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Book Review: Restatement of the Law Second, Conflict of Laws 2d, by the American Law Institute; Private International Law, Eighth Edition, by G. C. Cheshire and P. M. North; The Conflict of Laws, by J. H. C. Morris, D. C. L., F. B. A.

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Restatement of the Law Second. Conflict of Laws 2d. By THE
AMERICAN LAW INSTITUTE. 3 Vols. St. Paul, Minn.: American

¹¹ P. 240. Italics are the author's.

¹² P. 1.

¹³ They are mentioned in footnotes with no comment.

¹⁴ P. 25.

¹⁵ P. 26.

¹⁶ P. 28.

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London, Ontario.

Law Institute Publishers. 1971. Pp. Vol. 1: xxviii, 734; Vol. 2: xxiv, 524; Vol. 3: xlvii, 784. (No price given)

Private International Law. Eighth Edition. By G. C. CHESHIRE and P. M. NORTH. London: Butterworth. 1970. Pp. xxi, 709. (\$23.10)

The Conflict of Laws. By J. H. C. MORRIS, D.C.L., F.B.A. London: Stevens and Sons Limited. 1971. Pp. xxxiv, 570. (\$14.15 hardbound; \$10.10 paperbound)

The publication of the Official Draft of the *Restatement of the Law Second* on conflict of laws, approved by the American Law Institute at the Annual Meeting of 1969, constitutes an event of major significance because of the frequency with which American courts rely on the work of the Institute and the interest it invariably arouses abroad. The *Restatement Second* supersedes entirely the original *Restatement* of this subject published in 1934. As the Director of the Institute states in the Preface:¹ "In basic analysis and technique, in the position taken on a host of issues, in the elaboration of the commentary and addition of Reporter's Notes, what is presented here is a fresh treatment of the subject."

The *Restatement Second* rejects the rigid rules that were the characteristic of the first *Restatement* as the Institute now recognizes that "black-letter formulations often must consist of open-ended standards, gaining further content from reasoned elaboration in the comments and specific instances of application given there or in the notes of the Reporter".²

The new edition of Cheshire's *Private International Law* now jointly authored by Professors G. C. Cheshire and P. M. North continues a time-honoured tradition of excellence. It contains a number of changes and additions most of which were prompted by the legislature and the judiciary.

Professor J. H. C. Morris' *Conflict of Laws* is not a shortened version of *Dicey and Morris on the Conflict of Laws*³ prepared for the use of students. Although in the main it follows the arrangement of *Dicey and Morris* there are many variations including new chapters and also many original ideas which are the product of Dr. Morris' long and deep study of his subject.

The chapter on torts in the three works under review and Dr. Morris' new chapter on theories and methods are very good illustrations of their high quality and usefulness to practitioners, teachers and students because,

. . . the problem of torts has moved into the centre of the discussion of methodological issues in the conflict of laws, or (in simpler lan-

¹ Vol. 1, p. vii.

² *Ibid.*

³ (8th ed., 1967).

guage) the discussion of why courts apply foreign law, and on what basis do they choose it,⁴

and also because,

. . . in the twentieth century the law of torts has responded to the pressures of the technological revolution as applied to the manufacture and distribution of products and to the means of transport and communications.⁵

In *Chaplin v. Boys*⁶ a majority of the House of Lords rejected the concept of the proper law of the tort and left *Phillips v. Eyre*⁷ as the basis of English law:

As a general rule, in order to found a suit in England, for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done.

Professor North is of the opinion that the first part of the rule which was originally enunciated in the *Halley*⁸ case places too much emphasis upon the accident of the forum and rightly suggests that it should be interpreted to mean that the *lex fori* will recognize a type of liability roughly similar to that for which the plaintiff seeks a remedy.⁹ Unfortunately this point of view has not been accepted by the House of Lords. A plaintiff who sues on a foreign tort in England must show that the wrong of the defendant would have been actionable had it been committed in England.

With respect to the second part of the rule in *Phillips v. Eyre*, the majority of the House of Lords clearly rejected the interpretation given to the word "justifiable" by the Court of Appeal in *Machado v. Fontes*.¹⁰ Non-justifiability by the *lex loci delicti commissi* has now been replaced by actionability by the *lex loci delicti commissi*.¹¹

However, as Dr. Morris points out actionability by the *lex loci delicti* must mean *civil liability*.¹²

There is no requirement that the conduct must be tortious by the *lex loci delicti*; it is sufficient if by that law the defendant's liability to pay damages is contractual, quasi-contractual, quasi-delictual, proprietary or *sui generis*.

⁴ Morris, p. 256.

⁵ *Ibid.*

⁶ [1969] 2 All E.R. 1085, [1969] 3 W.L.R. 322.

⁷ (1870), L.R. 6 Q.B. 1, at pp. 28-29.

⁸ (1868), L.R. 2 P.C. 193.

⁹ Cheshire, p. 265.

¹⁰ [1897] 2 Q.B. 231.

¹¹ See for instance Lord Wilberforce, *supra*, note 6, at pp. 329-330, 339-341 (W.L.R.), Lord Guest, *ibid.*, at p. 334 (W.L.R.).

¹² Morris, p. 271.

It seems natural to assume that the wrong of the defendant entailed civil liability by the law of the place where it was committed. The word "justifiable" or "non-justifiable"¹³ was too ambiguous to have a place in a broad rule of conflict of laws. "Actionable" is a technical term which cannot be interpreted in such a way that a remedy would be granted by the forum where none existed in the place of wrong. Thus, today, to justify an action in England for a tort committed abroad the conduct must be civilly actionable by English law and by the law of the country in which the conduct occurred. It is surprising that it took so long for the English courts to reject such an indefensible rule which, in its application, leads to results often so contrary to the principles of fair play. Why should a plaintiff obtain a remedy denied to him in the country where he suffered injury?

After reviewing the various theories that have been advanced to explain *Phillips v. Eyre*, Professor North comes to the conclusion that this case provides a rule for choice of law and not one of jurisdiction. This view does not mean that actionability by both the *lex loci delicti* and the *lex fori* resolves the issue of the substantive law. Although *Chaplin v. Boys* does not provide a clear answer, the author is forced to recognize that the *lex fori* is the dominant substantive law, thus unduly favouring the defendant.

In the end, one must agree with Professor North that *Chaplin v. Boys* does not constitute a landmark in the field of conflict of laws:¹⁴

Judicial law-making of this kind is of little service to the conflict of laws and it is not surprising that the Lord Chancellor has established a committee to examine the rules governing choice of law in proceedings based upon foreign torts.

Let us hope that, in Canada, the higher courts will at long last reconsider *Machado v. Fontes* or if not that the Conference of Commissioners on Uniformity of Legislations will finally complete their work on the Draft Foreign Torts Act.¹⁵

While no definite position is taken in Cheshire's book as to which theory of the governing law should be taken by the courts,

¹³ *Machado v. Fontes*, *supra*, footnote 10, is still the law in Canada: See *La Van v. Danyluk and Danyluk* (1970), 75 W.W.R. 500 (B.C.) applying *McLean v. Pettigrew*, [1945] S.C.R. 62, [1945] 2 D.L.R. 65 and *Canadian National Steamships Co. Ltd. v. Watson*, [1939] S.C.R. 11, and *Castel* (1971), 49 Can. Bar Rev. 632; Carr, *Torts in the Conflict of Laws in British Columbia: La Van v. Danyluk* (1971), 6 U.B.C.L. Rev. 353.

¹⁴ Cheshire, p. 275.

¹⁵ See Castel and Crépeau, *Views from Canada* (1971), 19 Am. J. Comp. L. 17, at p. 31. Note that in 1970, the Conference adopted the Conflict of Laws (Traffic Accidents) Act based on the 1968 Hague Convention on the Law Applicable to Traffic Accidents, see Castel and Crépeau, *ibid.*, at p. 19.

Dr. Morris in his *Conflict of Laws* is still a supporter of the proper law of the tort which he enunciated more than twenty years ago:¹⁶

... while in many, perhaps most, situations there would be no need to look beyond the place of wrong, we ought to have a conflict rule broad enough and flexible enough to take care of the exceptional situations as well as the more normal ones: otherwise the results will begin to offend our common sense.¹⁷

... it seems unlikely that a single mechanical formula will produce satisfactory results when applied to all kinds of torts and to all kinds of issues.¹⁸

Dr. Morris strongly criticizes the first part of the rule in *Phillips v. Eyre* and is distressed by the fact that the House of Lords in *Chaplin v. Boys* went out of their way unanimously to approve it. As he points out:

... if certainty and the promotion of English ideas of justice are to be the only goals, why not scrap the second rule in *Phillips v. Eyre* and dispense with any reference to foreign law whatsoever?¹⁹

Dr. Morris offers two answers to the question of what is the *ratio decidendi* for *Chaplin v. Boys*. The first is that there is none and the second that we can pick and choose which *ratio* we prefer. Of course he prefers the proper law of the tort "not only because he invented it, but also because . . . the other possible *rationes* seem retrograde and likely to produce unacceptable results".²⁰ He does not agree with Professor North that *Chaplin v. Boys* sounds the death-knell of the proper law of the tort. Analysing the views of Lords Hodson, Wilberforce and Pearson, he comes to the conclusion that quite on the contrary, the first step has been taken in the direction of injecting some flexibility into the rules in *Phillips v. Eyre*. He views the proper law of the tort theory as an exception to the double actionability rule. Thus, as a result of *Chaplin v. Boys*, in England:

... a particular issue may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties. For Lord Hodson stressed that the rule in *Phillips v. Eyre* must be given a flexible interpretation because Willes J. himself said that the rule was only applicable "as a general rule".²¹

Professor North does not mention this exception although it should be accepted by the English courts.

¹⁶ The Proper Law of a Tort (1951), 64 Harv. L. Rev. 881.

¹⁷ Morris, p. 259.

¹⁸ *Ibid.*, p. 260.

¹⁹ *Ibid.*, p. 264.

²⁰ *Ibid.*, p. 269.

²¹ *Ibid.*, p. 271.

Dr. Morris' approach has found its way in the *Restatement Second* on conflict of laws. In the light of the difficulties and complexities of the subject of foreign torts, the American Law Institute did not wish to formulate a precise rule or series of rules. It has simply stated as a general principle that the court will apply the local law of the state of most significant relationships. In each case the court must accommodate a certain number of underlying factors.

The rights and liabilities of the parties in tort are to be governed by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties. Separate rules are stated for different torts and for different issues in tort. "In other words, the identity of the state of most significant relationship is said to depend upon the nature of the tort and upon the particular issue."²² Furthermore, in reaching its decision the court must give greater weight to certain choice of law policies than to the demands of vested rights. According to section 145:

The General Principle

- (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
- (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
 - (a) the place where the injury occurred,
 - (b) the place where the conduct causing the injury occurred,
 - (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
 - (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

The analysis of choice of law rules in the field of torts found in the *Restatement Second* is of great interest to Canadians at a time when the courts seem hesitant about abandoning the traditional approach as exemplified in *Machado v. Fontes* and *McClellan v. Pettigrew*.²³

Unlike the American courts which have considered the matter, Canadian courts do not seem to prefer a more flexible approach in which the various policy factors are considered, on the ground that its adoption would produce uncertainty in the law.

As Dr. Morris points out:²⁴

It is a pity that counsel in *Chaplin v. Boys* were unable to cite any

²² Restatement Second, Vol. 1, p. 413.

²³ See *supra*, footnote 13.

²⁴ P. 283.

American cases more recent than *Dym v. Gordon* ((1965), 16 N.Y. 2d 120, 209 N.E. 2d 792). If they had done so, it seems unlikely that the House of Lords would have stigmatised the new flexible approach as productive of uncertainty. Nor would Lord Wilberforce have said that "if one lesson emerges from the United States decisions it is that case to case decisions do not add up to a system of Justice" ([1969] 3 W.L.R. 322, at p. 343). For if that is true, then we might as well scrap not only the conflict of laws but also the common law itself.

Professor Morris' chapter on "Theories and Methods" is interesting because it contains an appraisal of the spate of writing in the United States on theories and methods in the conflict of laws. In a few pages brilliantly written, he has accomplished the seemingly impossible task of bringing order out of chaos, and for this we must be grateful to him.

The theories (not all of which are of American origin) seek to explain how it is that foreign law is applied in the forum despite the division of the world into independent sovereign States. The methods offer new techniques for solving choice of law problems.²⁵

The theories discussed are the comity theory, the vested rights theory and the local law theory. With these, most of us are already familiar. It is with respect to methods that Dr. Morris' analysis is enlightening and refreshing as many students of conflict of laws often have difficulty distinguishing one method from the other. He discusses first the method which prefers rule-selecting rules to jurisdiction-selecting rules (Cavers); secondly, governmental interest analysis (Currie); thirdly, the interpretation of forum policy (Ehrenzweig); fourthly, principles of preference (Cavers); and lastly the use of choice-influencing factors as exemplified by the *Restatement Second*.

With respect to theories, it should be noted that the *Restatement Second* has abandoned the vested rights theory and all its consequences. In the first *Restatement*, choice of law rules in torts and contracts derived from vested rights analysis and were immutable and therefore led to a mechanical application of the local law of the place where the injury occurred in the field of torts and the law of the place in which the contract became binding or, when performance was in issue, where the contract was to be performed,²⁶ in the field of contracts. On the other hand, the *Restatement Second*, as noted above, adopts the flexible rule that rights and liabilities with respect to a particular issue are determined by the local law of the state which, as to that issue, has "the most significant relationship to the occurrence and the parties". In ascertaining the law applicable to the issue at hand the courts

²⁵ P. 517.

²⁶ First *Restatement*, ss 377, 332, 358. For a review of the first *Restatement* see Willis (1936), 14 Can. Bar. Rev. 1.

should be guided by a number of enumerated but not exclusive factors or policies.²⁷ These policies are not listed in the order of their relative importance. As often some of the factors point in different directions in all but the simplest case, any choice of law rule represents an accommodation of conflicting values. Thus section 6 states:

Choice-of-Law Principles

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
 - (a) the needs of the interstate and international systems,
 - (b) the relevant policies of the forum,
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 - (d) the protection of justified expectations,
 - (e) the basic policies underlying the particular field of law,
 - (f) certainty, predictability and uniformity of result, and
 - (g) ease in the determination and application of the law to be applied.

“. . . this mode of treatment leaves the answer to specific problems very much at large. There is, therefore, wherever possible, a secondary statement on blackletter setting forth the choice of law the courts will ‘usually’ make in given situations. These formulations are cast as empirical appraisals rather than supported rules to indicate how far the statements may be subject to reevaluation in a concrete instance in light of the more general and open-ended norm”.²⁸

Conflicts problems are resolved in a flexible manner, case by case, issue by issue.²⁹ In other words, the *Restatement Second* retreats from dogma in the sense that many basic norms consist of standards that are open-ended. This does not mean the *Restatement Second* rejects formulated conflict of laws rules. For instance in parts of property the rules are sufficiently precise to permit them to be applied in the decision without reference to the factors which underlie them. However as the Reporter points out:³⁰

Statement of precise rules in many areas of choice of law is made even more difficult by the great variety of situations and of issues, by the fact that many of these situations and issues have not been thoroughly explored by the courts, by the generality of statements frequently used by the courts in their opinions, and by the new grounds of decision stated in many of the more recent opinions.

²⁷ Restatement Second, s. 6.

²⁸ Restatement Second, Vol. 1, Preface, p. viii.

²⁹ Morris, p. 546.

³⁰ Restatement Second, Vol. 1, p. 13.

In spite of the virulent attacks made upon the very idea of re-stating the rules or standards to be applied by the courts in conflict of laws cases,³¹ Professor Reese, the Reporter, and his colleagues have performed their task with great success and have come up with a very rational and workable system which will without doubt have a great constructive influence on the solutions to be adopted by the courts in the United States and elsewhere when confronted with difficult conflict problems.

Dr. Morris takes a realistic although somewhat conservative view when he points out that:³²

It does not seem necessary to abandon the whole existing system of the conflict of laws with its apparatus of concepts and rules, as long as it yields acceptable results. It economises thought to be able to apply a conflict rule instead of having to think out each problem afresh each time it arises.

I fully agree with Dr. Morris that the new American methods, except for the choice influencing factors of the *Restatement Second*, are not suitable for adoption by English or Canadian courts in international cases.

We would do better to build on what is good in the traditional system, as the *Restatement Second* seeks to do, rather than to abolish that system altogether and start again. On the other hand, these methods have three lessons which we should do well to take to heart. The first is that choice of law rules should be flexible and should be flexibly applied. The second is that they should never be applied without some regard to the content of the foreign law referred to. The third is that we should be on the alert to identify and avoid false conflicts, and not be afraid to decide such cases in accordance with the law that is common to both countries, rather than in accordance with traditional conflict rules.³³

The three books reviewed here are well printed and easy to read. They also contain excellent indexes, tables of cases, statutes, rules of the Supreme Court and books referred to. In the *Restatement of the Law Second* on the conflict of laws, in addition to the valuable Comments explaining each rule and which carry the approval of the Institute, the Reporter's Notes are of great im-

³¹ See for instance Ehrenzweig, *American Conflicts Law in its Historical Perspective; Should the Restatement be "Continued" (1954)*, 103 U. of Pa. L. Rev. 133; *The Second Conflicts Restatement: A Last Appeal for its Withdrawal (1965)*, 113 U. of Pa. L. Rev. 1230. Professor Ehrenzweig raises four questions: Should the draft not be expressly limited to interstate conflicts? Should it not be revised with a view to achieving greater theoretical consistency? Should it not be revised to respond to current doctrine? Should it not be limited to those narrow propositions which are settled in light of judicial practice (rather than mere language)? In my opinion the *Restatement Second*, *Conflict of Laws* answers positively at least some of these questions.

³² P. 530.

³³ *Ibid.*, p. 547.

portance as they give the reader an up-to-date account of American case law on the topic under discussion. Volume 3 also contains parallel tables between the *Restatement of the Law Second* and the first *Restatement*³⁴ as well as court citations to the first and second *Restatement* and a table of cases cited in the Reporter's Notes.

To anyone teaching or studying conflict of laws, each of these books should be very important as a guide and as a source reference. The fact that they are not concerned with Canadian conflict rules does not detract from their value due to the common legal tradition which Canada shares with England and the United States. They should certainly find a place in the library of anyone interested in conflict of laws, a discipline of increasing practical importance in the world and especially in federal states such as Canada.

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* * *

³⁴ (1934).

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¹ Preface, p. v.