COMPARATIVE LAW AND THE CONFLICT OF LAWS

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(*Read before the Society on 6th October*, 1943)

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Comparative Law and private international law have much in common because the two disciplines converge on the same focal point, namely, the necessity for international collaboration in matters of private justice. But this does not presuppose an identity of purpose or a similarity of method between these two departments of the law. The fact that both have originated from the existence in the world of many different systems of law and that both are concerned with foreign law has resulted in a certain blurring of the border line between the two which is not, in itself, a matter of great importance, but has led to the belief, in certain quarters, that comparative law is mainly concerned with the removal of the causes of the conflict of laws—a belief which has profoundly influenced the development of comparative law in directions which have not been altogether to its advantage. It would seem, therefore, that the time may have arrived when we should take stock of the resources which comparative law is in a position to place at the disposal of private international lawyers, in the hope that this may serve to place the two disciplines in their proper perspective and may also act as a corrective to the somewhat exaggerated claims which, on occasion, have been advanced as to the services which comparative law is able to render in this connection.

The kinship between comparative law and private international law is, of course, closer than that which exists in the case of the law of nations or public international law; nevertheless, it is more apparent than real. Both subjects are concerned with the differences which exist between the legal systems of the world and both stand apart from any of the accepted schemes of the classification of law according to its subject matter.[1] The analogy cannot, however,

be said to extend very far beyond this point because the two subjects not only differ intrinsically, but exist for widely different purposes. Private international law is "law" in the full sense of the word: comparative law is merely a convenient label attached to a particular method of study and research. If a dispute contains a foreign element, private international law intervenes to select the jurisdiction which is competent to decide it and the system of law by which it is to be governed. This process is selective and not comparative; the judge is not called on to examine the foreign law and to compare it with his own law. Comparative law, on the other hand, is not concerned with the selection of appropriate jurisdictions or with the choice of law. The task which it has to perform covers a far wider area and does not depend on the existence of disputes; it is not confined to conflicts of jurisdiction or law. To a comparative lawyer similarities of rule may, indeed, be of equal, or perhaps, even greater interest than differences. It might even be argued that private international law and comparative law are, in a sense, antagonistic because private international law has the effect of stabilising a situation of conflict whereas comparative law—so far as it may be concerned with conflict—does not act as an umpire between competing jurisdictions or rules of law, but envisages a solution which will do away with conflict once and for all.

But even if we assume that the comparative lawyer and the private international lawyer are not engaged in a common task, it is nevertheless beyond dispute that the two disciplines are in very close contact with one another. Every comparative lawyer must of necessity also be a private international lawyer for otherwise he can never hope to gain a true appreciation of the extent to which differences in law constitute a barrier to intercourse between the nations. It has also been said that every private international lawyer must be a comparative lawyer. This generalisation is incorrect if it means that a private international lawyer necessarily engages in a comparative study of the rules of conflict of his own system and the corresponding rules of other systems of law. So long as private international law continues to be regarded as being essentially a part of the municipal or internal law of a country it is quite possible and, indeed, usual for a private international lawyer to refrain from concerning himself with foreign rules of conflict unless he is compelled to do so as, for instance, when questions of *renvoi* or qualification arise. On the other hand, the mere fact that

a private international lawyer deals with issues of law and fact which contain a foreign element means that he must inevitably come into contact with the concepts and institutions of other systems and so acquire some knowledge of foreign law though, possibly, only to a limited or superficial extent.

It is the object of this paper to plead for more definite recognition of the importance of a subject of study which, for the sake of convenience, may be termed "Comparative Private International Law." Its value is, I think, undoubted both to the private international lawyer himself and to the growth and development of collaboration in matters of justice between the nations. If, as private international lawyers, we regard the matter subjectively, it must be conceded that comparison broadens our outlook and keeps us in touch with current movements and developments in other countries. It will teach us that the true significance of rules of conflict is not always to be ascertained by the consultation of codes and text-books, but depends on a variety of elements which go to build up a branch of the law which is still so hesitant and vaccillating that it may be difficult to extract with confidence the governing principle on which any rule of conflict is based.[2] Thus we may hope to learn of the dangers to be encountered and seek to avoid the many pitfalls which lie in the path of those whose studies lead them into new and unfamiliar paths. Comparative Private International Law also holds out great possibilities as an element in advanced legal education and study. But by far the most important aspect of the comparison of the various systems of the rules of conflict is to be found in its bearing on the future of private international law and it is with this aspect of the mattter that I propose to deal.

Two questions appear to be involved. The first is whether the results of comparison can be regarded as a source of private international law in the sense that they can be made available to fill any gaps which exist in our own and other systems of the rules of conflict. The second question concerns the nature and extent of the assistance which can be rendered by comparison to those who are endeavouring to find a cure for the many ailments from which private international law is suffering in all jurisdictions. This is a question of very great importance because the unhappy condition in which private international law finds itself at the present day constitutes one of the major failures in the sphere of international

collaboration in matters of justice. It is one which would merit careful consideration in connection with any plans for post-war reconstruction more particularly if the proposals which have been made for a federation of the European countries should hereafter enter the realm of practical politics.

I

Comparison as a Source of The Rules of Private International Law

How far can the results of comparison be regarded as a source of Private International Law? The answer to this question is not in doubt. Private International Law—as Dr. Cheshire points out—is still in the formative stage. "It is at the moment fluid not static, elusive not obvious; it repels any tendency to dogmatism and, above all, the possible permutations of the questions that it raises are so numerous that the diligent investigator can seldom rest content with the solution that he proposes."[3] I think that private international lawyers in general will find themselves in agreement with this dictum of Dr. Cheshire. They have many difficulties to contend with which are peculiar to this branch of the law. New problems are constantly arising; existing rules may have to be adapted to deal with situations either of law or of fact which are unfamiliar to them because they emanate from abroad. Foreign legal concepts must somehow or other be brought within the categories of institutions and relationships recognised by the lawyer's own law. No system of private international law is complete; it may contain gaps which have been bridged over by other systems. In such circumstances comparison cannot fail to be of value; it must, indeed, be regarded as indispensable.

The importance of comparison has been recognised by the leading American and English text-book writers. Story, Beale, Wheaton, Westlake, Dicey, Foote, and Cheshire all turn to foreign sources for the elucidation of problems for which no solution can be found in English case law. The English judges have also sought enlightenment in the same quarter. The early history of the English rules of conflict lies outside the scope of our present inquiry, but it appears to be well established that these rules were largely built up, in the first instance, on the doctrines of the Dutch jurists of the 17th century—notably on Huber's *De Conflictu Legum*.[4] These doctrines were known to and applied by such great lawyers as

Lord Mansfield[5] and Lord Hardwicke[6], though it was mainly through the instrumentality of Story's *Commentaries on the Conflict of Laws* that they ultimately became absorbed into the Common Law.[7] In the early part of the 19th century the English judges frequently resorted to foreign sources when laying down the rules of conflict as, indeed, they were compelled to do owing to the paucity of material in our own law.[8]

English private international law is, however, passing out of the formative stage and a body of case law has come into existence which establishes its main principles. This developmeut has combined with the cleavage between the Common Law and Civil Law systems, on the subject of the weight to be attached to domicil and nationality respectively, to lessen the frequency with which foreign authorities are consulted, except as regards the case law and doctrinal writings of the United States, which are being resorted to by English judges and practitioners as freely as before.

It is regrettable that civil law sources should not be utilised to the same extent, but this can, no doubt, be explained by linguistic difficulties and by the fact that the technique of continental legal authors is apt to be baffling to one who has been trained in the methods of approach of the common law. There is also, in the background, a feeling that, since the rules of conflict must be considered to be part of the common law, there is little help to be derived from civil law sources. This unfortunate attitude not only fails to recognise the importance of ensuring that similar problems in the conflict of law should not receive different solutions in different jurisdictions, but it also ignores the fact that problems of conflict often assume the same form in all systems of law. This was pointed out by high authority when Lord Wright said, in dealing with the construction of "gold clauses" in agreements for international loans, that "it would be a very serious matter" if these clauses were interpreted in different senses in different countries.[9] When delivering a dissentient judgment in a recent case,[10] Scott, L. J., made the following observation: "I now come to the jurists. Although Private International Law is a branch of English Law, their opinions are of great weight." The learned Lord Justice followed up this remark by a discussion of the opinions of Savigny, Lafleur and Von Bar on the point at issue (a question of legitimation by declaration) thus reverting to the admirable precedent set by English judges of an earlier epoch.

The fact remains, however, that the opinions of foreign legal authors and the decisions of foreign courts do not receive the attention in this country which is due to them. This is, perhaps, only natural, up to a point, because it would be too much to expect of our judges that they should all be comparative lawyers. The burdens imposed on them are already sufficiently heavy without the addition of a further requirement that they should engage in a profound study of foreign law. This is a plea, however, which should not be available to those who practise in the courts. If they themselves have not the qualifications to enable them to place before the Court an accurate synopsis of solutions which have been arrived at or proposed in other jurisdictions, it is their duty to consult others who are in a position to supply the information which is needed. The situation is not improved by the difficulty of access in this country to more than a limited number of foreign law books, including books on American law. This is a matter which might well engage the attention of those responsible for the maintenance of our law libraries since the body of foreign literature relating to matters of private international law, though voluminous, is not so large as to involve a prohibitive expenditure of library funds or the allocation of an excessive amount of shelf room. Much might be done by co-operation between the libraries; it should be possible to assign the literature of a certain country or of a particular subject to each of the libraries, thus avoiding over lapping and unnecessary expense. A central catalogue would enable the books to be traced and consulted without undue delay or inconvenience. Some progress has, nevertheless, been made. At the moment there is in the Squire Law Library at Cambridge, for instance, a good working library of foreign books and periodicals dealing with private international law; it is, of course, in no sense complete and contains gaps which should be filled and would, for the most part, have been filled by now if obstacles had not arisen to the import of books from abroad.

Further difficulties are created by the rules in force in this country with regard to the proof of foreign law.[11] It is, in reality, incorrect to say that a foreign rule of law is one of the facts in a case; on the contrary, it is provided by statute[12] that questions of foreign law must be determined by the judge and not be left to the jury. But the judge cannot deal with such a question *ex officio*; he must be furnished with proof of the nature and content of the

foreign rule relied upon and in default he must assume that the foreign law is the same as English law, although he may be perfectly well aware of the existence of the foreign rule. In a recent case of *Hartmann* v. *Konig*[13] the question at issue was one of the interpretation of a contract which was in the German language and was governed by German law. The Courts of first and second instance acted on their knowledge of the continental methods of intrepretation of which no proof had, however, been given by the expert witnesses. The Master of the Rolls said :—" I think we are entitled particularly as we are now considering German law and a German contract to look at the surrounding circumstances with a more liberal interpretation of that term than is permitted under English law. I think it is commonly known that continental jurists adopt a wider interpretation of surrounding circumstances than we allow for the purpose of a contract in England." But when the case went to the House of Lords, the absence of any expert evidence to support the conclusions of the Master of the Rolls, correct though they were, was treated as fatal. Lord Buckmaster, in his speech, laid it down that " it is impossible to rely on knowledge that may be possessed by expert lawyers here, but which has never found expression in any evidence, to interpret a contract made in a foreign country." Quite apart from any other changes in the existing law which may be desirable, it would seem that there is a strong case for a relaxation of the rule which forbids a judge to go outside the four corners of the expert evidence presented to the Court.[14]

Proof must take the form of the evidence of an expert in the foreign law concerned and may be tendered in the form of an affidavit, though it is normally given in open court in the same way as evidence in general. If the experts disagree, as may well happen, the English judge finds himself in the unfortunate position of being called upon to decide between them. How difficult this may be, can be seen by referring to such cases as those of *The Colorado*[15] in which experts in French law were unable to agree as to the nature and effect of a " *hypothèque* " on a ship, or the *Russian Bank* cases,[16] where serious differences of opinion arose as to the consequences of the decrees of nationalisation of the Soviet Government. It would seem that once proof is tendered, but not otherwise, the English judge may, if he so choose, pursue his own inquiries into the sources of foreign law and draw his own conclusions and there is no reason to doubt that he does do so on occasion.[17] The difficulties

attendant on any investigation of this kind may, however, be such as to deter him, for few of our judges are likely to possess the knowledge of foreign law and foreign legal terminology required for the task. In many cases the Court has to make the best of a difficult situation and arrive at such conclusions as appear best suited to do justice. It may happen that the point before the English Court has already been decided by a foreign court, and although the foreign judgment does not bind the English judges,[18] it is unlikely that they will incur the responsibility of overruling the foreign decision, except in a case where there has been a manifest error. There is, at least, one instance of a foreign judgment being dissented from by an English Court. In *Guaranty Trust Co. of New York* v. *Hannay and Co.*,[19] the Court of Appeal examined a decision of the Courts of the State of New York in the light of the American case law on the point and the opinions of American text-book writers and held that the decision was obviously incorrect and could not be treated as binding on an English Court. On the other hand, it would obviously be undesirable for an English Court to place a construction on a foreign rule of law which would run counter to the interpretation of it given by the highest foreign court or to ignore the implications of the *jurisprudence constante* or *Rechtsprechung* of a foreign country.

As I understand it, there is a division of opinion with regard to the matter on the continent of Europe, though the attitude is less rigid there than in England.[20] So far as the German Courts are concerned, the judges appear to have a free hand; they may demand the production of evidence by the parties as to the foreign law or they may avail themselves of other sources of information. In any event the German judge cannot fold his hands and leave the question to be dealt with by the parties; he must take it up himself and pursue the matter on his own account.

Our concern is, however, not so much with the rule which requires foreign law to be proved as a fact as with the legal technique which is employed in giving effect to the rule. One may well ask oneself if the process of eliciting information as to a foreign rule of law by means of the examination in open court of an expert witness is the method best adapted to secure satisfactory results. The expert is, in a certain sense, both an advocate and a witness, save that he has not the right to address the Bench. But quite apart from this it may be extremely difficult for him to explain

his conclusions by means of answers to questions put to him by counsel, who may only have a perfunctory knowledge of the point at issue. If the expert is unaccustomed to the trial methods of our courts, he may, without realising it, be induced to qualify his evidence and to obscure its effect by skilful cross-examination, and my experience is that it is sometimes extremely difficult to repair the damage so done by means of re-examination of the witness.[21]

It is also open to doubt, for other reasons, whether the process of question and answer in open court always results in the giving of satisfactory evidence on a point of foreign law. Let us assume that the foreign law on a given question is to be proved in an English Court. One or more foreign lawyers are to enter the witness box and give evidence and as they do not speak English, an interpreter is in attendance who knows the language, but not the law of the country. Counsel on either side have been primed, in conference or consultation, with as much foreign law as is deemed necessary for enable them to examine their witnesses and to address the Court on the point of foreign law. Can it be suggested that this is the procedure best adapted to ensure that a foreign rule of law, if held to be applicable, will be applied correctly ?

The interpreter may be perfectly competent so long as he is dealing with questions of fact, but it may easily happen that he will distort the effect of the expert evidence since he will almost certainly be unfamiliar with the legal terminology used by the experts and will not appreciate the background to the answers given by them. The foreign expert, unless he is an old hand, may be too ready to assume that the general principles of his law and the environment in which they are called on to function are so well known as not to require elucidation. The combined effect of these factors may easily be to confuse the issue or to cloud the real purport of the expert evidence. The situation is much the same if affidavit evidence is substituted for evidence given in open court. Sir Frederick Pollock has put the matter very clearly in the following way : " As a matter of fact you cannot begin by asking questions of a foreign lawyer in the right way until you know something about the general ideas and methods of his system. It is quite probable that if you address him in the language of your own, he will not know what you are talking about. But if he is a very wise man it may seem to him that he does not know and there will have to be further explanations. But if he is an ordinary learned man

he will just interpret your questions in the way to his own thinking and he will give you an answer which will be quite misleading. And the more correct it is in the terms of his own system, the less likely it is to have any bearing on yours."[22]

A further complication may arise if the foreign expert cites authorities in support of his opinion. So far as reference to the provisions of codified law are concerned this is a simple matter, but if—as may happen—the codes do not supply the answer to a problem of foreign law, the expert will have to rely on the decisions of the foreign courts or on "*doctrine*", that is to say, on the opinions of foreign text-book writers. Unless the expert explains fully the precise degree of authority possessed by each of these sources, an English judge may easily be misled and may fail to recognise the persuasive effect of "*doctrine*" or may attach undue importance to the foreign case law. An expert witness who is unfamiliar with the structure of our law may not realise the necessity for such explanation, nor may counsel whose duty it is to examine him in chief.

It is, of course, true that the present method of obtaining proof of foreign law possesses many advantages. The presence of experts in court at the hearing of the case may sometimes be of assistance to the judge who can obtain from them, there and then, such further explanations as to the foreign law as he may require. The liability to cross-examination may also exercise a restraining influence on experts who might otherwise be tempted to give rein to views and opinions which they believe to be correct, but are not accepted by other lawyers in the foreign country. It is also fortunate—at least in the case of the main systems of law—that expert witnesses are generally available who understand our trial methods and can be relied on to see that the court is properly informed as to the issues of foreign law. It is, nevertheless, sometimes difficult to obtain expert evidence as to the law of certain other countries or with regard to certain highly specialised branches of foreign law without incurring great expense which may well prove to be prohibitive.

The situation cannot therefore be described as satisfactory. That this is so is, in fact, admitted by our courts in applying the rules as to proof of foreign law; the rigidity of the rule has sometimes been relaxed where hardship would have resulted and the courts have on occasion accepted the evidence of witnesses with no qualifications, such as government officials,[23] or doubtful qualifications, such as professors of law.[24] The need for some

alternative method of proof has also been recognised by the enactment of two statutes, i.e., the British Law Ascertainment Act, 1859,[25] relating to proof of the law of British Overseas Territories, and the Foreign Law Ascertainment Act, 1861,[26] which deals with proof of the law of other countries. In both instances, the prescribed procedure is to request a foreign court to give an opinion, but in the case of countries other than those embraced in the British Commonwealth of Nations, this procedure is only available when it has been sanctioned by an appropriate convention between the United Kingdom and the country whose law is to be the subject matter of proof. In practice little use appears to have been made of these statutory provisions.[27]

It is not easy to suggest remedies for the existing situation. It would, no doubt, be possible to raise the status of experts in foreign law to that of assessors and so remove them from the witness box. Or, it might be frankly recognised that an expert is, in reality, often an advocate and allow him to address the Court on behalf of his clients. But it is at least doubtful if either of these expedients would be preferable to the present practice. The substitution of an assessor or assessors for expert witnesses is, at first sight, an attractive solution, but it would always be difficult and, sometimes, even impossible to obtain the services of foreign lawyers of the required standing. Nothing would, in my opinion, be gained by treating foreign experts as advocates rather than witnesses and the objections to this expedient are obvious.

The only alternative which would function in practice appears to be that of making use more freely of the discretionary powers possessed by the English Courts to obtain advisory opinions from foreign courts. This expedient pre-supposes, of course, that the foreign countries concerned have made provision for the adoption of this procedure and it by no means follows that they would be willing to do so. In any event this form of procedure is one which should not be adopted normally; it should only be resorted to in cases of complexity or grave doubt.[28] International collaboration in matters of justice has not yet reached such a pitch of cordiality that applications of this nature would be welcomed by the judicial authorities of the countries concerned, and, if the request for an advisory opinion has to be forwarded by the usual diplomatic channels, the result is to cause very considerable delay. A possible solution of the problem might be to provide by common inter-

national action for the establishment in each country of a panel of eminent lawyers who would, when requested to do so by a foreign court, give an advisory opinion on such questions as might be submitted to them. The advantage of this procedure would be that it would avoid the infliction on already overworked tribunals of the additional duty of furnishing opinions for the benefit of their foreign colleagues and would avoid the necessity for filtering requests for such opinions through the Foreign Offices and the Ministries of Justice of the two countries concerned.

If we assume that the present procedure for the proof of foreign law before an English court is to remain as it is, then the remedy for the present shortcomings lies very largely in the hands of those whose duty it may be to give expert evidence on foreign law. It is, I think, too much to hope that our judges and barristers will become comparative lawyers, but an expert witness on foreign law should always be prepared to make use of the comparative method if the necessity should arise. If he is familiar with the law of the country of the court as well as with his own law, he will often be able to prevent misunderstanding by calling attention to fundamental points on which the two systems differ. He will also be in a position to avoid the pitfalls created by any assumption that the elementary principles of his own law are axiomatic and need not be referred to. He will also realise the need there may be for an explanation of the precise weight to be attached to any authorities that he may cite or that may be cited against him by experts on the other side.

It must, of course, always be borne in mind that a comparative lawyer cannot enter the witness box in that capacity. This follows from the rule that, save in exceptional circumstances, a witness can only be admitted to give proof of foreign law if he is able to show that he has carried on practice in the country concerned or has held some position which is the equivalent.[29] In *Bristow* v. *Sequeville*[30] an attempt was made to assist the court by calling a comparative lawyer to prove that the law in force at Cologne, on all material dates, was the Code Napoleon. I am inclined to think that he himself was largely responsible for the rejection of his evidence because he described himself as a " jurist " (a fatal term to employ when English judges and lawyers are concerned !). He had studied law at the University of Leipzig and was legal adviser to the Prussian Consul in London, but had never practised at Cologne. It is somewhat difficult to see why his evidence was

excluded, but in so doing, Alderson, B., made the following observations :—"If a man who has studied law in Saxony, and has never practised in Prussia, is a competent witness, why may not a Frenchman, who has studied the books relating to Chinese law, prove what the law of China is ? "

There are, no doubt, good reasons in a normal case for preferring the evidence of witnesses who have experience of the application of foreign law in practice, but, if the dictum of the learned judge means that in no circumstances shall a witness be permitted to testify unless he is so qualified, the result would be to exclude comparison from consideration when it becomes a question of laying down a new rule of conflict. When a gap in our existing rules has to be filled, it is difficult to understand why the court should not be entitled to receive expert evidence, given by a witness who has studied the matter comparatively, for the purpose of ascertaining whether the point has arisen in other jurisdictions and, if so, what are the solutions which have been arrived at. As our rules of evidence now stand, this is impossible and the court may be left to come to a conclusion as best it can. It seems strange that a judge who may consult a text-book on Chinese law written by a Frenchman who has merely studied that law, but not practised it, is compelled to exclude the same Frenchman from the witness box if his evidence is tendered as that of an expert. The moral to be drawn is that the rules as to proof of foreign law should be treated as flexible and should not be applied in a hard and fast manner. It has been found necessary to relax them when their enforcement would mean that no evidence could be given owing to difficulty in complying with the rules. It would seem worth while to consider at least, whether the rules could not also be relaxed at the discretion of the Court when a problem of a novel character has to be solved and no assistance is forthcoming either from existing case law or the pages of " Dicey " or other English or American writers.

II

Comparison as a Remedy for Defects in The Rules of Conflict

The complexities and uncertainties which in practice characterise the operation of the rules of private international law at the present time have done much to prejudice its position as a solvent

of conflicts of law and jurisdiction. A branch of the law which exists for the purpose of doing away with conflict has developed within its own bosom a mass of inconsistencies and ambiguities which have resulted in conflict being piled on to conflict.[31] Private international law has become enveloped in a cloud of abstract theories, some of them of great intricacy and difficulty, which flourish in the atmosphere of the lecture room, but create serious embarrassment to judges and practitioners. An illustration of this is to be found in the uncertainty which prevails when the rights of parties turn on the question whether the doctrine of *renvoi* is accepted by the law of a foreign country or not—a state of affairs which has been stigmatised by high authority as unsatisfactory because it depends, in some instances, on the doubtful and conflicting evidence of foreign experts.[32] It is a matter of common knowledge that the manner in which a clash between two competing systems of law will be solved, may turn on the success or otherwise of manœuvering for position by the parties in order to obtain a hearing in the courts of the particular country whose rules of conflict are most favourable to the one side or the other. The boycotting of courts of law by men of business and the drifting away of commercial litigation into the hands of arbitrators is to no small extent the result of a marked disinclination to run the risk of becoming involved in the mesh of rules of conflict which are so complicated and obscure that neither the merchant nor his legal advisers can foresee their effect on the rights of the parties with any reasonable degree of certainty. Moreover, the law which will prevail when there is a conflict might ultimately be determined by some event which is purely fortuitous, or relatively trivial. Thus in the much discussed case of *Vita Food Products Inc.* v. *Unus Shipping Co.*,[33] English law was held to be the proper law of the contract because the master of a small coasting vessel had framed the contract of carriage on an obsolete printed form of bill of lading which we may assume was not read either by him or the cargo owner. It is quite certain that if the signatories to the Brussels Maritime Convention of 1923 had realised that the rules of private international law might have the effect of rendering their efforts nugatory, steps would have been taken to prevent this from happening.

The remedies for this unhappy state of affairs can be sought in two directions. The first remedy consists in the unification of private law, which would go to the root of the matter by removing

the causes of conflict altogether. The second remedy takes the form of the codification of private international law, a method which leaves the state of conflict untouched, but aims at the establishment of universal rules of the conflict of laws which would get rid of the present situation of conflicts within conflict. In addition to these two remedies it has also been suggested that the malaise from which private international law is suffering is largely if not entirely due to the existence of certain specific ailments which can be cured with the aid of comparative law. The ailments which have been specified are the following—*renvoi*, the conflict of qualifications, the over-riding effect of national rules of public policy or *ordre public* and the uncertainty which prevails as regards the right of the parties to a contract to choose their own law.

The unification of private law represents a noble ideal which is the embodiment of the spirit of international collaboration in its highest form and, if successful, possesses the very great advantage of causing conflicts to disappear entirely. But this question is one which lies outside the scope of our present discussion and cannot be dealt with here. The process of unification, in any event, represents a long-term policy, which would be of little avail in solving the urgent problems with which we are concerned.

The codification of private international law,[34] on the other hand, does appear to offer a reasonable prospect of finding a remedy for the present situation. It will not be an easy task or one which can be carried through rapidly because it will not consist in the mere technical process of embodying the existing rules of conflict in a systematic form but will also involve the revision or reform of many of those rules. It must also be admitted that the results obtained by attempts which have been made hitherto to codify the rules of conflict are not such as to furnish much ground for encouragement. All attempts of this kind encounter special difficulties due to the imperfection of the international machine which is necessary to the working of the process and to the admixture of political considerations which have become infused into the material with which that machine will be called upon to deal. But it would, I think, be wrong to adopt a defeatist attitude and the attempts hitherto made should be renewed. They may, perhaps, not meet with immediate success but it will, at least, have been worth while to make them.

The duties to be discharged by a comparative lawyer in this

connection are, I think, fairly obvious. They are twofold in character and consist, in the first place, in the provision of materials required for the purpose and, secondly, in the scrutiny of the proposals of the codifier with a view to the discovery of any elements which might render such proposals unworkable either because of the phraseology which is employed or because the proposals themselves cannot be fitted into the general scheme of any of the national systems of law concerned.

The collection of the necessary materials is essentially a matter for comparative lawyers. No one would, I think seriously deny the importance of this preliminary stage of the enterprise involved in codification although there is in some quarters a tendency to belittle it and to assume that much of the materials in question can be procured, almost mechanically, by means of questionnaires addressed to governments and such like expedients. But those who have had practical experience of the working of what I might, perhaps, call the " questionnaire " process will be well aware of its limitations. More is needed than a mere series of answers to questions however detailed and carefully framed these may be. Divergencies of rule must, for example, be considered in the light of the causes which may have brought them into being ; apparent similarities must be rigidly scrutinised and tested with a view to ascertaining whether they are real or conceal hidden divergencies. Above all, codification can only be carried out successfully if it is based on a synthetical statement of the situation which emerges from a study of the divergencies and similarities between different systems of the rules of conflict.

Much work of this kind has already been done though the results are scattered. It is, however, satisfactory to know that an organised and systematic attempt to explore the ground is being made in the United States. The Restatement of the Conflict of Laws is being taken as the basis for a comparative survey of the common law and civil law systems of the rules of conflict. The supervision of this very important task has been confided to the very able and competent hands of Dr. Rabel whose masterly treatise on the Comparative Law of Sale (*Der Warenverkauf*) furnishes a model for those who are engaged in preliminary work of this nature.

In addition, the comparative lawyer may also be called upon to render services of a consultative character whilst the work of codification is in progress. He is not directly concerned in the

drafting of the codified rules because—as Dr. Schmitthoff observes[35]—his rôle is that of a diagnostician and not that of a clinical expert. But questions will frequently arise as to whether the phraseology of the code is appropriate. " Terms of art," as a common lawyer would say, do not always possess the same meaning in all systems of law and the draftsman of an international code may use phraseology which is incapable of being translated correctly into other languages. This particular difficulty was not encountered by the framers of the only code of private international law which can be said to have met with any success, namely, the Codigo Bustamante but it provides a serious problem when multilingual codes are being drafted.

Everything will, of course, turn on the readiness of the nations concerned to make sacrifices and to abandon the pronounced national features which characterise private international law at the present time. The discordance between the various systems of the rules of conflict is too marked to be ignored ; in fact, there is little or no agreement of a general nature on the fundamental principles of this branch of the law. In a very interesting paper read to this Society recently by Dr. Lipstein it was suggested that there are certain principles which can be described as " rules of international conflict of laws " and are to be found in the decisions of the international tribunals set up at the close of the last war.[36] It is true that these courts referred on occasion to certain principles of conflict alleged to be recognised by all civilised nations but the existence of such principles is, I think, open to very grave doubt except in the few instances where a principle compels universal recognition because it is the only one which would function in practice. During the discussion which followed the reading of Dr. Lipstein's paper it was observed by Dr. Ernst Wolff that there are in reality only two such principles, namely *locus regit actum* and the principle that rights in immovable property depend on the *lex rei sitae*. The unanimity which exists in these two cases is not, however, due to international consensus but to the inescapable necessity for the application of these principles if any positive result is to be achieved.

It is this absence of universal agreement on fundamental questions which constitutes the main impediment to codification of the rules of conflict and it is difficult to believe that any real progress can be made until they are surmounted. The thorniest pro-

blem of all will, of course, be to bridge over the gulf between the rival claims of domicil and nationality as the basis of the personal status of individuals. The Codigo Bustamante was to some extent rendered nugatory by failure to reach agreement on this question, the obstacle being one of a political character, namely, the desire of countries of immigration to retain domicil as the test of personal law whilst the other countries were unwilling to surrender the principle of nationality. The solution of this and similar problems is not the task of the comparative lawyer but comparative law may, perhaps, be of value in so far as it enables an appreciation to be made of the operation in practice of the two competing systems of national and domiciliary law. Each of them possesses certain merits and is also open to certain objections so that the balance between them is somewhat delicately poised. In these circumstances it may, conceivably, be possible to arrive at a compromise such as that suggested by a comparative lawyer, the late Dr. Asser, which would for the purposes of the rules of conflict treat a period of habitual residence in a given country as the equivalent of nationality of that country. This period of residence would, of course, have to be of sufficient duration to eliminate any temptation there might be to effect a change of residence with the sole intention of obtaining a change of law.

In any event, it would seem that comparative law has a definite part to play in connection with any proposals for the codification of private international law. There remain the other claims which have been advanced for its value in other directions. One of these, at least, seems to demand more than a mere passing reference, namely, that comparative law may assist in finding a solution for the problems which have been epitomised under the heading of conflicts of qualifications. The theory of " qualifications "—or " characterisation " as it has been variously styled—has not so far received judicial notice in our courts. Dicey only refers to it very briefly though Cheshire deals with it at some length.[37] It consists of a statement in reasoned form of a problem which is encountered in every system of private international law and arises from the fact that a legal relationship may be placed in different categories by the two systems of private international law which happen to be in collision. One system may, for instance, classify the issue between the parties to a dispute as a matter of matrimonial law, whereas the other treats it as a question of testamentary

law, and the ultimate decision of the court may depend on which of the two categories is selected, because a different national law is applicable in the case of each category. There is no agreement either within the systems or internationally, as to the law which should govern the process of categorization. The problem has always been there but it is only in recent years that it has attracted the attention of the jurists which rather suggests either that it is not of such importance as is sometimes asserted to be the case or—which is more probable—that the *lex fori* has been applied in such cases with results that have not been unsatisfactory in practice. The alternative solutions of the problem are to qualify or classify the issue in a dispute either according to the *lex fori* or the *lex causae* or according to the principles of general jurisprudence and it is with this last alternative that we are concerned because it implies the use of the comparative method. It rests on the belief that there are certain concepts of private international law which are distinct from those of internal or domestic law and are of universal application. There concepts can—it is said—be ascertained " by the study of comparative law, which extracts from this study essential principles of professedly universal application—not principles based on or applicable to the legal system of one country only."[38]

This view of the matter cannot fail to make a strong appeal to a comparatively minded lawyer but it is, nevertheless, one which it is difficult to accept. To begin with ; no one has yet, so far as I am aware, been able to indicate any principles of this nature and it would seem that if they exist, they are few in number. Nor, if these principles can be ascertained, is it clear to what extent they would help to solve the problem of " qualifications." In any event it does not appear to be feasible to insist on a solution which would demand from judges and practitioners a knowledge of analytical jurisprudence and an experience of the working of the comparative method which few of them are likely to possess. A well-known private international lawyer expressed the opinion that : " if the contribution comparative law has recently offered to the question of qualification or classification in private international law is to be taken as a test it might even be found that the confusion has been considerably increased."[39]

It also seems to be more than doubtful whether comparative law has any contribution to make towards the solution of the vexed

question of *renvoi*.[40] Private International lawyers are divided in opinion as to the merits or demerits of this doctrine but I think that most practitioners and judges would welcome its disappearance. I must, however, confess that I find it difficult to appreciate the value of any assistance which comparative law could provide in mitigating the uncertainty and inconvenience which is undoubtedly caused by the absence of any general agreement as to the scope and nature of the doctrine. If a remedy is required it will call for more drastic measures than a comparative investigation of *renvoi* in all its various aspects.

The same considerations would appear to apply to the further suggestion[41] that comparative law can be relied upon to furnish some relief from the difficulties created by the tendency to resort to national rules of public order when the rules of conflict are deemed in some way or other to be contrary to national interests. This particular problem is one which is not limited to private international law but forms part of a very much wider question, namely, of the limits which should be assigned to general principles or *clausulae generales* which can be used as a super-eminent or overriding force to control the operation of the rules of private law. That national rules of public policy or order constitute a serious menace to international collaboration in the field of the conflict of laws is beyond doubt. Even if agreement can be reached to apply an identical rule of conflict in all jurisdictions the result thus achieved can at any moment be rendered of no avail if the courts of one of the contracting parties should decide that the internationally agreed rule constitutes an infringement of the national public policy rules of the court.[42] Public policy and public order are concepts of a fluctuating character and are, therefore, a source of great uncertainty. They cannot be measured by any fixed standard and like all the *clausulae generales* are subject to sudden transformation in obedience to current ideologies. In countries under democratic rule the governing factor will be public opinion; in totalitarian states the standard is of an arbitrary nature and depends on the caprice of a dictator or ruling clique. National rules of public policy are moulded by influences which lie outside the law and this coupled with the fluid character of the rules is sufficient to deprive a comparative study of the rules of any real or permanent value. Even the most learned and industrious of comparative lawyers can hardly hope to acquire the insight into the political and social mentality

of other countries which would enable him to give a complete and accurate synopsis of the international situation.

This does not mean, of course, that the comparative method can be disregarded when such concepts as those of *renvoi*, qualification or public order are placed under scrutiny. The international regulation of the problems presented by these problems would be an impossible task without a realisation of the extent to which these concepts impede the normal operation of the rules of conflict. But the task of finding a cure does not devolve on the comparative lawyer.

In conclusion : the value of comparative study to the private international lawyer himself is self-evident because without it he cannot be said to be adequately equipped or trained for his duties : nor would anyone deny the value of comparison in filling any gaps there be in the rules of conflict. Comparison is also an indispensable preliminary to any project of codification but, as Professor Brierly has pointed out, the codification of rules which are to function in the international sphere means more than the reduction of known and accepted principles into a systematic form so that they can be adopted in all jurisdictions.[43] It necessarily involves the reform and development of the law and is therefore not a purely technical task but is to a large extent political in character. The process of comparison may furnish the materials from which a policy of development and reform can be shaped and so make possible the first steps towards that end but the task of determining what those steps shall be is not for the comparative lawyer but for others.

Finally : the present state of private international law appears to be such as to give rise to serious misgivings. A branch of the law which calls for a very high degree of international collaboration is subject to the constant menace of discordance of rules created by rival concepts of the basis upon which it rests and by many competing measures for the solution of conflicts. These disturbing factors are too often ignored or else viewed with complacency or even approval because of the absence of the communion of thought which alone can indicate the existence of discordance and point the way towards its removal. The comparative method of study and research has many tasks to perform but not the least important of these is the service which it may be able to render in bringing about a common understanding of the many difficult problems which private international lawyers have to face and thus pave the way

for action which will result in general agreement as to the basic principles upon which all systems of the rules of the conflict of laws and jurisdiction should be founded.

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[1]Dr. Baty's distinction between the two subjects appears to rest on a misapprehension of the functions of comparative law. He refers to it as a "deeply interesting academic study," which lacks the "interest of reality," found in private international law. (*Polarised Law*, p. 6.) This view of the matter ignores the fact that comparative law has repeatedly given proof of its practical value, more especially in the domains of maritime and commercial law.

[2]Cheshire, *Private International Law* (2nd ed.). p. 21. See also Schmitthoff, *The Science of Comparative Law.* Cambridge Law Journal (1939), Vol. VII, 94.

[3]Cheshire, *op. cit.*, Preface to the 1st Edition.

[4]Westlake, *Private International Law* (7th ed.), p. 8; Llewellyn Davies, *The Influence of Huber's De Conflictu Legum on English Private International Law*, British Year Book of I.L., 1937, p. 52. Sack, *Conflicts of Laws in the History of English Law*, (*Law, a Century of Progress*, Vol. III. p. 342.)

[5]See *Robinson* v. *Bland* (1760), 1. W. Bl. 234, at p. 256 and the other cases referred to by Llewellyn Davies, *supra.*

[6]*Ex parte Burton* (1744), 1. Atk. 255.

[7]Beale, *Conflict of Laws*, Vol. III, p. 1904.

[8]Llewellyn Davies, *supra*, cites the following observation by Grant, M. R., in *Potinger* v. *Wightman* (1817), 3 Mer. p. 67, as regards the law of domicil: "We are obliged to resort to the writings of foreign jurists for the decision of most of the questions that arise."

[9]*Rex* v. *International Trustee* (1937), A.C., at p. 515.

[10]*Re Luck's Trusts* (1940), 1 Ch., at p. 914.

[11]For a general discussion of this question see Dicey, *Conflict of Laws* (5th ed.), p. 859; Westlake, *Private International Law* (7th ed.), pp. 423-8; Cheshire, *op. cit.*, p. 129; Halsbury's *Laws of England* (Hailsham ed.), Vol. XIII, p. 614; Kuhn, *Comparative Commentaries on Private International Law*, p. 97.

[12]Supreme Court of Judicature (Consolidation) Act, 1925, s 102.

[13](1933), 50 T.L.R. 114.

[14]I am greatly indebted to Dr. Kauffmann for calling my attention to this case.

[15](1923), P. 102.

[16]See *Lazard Brothers and Co.* v. *Midland Bank* (1933), A.C., p. 289, and in particular pp. 298 and 299. cf. *Russian Commercial and Industrial Bank* v. *Comptoir D'Escompte de Mulhouse* (1925), A.C. 112.

[17]Dicey, *op. cit.*, at p. 861, Westlake, *op. cit.*, p. 426. *Kolbin and Son* v. *Kinnear and Co., Ltd.* (1930), S.C. 724, at p. 737, and see the authorities cited in the preceding note.

[18]*Bankers and Shippers Insurance Co.* v. *Liverpool Marine and General Insurance Co* (1925), 24 Ll.L. Rep. 85.

[19](1918), 2 K.B. 623.

[20]See Kuhn, *op. cit.*, p. 101; Frankenstein, *Internationales Privatrecht*, I, pp. 291 and 294; Arminjon, *Précis de Droit International Privé*, Nos. 139 *passim.*

[21]The position appears to be the same in the United States. See an extremely intere ting and valuable discussion of this question (to which I am much indebted) in Moses, *International Legal Practice*, Fordham Law Review, May, 1935, at p. 27. Cf. German Code of Civil Procedure, Art, 293.

[22]Proceedings of the American Foreign Law Association, No. 9, pp. 7 and 8, cited by Moses, *supra*, at p. 28.

[23]*In the Goods of Prince Oldenburg* (1884), 9 P.D. 234.

[24]*Bailey* v. *Rhodesia Consolidated, Ltd.* (1910.) 2 Ch. 95.

[25]22 and 23 Vict., c. 63.

[26]24 and 25 Vict., c. 11.

[27]See Dicey, *Conflict of Laws* (5th ed.), p. 862 : The Annual Practice, 1943, p. 673, note to 0. XXXVII. 2. 5 ; The power of an English Court to apply to a foreign court for its opinion may perhaps exist independently of statute, but this seems to be doubtful. See *Phosphate Sewage Co.* v. *Molleson* (1876), 1. A.C. 780, per Lord Selbourne, at p. 787.

[28]A somewhat similar situation has arisen in the case of the Permanent Court of International Justice. See Jenks, *The Interpretation and Application of Municipal Law by The Permanent Court of International Justice.* British Year Book of I.L.; 1938, at p. 10.

[29]The rule has been relaxed in certain cases apparently on the ground of possible hardship resulting from its enforcement. See the instances given in Dicey, *op. cit.*, at p. 860, and Cheshire, *op. cit.*, at pp. 131, 132.

[30](1850), 19 L.J. Ex. 289.

[31]" A conflict between the laws that solve a conflict of laws is an absurdity " (Mendelssohn-Bartholdy, *Renvoi in Modern English Law*, p. 83).

[32]See per Maugham, J., in *Re Askew* (1930), 2 Ch. at p. 278.

[33](1939), A.C. 277.

[34]See the observations of Brierly on the use of the term " codification " in this connection : *The Future of Codification*, British Year Book of I.L., 1931, at pp. 3 and 8.

[35]*The Science of Comparative Law*, Cambridge Law Journal (1939), Vol. VII, 94.

[36]*Conflict of Laws before International Tribunals.* Transactions of the Grotius Society (1941), pp. 175, 176.

[37]See Dicey, *op. cit.*, p. 43 ; Cheshire *op. cit.*, p. 24 ; Balogh, *Le Rôle du Droit Comparé dans le Droit International Privé.* Receuil des Cours de l'Académie de Droit International, 1937, Ch. II.

[38]Beckett, *Classification in Private International Law*, British Year Book of I.L., 1934, p. 59 ; See also Rabel, *Le Problème de la Qualification*, Revue de droit international privé, 1933, No. 1, p. 1. Cf. Robertson, *Characterization in the Conflict of Laws*, pp. 38-43. Falconbridge, *Characterisation in the Conflict of Laws*, 53, L.Q.R. 235, 537. Unger, *The Place of Classification in Private International Law* (1937), Bell Yard.

[39]Mendelssohn-Bartholdy, *Delimitation of Right and Remedy in the Case of Conflict of Laws*, British Year Book of I.L., Vol. XIX (1938), p. 20.

[40]*Contra*, see Balogh, *op. cit.*, Ch. III.

[41]Balogh, *op. cit.*, Ch. IV.

[42]Nolde, *Codification du Droit International Privé.* Recueil des Cours de l'Académie de Droit International (1936), p. 117.

[43]Brierly, *The Future of Codification*, British Year Book of I.L., Vol. XII. (1931), p. 4 and 5.