Ehrenzweig on the Law of Conflict of Laws

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Every discussion of Professor Ehrenzweig's book ought to open with words of praise.

The feature of the work that ought to be stated in the first place is Ehrenzweig's consistent use of the method of jurisprudence of interest, in contrast to that older school of thought which so long dominated American conflicts law. Ehrenzweig does not base his ideas upon pre-conceived notions of alleged self-evidence or logical necessity, but upon a careful investigation of the interests which are at stake in every given type-situation, and a balancing of these interests in the light of the value judgments that dominate our social life.

Especially praiseworthy is it that for Ehrenzweig the interests which are at stake in choice of law situations are not the governmental interests of states competing for the power to regulate certain lines of human conduct. For him conflicts law is private law rather than a branch of American constitutional law or of public international law. Another merit of Ehrenzweig's is his consistent utilization of foreign material. The problems with which conflicts law has to deal are practically the same all the world over. For Ehrenzweig, being a remarkable linguist, it is self-evident that an effort to rebuild American conflicts law upon the ruins of the demolished structure of the vested rights-territoriality theory utilize the wealth of thought and experience that has been stored up in the writing of European scholars and in the decisions of European courts. Ehrenzweig is also concerned, indeed primarily, with the American material. In addition to those well-known cases which have figured in successive texts and case books, Ehrenzweig has discovered a large number of cases that have escaped the attention of prior authors. He has also discovered that a good many of the old stand-by cases are doubtful authority for the propositions which they have been alleged to support. When the two or more laws in question lead to identical results, judicial statements about choice of law are dicta.

Quite probably the critic who subjects Ehrenzweig's vast case material to scrutiny will find that not every one of his case citations bears out the proposition for which it is alleged to stand. In a more extensive review

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of Ehrenzweig's books I have expressed some doubts of this kind. But such discoveries ought little to detract from the value of a book whose significance lies in the statement of the policies and ideas by which workers in the field of American conflicts law are to be guided in the vast job of reconstruction before which they have been placed by the destruction of the old Bealite edifice. These policies must speak for themselves, even if they were supported by case law to a lesser extent than Ehrenzweig believes. No more is to be demanded of new ideas than that they are not incompatible with fixed lines of decision. I cannot find that Ehrenzweig's ideas conflict with any of the few clear lines of case law that can be discovered in the choice of law. In its present state, that branch is too confused to present, with a few exceptions, any line of case law for which no contradictory line could be found in the chaotic welter of the judicial opinions.

The essential question is whether or not Ehrenzweig's method is "sound" and whether it leads to "sound" results. His method is sound in that Ehrenzweig approaches each problem on its own merits, investigates what interests, public and private, are at stake, and how they ought to be balanced against each other. Results reached in that method may be debatable insofar as they depend upon different evaluations of the interests at stake in a given situation. The value judgments expressed by Ehrenzweig are, of course, meant to be those of the American polity rather than his own personal predilections. That the latter occasionally color the former has been hardly avoidable.

Eminently sound is Ehrenzweig's predilection for the *lex fori*. After all, that is the law with which the court is familiar and the ascertainment of which does not require cumbersome evidence. But for this preference for the *lex fori*, the author does not so much adduce this simple policy argument, as he tries to deduce it from history and from the cases. The evidence of the case law is not convincing. The argument from history seems to me to point in the opposite direction.  

On the European continent, as well as in England, the technique of every now and then deciding a case under a law other than the *lex fori*, i.e., the technique of choice of law, was developed for the very purpose of avoiding those injustices that had come to arise from prior indiscriminate application of the *lex fori*. Wherever this technique has come to be adopted, scholars have tried to elaborate sets of rules that would clearly tell the courts under what circumstances they ought to apply the *lex fori* and under what circumstances

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2 Id. at 371.
resort ought to be had to the rules of decision of some other law, and, in that latter case, to which. Trouble arose when the elaboraters of such rules came to forget the reason why it was felt appropriate every now and then to decide a case under a foreign law. Seduced by that short-hand mode of speech that a case would be “governed” by such and such a law, writers came to regard it as the task of conflicts law to demarcate from each other the spheres of proper exercise of the power of sovereign states to regulate human activities. Such an effort would be appropriate for a super-state having the power to determine the proper spheres of regulatory jurisdictions of each of its subordinate units, which would then no longer be sovereign in this respect. Insofar as no such super-state exists, efforts of the kind are bound to remain as futile as have been those of the continental statutists of the 17th and 18th centuries.

We usually define law, in the tradition of John Austin, as the command of the sovereign, meaning the command directed toward the individual members of the society and meant to regulate their behaviors. If we look upon laws as rules meant to regulate human behavior, if we see that there are several states from which such rules emanate, and that the rules emanating from different states in many respects differ from each other, it is natural that we believe it to be necessary in some way to demarcate from each other those spheres within which each state may properly attempt to regulate, or to “govern through its law,” human conduct. But, regulatory effect of the law is achieved in an indirect way. People adjust their conduct to the norms of the law because they know that otherwise the courts and the governmental enforcement officers, such as sheriffs, prison wardens and public hangmen, might come to bear down on them. Before a court will order or authorize a sheriff or another enforcement officer to go into action against an individual, it must, of course, look at the law. Courts are supposed to follow the law. We may thus look upon law as being addressed primarily to the judges, to constitute, as it is expressed in the Judiciary Act of 1789, “rules of decision.” Ordinarily it makes no difference whether we look upon law as a set of rules of conduct or as a set of rules of decision. “Ordinarily” means the situation in which conduct is carried on in the same state in which it is expected that disputes may possibly have later on to be brought before a court. However, law regarded as a set of rules of decision, and law regarded as a set of rules of conduct, no longer necessarily coincide in those situations in which a dispute arising out of a certain line of conduct is brought before a court other than the one of the state in which the conduct was carried on. How is an individual to be sure that his conduct will be in accordance with the law if he does not know by
which law it will be later on judged? The ideal would be a state of affairs in which every individual could know in every case exactly by what state’s “rules of decision” his conduct will later on be measured. Under the present state of world organization such a state of affairs is unattainable. All we can do is make an effort to mitigate the hardships which may result from the diversity, from state to state, of the rules of decision, and the uncertainty as to which state’s rules of decision will eventually be applied. The alleviation of these hardships is exactly the task of the choice of law branch or the law of conflict of laws. The technique of every now and then looking to the rules of decision of a state other than those of the court’s own, was invented for this purpose. Most of the confusion that has grown up in the field is due to the fact that this rationale has been so widely forgotten.

If we keep it in mind, three interrelated propositions follow, viz.:

First: Ordinarily the courts of a state decide cases under the rules of decision of that state, i.e. under the lex fori.

Second: Decision of a private dispute under the lex fori is inappropriate if it is clear under the circumstances that the party whose conduct is in question did not consider and could not reasonably be expected to consider that it might be decided under the rules of decision of the forum.

Third: In those private disputes in which decision under the lex fori would be inappropriate under the second proposition, the court ought to try to find out which state’s rules of decision were actually considered by the party whose conduct is in question or should reasonably have been considered.

The second and third propositions are designed to provide protection, insofar as reasonably possible, to the justified expectations of private individuals. The protection of such expectations is necessary in order to provide that predictability and stability of society without which social life could not function, least of all in a credit society. The protection of justified expectations lies at the bottom of most of our private law and a good deal of our public law too. It constitutes the raison d’être for the existence of our entire law of contract, of our abhorrence of ex post facto laws and our entire law of property. With respect to the last-named, we must remember that the expectations which we wish to protect are not only, or perhaps not so much, those of the parties directly engaged in a property transfer transaction than those of later third purchasers and mortgagees. They must know in whom title to a chattel or an immovable is vested and they must know what encumbrances have been placed on the title. Decision of such
questions under the *lex situs* provides that security. Decision under the *lex fori* would destroy it.

Of course, the three propositions just stated apply only insofar as the governmental interest in providing security for private deals and private conduct is not overbalanced by some governmental interest which is regarded as even more important. It is the task of the workers in the field of the law of choice of law exactly to determine the situations in which the governmental interest in the security of expectations has to yield to other governmental interests. In the field of private law this will not very often be the case.

It is furthermore the task of the worker in the field of the law of choice of law to determine which interests are worthy of protection in the infinite variety of human type-situations.

It is a great merit of Ehrenzweig that he has engaged in exactly that latter task. But it seems to me that he has not always kept inside the overall basic idea which lies, historically and for present policy reasons, at the bottom of the entire law of choice of law. Ehrenzweig goes in places too far in the application of the *lex fori* and in other places not far enough. Why should the *lex fori* have to yield to a foreign law if it is clear under the circumstances that the parties to a contract did not contemplate any particular law at all, so that no expectations of theirs will be thwarted by a decision under the *lex fori*. But why, on the other hand, should someone be subjected to tort liability under the rules of decision, i.e. the rules of risk allocation developed in the state of the forum, if it is clear that, when he engaged in the conduct in question, he had not reason to pay any attention to that state's law?

Ehrenzweig's book is the first comprehensive treatise of conflicts law which consistently applies the method of the New Jurisprudence. Obviously it is not the last word on the matter, but it marks a long step forward. The wealth of ideas calls for careful and detailed study, which will have to attend to the merits of these ideas rather than to the case citations by which they may or may not be borne out.