Treaties often involve reciprocal obligations, and the question has arisen whether the alleged breach by one party of one or more stipulations of the treaty justifies the other party in repudiating or claiming relief from the reciprocal obligations of the treaty, in whole or in part. The other party or parties to the treaty before proceeding on the supposition that the act proposed or consummated constitutes in reality a breach and discharges them from the performance of further obligations under the treaty, should have the privilege of seeking a judicial declaration as to the legal effect of the disputed act and of its consequences in discharging the petitioning state from further obligations under the treaty, or otherwise. During the European War of 1914 many English firms found it important to obtain a judicial construction of their long-term contracts with German firms to determine whether the war had terminated the contracts and released them entirely from, or merely suspended during the period of the war, obligations which would have to be resumed in normal course when the war was over.[6] Upon the answer to the question of construction propounded depended the plans of the plaintiffs for the conduct of their post-war business, and it was important that they be not left in suspense but know with authoritative accuracy their legal position toward the German defendants.

In a rapidly changing world new developments of all kinds have effect on treaties bilateral and multilateral, the exact scope, nature and legal consequences of which it is difficult to establish and which at all events it is unwise to endeavor unilaterally to determine. It should be possible in all such cases for any of the parties placed in doubt, difficulty or jeopardy by such a possibly operative fact, to obtain the assurance against all other interested parties of a judicial declaration substituting certainty for uncertainty and clarity for doubt and jeopardy. We shall thus enlarge the scope of legal control and proportionately narrow the area of political action.

EDWIN M. BORCHARD

THE CONFLICT OF LAWS RESTATEMENT

The publication in January, 1935, of the completed Restatement of the Law of Conflict of Laws by the American Law Institute was an event of great importance in the development of private international law. It relates to conflicts of law not only between the states of the Union, but also between the law of foreign countries and the local law in an issue pending before a State or Federal court.

The Restatement was adopted and promulgated in its present form at the meeting of the American Law Institute in Washington on May 11, 1934, but its publication was deferred for necessary editorial changes and for adapta-

[6] Ertel Bieber & Co. *v.* Rio Tinto Co. (C. A.) [1918] A. C. 260; Zinc Corp. *v.* Hersch (C. A.) [1916] 1 K. B. 541; Hugh Stevenson & Sons *v.* Akt. für Cartonnagen-Industrie (H. L.) [1918] A. C. 239. Borchard, *op. cit.*, 319.

tion of the comment and illustrations to the text. The Institute was organized in 1923 upon the invitation of a voluntary committee of which Mr. Elihu Root was chairman, for the establishment of a permanent organization for the improvement of the law. Conflict of Laws was one of the three subjects to be taken up in the first year of the establishment of the Institute, so that eleven years of drafting and discussion were spent by the reporter, the advisers, the members of the Institute and by the Bar generally, before the Restatement was finally accepted. Professor Joseph H. Beale, of Harvard University, acted as general reporter. Dean Herbert F. Goodrich, of University of Pennsylvania, and Professor Austin W. Scott, of Harvard University, were special advisers at various stages of the work, and Dean Goodrich acted as reporter for the chapter on Administration.

The Restatement has for its object an orderly system of the general common law of the United States relating to this subject, including not only the law developed through judicial decision but also as the result of application by the courts of statutes that have been generally enacted and in force for many years. It is not intended that the Restatement should be enacted into law anywhere. There was an ever increasing volume of decisions of the State and Federal courts, many of which showed irreconcilable differences of principle in solving conflicts of law between two states, or between a state and a foreign country. Some step was essential in the direction of promoting certainty and clarity in this field. Differences in principle for applying one system of the law rather than another are particularly unfortunate. Such differences permit a litigant to deliberately change the system of law to be applied by selecting a favorable forum. Differences between the substantive law of any two of our states, or *a fortiori*, between a state and a foreign country, are to be assumed. It is precisely such differences which make necessary a science of private international law. But discordance in the very principles which are designed to *solve* such conflicts is a negation of the science viewed as an international or universal system.

During the past half century, an earnest attempt has been made to eliminate conflicts of law between the various states of the Union through the work of the official Commissioners on Uniform State Laws. Draft statutes have been elaborated upon more than fifty subjects for uniform enactment by the states. Unfortunately, the legislatures of the states have been too slow in acting upon these statutes. The ideal of unanimity has never been achieved except with regard to the Negotiable Instruments Law, the Warehouse Receipts Law, and, to a less extent, the Sales Law. A considerable number of states have adopted the drafts on other subjects, but this movement is only palliative because incomplete. The achievement of the American Law Institute in completing a Restatement for the entire field of conflict is an event of first-rate importance. It recognizes differences, and endeavors to select the system applicable by the statement of principles upon which all jurisdictions may unite.

Instruction in the character of the problems involved in the conflict of laws has been far from universal in our law schools. The Director of the Institute, Dr. William Draper Lewis, points out in his introduction to the Restatement, "There has been no such general long-continued critical study of the subject as has been given to contracts, property and the other principal subjects of the common law." As a result of this neglect and possibly also because of the difficulty of adequately proving the foreign law which might have been applicable to the issue, the courts have not developed a jurisprudence that could be traced back in an unbroken line to accepted sources as in the case of other branches of law.

The Restatement consists of twelve chapters. Three of them are general subjects: Domicile, Jurisdiction in General and Jurisdiction of the Courts. Five chapters are upon specific subjects: Status, Corporations, Property, Contracts and Wrongs. Three final chapters relate to Application of Judgments, Administration of Estates and Procedure. The entire Restatement comprises 625 sections, with comment and illustration after nearly all, but without documentation or reference to decided cases. Annotations will be prepared for the various State and Federal jurisdictions showing how far the Restatement is in concurrence with the decisions and statutes of the particular jurisdiction and how far it modifies the principles established by such decisions and statutes. Some courts have already shown a desire to accept the principles established by the various restatements. Only by general acceptance will they have more than academic significance. A considerable number of decisions of the highest courts of the states have already referred to and adopted certain sections of the Restatement as authoritative statements of the common law of their respective jurisdictions. Over one hundred references to acceptances of sections of the Restatement by various State and Federal courts have been collated by the Institute down to February, 1935.[1]

While this evidences a sincere desire to make the Restatement effective by adoption into the body of our laws, it is recognized that upon some subjects the diversity of principle is so acute that acceptance of the Restatement by all jurisdictions is scarcely to be expected. Accordingly it has been proposed that consideration be given (1) to existing statutes and the sections of the Restatement with regard to jurisdiction for divorce and recognition of divorce from other states; (2) to possible legislation with regard to decedent's estates so as to insure equal treatment for foreign creditors who present their claims at the domicile of the decedent; (3) to the Statute of Frauds; (4) to the possibility of legislation to avoid the extreme confusion of authority on the rule of contracts in the Conflict of Laws.

While we cannot here undertake a critical examination of the provisions of the Restatement, it is of importance to mention that it rejects the principle of comity in the sense that reciprocity governs the action of a court of one

[1] The Restatement in the Courts, 2nd ed., February, 1935, pp. 63–110.

state with regard to the enforcement of a right created in a foreign state. The rule of reciprocity was accepted for Federal jurisdictions in Hilton *v.* Guyot.[2] But this the Restatement definitely rejected, just as it had already been rejected by the highest courts of some of our states.[3] The Restatement accepted the principle (§6) that: "The rules of Conflict of Laws of a state are not affected by the attitude of another state toward rights or other interests created in the former state." Thus, the comity of nations, though often spoken of as the basis for the application of foreign law, is not accepted by the Restatement so as to make reciprocity of treatment necessary for the application of the law of a foreign state.

The nations of Europe have been endeavoring to arrive at a unification of principles in the field of private international law by means of treaties elaborated at conferences held at the Hague from time to time since 1899. They have not been very successful, not only because of the inherent complexity of the problems, but also because of political difficulties. The greatest success achieved was perhaps in relation to the conflict of laws in the field of negotiable instruments. Conventions designed to unify the laws of bills of exchange and promissory notes were signed at Geneva, June 7, 1930, and on checks, March 19, 1931. At the same time, special conventions were signed by some 26 nations, accepting the principles of the conflict of laws to be applied within these specific fields. One would at first be inclined to believe that a uniform law is in itself designed to eliminate conflicts of law, but the conventions left considerable margin to be dealt with by domestic legislation. The same is also true of our own Negotiable Instruments Law.

The completion of the Restatement affords an opportunity to contrast the methods of procedure of the Old and the New World. The nations of Europe seek to establish positive law for solving conflicts through multilateral treaties covering specific fields. In the United States, unification by positive law has been supplanted by a restatement in terms of principles which, because of their inherent reasonableness and the weight of authority given them by the practitioners and the teachers of law throughout the country, are likely to gain acceptance and application by the courts. Perhaps this contrast of method is characteristic of the genius of the peoples who have adopted the respective methods. It also conforms to differences of historic tradition between the English common law and the Roman law.

ARTHUR K. KUHN

THE GROWTH OF THE LAW

When the officers of the French steamship *Lotus* and of the Turkish steamship *Boz-Kourt* negligently failed to avert a collision between their two vessels on the high seas, they set in motion a series of international forces of which they could have had no knowledge or anticipation.

[2] (1895), 159 U. S. 113.

[3] Johnston *v.* Compagnie Générale Trans-Atlantique (1926), 242 N. Y. 381.