemented by the *acción cambiaria*, which may be considered either as (1) the *acción ejecutiva cambiaria*, a particular species of the *acción ejecutiva*, the summary, executive proceeding provided for the enforcement of certain types of liquidated claims, in this case specialized for claims on negotiable bills, or (2) simply as any action on a commercial instrument, which action, according to the view adopted, may be either (a) exclusively under the commercial jurisdiction or (b) civil as well as commercial. Consequently, *derecho cambiario*, for example, ordinarily signifies law or right envisaged with reference to the commercial, as distinguished from the civil, law, and perhaps also with reference to its enforceability by the *acción cambiaria* in one or the other of the meanings attributed to this term, a complex of connotations not common to Anglo-American law. Even with such qualifications and explanations, there is room for apprehension that *traduire, c'est trahir*.

but functioning legal institutions, as they appear each in its more or less specific social context.[3] The scope of the studies represented in this series is limited to this hemisphere, but this requires the consideration of no less than twenty-two more or less individualized legal systems, certain of these, the United States for example, being, in effect, for certain subjects a congeries of subordinate systems. Moreover, since these systems are historically related to the corresponding European laws, it is necessary, as it were, to indicate in a general way the bearings not only of these legal systems but also of each development with reference to the European background. The subject matter of comparative legal science is as vast and intricate as the world of law; its advance will in great measure depend upon collaboration and division of labor, not merely among the institutions interested in each country, but especially also among such institutions throughout the world.

[3] See the writer's discussion, "Comparative Research and Unification of Law," 41 MICH. L. REV. 261-268 (1943).