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Book Review: A Treatise on the Conflict of Laws, by Albert A. Ehrenzweig

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BOOK REVIEWS

REVUE DES LIVRES

A Treatise on the Conflict of Laws. By ALBERT A. EHRENZWEIG, Walter Perry Johnson, Professor of Law, University of California, Berkeley. St. Paul, Minn.: West Publishing Co. 1962. Pp. li, 824. (\$10.00 U.S.)

In this attractively presented treatise Professor Ehrenzweig, by a veritable *tour de force*, has succeeded in offering a magnificent tool to bench, bar and school. As he points out in his Preface: "There was no other way: A text for students alone would have tended to restate an oversimplified fiction that would mislead them in later practice; a guide for lawyers alone would have tended to conceal new thought in 'acceptable' language at the risk of perpetuating chaotic dogma; and a treatise for the scholar alone would have tended to emphasize speculation as to what the law ought to be."¹

This scholarly treatise which examines the basic problems of conflict of laws in the light of American experience is divided into two parts preceded by a general introduction dealing with the concepts of jurisdiction and choice of law, a brief survey of interstate and international conflicts, and a general description of American sources of conflict of laws. Professor Ehrenzweig rejects the "vested rights" theory adopted by the American *Restatement of Conflict of Laws*² that purports to delimit the scope within which a state "may" or "can" create interests entitled to recognition in other states and embraces with some reservations Cook's local law theory³ as the only one capable of admitting the basic character of the *lex fori*. He also points out that there is little actual relationship between interstate and international conflicts and that different rules are and should be applied. Separation of interprovincial and international rules occurs in Canada only on rare occasions especially when a provincial legislature has passed laws favoring Canadian situations. In ordinary cases Canadian courts apply the same rules and principles to solve international and interprovincial problems.⁴

¹ P. vii.

² (1934), §§1, 42.

³ The Logical and Legal Bases of the Conflict of Laws (1924), 33 Yale L.J. 457.

⁴ See Castel, Conflict of Laws — Some Differences Between the Systems

The first part of the book is devoted to jurisdiction and foreign judgments. Here Professor Ehrenzweig is particularly concerned with the court's authority and willingness to "take" a case with foreign elements. "In every conflicts case the first two questions are whether the court can and if it can, whether it will take (local) jurisdiction".⁵ Although in the case of actual litigation, these are the usual questions that a lawyer will ask himself when faced with a conflicts problem, this is not always true particularly in the field of contracts, or estate planning. In some instances it is not necessary to look at conflicts of laws in terms of what the courts will do to resolve them. Conflicts of laws may be avoided.⁶

Part Two deals with choice of law, that is cases in which the court is called upon to decide whether a foreign element compels the "choice" of a foreign law.⁷ The author begins with an attempt to formulate a general theory tested only in relation to living law. He says: "Elimination of pseudo conflicts and pseudo rules is designed to lay the ground work for the establishment in history, comparative law, and American practice, of the *lex fori* as a basic rule of choice, and for the concomitant analysis, as mere devices for neutralizing overgeneralized a priori choices of foreign 'governing' laws, of such recent academic creations as 'characterization' and renvoi and such old cure-alls as failure of proof and public policy. This analysis is followed by a brief description of current doctrine, the exclusion from further discussion of those situations which are properly reserved to the law of the forum as matters of procedure; a preview of the approach taken throughout this part in ascertaining the conflicts rule; and a summary of the practices and theories which have determined the finding of the applicable law."⁸ The author then covers the usual topics included in choice of law such as status and its incidents, contracts, torts, transactions *inter vivos* and many others.

For a Canadian lawyer Part Two is the most useful part of the treatise. The author's approach is provocative, his ideas are stimulating and more often than not controversial. As an advocate of the realist school of jurisprudence Professor Ehrenzweig attempts "to describe the law as it appears in the actual decisions rather than in the language of the courts". This approach however, tends to create some confusion in the minds of lawyers accustomed to the doctrine of precedent who generally believe that judges mean what they say and say what they mean.

Found in the United States and Canada (1962), 11 Am. J. Comp. L. 315, at p. 316.

⁵ P. 307.

⁶ See Schmitthoff, *Conflict Avoidance in Practice and Theory* (1956), 21 Law and Contemp. Problems 429; Scoles and Rheinstein, *Conflict Avoidance in Successions Planning*, *ibid.*, at p. 499; in Canada see Leal, *International Estate Planning*, in *Estate Planning* (1957), p. 243.

⁷ P. 307.

⁸ Pp. 2-3.

The general thesis of the book is that the courts must emphasize their own law and the exclusion of that law must be exceptional and limited by forum policy. In other words the *lex fori* is the analytical starting point for the solution of conflicts cases. It is the basic rule of choice in every case regardless of the law under which the rights of the parties accrued. The forum will apply the foreign law only when its own law will not effect substantial justice. Actually, to a considerable extent the controversy seems to involve methodology and terminology.⁹ A system emphasizing the *lex fori* does not constitute an improvement over the traditional system. On the contrary it leads to forum shopping and increases the difficulties involved in advising clients.

The author also rejects characterization as an unwelcome addition to legal terminology. He feels that characterization "is unnecessary though harmless when used as a mere synonym for the policy-determined interpretation of formulated conflicts rules, and is unnecessary and harmful when used as an expression of 'legal ideas' in order to create new rules without the conscious weighing of policies".¹⁰ If one considers conflicts law merely as a technique to solve cases involving foreign elements it seems difficult to do away with methods of interpretation of rules of choice of law. Again the issue appears to involve problems of adequate terminology rather than substance as Professor Ehrenzweig acknowledges the necessity of interpreting choice of law rules¹¹ at least until the courts or the legislatures create a catalogue of specific and policy based exceptions from the *lex fori*.¹²

It is worth noting that the author discusses avoidance of domestic law,¹³ a topic largely ignored by conflicts textbooks in the common-law world. It is to be regretted, however, that there is only a passing reference to "intertemporal" conflicts that are often found combined with "interterritorial" conflicts.¹⁴

An interesting theory of the author is his rule of validation governing the choice of the applicable law in the field of contracts. He shows that American courts apply a presumption in favour of the law under which the contract is valid. He also maintains that all other theories in this area "represent futile attempts to ascertain a generally 'governing' law and have failed to take account of one simple fact: Properly and reasonably, courts of all countries and all ages, with a few clearly definable exceptions have tended to

⁹ See discussion p. 352.

¹⁰ P. 327.

¹¹ P. 330.

¹² P. 114. For a general analysis see Castel, *Propos sur la structure des règles de "rattachement" en droit international privé Québécois* (1961), 21 R. du B. 181.

¹³ P. 345; in Canada see Castel, *La fraude à la loi en droit international privé Québécois* (1964), 24 R. du B. 1.

¹⁴ See *Ambrose v. Ambrose* (1960), 32 W.W.R. 433, 25 D.L.R. (2d) 1 (B.C.C.A.); Castel, *Conflict of Laws in Space and Time* (1961), 39 Can. Bar Rev. 604.

uphold the parties 'validating intent' and have thus held bargain contracts valid under any 'proper law'. If any law 'governs' the validity of a contract, it is therefore the *lex validitatis* rather than a *lex contractus* or *lex solutionis* or *lex gravitatis*.¹⁵ Professor Ehrenzweig is most critical of the decision of the New York Court of Appeals in *Auten v. Auten*¹⁶ where it was said that "courts instead of regarding as conclusive the parties' intention or the place of making or performance, lay emphasis rather upon the law of the place which has the most significant contacts with the matter in dispute". This theory "gives to the place 'having the most interest in the problem' paramount control over the legal issues, [and] enables the court, not only to reflect the relative interests of the several jurisdictions involved, . . . but also to give effect to the probable intention of the parties and consideration to whether one rule or the other produces the best practical result". The "center of gravity" or "grouping of contacts" theory has its source in the English "proper law" of the contract approach recently adopted by the Ontario Court of Appeal in *Etlar v. Keztesz*.¹⁷ The author feels that this facile formula will prevent for some time to come the badly needed analysis of individual problems.

The chapter on torts should be of particular interest to Canadian lawyers in the light of a recent decision of the Supreme Court of Canada¹⁸ restating the traditional rule that an act done in a foreign country is a tort and actionable as such in one of the provinces of Canada only if it is both (i) actionable as a tort, according to the *lex fori* and, (ii) not justifiable, according to the law of the foreign country where it was done. Professor Ehrenzweig rejects in strong terms the rule of the place of wrong, applied by most American courts. He also expresses the hope that the *Restatement Second* will not adopt "another give-it-up formula like that of Professor Morris' 'proper law of torts'¹⁹ or that of the related law with the 'most significant relationship' which the [American Law] Institute has chosen for its chapter on contracts. For, such formulas which 'restate' the unstatable, would here, as in the conflicts law of contracts, all too easily induce courts to reach decisions without conscious realization of the underlying facts and policies"²⁰ and he

¹⁵ P. 458.

¹⁶ (1954), 124 N.E. 2d 99, 308 N.Y. 155.

¹⁷ [1960] O.R. 672, noted Castel (1962), 40 Can. Bar Rev. 106 and approved in *Re Viscount Supply Co. Ltd.* (1963), 40 D.L.R. (2d) 501 (Ont.).

¹⁸ *Samson v. Holden* [1963] S.C.R. 373 on appeal from Quebec. For a plea in favour of the application of the *lex loci delicti* in Quebec see Crépeau, *De la responsabilité civile extra contractuelle en droit international privé Québécois* (1961), 39 Can. Bar Rev. 3.

¹⁹ *The Proper Law of a Tort* (1951), 64 Harv. L. Rev. 881.

²⁰ P. 548. See however, *Restatement Second*, s. 379 (1) "The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort" and Introductory Note to Topic 1 of Chapter 9, p. 3, Tentative Draft No. 8, 1963.

adds "we must abandon not only the fundamentalism of the *First Restatement* and the nihilism of the *Second*, but all attempts at generalization, and seek to analyze the results actually reached by the courts in each typical fact situation".²¹

As in other fields of choice of law his starting point remains the law of the forum and in this respect he comes close to the Anglo-Canadian rule. However he admits exceptions depending upon the nature of the tort or its incidents. For instance in the case of guest statutes he advocates a choice of law rule referring to the "place of the garage" in order to determine the host's liability and the guest's recovery.²² Although some of Professor Ehrenzweig's ideas have been cited with approval by several courts in the United States, in *Babcock v. Jackson*²³ the New York Court of Appeals refused to adopt a rule based on the *lex fori* as supplemented by the law of the State in which the automobile is permanently kept. Miss Babcock a guest passenger in Mr. Jackson's automobile was injured in the Province of Ontario as a result of the driver's negligence. She brought an action for damages in the New York courts in spite of the fact that in Ontario the Highway Traffic Act²⁴ bars recovery. No such bar is recognized under New York substantive law of torts. Fuld J. in an impressive opinion repudiated the traditional rule that the law of the place of tort²⁵ invariably governs all substantive issues in tort cases. After noting that the vested rights doctrine underlying the rule may lead to unjust and anomalous results by failing to take into account policy considerations and objectives and particularly ignores the interest which jurisdictions other than that where the tort occurred²⁶ may have in the resolution of particular issues, he adopted the "center of gravity" or "grouping of contacts" doctrine as "affording the appropriate approach for accommodating the competing interests in tort cases with multi-state contacts".²⁷ The court extended to tort cases the doctrine it had formulated earlier and applied to contracts.²⁸ "Justice, fairness and 'the best practical result' may best be achieved [in tort cases with multi-state contacts] by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised by the litigation".²⁹ In the present case New York, as the place where all the parties resided, where the automobile guest-host motorist relationship arose, and the trip

²¹ P. 548.

²² P. 580.

²³ *Babcock v. Jackson* (1963), 12 N.Y. 2d 473, 191 N.E. 2d 279, 240 N.Y. 2d 743.

²⁴ R.S.O., 1960, c. 172, s. 105 (2).

²⁵ That is where both the wrong and the injury took place.

²⁶ In many cases the place of tort is merely a fortuitous circumstance.

²⁷ *Supra*, footnote 23, at p. 481 (N.Y.).

²⁸ See *Auten v. Auten*, *supra*, footnote 16.

²⁹ *Supra*, footnote 23, at p. 481 (N.Y.).

began and was to end, where the automobile was kept, licensed, and insured rather than Ontario as the place of the accident, had dominant contacts and superior claim for the application of its law to the issue whether Miss Babcock was barred from recovering for a wrong merely because she was a guest. In the circumstances Ontario had no conceivable interest in denying a remedy to the plaintiff for it was proved that the object of the province's guest statute is to prevent the fraudulent assertion of claims by passengers in collusion with the drivers obviously against Ontario defendants and their insurance carriers not New York defendants and their insurance carriers. Thus Miss Babcock was allowed to recover damages for her injuries.

The court was careful to point out that there is no reason why all issues arising out of a tort claim should be resolved by reference to the law of the same jurisdiction. Ordinarily the law of the place of tort might well be controlling on the issue involving the standard of conduct of the driver of the automobile.

This decision is most important and should be studied with considerable interest in Canada where the present rule frequently does not enable the court to reach the best practical result. The outcome of the litigation would have been quite different if the accident had taken place in New York and Miss Babcock had sued in Ontario.³⁰ Perhaps it is possible to reconcile the place of tort doctrine with the theory of "center of gravity" in order to enable American courts to follow the modern approach without departing from precedent. Application of the law of the place of tort does not necessarily mean that the law of the place of wrong or of injury must govern. The materiality of the facts is not always an essential element in the localization of the tort. One could consider the tort as having taken place not where the wrong or the injury occurred but in the jurisdiction with which it is most substantially connected. The jurisdiction having the greatest interest in the problem is the place of tort. Why be exclusively attached to elements such as wrongful conduct and injury?³¹

Professor Ehrenzweig's style is often compressed and this makes parts of the treatise difficult to read. Resort to words or phrases such as fundamentalist power ideology, super law of jurisdiction, neonihilism, neorealism, neoidealism, give-it-up formula, are obscure for the uninitiated. On several occasions his proposals are as doctrinaire as the theories he is combatting although he is careful to point out that they are merely a rationalization of what the

³⁰ For a critical analysis of the case see Comments on *Babcock v. Jackson*, a Recent Development in Conflict of Laws (1963), 63 Col. L. Rev. 1312.

³¹ See Bourel, *Les conflits de lois en matière d'obligations extra contractuelles* (1961), pp. 53-56.

courts do. This *imprimatur* is intended to give his proposals respectability and wide acceptance.

The treatise is replete with references to foreign cases and writings that may lead to useful analyses of problems similar to those arising in the United States. It also contains an excellent bibliography of modern domestic and foreign treatises as well as monographs in the field of conflict of laws.

To sum up the treatise is an excellent piece of work and Professor Ehrenzweig will certainly rank among the great conflict of laws scholars of all times. One may not agree with all the views expressed by the author but one must admire his erudition and the depth of his reasoning. The publication of the book is timely and lawyers will, I am sure, be curious to see to what extent the drafters of the *Restatement Second of Conflict of Laws* will give heed to his ideas. Will he have the influence that Beale had on the first *Restatement*? Certainly no other English or American treatise can compare with this one.³² Any Canadian lawyer faced with a conflict of laws problem will read this book with interest and profit; any person deeply interested in re-examining fundamental principles in a new light will be grateful to Professor Ehrenzweig for having transfused a fresh life into this time worn subject. His ideas, his destruction of old dogmas, will certainly contribute greatly to the further development of one of the most fascinating areas of the law. As Cardozo once remarked "law never is, but is always about to be".

J.-G. C.

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³² In Canada textbooks on the conflict of laws are not numerous and none of them combine theory and practice. Lafleur, *The Conflict of Laws* (1898), gives a short summary of Quebec conflict of laws; Johnson, *Conflict of Laws* (2nd ed., 1962), also devotes most of his book to Quebec and is for the primary use of practitioners. Falconbridge's *Essays on the Conflict of Laws* (2nd ed. 1954) is the only work of a scholarly nature. However, the author does not cover the entire field. Castel's *Private International Law* (1960), is a short and up-to-date summary of Canadian rules compared to American ones. It is a book for practicing lawyers; Castel's *Cases, Notes and Materials on the Conflict of Laws* (1960), is designed for Canadian law students.

¹ *Highway Traffic Law* (2nd ed., 1961).

² *Highway Traffic Act* (6th ed., 1959).