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Max Rheinstein

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BOOK REVIEWS

CONFLICT OF LAWS. PART ONE: JURISDICTION AND JUDGMENTS. By Albert A. Ehrenzweig. St. Paul: West Publishing Co. 1959. Pp. 367. \$6.00.

By

MAX RHEINSTEIN*

OF ALL BRANCHES of American law, conflict of laws appears to be beset with the most uncertainties and to present the greatest difficulties in legal practice, difficulties which can only in part be avoided by the practitioners' tendency to shy away from conflicts problems or to ignore them altogether. One of the various reasons for this state of affairs must be found in the state of the literature of the field. The deceptively simple generalizations which were alleged by Story as intrinsic necessities to underlie the law of conflict of laws, were harmless as long as they were not taken seriously by Story himself. They turned into serious obstacles to sensible development when they were sought to be applied consistently by Beale and, occasionally, the Supreme Court of the United States. The effort of a generation of scholars had to be consumed in the task of tearing down the fallacies of vested right and territoriality. During this long period the courts had to grope their way, often misled by the territorialists' claims to authority. Their fumbling efforts contributed to the confusion. The work of the scholars, whose leadership was badly needed in the absence of a firm tradition and the unifying practice of a common supreme court, was ineffective as long as the expression of constructive thought remained without systematic unification scattered over monographic law review articles. The two textbooks of the post-Bealite period were written primarily for students: The world-wide comprehensiveness of Rabel's monumental treatise seems to have been too unorthodox a vestment for its body of sensibly reconstructed American conflicts law to let it become the common good of the legal profession. Besides, being limited to choice of law, that treatise covers only some special segments of the conflicts law of jurisdiction and foreign judgments, i.e., those topics which are playing the greatest role in legal practice.

Exactly these topics constitute the subject matter of that part of the new treatise on conflict of laws of Professor Albert A. Ehrenzweig which has just been published. Judging from this first part one can state already that this treatise will constitute the long needed guide for the reconstruction of the field. The book is a work of mature scholarship, based upon com-

* Max Pam Professor of Comparative Law, University of Chicago Law School. Author of *Cases on Decedent's Estates* (1955).

plete familiarity with the case law as well as upon comprehensive acquaintance with legal learning of both common-law and civil-law countries, and inspired by a sound understanding of the needs of legal practice as well as of those of legal education. Ehrenzweig has succeeded in the difficult task of writing a book which will simultaneously be indispensable to the practitioner, helpful to the student, and to both, stimulating for independent thought.

The vast materials on which the author has drawn are not presented in the form of a mere digest but constitute the ingredients of a systematic whole. However, in contrast to Beale, Ehrenzweig's system is not an artificial creation superimposed upon the cases. It rather constitutes the successful effort to derive from the cases the policies by which they appear to have been guided. In this task the author has not succumbed to the temptation of conjuring up a deceptive unity of thought where it does not actually exist. No spurious effort is made to reconcile conflicting decisions which in truth constitute varying expressions of changing policies and attitudes. Contradictions and confusions in the case law are not glossed over but stated with that precision which is the indispensable condition for their future clarification, for which Ehrenzweig's own suggestions are likely to constitute valuable contributions.

In these suggestions as well as in the mental penetration of the thicket of the case law, Ehrenzweig's work indeed proves that for successful creativeness in the law of conflict of laws history and comparative law are indispensable. But, of course, in order so to use them, one must be steeped in them as comprehensively as Ehrenzweig. Haphazard resort to isolated bits of historical or comparatist learning would remain useless ornamentation or dangerous misguidance.

Ehrenzweig's book also demonstrates the significance of a clear and systematic arrangement. It does make a difference whether the immense mass of legal problems is presented in a purely extrinsic arrangement, for instance one following the alphabet from Animal to Zoo, or whether the arrangement is guided by a test of intrinsic coherence, derived from connections not superimposed, to be true, from the outside but inherent in the subject matter itself. Ehrenzweig's lucid arrangement not only facilitates the convenient use of the book for reference, but also reveals the existence of problems which have hitherto gone hardly noticed, indicates interconnections between seemingly remote problems, and generally facilitates understanding and readability. Indeed, the clear, easy and simple style of the book constitutes one of its special merits.

In his Preface Ehrenzweig apologizes for his unorthodox technique. I cannot find his book any more unorthodox than any other work of creative scholarship of the kind of Wigmore, Williston or Scott. Indeed, the

author might well have been a bit less conservative in his treatment of certain topics.

In the treatment of both jurisdiction and foreign judgments a distinction is traditionally made between, on the one side, proceedings and judgments in personam, and, on the other, judgments and proceedings in rem. The line between them has never been drawn quite clearly, however, and in consequence uncertainty exists in what ways the two categories ought to be treated differently. In recent years a tendency has even come to the fore to obliterate the distinction altogether. Ehrenzweig's treatment of the distinction hardly differs from the traditional. Yet clarification might well be derived from utilizing ideas which have been developed in the European-continental legal learning about judgments. By the European proceduralists three kinds of judgments have come to be distinguished from each other: ordering judgments (*Leistungsurteile*), declaratory judgments (*Feststellungsurteile*) and transforming judgments (*Gestaltungsurteile*). The great bulk of judgments rendered in civil matters are ordering judgments, i.e., judgments by which the defendant is ordered to do, or to refrain from doing, a certain act. To the category of ordering judgments belong the regular judgments at law by which the defendant is adjudged to owe the plaintiff a sum of money as well as the decree of specific performance or the injunction. The category of declaratory judgments coincides with that which has come to be known under the same name in the United States: nobody is ordered by it to do, or to refrain from doing, anything. The court contents itself with the authoritative declaration that a certain legal relationship, alleged to exist by one party and denied by the other, does or does not exist. The transforming judgment is different from both of these categories. By rendering it the court brings about a transformation of a legal situation hitherto existing, a change in the legal universe. By a decree of divorce a marriage hitherto existing is terminated and consequently, a married man and a married woman are transformed into an unmarried man and an unmarried woman respectively. By a decree of mortgage foreclosure the title situation of a piece of land is transformed; by the decree of a prize court title to a ship is transferred from its former owner to the captor; by a decree of adoption existing family ties are cut or weakened and new ones created; by the admission of a will to probate a hitherto legally irrelevant piece of paper is transformed into a paper which must now be treated as the legally effective will of a decedent, etc. The characteristic feature of the transforming judgment is that it is self-executing; that of the ordering judgment is that it calls for enforcement, and that of the declaratory judgment that there is no question of execution or enforcement at all.

The distinction between these three types of judgments and, consequently between proceedings respectively leading up to them, corresponds to differences of real significance, i.e., differences requiring different treatment

in procedural requirements and, quite particularly, in conflicts law situations. The answer to the question of whether state F-2 shall make available its sheriffs and the armed force and power standing behind them for the enforcement of a judgment rendered by a court of state F-1, depends upon criteria to some extent different from those by which state F-2 is likely to treat as terminated the marriage which a court of state F-1 has purported to terminate, or treat as the owner of a shipload of oil the person to whom a decree of a government agency of state F-1 has purported to transfer it from some one else who is thus purported to be deprived of his title. In the case of the foreign ordering judgment state F-2 will inquire whether there existed between F-1 and the person against whom the order was issued that relationship which lets it appear proper for state F-1 to order into action against him his own, F-2's, power machinery. In the question of the recognition *vel non* of the purported right transforming effects of a foreign decree of adoption, divorce, foreclosure, etc. the inquiry will be directed not so much toward the relationship between state F-1, and an individual adversely affected, as toward the relationship between F-1 and the factual situation whose legal treatment is purported to have been transformed by the act of F-1. It seems that this factual situation is exactly what is meant by the word "res" in the common-law terms of "action in rem" and "judgment in rem." However, the interpretation of the word "res" as a tangible thing rather than "subject matter" or "affair" has obscured the meaning of the common-law terms, and has thus prevented the recognition of the essential difference between judgments in rem and in personam, and, consequently, the consistent elaboration of rules for that treatment of the manifold problems which would correspond to the practical needs of the situation. Ehrenzweig's treatment of these problems would have been profited from a utilization of the European terminology which expresses in a clear fashion what the common law has so far succeeded to express in a fumbling way only.

Less orthodoxy might also have been desirable in the treatment of divorce. In an enjoyably refreshing way Ehrenzweig recognizes that by its decisions on jurisdiction in divorce the Supreme Court of the United States has rendered consent divorce generally available throughout the nation and has thus in effect changed the substantive law of the states in which consent divorce is almost uniformly abhorred, at least officially. In this respect he has perhaps gone even too far. Consistent adherence to the rule of *Johnson v. Muelberger*¹ would indeed imply the preclusion of any bigamy prosecution by the state of the parties' true domicile. But can we be sure of such consistency? Ehrenzweig himself recognizes the appearance in the country of a trend toward greater strictness. In the otherwise highly welcome discussion of the lawyer's ethical problem in cases of migratory divorce (pp. 238 ff.), it ought not to be overlooked that, in con-

¹ 340 U.S. 581 (1951).

sequence of the Supreme Court's resistance, in *Granville-Smith v. Granville-Smith*,² to the Virgin Island's attempt to do away with fiction, no "migratory" divorce can be obtained without perjury.

Where greater "unorthodoxy" might have been particularly beneficial is the field of ex parte divorce, which, incidentally is not satisfactorily described in that citation from *Hopson v. Hopson*³ which the author cites with apparent approval. An ex parte proceedings is not "one in which there had been neither personal service of process nor voluntary appearance or participation by the spouse sued," but a proceedings in which even where no defense is made, judgment may not be rendered by default or *pro confesso*, but only after the taking of evidence justifying the decision applied for by the moving party. Cases of divorce are but one specimen of this much broader category, even though in practice the court's duty to hear and evaluate evidence may often enough be treated but perfunctorily. To come back, however, to the desirability of greater unorthodoxy in the treatment of undefended divorces. Ehrenzweig seems to regard as desirable the ultimate treatment of divorce cases as proceedings in personam. But are the rules which have been designed for cases of litigation appropriate for cases of divorce? How many divorce cases ever involve real litigation between opposing parties, at least with respect to that sole issue under discussion the dissolution of marriage? Often enough parties to a broken marriage quarrel about the issues of alimony, property settlement, child custody, child support, or counsel's fees, but it will be a rare case in which one party's desire to have his marriage terminated and thus to be rendered free for remarriage, is, as such, opposed by the other party. In the overwhelming majority of cases no such opposition is made. One party wishes to free himself from the tie of a marriage that has become distasteful and the other agrees, either readily or grudgingly, and often enough as the result of a bargain in which the agreement is bought at the price of a satisfactory settlement of the aspects of pecuniary pay or child custody. Realistically seen, an action for divorce is thus a petition for restoration to the freedom of remarriage, a petition filed either jointly or unilaterally. For the case of the joint petition the Supreme Court has rendered generally available those states which are ready to grant such petitions for the asking, the payment of a fee, and the bestowal of certain benefits upon its tourist industry. For unilateral petitions, the Court still holds on to the requirement that the petitioner must stand to the state approached in a relationship which justifies that state to act upon the petition. It would be difficult to imagine what state that would be other than that to which the petitioner "belongs," which, in the American way of thinking, is the state of his domicile; domicile, of course, not in any mechanically defined sense but in a sense which ex-

² 349 U.S. 1 (1955).

³ 221 F. 2d 839 (App. D.C., 1955).

presses that tie which ought to exist between an individual and a political community to justify that community to concern itself with that individual's freedom of marriage. Insistence on such a tie will be indispensable as long as we are not ready to concede to the Supreme Court of the United States the power to bestow upon Nevada general power to release from their ties of marriage the domiciliaries of all states and territories of the union.

I also doubt whether, as the author states, the role of *lex rei sitae* has become obsolete as the exclusive contact for the determination of interests in land. Of course, we are no longer living in a community whose political structure is based upon rights in land. It is equally true that the *lex rei sitae* is not required by any intrinsic limitation of state power. But is it not a practical necessity for the security of land transactions? How could a prospective purchaser of land ever trace the title if the record would contain documents the legal significance of which all would not be determined by one and the same law? And which other law could that be than that of the situs? How would heirship be determined if one would have to look to potentially different and precariously ascertainable personal laws of successive owners, or by uncertain laws of unknown places of contracting? Exclusive reliance on the *lex situs* can be dispensed with in countries like Austria or Germany, where registration of title is compulsory and the registrar can be charged with the ascertainment of the foreign law by which a transaction or other title affecting event may have to be determined. In this country, even if registration of title were universal, the registrar could as little be expected to know and apply foreign laws as a county clerk can be expected to ascertain capacity to marry under the personal laws of foreign domiciliaries. Such a suggestion at which Ehrenzweig hints as possibly desirable, would simply be unworkable. For weighty reasons of workability, the exclusive domination over land titles of the rule of *lex rei sitae* will remain indispensable. Insight into the reason for this indispensability also indicates, however, its limits. There is no reason why the rule be applied to problems which are outside the purview of title searchers. No reason thus exists for the frequently alleged exclusive jurisdiction of the state of the situs to render judgments ordering a person to make a conveyance of a piece of land. But should such a judgment be held enforceable by the making of the deed by a commissioner of the court by which the judgment has been rendered, or by even simply treating the judgment as self-executing? Discussion of this problem in terms of law and equity will be of little help. The answer can easily be found, however, if the problem is approached, as it ought to be, from the point of view of the title searcher, and that answer can, of course, only be negative. Consideration of this modern policy reason of the rule of *lex rei sitae* might have helped Ehrenzweig's treatment of the problem of judgments purporting to affect foreign pieces of land (pp. 206 ff.).

Truly unorthodox is Ehrenzweig's insistence upon a consistently differentiating treatment of questions pertaining to interstate and to international conflict situations. My initial reluctance to accept this differentiation has been overcome by Ehrenzweig's demonstration that there exist, indeed, enough differences to justify the separate treatment. We should be careful, however, neither to exaggerate nor to sacrifice that remarkable liberality with which laws and judgments of foreign countries have traditionally been treated in the United States. This liberalism has certainly been connected with the fact that in this country conflicts law has generally been developed for interstate situations, from which it has then more or less automatically been transferred to international situations. The suspiciousness not infrequently shown toward foreign law and judgments by European countries is closely connected with the fact that for most of them the international situation has been the prototype. It would be deplorable if insistence upon consistent differentiation between interstate and international problems would have similar results in this country.

While such a general differentiation might thus be dangerous, we should, on the other hand, seriously consider Ehrenzweig's suggestion that occasionally a conflicts problem might well be treated in different ways in relation to different countries, especially in view of diversities of internal laws (p. 19).

None but complete agreement can be expressed with Ehrenzweig's warning not to rely for future development of conflicts law upon the Supreme Court of the United States (p. 30). By implication we can conclude that he disagrees, and properly so, with recent attempts to reduce the entire law of conflict of laws, or at least of choice of law, to a law of jurisdiction to be defined by the Supreme Court of the United States upon the weak ground of the due process clause of the 14th Amendment and the Full Faith and Credit Clause. In his critique of such attempts of the Supreme Court of the United States, Ehrenzweig seems to go too far in regarding as no longer relevant the case of *Home Insurance Co. v. Dick*.⁴ It seems still to be true that a person cannot be deprived of property by a court's applying to his transaction the law of a state which has with that transaction no contacts whatsoever and with the application of which the party could thus in no way reckon. I cannot see how such prohibition of arbitrary disappointment of justified expectations could be regarded as overruled by *Watson v. Employers Liability Assurance Corp.*⁵ (P. 140).

I could continue raising questions. It would indeed be strange if no questions were raised by a work of the scope of Ehrenzweig's treatise,

⁴ 281 U.S. 397 (1930).

⁵ 348 U.S. 66 (1954).

dealing with so controversial a subject, and so distinguished by originality of thought. It is an important book. Great expectations have been raised for the second volume.

THE ECONOMY, LIBERTY AND THE STATE. By Calvin B. Hoover. New York: The Twentieth Century Fund. 1959. Pp. 445. \$5.00.

By

ARTHUR S. MILLER*

WRITTEN BY ONE of America's leading economists, *The Economy, Liberty and the State* is essentially an essay in comparative political economy. The modern form of organizational capitalism, which stands somewhere between historical laissez-faire and complete state control, is analyzed and compared to the totalitarian systems of Nazi Germany and Soviet Russia as well as the mixed economies of Great Britain and Western Europe. Hoover accepts Galbraith's notion of countervailing economic power as necessary and even desirable, and thus does not mourn the rise of the trade union and increased state intervention in economic affairs. His finding that there is an "apparent lack of correlation between the degree of statization of the economy [under the present American system] and the degree of limitation of the liberties of individuals" (p. 347) will not sit easily with the zealots who see in any exercise of governmental power a diminution of liberty. But this emphatically does not mean that any amount of governmental intervention would be tolerable in terms of freedom: As Hoover points out, "substantially complete statization of the economy would result in a critical diminution of liberty." (P. 356.)

What, then are the long-range prospects for a private-enterprise economic system in a world where the trend is clearly toward greater governmental control? Hoover's thirteenth chapter is devoted to this crucial question. He concludes:

The further extension of state control and intervention in the economy is no doubt inevitable, not only to facilitate [the] process of amelioration of the economic status of lower-income groups, but even to keep the modern complex economy functioning at a tolerable level. The maintenance of personal liberty will turn upon whether or not these extensions of the powers of the state can be restricted to those which are truly necessary . . .

We may conclude that the development of acceptable relations between the economy, liberty and the state clearly depends upon the evolution of the institutions of modern capitalism. Whether this evolution can be so guided that the role of the state remains below the critical level where the tyrant and his

* Professor of Law, Emory University. Author of *Racial Discrimination and Private Education* (1957).